TRANSPOSING THE DIRECTIVE ON PREVENTIVE RESTRUCTURING 2019 INTO FRENCH INSOLVENCY LAW: RETHINKING THE ROLE OF THE JUDGE AND REBALANCING CREDITORS' RIGHTS

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1. Introduction[1]

On 6 June 2019, the European Council adopted the Directive on Preventive Restructuring Frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.[2] The Directive establishes a set of minimum standards for preventive restructuring procedures across Member States to enable debtors in financial difficulty to restructure at an early stage to avoid insolvency.[3] Its aims are to (i) enhance the efficiency of early restructuring; (ii) improve the negotiation process; (iii) facilitate the continuation of the debtor's business while restructuring; (iv) prevent dissenting minority creditors and shareholders from jeopardising the restructuring effort, while also safeguarding their interests; and (v) reducing the costs and length of restructuring procedures.[4] In doing so, the European legislator has conducted extensive consultations of stakeholders. From March to June 2016, an online public consultation was made available online and more than 250 national stakeholders from 27 Member States sent their contributions.[5] Dedicated meetings were also organised, involving Member States' governmental experts and an informal group on debt restructuring, insolvency and second chance was created.[6] Finally, the Commission commissioned a study on national substantive insolvency laws identifying areas where differences in national laws may raise obstacles to the Internal Market,[7] as well as an economic study on the impact of minimum standards in restructuring and insolvency law,[8] while a conference on the convergence of insolvency frameworks within the EU was organised in July 2016.

The Directive on Preventive Restructuring is the result of discussions between experts. It thus codifies the 422 different inputs received on existing European practices, including French practices. This is not surprising as the French regime is known for its developed and sophisticated preventive restructuring framework, with no less than five preventive procedures available to debtors experiencing difficulties

[1] This article is informed by work carried out for the JCOERE Project (Judicial Co-operation supporting Economic Recovery in Europe). For more information on the project, see https://www.ucc.ie/en/jcoere/.

[2] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132. [Hereinafter the Directive on Preventive Restructuring (DPR)].

[3] European Commission, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2012/30/EU, at p.9.

[4] *Ibid.*, at p.18.

[5] For the data and numbers, see the 'Public Consultation: Building a Capital Markets Union' (European Commission: Banking and Finance 2015).

[6] The main participants were Business Europe, AFME, EBF, ACCA, UEAPME, ESBA, Independent Retail Europe, EuroChambers, ETUC, EFIN, FEE, INSOL Europe, FDC, The Council of Bars and Law Societies of Europe, European Law Institute. The group met three times in 2016.

[7] Tender No. JUST/2014/JCOO/PR/CIVI/0075.

[8] Tender No. JUST /2015/JCOO/FW/CIVI/0103

but not yet insolvent (Section 2). Such position has earned France the label of a "restructuring-biased"[9] jurisdiction and explaining why the Directive has been said to be "largely inspired by the French conciliation procedure."[10]

However, although the French preventive restructuring regime is constituted of several efficient procedures, French insolvency law has also long been considered too favourable to the debtor and "unreasonably averse to creditors."[11] Regular reforms have reinforced the prerogatives of creditors in insolvency procedures[12] but French insolvency law remains internationally known for the comparatively low level of protection afforded to the interests of creditors in comparison to those of other stakeholders.[13] As a result, France ranks quite low regarding the "strength of its insolvency framework" in international, comparative studies,[14] because of the limited role of creditors in restructuring proceedings.[15] Transposing the Directive therefore provides a unique occasion for France to reform its preventive restructuring landscape to rebalance the protection afforded to different stakeholders' interests.[16]

The French legislator has risen to the challenge. On 11 April 2019, it passed the so-called "Pacte Law" (*Plan d'Action pour la Croissance et la Transformation des Entreprises*).[17] The Law is one of the latest steps in the economic strategy of the country and it has two main stated objectives: (1) to grow businesses and to create jobs; and (2) to redefine the place of the company in society and to better involve employees in the life of the company.[18] In order to achieve these, the Pacte Law has charged the French government to transpose the provisions of the Directive on Preventive Restructuring by means of an ordinance by 2021.[19] The introduction into French law of a shorter stay on enforcement actions, classes of creditors, a mechanism of cross-class cram-down, the "best-interest-of-creditors" test and the possibility to treat shareholders as a class of creditors should be welcomed. Introducing these elements into French law will have a deep impact on current practices and in particular, it will require: (i) rebalancing the involvement and role of judicial authorities in preventive restructuring proceedings (Section 3); and (ii) rebalancing the involvement of, and protection granted to, creditors (Section 4).

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[9] M. Adalet McGowan and D. Andrews, "Insolvency Regimes And Productivity Growth: A Framework For Analysis" (2016) OECD Economic Department Working Papers No.1309, at p.18.

[10] See *e.g.* J-L. Vallens, "The Preventive Restructuring Directive: A French perspective" *Eurofenix* (Spring, 2019), at p.22; R. Dammann and M. Boché-Robinet, "Transposition du projet de directive sur l'harmonisation des procédures de restructuration préventive en Europe. Une chance à saisir pour la France" (2017) Recueil Dalloz n.22, 22 June 2017.

[11] F. Pérochon, *Entreprises en difficulté* (LGDJ, 2014), at p.205.

[12] Law n°2005-845 of 26 July 2005; Ordinance n°2008-1345 of 18 December 2008; Ordinance n°2014-326 of 12 March 2014; Law n°2015-990 of 6 August 2015; Law No.2016-1547 of 18 November 2016.

[13] G. Plantin *et al.*, French Council of Economic Analysis, "Les notes du conseil d'analyse économique" N°7, June 2013, at p.1. Available at http://www.cae-eco.fr/IMG/pdf/cae-note007-en.pdf; L. Spizzichino *et al.*, "Les perspectives d'évolution du role des créanciers en droit des entreprises en difficulté" (2019) RPC N°3, at p.1.

[14] See for example, The World Bank, Doing Business. Available at https://www.doingbusiness.org/en/methodology/resolving-insolvency: the recovery rate of creditors in a fictious case under consideration is estimated at 74.8%, while it is well above 85% in other European countries such as Denmark, Finland, Ireland, the Netherlands, Norway, Slovenia and the United Kingdom. See also S. Davydenk and J. Franks, "Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the UK" (2008) 63 *Journal of Finance* 565.

[15] A. Epaulard and C. Zapha, "Distressed firms: how effective are preventive procedures?" *France Stratégie – La Note D'Analyse*, February 2020, N°84, at p.2 Available at https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/fs-na-84-procedures-preventives-anglais.pdf

[16] DPR, Recital 35.

[17] Law No.2019-486 of 22 May 2019.

[18] See the Report of the French Council of Ministers of 18 June 2018. Available at https://www.gouvernement.fr/conseil-des-ministres/2018-06-18/croissance-et-transformation-des-entreprises.

[19] Pacte Law, Article 196.

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2. French influences in the Directive

The first French pre-insolvency process was introduced as early as 1984[20] and since then, the French legislator and Government have been exceptionally prolific in regularly modernising the French preventive restructuring landscape, with substantial reforms occurring every couple of years.[21] This continuous reform activity is partly a reaction to regular economic crises which have led to an increase in the number of insolvency cases and partly to the consideration that previous reforms had fallen short of success.[22] Over the years, most reform efforts have centred around the acknowledgement that the more the difficulties of the company are dealt with upstream, the better the chances are of preserving the value of the assets of the company and to achieve a successful restructuring. As a result, the French preventive restructuring regime geared towards promoting the rescue of businesses at an early stage, with a view to preserving employment.[23] It is a comprehensive body of law, with no less than five pre-insolvency procedures: (i) ad hoc mandate (*mandat ad hoc*); (ii) conciliation (*conciliation*); (iii) safeguard (*sauvegarde*); and its two variants, (iv) accelerated financial safeguard (*sauvegarde financière accélérée*) and (v) accelerated safeguard (*sauvegarde accélérée*).

2.1. Out-of court, amicable proceedings: Ad hoc mandate and conciliation

French preventive restructuring law is comprised of two voluntary, amicable and confidential procedures, the ad hoc mandate[24] and the conciliation.[25] They are available to companies not yet insolvent[26] and are opened following a request by the debtor. Both procedures were introduced in 2005[27] and their objective is to encourage negotiations with the company's creditors at an early stage and on a confidential and contractual basis. They both allow the debtor to remain in possession[28] while nominating an insolvency practitioner who will oversee the negotiations. An ad hoc representative (*mandataire ad hoc*) or conciliator (conciliateur) is chosen by the debtor or appointed by the relevant court.[29] The conciliator will make any proposal which is relevant to the preservation of the business, the pursuit of its economic activity and the preservation of employment.[30] While there is no maximum duration for the ad hoc mandate procedure, a conciliation agreement must be reached within a period not exceeding four months, which can be extended by one month.[31] The appeal of these procedures is

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[20] Law No.84-148 of 1 March 1984.

[21] French insolvency law is about to be reformed once again as the Pacte Law of 22 May 2019 authorises the Government to draft an Ordinance which will implement the provisions of the Directive.

[22] A. Tetley and M. Bayle, "Insolvency Law in France" in O. Lobo *et al.* (eds.), *World Insolvency Systems: A Comparative Study* (Sweet and Maxwell, 2009) 195, at p.197

[23] See R. Parry, "Introduction" in K. Gromek Broc and R. Parry (eds.), Corporate Rescue in Europe: An Overview of Recent Developments from Selected Countries in Europe (Kluwer, 2004) 1, at p.1.

[24] Commercial Code, Articles L611-1 to L611-16.

[25] Commercial Code, Articles L611-1 to L611-16.

[26] The threshold of insolvency in France is determined by the concept of "payment failure" (*cessation des paiements*). A debtor is in a payment failure situation when due and payable debts exceed available assets. It must file for insolvency within 45 days of the occurrence of such situation: see Commercial Code, Article L631-1. See also P. Omar, "Defining insolvency: the evolution of the concept of 'cessation de paiements' in French law" (2005) 16 *European Business Law Review* 311.

[27] Law No.2005-845 of 26 July 2005. The ad hoc mandate already existed in practice before that date: See C. Dupoux and D. Marks, "Chapter 11 à la Française: French Insolvency Reforms" (2004) 1 *International Corporate Rescue* 74, at 75 and the conciliation replaced the procedure previously known as amicable settlement (*règlement amiable*) introduced by Law N°84-148 of 1 March 1984.

[28] Commercial Code, Article L611-7. A similar debtor-in-possession mechanism is found in Article 5 of the DPR.

[29] Commercial Code, Article L611-3. The relevant court will be either the Commercial Court if the debtor carries out commercial or handcrafted activities, or the High Court in all other cases.

[30] Commercial Code, Article L611-7.

[31] Commercial Code, Article L611-8. replaced the procedure previously known as amicable settlement (*règlement amiable*).

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their confidential and contractual nature. The debtor can select which creditors will be involved in the negotiation process and the agreement is not binding on third parties.

The main difference between the ad hoc mandate and the conciliation is that a conciliation agreement is ratified by the court at the request of the debtor. The court can either merely approve the agreement (*constatation*), which means that the confidentiality of the procedure is preserved, or it can sanction the agreement (*homologation*),[32] which involves publicising the judgment.[33] The adverse effect of publicity which is attached to the sanctioning of the agreement is mitigated by the fact that such sanctioning confers more legal advantages than a mere approval in the event of subsequent insolvency proceedings being opened. In particular, if the conciliation proceedings are converted into safeguard proceedings, new money providers will benefit from a protection for new financing (*privilège de conciliation*).[34]

In 2017, the ad hoc mandate and conciliation procedures amounted to 16% of all debt restructuring procedures in France.[35] Although their confidential nature makes their statistical evaluation difficult, and their success rate is not exactly known, a recent study mentions that it is close to 70%.[36]

2.2. Court-assisted, public proceedings: safeguard and its expedited variants

The safeguard procedure was the core change introduced by the Law of 2005. It was subsequently extensively reformed in 2008,[37] 2014[38] and 2016.[39] Modelled on Chapter 11 of the United States (US) Bankruptcy Code, the procedure was originally introduced as an insolvency procedure, where the debtor was required to show that it was facing "difficulties that it was not able to overcome" and which would lead to a payment failure situation. The Ordinance of 2008 relaxed this criterion[40] and transformed the safeguard procedure into a hybrid mechanism which can also serve as a pre-insolvency procedure. Indeed, the safeguard is now available to a debtor who is encountering difficulties which it is not in a position to overcome, while not yet being in a payment failure situation.[41]

Compared to the ad hoc and conciliation procedures, the safeguard exhibits characteristics closer to formal insolvency proceedings. For example, it is not confidential and must involve all creditors. It triggers a stay on enforcement actions,[42] thereby giving the company some breathing space during an observation period (*période d'observation*) in which the debtor proposes a reorganisation plan (*plan de sauvegarde*) to its creditors.[43] Although the debtor remains in possession, the judgment opening the procedure also triggers the appointment of an administrator (*administrateur judiciaire*)[44] who

[32] The court can sanction the agreement through *homologation* only if certain conditions are met, including that the provisions of the agreement aim to ensure the viability of the going concern of the company: Commercial Code, Article L611-8.
[33] Before the court sanctions an agreement, it must hear the debtor, the creditors who are parties to the agreement, the conciliator and some representatives of the company: Commercial Code, Article L611-9.
[34] Commercial Code, Article L611-11; Article L626-20; Article L626-30-2. Protection for new money is now granted in Article 17 of the DPR. 1
[35] France Stratégie, supra n.15, at p.3.
[36] N. Borga *et al.*, "Mandat ad hoc et conciliation : trouver le point d'équilibre" (2018) *Revue Lamy Droit des Affaires* N°135.
[37] Law No.2008-1345 of 18 December 2008.
[38] Ordinance No.2014-326 of 12 March 2014.
[39] Law No.2016-1547 of 18 November 2016.
[40] However, some commentators have noted that the amendment of the entry criterion is more theoretical than actual, since the debtor must still prove financial difficulties which it cannot overcome to the court: see J-L. Vallens, "Flexibility in France" (2009) *Summer Eurofenix* at p.22.
[41] Commercial Code, Article L620-1.
[42] Now also codified in Article 6 of the DPR.
[43] *Ibid.*
[44] An administrator is only legally required if the company meets one of two thresholds fixed by decree of the Council of State (*Conseil d'Etat*): (i) 20 employees; or (ii) €3 million in turnover before tax: Commercial Code, Article R-62111.

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supervises and/or assists the management to prepare the plan; an insolvency judge (*juge commissaire*), who oversees the whole procedure; and a creditors' representative(s) (*mandataires judiciaires*) who represents the creditors' interests and assesses the proofs of claims and valuation of the debtor's debts and assets.[45] They can be assisted by supervising creditors (*créanciers contrôleurs*) appointed by the insolvency judge.[46] Creditors are placed within committees[47] for the purpose of voting on the plan, and two-thirds in value of each committee must approve the plan[48] and employees also benefit from a special protection (*superprivilège des salaires).*[49]

In the immediate wake of the global Great Financial Crisis of the mid-2000s, developments in legal practice prompted further reforms. Debtors wishing to benefit from an arrangement similar in structure to a pre-pack[50] were negotiating an agreement before formally entering into safeguard proceedings. The agreement negotiated would then be adopted in the form of a safeguard plan.[51] The expedited financial safeguard was introduced in 2010 as a first "pre-pack" variant of the safeguard.[52] In 2014, following the prolonged devastating effects of the crisis on the French economy, the second variant of the safeguard – the expedited safeguard – was created.[53] While the expedited safeguard offers a means for the debtor to enter into negotiations with all his creditors, the expedited financial safeguard only affects financial creditors and/or bondholders.

These mechanisms can only be used following a conciliation procedure; they are not stand-alone processes. In order to file for the variants of the safeguard, a company must: (i) have opened conciliation proceedings; (ii) have negotiated a restructuring plan with the creditors later involved in the accelerated version of the safeguard; and (iii) be able to demonstrate to the court that the plan will receive the support of creditors involved.[54] The decision to open an expedited financial safeguard or expedited safeguard is then taken by the court on the basis of a report prepared by the conciliator expressing their opinion on the likelihood of the plan being adopted by the creditors concerned by the plan.[55] The

[45] A creditor can dispute the valuation and, in this case, the creditors' representative must send a letter to them requesting acknowledgment of the receipt of the letter and the amount proposed for registration: Commercial Code, Article R624-1(2). Depending on the creditor's answer, the dispute may be terminated or upheld. In the case of the former, the admission decision s submitted to the insolvency judge, while in the case of the latter, the creditor is summoned to a dispute hearing before the insolvency judge. If the creditor does not respond to the letter, the insolvency judge can pronounce the total or partial rejection of the claim which results in the extinction of the right.
[46] Commercial Code, Articles L621-10 and L621-11.
[47] See below at Section 4.2.
[48] Commercial Code, Article L626-30-2. Such voting rules have been mirrored in Article 9 of the DPR.
[49] French insolvency and restructuring law has historically been geared towards protecting social policy matters. All claims stemming from employment contracts are granted a super-priority (*superprivilège des salaires*) that trumps creditors' claims (Commercial Code, Article L625-7). This applies to their claims for the 60 days prior to the judgment commencing safeguard proceedings (Commercial Code, Article L625-7; Labour Code, Article L143-10). On the French position on protecting employees' rights in insolvency, see F.M. Mucciarelli, "Employee Insolvency Priorities and Employment Protection in France, Germany. And the United Kingdom" (2017) 44 *Journal of Law and Society* 255. The importance of protecting workers' rights in case of insolvency has been endorsed by the European legislator: see Article 13; Recital 1; Recital 3; Recital 43 of the DPR.
[50] F-X. Lucas, "Le plan de sauvegarde apprêté ou le prepackaged plan à la française", CDE 2009, dossier 28 ; A. Besse ad N. Morelli, "Le prepackaged plan à la française : pour une saine utilisation de la procédure de sauvegarde", JCP E n°25, 18 Juin 2009, 1628.
[51] Y. Le Gales, "Comment fonctionne la procédure de sauvegarde financière accélérée" (Le Figaro, 11 January 2011).
[52] Law No.2010-1249 of 22 October 2010. See also P. Omar, "Preservation and Pre-Packs à la Française: The Evolution of French Insolvency Law after 2005" (2011) 8 *International Company and Commercial Law Review* 258; L-C. Henry, "La sauvegarde financière accélérée ou les leçons de la pratique" LPA 2010, n°232, at p.4 ; T. Monteran and M. Mieulle, "Le vade-mecum du plan de cession 'prepack'" *BJE* 2015, n°3, p.164.
[53] Ordinance No.2014-326 of 12 March 2014.
[54] Commercial Code, Article L628-1.
[55] Commercial Code, Article L628-2.

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objective of these procedures is for the debtor to reach an agreement with its creditors in a speedy fashion. The attractiveness of the expedited variations of the safeguard procedure is that they combine confidentiality and contractual flexibility during the conciliation phase which serves to prepare the plan, with (i) the protection of new financing brought forward during the conciliation phase (*privilège de conciliation*);[56] and (ii) the possibility for the court to bind dissenting creditors in the safeguard phase of the procedure.[57]

2.3. Conclusion

Through regular modernisation of its insolvency and restructuring law, France has developed a sophisticated toolbox which offers a variety of efficient early restructuring tools for companies in financial difficulties. It is therefore not surprising that the European legislator borrowed some of these tools, such as the debtor-in-possession mechanism,[58] the stay on enforcement action,[59] the voting majority,[60] the protection for new financing[61] and the special protection granted to employees.[62]

However, despite the excellent outcomes of preventive restructuring procedures[63] and an increase in their uptake, the recourse to these procedures in France remains rather low, amounting to barely over 20% of all restructuring procedures.[64] The stakes are thus high for the French Government, offered a unique opportunity to turn its comprehensive restructuring landscape into a more efficient regime. In particular, the Directive is encouraging France to rethink the current involvement of the judge in preventive restructuring procedures, as well as the involvement and protection of creditors' interests and rights.

3. Revisiting the role of the judge

As noted by the Directive, "the degree of involvement of judicial or administrative authorities… varies from no involvement or minimal involvement in some Member States to full involvement in others."[65] In France, the court takes a leading role in preventive restructuring proceedings and makes key decisions, from the opening to the closing judgment. However, several French commentators have advocated for an adjustment of the involvement and role of the judge[66] as the debtor and creditors who should be left "to their own to negotiate a fair settlement."[67] Such an approach has somewhat been adopted by the Directive on Preventive Restructuring which states that "the involvement of a judicial or administrative authority in a preventive restructuring framework [may be limited] to where it is

[56] Commercial Code, Article L611-11.
[57] Commercial Code, Article L626-30-2.
[58] DPR, Article 5.
[59] DPR, Article 6. See below at Section 4.1.
[60] DPR, Article 9. See below at Section 4.2.
[61] DPR, Article 17.
[62] DPR, Article 13.
[63] 70% success rate for the ad hoc mandate and conciliation proceedings: see N. Borga *et al.*, "Mandat ad hoc et conciliation: trouver le point d'équilibre" (2018) *Revue Lamy Droit des Affaires* N°135, at p.19.
[64] See France Stratégie, supra n.15.
[65] DPR, Recital 4.
[66] V. Rotaru, "The Restructuring Directive: A Functional Law and Economics Analysis from a French Law Perspective" (30 September 2019), at para. 107. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461716; A. Pietrancosta and S. Vermeille, "Le droit des procédures collectives à l'épreuve de l'analyse économique du droit. Perspectives d'avenir ?" (2010) *RTDF n°1*, at p.15. Available at https://droitetcroissance.fr/wp-content/uploads/2015/04/1.-Le-droit-des-proc%C3%A9dures-collectives-%C3%A0-l%C3%A9preuve-de-lanalyse-%C3%A9conomique-du-droit.pdf.
[67] M.J. Roe, "Three Ages of Bankruptcy" (2017) 7 *Harvard Business Law Review* 187, at 188.

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necessary and proportionate."[68] The French legislator will thus have to rethink the role of the judge in French procedures.

3.1. Article 10: Confirming and rejecting plans

The European legislator aims to give a leading role to the parties and to promote speedier preventive procedures[69] by encouraging direct negotiations between stakeholders. Thus, Recital 29 of the Directive states that Member States "should … limit the involvement of [judicial or administrative] authorities to situations in which it is necessary and proportionate," while Article 10 does not make it compulsory for a judge to confirm all restructuring plans. A plan must be approved by a judicial authority in three instances only: (i) where the restructuring plan affects the interests of dissenting parties; (ii) where the restructuring plan provides for new financing; and (iii) where the restructuring plan involves the loss of more than 25% of the workforce.[70] This limited role given to judicial authorities is due to the Directive's focus on private negotiations. Although discussions and negotiations between stakeholders are already essential in the French system[71] within out-of-court, confidential procedures, as well as within court-governed procedures such as the safeguard,[72] it is anticipated that the role of the French judge will decrease following the transposition of the Directive.[73]

Under current French law, court involvement is systematic and heavier than that envisioned by the Directive. Indeed, several judicial authorities are involved, particularly in safeguard proceedings. A preliminary judge (*juge commis*) may optionally be appointed to undertake an audit of the debtor's situation. They will gather "all information on the financial, economic and social situation of the company."[74] Where required, they may be assisted by any expert of their choice. Their report will serve as the basis for the first ruling made by the court. One or more supervisory judge(s) (*juge-commissaire*) are systematically appointed during the opening order of safeguard proceedings and take the leading role in preventive restructuring cases. They have their own jurisdiction and extensive powers, such as the appointment of other actors during the proceedings,[75] as well as the approval and rejection of creditors' claims,[76] rendering them "omnipresent" in the proceedings.[77]

Nonetheless, the model envisioned by the Directive is one of private negotiations within a judicial framework. The judge is still needed to oversee the negotiations but also to "ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy."[78] As a result, the protections afforded to creditors under Articles 9-11 of the Directive require the involvement of judicial authorities. At present, although the French Commercial Code speaks of the possibility to amend a safeguard plan,[79] it does not explicitly

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[68] DPR, Article 4(6).
[69] DPR, Article 25(b).
[70] DPR, at Article 10(1).
[71] G. Costes et M. Franck, "Actes du Colloque de l'AFFIC, La prévention des défaillances des entreprises, le juge ou le marché", RJ com. sept.2003, n°9., speech by M.G. Costes, at p.24.
[72] Commercial Code, Article L626-9; Article L626-26.
[73] A.M. Romani. "Le droit français de la prévention et la directive "restructuration et insolvabilité" 2019/1023/UE, ou l'enrichissement des droits dans un but commun" (2020). Available at https://hal.archives-ouvertes.fr/hal-02285714/document [Last accessed: 30 June 2020].
[74] Commercial Code, Article L621-1, 4°.
[75] Commercial Code, Article L621-10. He will appoint the supervising creditors (*créanciers contrôleurs*) amongst the creditors and can also appoint experts if necessary: Commercial Code, Article L621-9.
[76] Commercial Code, Article L624-2.
[77] M. Houssin, "Le Droit français est-il creditor friendly ?" (2017) 1 *International Journal of Insolvency Law* 69, at 76.
[78] DPR, Recital 48.
[79] Commercial Code, Article L626-14.

discuss the possibility for a court to refuse the plan.[80] The Code merely states that if no plan is agreed, the court will convert the proceedings into liquidation proceedings or judicial reorganisation proceedings (*redressement judiciaire*).[81] Similarly, for an expedited (financial) safeguard, the Commercial Code states that if the court does not approve the plan, it can terminate the procedure, yet it is again silent as to why such rejection should occur. Finally, French Law also mentions that the court can cancel a plan after having sanctioned it if the debtor does not implement it adequately.[82]

Overall, French law does not provide as much detail as the Directive regarding the reasons why a plan could be rejected. Article 10(2) lists a number of mandatory criteria to be met before a plan can be confirmed which will need to be transposed into French law. One reason why the court could reject a safeguard plan could be because the interests of creditors are not sufficiently protected.[83]

3.2. Article 11: Cross-class cram-down and best-interest-of-creditors test

Although the role of the judge in French preventive restructuring proceedings is likely to decrease following the transposition of the Directive, several new concepts will be introduced into French law, including the mechanism of cross-class cram-down, introduced by Article 11, which requires some judicial involvement. The mechanism of cross-class cram-down enables a judicial authority to confirm a restructuring plan over the dissent of one or several affected class(es) of creditors. Although it has generated heated debates between EU Member States and the Commission,[84] the mechanism should be welcomed in the French regime, as long as safeguards are put in place to ensure that creditors are not treated unfairly, which will be incumbent upon judicial authorities.

One such safeguards is the best-interest-of-creditors test. Article 10(2)(d) provides that if there are dissenting creditors, a judicial examination of the restructuring plan is mandatory to verify that it satisfies the best-interest-of-creditors test. Such test requires that no dissenting creditor be worse off under the restructuring plan than they would be in the case either of liquidation, or the next-best alternative scenario if the restructuring plan were not confirmed.[85] In France, this next-best alternative scenario could possibly be considered to be judicial reorganisation proceedings, as these proceedings are closely aligned with safeguard proceedings, though without the preventive nature. The best-interest-of-creditors test has been criticised by international commentators, claiming that it is a "laborious and speculative exercise [of determining the liquidation value of the company]. The best interest test expects much of the court and leads to a complex debate on substantive financial and commercial issues with expert testimony required from several professionals."[86] Academics have therefore argued that "it makes sense to use [the test] in ordinary proceedings where the company would be liquidated if no rescue plan is adopted. However, such a concept would appear unnecessary in preventive restructuring proceedings where the debtor is continuing its business activities. A fairness test would appear to be sufficient to protect the minority creditors' interest."[87]

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[80] However, the Court will only sanction plans where there is a "serious possibility for the company to be rescued" (Commercial Code, Article L626-1: "*Une possibilité sérieuse pour l'entreprise d'être sauvegardée*"). It is therefore to be understood that a plan which does not meet this requirement can be rejected.

[81] Commercial Code, Article L622-10.

[82] Commercial Code, Article L626-27.

[83] Commercial Code, Article L626-31.

[84] See C. Tiret, "Retour sur les débats intervenus autour de la directive Insolvabilité au sein des institutions européennes" *Revue des Procédures Collectives,* N°3, Mai-Juin 2019, at p.2.

[85] Directive on Preventive Restructuring, Recital 52.

[86] See R.F. Broude, Reorganization under Chapter 11 of the Bankruptcy Code (New York, 2013), at pp.12-20; N. Tollenaar, *Pre-Insolvency Proceedings. A Normative Foundation and Framework* (Oxford: OUP, 2019), at p.130.

[87] DG for Internal Policies of the Union, "The Commission Insolvency Proposal and its Impact on the Protection of Creditors" (2017), at p.36. Available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf.

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Such fairness test exists in France, rather than the best-interest-of-creditors test. The court must verify that the interests of all creditors are sufficiently protected[88] by looking at: (i) the proposed restructuring plan; and (ii) the economic, social and environmental assessment drafted by the administrator. Although the best-interest-of-creditors test is more objective than the current French test,[89] it will prove "challenging for French courts [as it] suppose[s] a concrete simulation and calculation of the business: (1) in an ongoing [*sic*] concern scenario; and (2) in an isolated asset disposal, whatever is more favourable while taking into consideration the complex ranking of each dissenting creditor. Such an exercise means, in practice, that the debtor should provide the court with a report established by an accounting expert and will add a challenge in terms of costs and timing."[90]

Interestingly, both the "reasonable prospect test" of Article 10(3) and the "best-interest-of-creditors" test of Article 11 seem to contradict the overall philosophy of the Directive which (i) expects the court to take a decision about the restructuring plan in an "efficient manner with a view to expeditious treatment of the matter";[91] and (ii) sees the judge as a mere facilitator. These elements are difficult for the court to determine as they require looking into the future and determining commercial matters. Commentator are increasingly of the view that the role of the judge should be limited as "there is no reason to think that the latter is particularly able to identify the best economic opportunities for the reorganization of the debtor"[92] and therefore, "[g]iving discretion to the judge makes sense only when she is well-positioned to use it. The judge has no magical ability to make business decisions, let alone to outwit the market."[93] Following transposition of the Directive, it is likely that room will be made for other professionals, such as accounting professionals, whose expertise will increasingly be relied upon to make valuation and economic decisions pertaining to the restructuring process.[94]

3.3. Conclusion

The role of the judge under the Directive somewhat mirrors that envisioned by Douglas Baird, whereby the insolvency process

> takes place in discussions and negotiations among the various players, mediated by the …judge who decides discrete issues of law while steering the players in the right direction … The … judge brings parties to the bargaining table. The judge forces them to negotiate and compromise, while simultaneously ensuring that rights are protected and that the substantive goals of bankruptcy are vindicated.[95]

The Directive sees the judge as a facilitator, supporting the negotiations between the stakeholders, while under French law, the judge is a key actor in preventive restructuring proceedings, making decision from the opening judgment of the procedure to the closing judgment. Following the transposition of the Directive, the role of the judge will be limited to ensuring that the interests of all stakeholders are protected,[96] which is one of the main objectives of the Directive.[97] Such balancing will have important

[88] Commercial Code, Article L626-31: *"il s'assure que les intérêts de tous les créanciers sont suffisamment protégés."*
[89] Spizzichino *et al.*, supra n.13, at p.6.
[90] A. Droege Gagnier and A. Dorst, "France: quo vadis? France is keen to reform its security and insolvency law" (2018) 12 *Insolvency and Restructuring International* 24, at 26.
[91] DPR, Article 10(4).
[92] Rotaru, supra n.66, at para.107.
[93] D.G. Baird, "Bankruptcy's Uncontested Axioms" (1998) 108 *Yale Law Journal* 573, at 593 *et seq.*
[94] Spizzichino *et al.*, supra n.13, at p.7.
[95] D.G. Baird, "Bankruptcy's Uncontested Axioms" (1998) 108 *Yale Law Journal* 573, at 593. See also Pietrancosta and Vermeille, supra n.66, at p.15.
[96] See generally J. Payne, "The Role of the Court in Debt Restructuring" (2018) 77 *Cambridge Law Journal* 124.
[97] DPR, Recital 35.

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implications for French law as under the current regime, proceedings are mainly led by the judge and the debtor, leaving only a passive role to creditors.[98]

4. Revisiting the creditors' involvement and protection

French insolvency law is internationally unusual for its rather low level of involvement of creditors and the protection afforded to their interests compared to those of other stakeholders.[99] As a result, the French regime ranks quite low in international studies, which often rely predominantly on the role of creditors in insolvency procedures, as well as their recovery rates.[100] It is therefore not surprising that commentators have branded France as "bias[ed] in favour of both the management of the failing business and its shareholders"[101] and called for rebalancing the protection afforded to creditors.[102]

The transposition of the Directive is therefore an opportunity for the legislator to reform the French regime and make it more balanced. In addition to allowing creditors to request the opening of a restructuring procedure,[103] key areas for consideration include the stay on enforcement action, classes of creditors and the cross-class cram-down mechanism.

4.1. Article 6: Shortening the stay on enforcement actions

In order to support the negotiations on a restructuring plan,[104] the Directive provides for a stay of individual enforcement actions, whose stated aim is to support the negotiations of a restructuring plan.[105] Member States are given some leeway regarding the stay. They can decide to provide for a general stay, which covers all creditors, or a limited stay, covering selected creditors only;[106] they can also opt for an automatic stay or a stay granted at the discretion of a judicial or administrative authority.[107] The French system exhibits a mix of these options. In conciliation proceedings, the debtor can request a stay on enforcement action under Article 1345-5 of the French Civil Code,[108] while the opening of safeguard proceedings triggers an automatic stay on enforcement actions during the observation period.[109]

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98 M. Houssin, "Le Droit français est-il creditor friendly ?" (2017) 1 *International Journal of Insolvency Law* 69, at 74.

99 Plantin *et al.*, supra n.13, at p.1; Spizzichino *et al.*, supra n.13, at p.1.

100 See for example, The World Bank, Doing Business. Available at https://www.doingbusiness.org/en/methodology/resolving-insolvency: the recovery rate of creditors in a fictious case under consideration is estimated at 74.8%, while it is well above 85% in other European countries such as Denmark, Finland, Ireland, the Netherlands, Norway, Slovenia and the United Kingdom. See also S. Davydenk and J. Franks, "Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the UK" (2008) 63 *Journal of Finance* 565; France Stratégie, supra n15, at p.2.

101 S. Vermeille and A. Pietrancosta, "A Critical Appraisal of French Bankruptcy Law Through the Lens of the Law and Economics Movement: A Solution for the Future?" (2010) *Revue Trimestrielle de Droit Financier N°1,* at para. 39.

102 Plantin *et al.*, supra n.13, at p.1.

103 DPR, Article 4(8). Under the current French regime, preventive procedures are opened at the request of the debtor (Commercial Code, Article L611-3 for ad hoc mandate proceedings; Article L611-6 for conciliation; and Article L620-1 for safeguard proceedings) who can also propose who should be appointed as ad hoc representative, conciliator or administrator (Commercial Code, Article L611-3 for ad hoc mandate proceedings; Article L611-6 for conciliation proceedings; and Article L621-4 for safeguard proceedings).

104 DPR, Recital 32.

105 DPR, Article 6(1).

106 DPR, Article 6(3).

107 DPR, Article 2(1)(4).

108 Commercial Code, Article L611-7 (before the agreement is sanctioned by the Court) and Article L611-10-1 (during the implementation phase of the agreement).

109 The observation period is open for six months, which can be renewed once if the administrator or debtor so requests and is agreed by the Court: see Commercial Code, Article L621-3.

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However, in the interest of providing a fair balance between the rights of the debtor and those of creditors,[110] the European legislator has limited the duration of the stay to a maximum period of four months.[111] The French regime will need to be amended to match the duration of the stay under the Directive. On the one hand, in conciliation proceedings, the stay can last for up to two years.[112] This duration is viewed as "excessive," allowing for "a substantial transfer of wealth benefitting the shareholders" and carrying "very costly effects for credit institutions, since their debt becomes almost automatically non-performing."[113] Although such long stays are seldom granted by the court in practice, its mere prospect has an impact on the negotiations during conciliation proceedings, where creditors may make unjustified compromises. The French position has therefore been heavily criticised for being a "formidable threat to the benefit of the debtor,"[114] especially considering that appeals are not possible.[115] On the other hand, the stay granted under safeguard proceedings can last for up to 18 months, if the observation period is renewed. It is only when conciliation proceedings are converted into expedited (financial) safeguard proceedings[116] that the stay does not exceed the duration imposed by the Directive (one month (renewable once) for the expedited financial safeguard and three months for the expedited safeguard).[117]

Finally, to ensure that "creditors do not suffer unnecessary detriment,"[118] Article 6(9) of the Directive states that "Member States shall ensure that judicial or administrative authorities can lift a stay" in some instances, including when it no longer fulfils its objectives due to the lack of creditors' support for the plan,[119] when one or more creditors or classes of creditors are unfairly prejudiced by the stay[120] or when it would lead to the insolvency of a creditor.[121] The French Commercial Code is silent on the issue of lifting the stay and therefore, this will be a point that the French Government will need to consider when implementing the Directive.

The transposition of the Directive is an opportunity for the French legislator to rethink the long duration of the stay in conciliation and safeguard proceedings, in order to create a regime which is less stringent on the rights of creditors.

4.2. Article 9: Classes of creditors

Article 9(2) requires that Member States ensure that "all affected parties have a right to vote on the adoption of a restructuring plan," while parties not affected by the plan should not vote on it. French law aligns with this first element of Article 9 as only creditors affected by the plan can vote on it.[122] The Commercial Code also specifies that some creditors are explicitly excluded from voting on the safeguard plan. These include: (i) those not affected by the restructuring plan; (ii) those who benefit from a fiducie agreement (*bénéficiaires d'une fiducie*);[123] and (iii) social and taxes authorities, who are

[110] DPR, Recital 35.
[111] DPR, Article 6(6).
[112] Civil Code, Article 1343-5.
[113] See Rotaru, supra n.66, at para.97.
[114] *Ibid.* at para. 98.
[115] Douai, 27 March 2007, BICC 2007, N°1889.
[116] Commercial Code, Article L622-28.
[117] Commercial Code, Articles L628-8 and L628-10.
[118] DPR, at Recital 36; Article 6(9).
[119] DPR, at Article 6(9)(a).
[120] DPR, at Article 6(9)(c).
[121] DPR, at Article 6(9)(d).
[122] Commercial Code, Article L626-30-32.
[123] Commercial Code, Article L626-32. A fiducie is defined by Article 2011 of the Civil Code as "the operation by which one or more settlors transfer assets, rights or security interests, or a set of assets, rights or security interests, present or future, to one of more trustees who, keeping them separate from their own assets, act for a specific purpose for the benefit or one or more beneficiaries."

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invited to take part in the negotiations and can agree to debt cancellations or rescheduling,[124] but are not members of any committees and therefore, cannot vote on the plan. The voting rules are similar under the French Commercial Code[125] and the Directive[126] and require that two-thirds in value of each committee must approve the plan.

Secondly, although French law already complies with the voting rights element of Article 9, the formation of classes of creditors is one of the main areas for consideration by the French Government when transposing the Directive since the French Commercial Code does not provide for actual "classes" of creditors. "Class formation" means grouping affected parties for the purpose of adopting a plan "in such a way as to reflect their rights and the seniority of their claims and interests"[127] and Article 9(4) of the Directive states that "Member States shall ensure that affected parties are treated in separate classes, which reflect sufficient commonality of interest… As a minimum, creditors of secured and unsecured claims should be treated in separate classes for the purpose of adopting a restructuring plan." Under French law, creditors are grouped within committees depending on their *institutional nature*, as opposed to the *nature of their claims* as provided in the Directive.[128] The Commercial Code therefore provides that creditors be organised in three committees grouping: (i) credit institutions; (ii) main suppliers; and (iii) bondholders. Bondholders vote in a single group, even if there are several types of bonds issued and they vote in a general meeting, after the plan has been approved by the other two committees.[129] The French position has been heavily criticised by commentators[130] for its lack of homogeneity of interests, with senior, junior, privileged and unsecured creditors being grouped in the same committees[131] and for not meeting international standards when complex financing schemes involving different layers of debt are involved.[132] They are therefore welcoming the forthcoming transformation of creditors' committees into classes[133] and debates around class formation have been numerous.

For example, some authors have proposed that the formation of these classes be done also during amicable, out-of-court proceedings such as conciliation proceedings.[134] However, because conciliation proceedings are contractual in nature and do not abide by the voting mechanism envisioned by the Directive, the introduction of classes of creditors during conciliation would only prove useful if the proceedings were subsequently converted into an expedited variant of safeguard proceedings. Some commentators have also suggested that classes could be divided into sub-categories based on a commonality of interest, like in Chapter 11 of the US Bankruptcy Code and in German insolvency law,[135] while Reinhard Dammann mentioned the possibility for the Government to introduce a specific class for new money providers during conciliation proceedings, or a one-person class comprised of one creditor only,[136] as well as a class grouping all shareholders who could vote on the safeguard plan but

[124] Commercial Code, Article L626-6.
[125] Commercial Code, Article L626-30-2.
[126] DPR, Article 9(6).
[127] DPR, Recital 44.
[128] DPR, Article 9(4).
[129] Commercial Code, Article L626-32.
[130] See *e.g.* R. Dammann, "L'introduction des classes de créanciers dans l'optique d'une harmonisation franco-allemande des procédures d'insolvabilité", in Mélanges en l'honneur du Professeur Claude Witz, LexisNexis, 2018, p. 223 ; Dammann and Boché-Robinet, supra n.10.
[131] Rotaru, supra n.66, at para.12. ("current French law provides, contrary to any common sense, that any safeguard plan must be voted on by creditors organized in three separate bodies").
[132] Droege Gagnier and Dorst, supra n.82, at 25; see also Dammann and Boché-Robinet, supra n.10.
[133] Pacte Law, Article 196(1).
[134] See Dammann and Boché-Robinet, supra n.10.
[135] Droege Gagnier and Dorst, supra n.82, at 25.
[136] See R. Dammann and Anaïs Alle, "Directive 'Restructuration et Insolvabilité' : l'introduction des classes de créanciers en droit français" (2019) Recueil Dalloz, p.2047 *et seq.*

could also be cram-downed not to “unreasonably prevent or create obstacles to the adoption … of a restructuring plan.”[137]

Thirdly, Article 9(5) requires that voting rights and the formation of classes be examined by a judicial or administrative authority, at the latest when a request for confirmation of the restructuring plan is submitted. The French system is less straightforward. Strictly speaking, there is no requirement for examination, confirmation or approval of the classification of affected parties or their voting rights for the purpose of approving the restructuring plan. However, the administrator can modulate creditors' voting rights in a committee depending on their guarantees or subordination agreements, thereby determining the amount of the claim with which the creditors are allowed to vote.[138] Decisions made by the administrator regarding the value of votes can be referred to the court for adjudication, should a dispute arise. However, the absence of objective criteria for such modulation is a source of legal uncertainty and can result in a potential unfair treatment of creditors.[139] This explains why this practice seldom takes place.[140] Transposing Article 9(5) into French law will therefore result in more transparency and predictability of the French system, especially for creditors.

When transposing Article 9(5) into French law, the Government will need to consider the timing at which the examination of voting rights and class formation is done. Article 9(5) adopts a minimum standard approach whereby Member States can decide to request judicial or administrative authorities to undertake this examination when the plan is submitted for confirmation, or at an earlier stage. Some commentators have criticised this minimum standard approach, arguing that the examination of class formation and voting rights should be exercised earlier than when the plan is submitted for confirmation, for example as early as the opening of the restructuring procedure, “in order to be fixed prior to the vote and not to delay the voting process”[141] and so that creditors can anticipate whether the necessary majorities are acquired when negotiating amicable agreements.[142] It would therefore be judicious to vest such examination requirement with the insolvency practitioner appointed during the proceedings. The compulsory examination by the court at the approval stage would therefore become a mere formality, an “ultimate control, verifying that the legal criteria are duly complied with.”[143]

Overall, the current French system has been criticised for its potential for abuses[144] as well as unfair treatments of creditors who are placed in committees that go against their legitimate expectations and their real position vis-à-vis the company's indebtedness. The transposition of the Directive into French law is therefore an opportunity to modernise the French regime so that creditors classes better reflect complex financing and will “lead to a revolution long called by a large part of the French restructuring community.”[145] If transposed adequately, the provisions of the Directive would lead to a rebalancing of the protection of creditors' rights. It is thus important that the Government adopt criteria which are flexible enough to ensure that classes are truly homogeneous, yet not too flexible that they could void some of the protections provided in Articles 10 and 11 of the Directive, such as the cross-class cram-down.

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[137] DPR, Article 12.
[138] Commercial Code, Article L626-30-2, 4°.
[139] See R. Dammann and Anaïs Alle, “Directive ‘Restructuration et Insolvabilité’ : l'introduction des classes de créanciers en droit français”; (2019) Recueil Dalloz, p.2047 *et seq.*; R. Dammann, “L'introduction des classes de créanciers dans l'optique d'une harmonisation franco-allemande des procédures d'insolvabilité”, in Mélanges en l'honneur du Professeur Claude Witz, LexisNexis, 2018.
[140] R. Dammann and G. Podeur, “Le rééquilibrage des pouvoirs au profit des créanciers résultat de l'ordonnance du 12 March 2014” D., 2014, at 752.
[141] Droege Gagnier and Dorst, supra n.82, at 25.
[142] Rotaru, supra n.66, at para.139.
[143] Droege Gagnier and Dorst, supra n.82, at 25
[144] Rotaru, supra n.66, at para.130.
[145] Rotaru, supra n.66, at para.131.

4.3. Article 12: the role of shareholders

The importance of creditors' rights and involvement in insolvency proceedings can also be assessed in comparison to that of the shareholders. Under current French law, if a restructuring plan provides for an operation requiring the approval of shareholders, such as in the case of debt-for-equity swap, the latter must be consulted.[146] Shareholders have therefore a de facto veto right over restructuring plans resulting in a reduction to zero of the nominal capital in order to cover losses by cancelling shares, followed by an immediate capital increase paid for by the conversion of the debts into equity. This can lead to some undue transfer of wealth which explains why the French position has been criticised for creating a situation whereby the voting rights of shareholders becomes monetised even though the value of the securities to which it is attached is null.[147] Shareholders are therefore not inclined to approve a restructuring plan providing or a dilution of their shareholding if they are not financially encouraged to do so.

The Directive provides an opportunity for the French regime to rebalance the rights of creditors against those of shareholders. Recital 57 of the Directive states that "[w]hile shareholders' or other equity holders' legitimate interests should be protected, Member States should ensure that they cannot unreasonably prevent the adoption of restructuring plans that would bring the debtor back to viability… for example by not giving equity holders the right to vote on a restructuring plan and by not making the adoption of a restructuring plan conditional on the agreement of equity holders." These provisions are important as when a company is in financial distress, shareholders are often "out of the money" and having nothing to lose. They are therefore prone to take risks resulting in a decrease in the overall value of the company and/or its assets.[148] Shareholders therefore often benefit from an undue protection to the detriment of the interests of the creditors and it has been argued that the decision-making power should be vested with the latter.[149]

Article 12 of the Directive gives two options to the French legislator. The first possibility is to ensure that "equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan."[150] The wording of this provision is quite vague and it is difficult to foresee what solution could be found to comply with such approach. The second possibility is for the French legislator to operate a paradigm shift whereby shareholders be treated as a separate class of creditors. In this case, since shareholders would be placed in a class of creditors as opposed to the current shareholders' meeting, the Court would be in a position to subject them to a cross-class cram-down. As a counterpart, they will benefit from the protections discussed above, such as the "best-interest-of-creditors test" and the priority rule adopted by the French legislator. The first option enables shareholders to be exempt from the provisions of the Directive relating to loss absorption while the second option mirrors firms' capital structures following which creditors and shareholders do not differ but for their ranking and loss absorption.[151]

4.3. Conclusion

French law is internationally known for its pro-debtor nature and the rather low involvement of creditors in preventive restructuring proceedings. Transposing the Directive into French law will upset the current balance between the key actors and creditors will occupy a more important place in the restructuring

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[146] Commercial Code, Article L626-3 ; Article L626-31.
[147] Pietrancosta and Vermeille, supra n.66, at p.11.
[148] R. Kraakman *et al., The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press), at p.116; K.H. Daigle and M.T. Maloney, "Residual Claims in Bankruptcy: An Agency Theory Explanation" (1994) 37 *Journal of Law and Economics* 157; E.P. Gilje, "Do Firms Engage in Risk-Shifting? Empirical Evidence" (2016) 29 *Review of Financial Studies* 2925.
[149] Rotaru, supra n.66, at para.107.
[150] DPR, Article 12(2).
[151] For a similar opinion, see Rotaru, supra n.66, at para.159.

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effort. It will lead to a rebalancing of the protection granted to all stakeholders' interests, notably through revisiting shareholders' prerogatives and converting creditors' committees into classes. The introduction of these homogeneous classes of creditors will also lead to increased efficiency and legal certainty in the French preventive restructuring regime. At the same time, this legislative change will satisfy the European legislator's objective of harmonising some core elements of preventive restructuring procedures, as creditors are already grouped in classes in Member States such as the United Kingdom and Germany.

5. Concluding remarks

France's experience in preventive restructuring frameworks dates back to 1984, making it one of the pioneer European jurisdictions in this area. The French preventive restructuring regime has since been extensively expanded through regular reforms which have turned French insolvency law into a comprehensive and sophisticated toolbox for corporate debtors, exhibiting numerous elements which have proven effective in practice. These include the possibility for the debtor to remain in possession during preventive restructuring proceedings; the stay on enforcement actions; the protection for new financing; the possibility for a court to bind dissenting creditors; and a special protection granted to employees. These elements are found within no less than five pre-insolvency procedures, which range from out-of-court, amicable, confidential proceedings to court-governed, public ones. In particular, the singularity and effectiveness of the French regime lie in the creation of a two-stage process. A corporate debtor experiencing financial difficulties can first open conciliation proceedings, based on confidential and amicable negotiations with its main creditors. If no compromise is reached, the proceedings can be converted into expedited (financial) safeguard proceedings, which enables the court to bind dissenting creditors. The efficiency of this two-stage process influenced the European legislator in the drafting of the Directive on Preventive Restructuring.

However, although the European text has been said to be largely inspired by the French regime, other European practices, inexistent under French insolvency law, have been codified by the European Commission. As a result, new concepts will need to be introduced into the Commercial Code, such as the mechanism of cross-class cram-down, the "best-interest-of-creditors" test and classes of creditors. The transposition of the Directive is therefore giving the French Government an opportunity to increase the attractiveness of its regime as if transposed ingeniously, the Directive could turn France into a significant competitor in the race to become a leading preventive restructuring jurisdiction in the EU. Such international positioning is particularly timely in the wake of Brexit, which will undoubtedly prompt nation legislators to compete in becoming the new "capital" of European cross-border restructuring proceedings.[152]

In particular, the transposition of the Directive will require a rebalancing of the involvement and protection of stakeholders. The French regime is internationally known for its low involvement of creditors in preventive restructuring proceedings and for its high judicial involvement. The Directive is operating a paradigm shift, from verticality, dominated by the role of the judge, to increased horizontality, through the promotion of private negotiations, which will upset the role of key actors. The French regime will need to increase the space given to creditors in preventive restructuring proceedings, while the role of the judge will become that of a facilitator.

Transposing the Directive into the French Commercial Code is not an easy task as several issues have come to the fore since its passing in 2019. The first question that the French Government will need to answer is whether the elements of the Directive should be implemented in an existing procedure or several, or whether a new, standalone procedure should be created. Although this question has not been

[152] *Ibid.*, at n.178.

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answered yet, it is unlikely that the latter option will be selected as the French system has already been criticised for its complexity.[153] Creating a new procedure would add to such complexity.

Another debated issue is whether the safeguard procedure should be merged with the judicial reorganisation procedure (*redressement judiciaire*). Studies have reported that firms that file for safeguard proceedings are better off than those that go into judicial reorganisation proceedings. Indeed, 62% of safeguard proceedings result in a successful restructuring plan, while only 27% judicial reorganisation proceedings succeed.[154] Although the difference can be explained by different factors, the reputation of the safeguard also contributes to its success. "Since firms under safeguard have a greater chance of survival, the opening of this procedure does not drive away stakeholders – customers, creditors, employees, suppliers – which in turn increases the firm's chances of survival."[155] Despite its efficient regime, the safeguard procedure represents a mere 6% of the restructuring procedures opened in France between 2008 and 2018[156] due to firms (i) preferring to enter into confidential procedures; or (ii) not filing for insolvency proceedings on time and ending up in judicial reorganisation proceedings. French commentators therefore argue that more information and "a clearer distinction between the safeguard and [judicial reorganisation] procedures could help increase the use of this procedure."[157] The transposition of the Directive on Preventive Restructuring is an opportunity to tackle this issue. In any case, both procedures are already very similar, and it would be difficult to imagine adapting the safeguard proceedings, in particular transforming creditors' committees into classes, without a similar alignment for judicial reorganisation proceedings.

These debates are currently ongoing, but time is running out for the French Government as the Directive must be transposed by 2021.

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[153] A. Tetley and M. Bayle, "Insolvency Law in France" in O. Lobo *et al.* (eds.), *World Insolvency Systems: A Comparative Study* (Sweet and Maxwell, 2009) 195, at p.200.
[154] France Stratégie, supra n.15, at p.1.
[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*