European Insolvency and Restructuring Journal
Academic Article
EIRJ-2022-4
eirjournal.com

Between modernity and prudence: the transposition into French law of Directive (EU) 2019/1023 of 20 June 2019 on restructuring and insolvency

Thomas Mastrullo, Associate Professor at Luxembourg's University

Abstract

Ordinance n° 2021-1093 of 15 September 2021, which came into force on 1 October 2021, transposed into French law Directive (EU) 2019/1023 of 20 June 2019 on restructuring and insolvency. This transposition, prudent and respectful of the terms of the Directive, modernizes French insolvency law without overturning it. The most notable advances concern the adoption of restructuring plans, with the introduction of classes of affected parties and the mechanism of cross-class cram-down, as well as the institution of a new *sauvegarde accélérée* preventive procedure. More generally, several advancements are to be welcomed in terms of prevention, negotiation of restructuring plans, second chance of entrepreneurs and efficiency of procedures.

1. Introduction

1.1 International background

International studies, most notably the Doing Business reports published by the World Bank[1], show that insolvency law is now an issue of legal competitiveness and investor attractiveness.

In recent years, many countries have reformed their insolvency law to offer entrepreneurs in difficulty the means to negotiate amicable agreements with their creditors in a confidential manner, through a conciliation or a mediation for example, or to proceed with the preventive restructuring of their enterprise thanks to more flexible and rapid procedures. The institution of *conciliation* and *sauvegarde* proceedings[2] – then *sauvegarde financière accélérée*[3] and *sauvegarde accélérée*[4] – is an example of this movement in France[5]. The creation of specialized courts for European and International bankruptcies[6] is another step in this direction[7].

The increased interest in insolvency law is also illustrated by the vitality of reflections in this field at international level. Thus, the Model Law on Cross-Border Insolvency published by UNCITRAL in 1997 has recently been enriched by a Model Law on Recognition and Enforcement of Insolvency-

[1] See *Doing Business* 2020, *Sustaining the pace of reforms*: https://www.banquemondiale.org/fr/news/feature/2019/10/24/doing-business-2020-sustaining-the-pace-of-reforms.

[2] Law n° 2005-845 of 26 July 2005 *de sauvegarde des entreprises* : *JORF* n° 173, 27 July 2005.

[3] Law n° 2010-1249 of 22 October 2010 *de régulation bancaire et financière* : *JORF* n° 247, 23 Oct. 2010.

[4] Ordinance n° 2014-326 du 12 March 2014 *portant réforme de la prévention des difficultés des entreprises et des procédures collectives* : *JORF* n° 62, 12 March 2014.

[5] J.-L. Vallens, Doing Business – *Le droit français de l'insolvabilité : des signes encourageants pour la Banque mondiale*, *Rev. proc. coll.* 2015, focus 1.

[6] C. com., Art. L. 721-8 created by Law n° 2015-990, 6 August 2015 *pour la croissance, l'activité et l'égalité des chances économiques* : *JORF* n° 181, 7 Aug. 2015. – On the creation of specialised commercial courts : M. Menjucq, *Compétence des tribunaux de commerce et groupes de sociétés : Rev. proc. coll.* 2015, repère 5.

[7] Beyond France and the European borders, many countries have recently reformed their insolvency law in order to reinforce the attractiveness of their legal system. We can cite the case of India, which adopted a new Bankruptcy Code in 2016 to increase the efficiency and speed of its procedures, Egypt, whose Law L. 11/2018 of 19 February 2018 introduces the concepts of mediation and preventive restructuring into Egyptian law, or Saudi Arabia, which has modernized its legislation by adopting a reorganization procedure (on this last example: Doing Business 2020, *Sustaining the pace of reforms*, *supra*, pp. 8 and 13).

Related Judgments adopted in 2018[8] and a Model Law on Enterprise Group Insolvency adopted in 2019[9]. These texts are in addition to the UNCITRAL Legislative Guide on Insolvency Law[10] and its Legislative Recommendations on Insolvency of Micro- and Small Enterprises adopted in 2021[11].

1.2 European background

It is therefore not surprising that insolvency law is currently at the heart of the development of business law in the European Union.

While it has long been recognized that insolvency-related issues have a European dimension, the financial crisis of 2008 has given rise to a real awareness of the need to create a framework for early and effective intervention to deal with enterprises' difficulties in a preventive manner and to give honest entrepreneurs a second chance. The aim is to ensure an environment conducive to trade within the internal market, as the approximation of national insolvency laws is likely to increase the legal certainty of cross-border investors – especially in times of economic crisis.

However, there are traditionally major differences between the laws of the Member States governing enterprises in difficulty in the EU[12]. Harmonization of national laws has therefore long seemed inconceivable. In a Communication of 12 December 2012, entitled "A new European approach to business failure and insolvency"[13], and a Recommendation of 12 March 2014[14], the European Commission, however, came out in favour of a substantive harmonization of national insolvency laws. This ambition led to the publication on 22 November 2016 of a Proposal for a directive[15] and then, on 26 June 2019, of Directive (EU) 2019/1023 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 (Directive on restructuring and insolvency)[16]. The text aims to reduce differences between national laws on preventive restructuring, insolvency, debt discharge and disqualifications, in order to facilitate the exercise of the freedom of movement of capital and the freedom of establishment of companies and investors. The challenge is also to combat non-performing loans (NPLs), which affect bank profitability and the ability of financial institutions to grant credit.

Directive (EU) 2019/1023 marks an important step in the construction of commercial law in the EU. Traditionally, European commercial law has been built on the basis of freedom of establishment in order to promote the creation and movement of enterprises, and in particular companies, throughout the European regional area. Directives (EU) 2019/2121 of 27 November 2019 on companies' mobility[17] and (EU) 2019/1151 of 20 June 2019 as regards the use of digital tools and processes in company law[18] are clear example. Directive (EU) 2019/1023 brings to light that the challenge of freedom of establishment is not only to facilitate the formation and mobility of enterprises and companies but also, once established, to help them to cope with their financial difficulties.

[8] https://uncitral.un.org/en/texts/insolvency/modellaw/mlij.
[9] https://uncitral.un.org/en/mlegi.
[10] https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.
[11] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/part_5_en.pdf.
[12] See J.-L. Vallens et C.-C. Giorgini (ss dir.), *Étude comparative des procédures d'insolvabilité*, SLC, 2015.
[13] COM (2012), 742 final. – See M. Menjucq : *Rev. proc. coll.* 2013, repère 1.
[14] COM (2014), 1500 final.
[15] COM (2016), 723 final. – See M. Menjucq, *JCP* E 2017, 1198, n° 12.
[16] *OJEU* L 172/18, 26 June 2019. – See G. McCormack, *The European Restructuring Directive*, Edward Elgar Publishing, 2021.
[17] *OJEU* L 321/1, 12 Dec. 2019.
[18] *OJEU* L 186/80, 11 July 2019.

For the areas in which it intervenes, Directive (EU) 2019/1023 complements in a substantial way the rules of private international law laid down by Regulation (EU) n° 2015/848 of 20 May 2015 on insolvency proceedings[19].

The directive is structured around three axes, against which the competitiveness of an insolvency law is assessed nowadays.

The first axis is prevention and restructuring. Thus, Member States are invited to give debtors in "likelihood of insolvency" access to "effective preventive restructuring frameworks", in order to ensure their viability, protect jobs and maintain business activity[20]. To facilitate the adoption of preventive restructuring plans, the directive promotes early warning tools[21] or principles as fundamental as the the debtor in possession[22] and the stay of individual enforcement actions[23]. But it is above all the creation of classes of affected parties[24] and the rule of cross-class cram-down [25] that make up the essence of the directive's mechanism. The transposition of these provisions was the most important challenge for French law, which knew neither the classes of affected parties nor the cross-class cram-down rule.

The second axis of the directive (EU) 2019/1023 is the second chance for the "honest" entrepreneurs. In each Member State, they must be able to benefit from at least one procedure that can lead to a full discharge of debt within a maximum of three years[26]. Many EU countries already have provisions to this effect. However, national solutions are very diverse and the directive aims to coordinate them.

The third axis is efficiency. In this sense, the directive encourages Member States to make procedures more efficient through the training of judicial authorities and insolvency practitioners (to prevent conflicts of interest and to regulate access to the profession), the supervising of their work and their remuneration and the use of electronic means of communication[27]. We are thus witnessing the birth of a genuine European statute for insolvency professionals. This will help to increase the efficiency and uniformity of the treatment of entrepreneurs' difficulties in the European area.

Directive (EU) 2019/1023 is a compromise text with multiple influences (French, German, Italian or English) that leaves flexibility to national legislators. The transposition of this text ought to have two implications for the law of the Member States. On the one hand, national laws tend to be approximated "from above" through the coordinating effect of the directive. On the other hand, Member States are put in competition to produce the most competitive transposition possible... This may lead them to spontaneously approximate their law, "from below", by adopting the solutions considered to be the most effective – while ensuring that they maintain a certain originality which will enable them to distinguish themselves from other Member States and respect local culture of dealing with enterprises' insolvency. This dialectic between competition and rapprochement is certainly likely to characterize the transposition of Directive (EU) 2019/1023, although it is probably still a little early to make a definitive statement on this point.

---

[19] See M. Menjucq, *Droit international et européen des sociétés*, LGDJ, coll. « Précis Domat », 6e éd., 2021, p. 511 and seq. – M. Brinkman, *European Insolvency Regulation*, Beck, 2019. – G. Cuniberti, P. Nabet et M. Raimon, *Droit européen de l'insolvabilité*, LGDJ, 2017. – *L'insolvabilité nationale, européenne et internationale – Le règlement européen du 20 mai 2015*, coord. Y. Brulard, Anthémis, 2017. – *Le nouveau droit européen des faillites internationales*, dir. A. Cotiga-Raccag, L. Sautonie-Laguionie, Bruylant, 2018. – Th. Mastrullo, *Rép. com.* Dalloz, V° *Entreprises en difficulté (Droit international et européen)*, nos 212 and seq.

[20] Dir. (EU) 2019/1023, Rec. 1 and Art. 4.

[21] Dir. (EU) 2019/1023, Art. 3.

[22] Dir. (EU) 2019/1023, Art. 5.

[23] Dir. (EU) 2019/1023, Art. 6 et Art. 7.

[24] Dir. (EU) 2019/1023, Art. 9.

[25] Dir. (EU) 2019/1023, Art. 11.

[26] Dir. (EU) 2019/1023, Art. 20 and Art. 21.

[27] Dir. (EU) 2019/1023, Art. 25 to Art. 28.

Indeed, if the Directive was to be transposed by the Member States by 17 July 2021 at the latest[28], it must be noted that the work of transposition is far to have been completed in all Member States, several of which (Spain and Italy, for example) have asked to benefit from the one-year extension for the implementation period envisaged by Article 34, § 2, of the Directive.

The Directive was particularly transposed into German law by the *StaRUG*, which came into force on 1 January 2021. The German legislator has been ambitious in adopting a new confidential mediation procedure inspired by the French *conciliation* and a new stabilization and restructuring framework[29]. Some other Member States are in the process of implementing the Directive and have recently introduced new provisions or procedures in their insolvency law in the wake of the European text. The Netherlands, for instance, has adopted the *Wet Homologatie Onderhands Akkoord* (or *WHOA*) that provides a mechanism for entrepreneurs, creditors and shareholders to conclude a binding private plan with court approval[30]; the Dutch reform came into force on 1 January 2021.

1.3 French background

In France, Article 196 of Law n° 2019-486 of 22 May 2019[31] *relative à la croissance et la transformation des entreprises*, so called *Loi Pacte*, authorized the government to legislate by way of ordinance in order to transpose Directive (EU) 2019/0123 and make the provisions of Book VI of the *Code de commerce (C. com.)* – devoted to enterprises in difficulty (*entreprises en difficulté*) – compatible with European Union law.
The directive was transposed by Ordinance n° 2021-1193 of 15 September 2021 amending Book VI of the *Code de commerce* [32], supplemented by Decree n° 2021-1218 of 23 September 2021[33]. These texts came into force on 1 October 2021[34].

Three preliminary remarks are necessary to present the transposition of the Directive on restructuring and insolvency into French law.

Firstly, concerning the method, the use of ordinances is questionable. According to Article 38 of the French Constitution, the ordinance allows the executive power, and more precisely the government, to adopt measures that are normally in the domain of the law. It is true that the use of the ordinance makes it possible to speed up the adoption of texts. However, a certain democratic prejudice can be deplored insofar as the reform has not been discussed in Parliament. Nevertheless, it should be noted that, according to Article 196 of the *Loi Pacte*, a ratification bill must be tabled before Parliament within four months of the publication of the ordinance. This ratification bill n° 326 was presented to the Senate on 5

[28] With the exception of the provisions of Article 28 on the use of electronic means of communication, for which the transposition period is extended to 17 July 2024 (points (a), (b) and (c)) and 17 July 2026 (point (d)).
[29] E. Delzant, *Le nouveau régime de la restructuration préventive en Allemagne*, BJE mars 2021, n° 118n1, p. 64. – T. Pogoda & Ch. Thole, *The new German "Stabilisation and Restructuring Framework for Businesses"*, EIRJ, 2021-6.
[30] See H. Volberda, 2021. *Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023*, *Utrecht Law Review*, 17(3), pp.65–79. DOI: http://doi.org/10.36633/ulr.638.

[31] *JORF* n° 119, 23 May 2019.
[32] *JORF* n° 216, 16 Sept. 2021.
[33] *JORF* n° 223, 24 Sept. 2021.

[34] See P. Rossi, *L'ordonnance prise sur les habilitations des articles 60 et 196 de la loi PACTE*, BJE sept. 2021, n° 200g2, p. 1. – N. Borga et J. Théron, *Ordonnance du 15 septembre 2021 réformant le droit des entreprises en difficulté, un tournant ?*, D. 2021. 1773. – C. Favre-Rochex, *Une nouvelle réforme du Livre VI du Code de commerce !*, BJE sept. 2021, n° 200g9, p. 37. – K. Lemercier et F. Mercier, *Réforme du droit des entreprises en difficulté*, D. actu., 28 sept. 2021. – M. Menjucq, *Ordonnance transposant la directive 2019/1023, une harmonisation* a minima, *Rev. proc. coll.* sept.-oct. 2021, Repère 5. – *Les procédures collectives après les ordonnances du 15 septembre 2021*, *Rev. proc. coll.* nov.-dec. 2021, p. 51. – *Temps nouveaux pour l'entreprise en difficulté*, dir. L. Sautonie-Laguionie, JCP E 2021, 1523-1538. – *Regards croisés sur la réforme du droit des entreprises en difficulté*, *Rev. proc. coll*. janv.-févr. 2022, p. 30.

January 2022[35] ; due to the elections in France, this text has still not been adopted.

Secondly, concerning the context, the ordinance that transposed Directive (EU) 2019/1023 was thought out in relation to the reform of the law of securities that took place with Ordinance n° 2021-1192 of 15 September 2021[36] and whose entry into force was set at 1 January 2022. The French legislator has thus sought to link the law of enterprises in difficulty with the law on securities. This has resulted, in particular, in an update of the terminology relating to security interests in Book VI of the *Code de commerce*. Ordinance n° 2021-1193 was also an opportunity to perpetuate certain contributions of Ordinance n° 2020-596 of 20 May 2020[37], which adapted French insolvency law to the consequences of the Covid-19 pandemic. Not all aspects of the latest reform of French insolvency law are therefore directly linked to the transposition of Directive (EU) 2019/1023. One good example is the increased protection of co-obligors and guarantors who are natural persons as a result of the alignment of *sauvegarde* and *redressement judiciaire* proceedings, from which it follows that they can now benefit from the stop of interests due, the unenforceability of undeclared claims and the provisions of the plan in both procedures[38].

Thirdly, concerning the content, the French transposition of the Directive on restructuring and insolvency appears to be minimal in some respects and, in general, hardly deviates from the provisions of the European text nor does it overturn French law. The French legislator has been prudent, aware of introducing "unfamiliar concepts[39] into French regulation of enterprises in difficulty. The second chance of entrepreneurs and the efficiency of procedures have received less attention from the French legislator than prevention and restructuring. This certainly can be explained by the fact that French law already met the main European requirements on this point. It is also regrettable that no progress has been made on certain aspects of the Directive, the most important of which is the duties of directors where there is a likelihood of insolvency[40] that could have led to the creation of a new liability in French law[41].
Nevertheless, the transposition of Directive (EU) 2019/1023 has enabled the modernization and progress of French insolvency law in many areas, whether in prevention (2), restructuring (3) or second chance of entrepreneurs and efficiency of procedures (4).

2. Progress in prevention[42]

The transposition of Directive (EU) 2019/1023 involved a strengthening of the effectiveness of the preventive aspect of French insolvency law. Ordinance n° 2021-1193 has effectively accelerated the alert procedures (2.1) and increased the attractiveness of the *conciliation* proceeding (2.2).

2.1 Accelerated alert procedures

Directive (EU) 2019/1023 requires Member States to provide access to clear and transparent early warning tools. These tools should alert the debtor to the need to act without delay by bringing to his attention circumstances that could give rise to a likelihood of insolvency[43].

Traditionally, French law is fairly well equipped in this area, since it includes five alert procedures: the auditor's alert in groups with such a body (*commissaire aux*

[35] http://www.senat.fr/leg/pjl21-326.pdf.
[36] *JORF* n° 216, 16 Sept. 2021.
[37] *JORF*, n° 124, 21 May 2020.
[38] N. Borga et J. Théron, *op. cit.*, n° 21 and seq.
[39] P. Rossi, *op. cit.*, p. 1.
[40] Dir. (EU) 2019/1023, Art. 19.
[41] Th. Mastrullo, *Directive (UE) 2019/1023 du 20 juin 2019 relative aux cadres de restructuration préventive : vers de nouvelles obligations pour les dirigeants de sociétés*, BJS oct. 2019, n° 120e0, p. 28.
[42] About this subject : B. Saintourens, *La prévention et le traitement amiable des difficultés de l'entreprise dans l'ordonnance du 15 septembre 2021*, Rev. proc. coll. nov.-déc. 2021, dossier 6.
[43] Dir. (EU) 2019/1023, Art. 3.

comptes)[44], the social and economic committee's alert (*comité social et économique*)[45], the alert of non-managing partners of private companies (*sociétés à responsabilité limitée*)[46] and the alert of shareholders of public limited companies (*sociétés anonymes*) representing at least 5% of the share capital[47], the alert of the president of the court[48] and the alert of the approved prevention group (*groupe de prevention agréé*)[49].

However, in line with the Directive on restructuring and insolvency, the Ordinance of 15 September 2021 introduced two new rules to enhance the effectiveness of French warning tools.

Firstly, the alert of the president of the court[50] is strengthened by accelerated access to information. The president of the court is entitled to obtain information that will give him an accurate picture of the debtor's economic and financial situation. This information can be provided by the auditors, employee representatives, public administrations, social security and welfare organizations or the services responsible for centralizing banking risks, without none of them being able to invoke professional secrecy. Before the reform, this possibility was only available to the president of the court after an interview with the director of the enterprise in difficulty or if the latter did not attend the meeting. From now on, the president of the court can benefit from this communication as soon as the director is summoned[51]. This means that the president of the court can act more quickly to deal with the enterprise's difficulties, without having to wait for the director's reaction or lack of reaction. The president of the court will thus have the results of his investigations at his disposal more quickly, which may enable him to hold more informed discussions with the director – if the information reaches him before the interview – and to communicate more promptly with the public prosecutor's office with a view to the opening of an insolvency proceedings (*redressement judiciaire* or *liquidation judiciaire*)[52].

Secondly, the alert procedure is also accelerated thanks to the modification of the auditor's alert. According to the new Article L. 611-2-2 of the *Code de commerce*, the auditor can inform the president of the court as soon as the board of directors of the company is informed of difficulties likely to jeopardize the continuity of operations, without having to wait for a response from the company's board of directors. This presupposes that the urgency requires the adoption of immediate measures and that the director refuses to do so or indicates that he is considering measures which the auditor considers insufficient. We can already observe that the urgency will be assessed by the court and may give rise to difficulties of interpretation. If he decides so, the auditor shall inform the president of the court by any means and without delay of his findings and actions and can provide him with any useful information on the situation of the company. The auditor may also ask to be heard by the president of the court at any time, together with the directors. The alert of the president of the court can thus more quickly take over from the alert of the auditor. These new arrangements are clearly respectful of Directive (EU) 2019/1023's provisions which calls on Member States to incentivize third parties holding relevant information about the debtor, such as accountants, to flag it[53].

[44] C. com., Art. L. 234-1 to Art. L. 234-4 for companies, Art. L. 251-15 for *groupements d'intérêt économique* (GIE) and Art. L. 612-3 for *personnes morales de droit privé non commerçantes ayant une activité économique*.
[45] C. trav., Art. L. 2312-63.
[46] C. com., Art. L. 223-36.
[47] C. com., Art. L. 225-232.
[48] C. com., Art. L. 611-2 and Art. L. 611-2-1.
[49] C. com., Art. L. 611-1.
[50] Commercial court or civil court, depending on the debtor's activity, see infra 3.
[51] C. com., Art. L. 611-2, I, al. 2.
[52] C. com., Art. L. 631-3-1.
[53] Dir. (EU) 2019/1023, Art. 3, § 2, c).

2.2 A more attractive conciliation

Resulting from the Law of 26 July 2005, French *conciliation* is a preventive, confidential and contractual procedure which, through the intervention of a conciliator, aims to promote the conclusion of an amicable agreement between the debtor and his creditors intended to put an end to the enterprise's difficulties[54]. It benefits debtors who are experiencing legal, economic or financial difficulties, proven or foreseeable and who have not been in a state of cessation of payments[55] for more than forty-five days[56]. *Conciliation* is not an insolvency proceeding within the meaning of Annex A of Regulation (EU) n° 2015/848. However, it may play a significant role in preventive restructuring as it can provide the debtor with a confidential framework to prepare a draft restructuring plan before the opening of *sauvegarde accélérée* procedure in which the preventive restructuring plan will be adopted (see *infra* 3.2.2). French *conciliation* may be therefore a link between prevention and restructuring.
The *Loi Pacte* did not expressly authorize the government to change the *conciliation*'s regime. However, the government was allowed to amend "the rules relating to the suspension of lawsuits"... And it was by this means that the *conciliation* was reworked when the Directive was transposed.

More specifically, the Ordinance of 15 September 2021 increased the attractiveness of *conciliation*, especially by organizing a more favourable negotiation framework[57].
Thus, following the inspiration of the Ordinance of 20 May 2020 adapting the insolvency law to Covid-19 pandemic, the new Article L. 611-7, paragraph 5, of the *Code de commerce* provides that the debtor may ask the judge who opened the *conciliation* to grant him terms of payment, pursuant to Article 1343-5 of the *Code civil*, with regards to a creditor who has put him in default or sued him, or who has not agreed to suspend the due of his claim at the request of the conciliator. In the latter case, the judge only has the possibility to postpone or spread the payment of the non-due claim "within the limit of the duration of the conciliator's mission", although Article 1343-5 provides for a possible postponement or spreading of the sums owed within the limit of a 2-year period. The debtor will therefore have the choice of waiting for the creditor to act and requesting the deferral of a sum due for two years, by virtue of Article 1343-5 of the *Code civil*, or taking the initiative to request the deferral of a sum not yet due for a period that will not exceed the duration of the conciliator's mission[58]. The debtor will then have to summon the creditor and the court will rule according to an accelerated procedure[59].

The possibility for the debtor to apply for terms of payment gives him an additional argument to negotiate with his creditors. A stay of individual enforcement actions is thus introduced during the *conciliation*. But this stay is not applied collectively, as in insolvency proceedings, but in a targeted manner, with regards to a specific creditor. This innovation echoes Directive (EU) 2019/1023 which promotes the stay of individual enforcement actions to facilitate the adoption of a restructuring plan.

Another innovation in favour of the debtor's credit should also be highlighted at this stage: the terms of payment granted to the debtor benefit natural person co-obligors and guarantors[60].

Even if it is less directly linked to the transposition of the Directive on restructuring and insolvency, another rule is worth noting since it is in the spirit of the European text by

[54] C. com., Art. L. 611-4 to Art. L. 611-15 and Art. R. 611-22 to Art. R. 611-46-1.
[55] The cessation of payments is defined in French law as the impossibility for the debtor to meet its current liabilities (*passif exigible*) with its available assets (*actif disponible*). – See C. com. Art. L. 631-1.
[56] C. com., Art. L. 611-4.
[57] J.-L. Vallens, *Quelques innovations bienvenues en marge des classes des créanciers*, BJE nov. 2021, n° 200h6, p. 33.
[58] N. Borga et J. Théron, *op. cit.*, n° 9.
[59] C. com., R. 611-35.
[60] C. com., Art. L. 611-10-2.

improving the negotiation of an agreement within *conciliation*. This is the new Article L. 611-10-4 of the *Code de commerce*, according to which the lapse or resolution of the amicable agreement does not deprive of effect the clauses whose purpose is to organize the consequences thereof. This provision ensures the effectiveness of the securities granted by the *conciliation* agreement in the event that the agreement is terminated.

Indeed, pursuant to Article L. 611-12 of the *Code de commerce*, the opening of insolvency proceedings (*sauvegarde*, *redressement judiciaire* or *liquidation judiciaire*) "automatically terminates the agreement". The *Cour de cassation* deduced that a creditor who granted the debtor terms of payment or debt remissions under the *conciliation* agreement recovered all of his claims and the securities that guaranteed them but did not retain the benefit of the new securities obtained under the agreement[61]. It will therefore now be possible to provide for clauses ensuring that security interests granted are maintained even if the *conciliation* agreement lapses or is terminated, which is likely to encourage creditors to participate in the amicable agreement and – hopefully – to grant concessions to the debtor.

3. Progress in restructuring

Under French law, two insolvency proceedings may lead to the adoption of a restructuring plan at the end of an observation period[62]: *sauvegarde*[63] – and its subspecies *sauvegarde accélérée* (see *infra* 3.2.2) – and *redressement judiciaire*[64].

These insolvency proceedings can be opened by either a commercial court (*tribunal de commerce*), when the debtor's activity is a commercial or craft activity (this obviously includes commercial companies), or a civil court (*tribunal judiciaire*), for any other activity (farmers, liberal professions for example) [65]. The objectives of *sauvegarde* and *redressement judiciaire* are the same: continuation of the economic activity, maintenance of employment and settlement of liabilities.

However, *sauvegarde* is a more preventive procedure than *redressement judiciaire* insofar as its opening presupposes that the debtor is not in a state of cessation of payments[66] but only justifies difficulties that he is not able to overcome. On the contrary, opening of *redressement judiciaire* presupposes a more serious situation of insolvency of the debtor who must be in a state of cessation of payments.
Both procedures aim to reorganize the business.

A *mandataire judiciaire*[67] must be appointed in these insolvency proceedings[68]. This insolvency practitioner's mission is to defend the interests of the creditors: only the *mandataire judiciaire* has the right to act on behalf of and in the collective interest of the creditors[69].
The court can also appoint an *administrateur judiciaire*[70]; the appointment of this practitioner is only compulsory when the debtor employs at least 20 employees or has a turnover excluding tax of at least 3 000 000 euros[71]. An *administrateur judiciaire* is

[61] Cass. com., 25 sept. 2019, n° 18-15.655, D. 2019. 1886, 2100, *point de vue* R. Dammann et A. Alle, 2020. 1857, obs. F.-X. Lucas ; Rev. sociétés 2019. 779, obs. L. C. Henry ; RTD com. 2020. 456, obs. F. Macorig-Venier, et 708, obs. A. Martin-Serf. – See also : Com. 21 oct. 2020, n° 17-31.663, RTD civ. 2021. 121, obs. H. Barbier.

[62] On these two proceedings: A. Jacquemont, N. Borga et Th. Mastrullo, *Droit des entreprises en difficulté*, LexisNexis, 11ème éd., n° 299.
[63] C. com., Art. L. 620-1 and seq.
[64] C. com. Art. L. 631-1 and seq.

[65] C. com. Art. L. 621-2 and Art. L. 631-7.
[66] S*auvegarde accélérée* can nevertheless be opened despite the cessation of payments of the debtor; see *supra* 3.2.2.
[67] C. com., Art. L. 812-1 to Art. L. 812-10. *Mandataire judiciaire* is appointed as *liquidateur* if a *liquidation judiciaire* is opened.
[68] A. Jacquemont, N. Borga et Th. Mastrullo, *op. cit.*, nos 266 and seq.
[69] C. com. Art. L. 622-20, al. 1.
[70] C. com., Art. L. 811-1 to Art. L. 811-16.
[71] C. com., Art. L. 621-4, al. 3 et 4, Art. L. 631-9 and Art. R. 621-11.

responsible for supervising the management of the debtor or assisting him. The involvement of the *administrateur judiciaire* in *redressement judiciaire* is often much more important than in *sauvegarde*: in the case of *redressement judiciaire*, the administrator cannot only have a supervisory mission but is entrusted with a mission of assistance or even representation of the debtor. In the event of the adoption of a plan, the *mandataire judiciaire* or the *administrateur judiciaire* may be appointed as a *commissaire à l'exécution du plan*; the main mission of this practitioner is to ensure the proper execution of the plan[72].
In *sauvegarde* or *redressement judiciaire*, a *juge-commissaire* is also designated. His mission is to ensure that the procedure is carried out rapidly and that the interests involved are protected[73]. For instance, the *juge-commissaire* helps to speed up the procedure by ruling alone on some of the contentious claims[74], ensures that the interests involved are respected by authorizing certain important operations[75] and informs the court by submitting mandatories reports[76].

Finally, in *sauvegarde* or *redressement judiciaire*, the public prosecutor's office ensures the regularity of the procedure, the preservation of the general interest and the defence of economic public policy[77].
In order to bring French law more in line with the requirements of the Directive on restructuring and insolvency, the Ordinance n° 2021-1193 introduced several innovations with regards to the negotiation (3.1) and the adoption (3.2) of restructuring plans.

3.1 Negotiation of restructuring plans

The transposition of Directive (EU) 2019/1023 has prompted the French legislator to reduce the restructuring plan negotiation phase by shortening the observation period of the *sauvegarde* procedure (3.1.1). In addition, in accordance with the European text[78], the Ordinance of 15 September 2011 sought to improve the balance between the debtor's and the creditors' rights (3.1.2).

3.1.1 Shortening of the *sauvegarde*'s observation period

Directive (EU) 2019/1023 requires Member States to ensure that procedures concerning restructuring can be carried out "in an efficient and expeditious manner"[79].
This requirement has been taken into account by the Ordinance of 15 September 2021 which has reduced the length of the observation period of *sauvegarde* procedure.
It should be remembered that Article L. 621-3 of the *Code de commerce* sets the maximum duration of the observation period at six months. The *administrateur* (see *supra* 3), the debtor or the public prosecutor also have the possibility of requesting an additional extension for a further maximum period of six months, an extension that can only be granted by reasoned decision of the court. Before the reform, however, an additional extension of up to six months could still be granted "exceptionally" by reasoned decision, at the request of the public prosecutor. The observation period of *sauvegarde* could therefore be extended for eighteen months. The same period applied to *redressement judiciaire*[80].

The Ordinance n° 2021-1193 has disconnected *sauvegarde*'s and *redressement judiciaire*'s regimes on this point: the exceptional extension at the request of the public prosecutor is abolished for *sauvegarde* and maintained for *redressement judiciaire* [81]. As a result, the maximum duration of an observation period in

[72] C. com. Art. L. 626-25.
[73] C. com., Art. L. 621-9.
[74] Actions for recovery of property or claims against *mandataires de justice*'s acts, for example.
[75] Dismissals, for instance.
[76] C. com., Art. R. 662-12.
[77] See F. Pérochon, *Entreprises en difficulté*, LGDJ, 10ème éd., n° 482 and seq.
[78] Dir. (EU) 2019/1023, Rec. 35.
[79] Dir. (EU) 2019/1023, Rec. 86 and Art. 25.
[80] By reference from Article L. 631-7 to Article L. 621-3 of *Code de commerce*.
[81] C. com., Art. L. 631-7, al. 2.

sauvegarde is now twelve months. The additional six-months extension is also more closely supervised since it must now be specially motivated, which implies a particular effort to motivate from the judge.

The aim is to speed up the completion of *sauvegarde* procedure and the adoption of a preventive restructuring plan, which is consistent with the situation of a debtor in *sauvegarde*, who, unlike a debtor in *redressement judiciaire*, is not in a state of cessation of payments but is simply facing difficulties that it is unable to overcome[82]. This reduced duration also appears to be in line with Directive (EU) 2019/1023, which provides that, in the context of a procedure aimed at the adoption of a preventive restructuring plan, the total duration of the stay of individual enforcement actions – applicable precisely during *sauvegarde*'s observation period (see *infra* 3.1.2.1) – must not exceed twelve months, including extensions and renewals[83].

With the same objective of speeding up the observation period, *sauvegarde* or *redressement judiciaire* plan can now be drawn up on the basis of a certificate from the chartered accountant or auditor, without waiting for the end of the claims verification procedure[84]. The commitments on the settlement of liabilities then relate to claims that have been admitted or not contested, as well as to identifiable claims, in particular those for which the time limit for declaring the claim has not expired. This is again a rule inspired by Ordinance of 20 May 2020 adapting the French insolvency law to Covid-19 pandemic. This solution favours the adoption of the plan which is not slowed down by the duration of the verification procedure. Nevertheless, it is regrettable that the French legislator has not further specified the treatment of litigious or contingent claims during the execution of the plan[85]. One can however consider that the possibility of amending the restructuring plan, which is simplified by the reform (see *infra* 3.2.3), should permit to resolve the main issues.

3.1.2 Improved balance between the debtor's and creditors' rights

The Ordinance of 15 September 2021 aims to improve the rights of debtors and the rights of creditors in a balanced way: the debtor benefits from the extension of the stay of individual enforcement actions (3.1.2.1), while creditors benefit from the privilege granted to new financing (3.1.2.2).

3.1.2.1 The debtor's rights: the extension of the stay of individual enforcement actions

Directive (EU) 2019/1023 makes the stay of individual enforcement actions an indispensable element to support the negotiations of a restructuring plan[86]. This rule effectively allows the debtor to continue to operate during the negotiation period or, at the very least, to preserve the value of his assets.

Under French law, Article L. 622-21 of the *Code de commerce* provides that the opening of insolvency proceedings, whether in the form of *sauvegarde*, *redressement judiciaire*[87] or *liquidation judiciaire*[88], is accompanied by the stay of individual enforcement actions. Only "useful subsequent creditors"[89] are exempt from this rule, in accordance with Article L. 622-17, I, of the *Code de commerce*. The stay also benefits natural persons who are co-obligated or have granted a personal guarantee or have assigned or transferred an

[82] C. com. Art. L. 620-1, al. 1.
[83] Dir. (EU) 2019/1023, Art. 6, § 8.
[84] C. com., Art. L. 626-10, al. 2, and Art. L. 631-19.
[85] C. Houin-Bressand, *La pérennisation des mesures Covid*, Rev. proc. coll. janv.-févr. 2022, dossier 9, spéc. n° 6.
[86] Dir. (EU) 2019/1023, Art. 6 and Art. 7.
[87] C. com., Art. L. 631-14, which refers to Art. L. 622-21.
[88] C. com., Art. L. 641-3, which refers to Art. L. 622-21.
[89] That is to say, according to Article L. 622-17 of the *Code de commerce*, creditors whose claims arose regularly after the opening judgment for the purposes of the proceedings or the observation period, or in return for a performance provided to the debtor during that period.

asset as security[90], in accordance with the provisions of the Directive[91].

Although it is well established in French law, the principle of the stay of individual enforcement actions was extended when the Directive was transposed.

Firstly, there is a broadening of the scope in terms of persons, since the stay is now applied not only to creditors but also to third parties. Prior to the adoption of the Ordinance n° 2021-1193, Article L. 622-21 of the *Code de commerce* provided that the judgment prohibited or halted all enforcement actions against movable or immovable property by creditors whose claims were not covered by Article L. 622-17. As a result, the stay of individual enforcement actions concerned only the debtor's creditors. From now on, the rule applies "without prejudice to the rights of creditors whose claim is mentioned in I of Article L. 622-17". This new wording implies that all enforcement actions are now prohibited on the debtor's assets, regardless of whether they originate from a debtor's creditor (whose claim is not mentioned in I of Article L. 622-17) or from a third party – who would wish to realize a security *in rem* for others (*sûreté réelle pour autrui*), for example. The case law according to which the holder of a security *in rem* for others does not have the status of a creditor, and is not subject to the principle of stay of individual enforcement actions[92], is thus overruled[93].

Secondly, the rule on the stay of individual enforcement actions has been broadened with regards to the assets concerned. The new Article L. 622-21, IV, of the *Code de commerce* provides that the opening judgment "prohibits (...) by operation of law, any increase in the collateral of a contractual security *in rem* or a contractual right of retention". Apart from the exceptions set out in the last paragraph of Article L. 622-21, IV[94], the opening judgment therefore implies the freezing of the collateral (*assiette de la sûreté*) constituted against the debtor's assets. This rule is reinforced in terms of claims declaration, as the new version of Article L. 622-25 of the *Code de commerce* provides that the declaration must specify the security right that may be attached to the claim.

3.1.2.2 The creditors' rights: the privilege of new financing during the observation period

Article 17 of Directive (EU) 2017/1023 encourages Member States to "adequately" protect new and interim financing that occurs during insolvency proceedings, as such financing is often very important for the continuation of the activity and the success of the restructuring plan negotiation.

French law knows this type of protection since the Law of 26 July 2005. More precisely, in the event of the opening of *sauvegarde*, *redressement judiciaire* or *liquidation judiciaire*, the financing granted during *conciliation* is protected as long as, on the one hand, it was granted "with a view to ensuring the continuation of the enterprise's activity and its durability" and that, on the other hand, the *conciliation* agreement was judicially homologated[95]. The protection of this new financing is achieved by the granting of the so-called "new money" privilege, which allows the persons having granted the cash contribution to be paid in preference, since they are only precedeted by the super-privileged claims (of the employees, in particular) and the legal costs[96].

[90] C. com., Art. L. 622-28, al. 2.
[91] DE (UE) 2019/1023, Rec. 32.
[92] See Cass. com., 25 nov. 2020, n° 19-11.525, D. 2021. 555, note D. Robine, et 532, point de vue R. Dammann et K. Malavielle ; Rev. prat. rec. 2021. 25, chron. P. Roussel Galle et F. Reille ; RTD civ. 2021. 183, obs. C. Gijsbers ; RTD com. 2021. 194, obs. A. Martin-Serf ; RDC mars 2021, p. 129, obs. F. Danos ; BJE 2021. 31, obs. N. Borga ; JCP E 2021, n° 15, 1191, n° 3, obs. P. Pétel.
[93] See N. Borga et J. Théron, *op. cit*., nº 14.
[94] These exceptions apply to the benefit of the financial sector.
[95] C. com., Art. L. 611-11.
[96] C. com., Art. L. 622-17, II, and Art. L. 643-8.

The transposition of Directive (EU) 2019/1023 was an opportunity to strengthen the French system.

In order to help enterprises deal with the health crisis due to Covid-19, the Ordinance of 20 May 2020 anticipated the transposition of Article 17 of Directive (EU) 2019/1023 by establishing a new legal privilege for cash contributions granted during the observation period of *sauvegarde* or *redressement judiciaire* in order to "ensure the continuation of the company's activity and its durability"[97]. The Ordinance of 15 September 2021 perpetuates this privilege for the benefit of claims "resulting from a new cash contribution granted in order to ensure the continuation of the business for the duration of the procedure"[98]. The new financing must consist of cash flow, such as a loan. On the contrary, this does not seem to apply to debtor's shareholders' and partners' contributions in the context of a capital increase, even though the law does not explicitly state this – whereas it does expressly say it for "new money"[99] or "post-money" financing (see *infra* 3.2.3)[100]; indeed, logic dictates that the same solution should be adopted for all new financings. Only financing authorized by the *juge-commissaire* (see *supra* 3) "within the limit necessary for the continuation of the business during the observation period" benefits from the new privilege[101]. In accordance with Article L. 622-17 of the *Code de commerce*, the claims resulting from these cash injections must be paid on the due date. And, where this is not the case, these claims are only primed by the claims mentioned in II of Article L. 622-17, i.e. super privilege of employees, legal costs and "new money" claims, as well as wage claims for which payment has not been advanced by the *Association pour la gestion du régime de Garantie des créances des Salariés* (AGS)[102].

In the event of *liquidation judiciaire*, when the assets are distributed, the situation of these claims is less favourable as they are only paid in 8th place, after super privileged claims (unpaid subsidies and super privilege of employees), legal costs, claims of agricultural producers[103], claims benefiting from the "new money" privilege, claims secured by real estate security and claims for unpaid wages for which payment has not been advanced[104]. However, they take particularly precedence over claims arising from the contracts being pursued, wage claims whose amount has been advanced by the AGS, claims benefiting from a tax lien, claims secured by the lessor's lien and by the lien under the *Code des douanes* and, obviously, unsecured claims[105].

3.2 Adoption of restructuring plans[106]

From the point of view of French law, the most emblematic contribution of Directive (EU) 2019/1023 is the procedure for the adoption of restructuring plans by affected parties divided into classes[107] and the establishment of cross-class cram-down[108].

Anxious to scrupulously follow the prescriptions of the Directive, the French legislator has largely modernized the rules relating to the adoption of restructuring plans: classes of affected parties – accompanied by cross-class cram-down – have been introduced into the *Code de commerce* (3.2.1), as has new *sauvegarde accélérée* procedure (3.2.2). Finally, useful innovations concern financing and restructuring plan amendment (3.2.3).

[97] Ord. n° 2020-596, 20 May 2020, Art. 5, IV.
[98] C. com., Art. L. 622-17, III, 2°.
[99] C. com., Art., 611-11, al. 2.
[100] N. Borga et J. Théron, *op. cit.*, nº 16.
[101] C. com., Art. L. 622-17, III *in fine*.
[102] C. com., Art. L. 622-17, III.
[103] C. com., Art. L. 624-21.
[104] C. com., Art. L. 643-8.
[105] J.-L. Vallens, *Quelques innovations bienvenues en marge des classes des créanciers*, *op. cit.*, p. 35.
[106] Ph. Roussel Galle et Ch. Fort, *L'élaboration et l'arrêté du plan de continuation avec ou sans classes*, Rev. proc. coll. nov.-déc. 2021, dossier 9.
[107] Dir. (EU) 2019/1023, Rec. 44 and Art. 9, § 4.
[108] Dir. (EU) 2019/1023, Art. 11.

3.2.1 Introduction of classes of affected parties[109]

The Law of 26 July 2005 introduced into French law two creditors committees (*comités de créanciers*), the credit institutions' committee and the suppliers' committee, responsible for giving their opinion on the draft *sauvegarde* plan or *redressement judiciaire* plan. The establishment of these committees was only compulsory in proceedings initiated against a debtor whose accounts were certified by an auditor or drawn up by a chartered accountant and which employed more than 150 employees or had a turnover of more than 20 millions euros. The composition of these committees was determined solely with regards to the quality of the creditors (credit institution or supplier) but without taking into consideration their interests or the nature of their claims, which could be very heterogeneous within the same committee.

The Ordinance n° 2021-1193 abolished creditors committees and replaced them with the classes of affected parties provided for in Directive (EU) 2019/1023. A special section is devoted to this subject[110] in Articles L. 626-29 to L. 626-34 of the *Code de commerce*.
These provisions are characterized by their great technicality[111] and the prudence of the French legislator, who has faithfully followed the provisions of the Directive.

3.2.1.1 Scope of the rules on classes of affected parties

Classes of affected parties are not intended to be introduced in all insolvency proceedings opened in France. Indeed, their formation is only compulsory when the proceedings concern a company that either employs 250 employees and has a net turnover of 20 million euros, or has a net turnover of 40 million euros, these thresholds being assessed on the date of the application to open the proceedings[112]. The rules on classes of affected parties will therefore concern few enterprises and, in any case, not the small and medium sized enterprises (SMEs) – as permitted by the Directive[113].

However, two exceptions allow for the formation of classes of affected parties regardless of the criteria aforementioned.

Firstly, the opening of *sauvegarde accélérée* procedure necessarily implies the formation of classes of affected parties (see *infra* 3.2.2.1)[114]. Indeed, *sauvegarde accélérée* is considered as the French standard procedure for preventive restructuring frameworks within the meaning of Directive (EU) 2019/1023 (see *infra* 3.2.2.2), and it is therefore perceived as a "laboratory" to experiment the new European rules on adoption of restructuring plan.

Secondly, classes of affected parties can always be introduced into insolvency proceedings at the request of the debtor and with the authorization of the *juge-commissaire*[115]. The decision of the *juge-commissaire* is then a judicial administration measure (*mesure d'administration judiciaire*)[116], not subject to appeal[117]. It gives rise to the appointment of an insolvency practitioner, in this case an *administrateur judiciaire*[118].
In general, the *administrateur judiciaire* appears as the "conductor" of the composition and consultation of the classes of affected parties (see *infra* 3.2.1.3); the important role of the *administrateur judiciaire* is due to his main mission consisting of assisting or

[109] V. H. Poujade et C. Saint-Alary-Houin, *L'instauration des classes de parties affectées*, Rev. proc. coll. nov.-déc. 2021, dossier 8. – L.-C. Henry, *Les classes de parties affectées : la consécration des classes de parties affectées et les nouvelles modalités de vote des plans, une double innovation majeure*, Rev. sociétés to be published.
[110] Section 3 of Chapter VI ("Du plan de sauvegarde") of Title II ("De la sauvegarde") of Book VI of the *Code de commerce*.
[111] See O. Busine, *Des classes de créanciers*, BJE nov. 2021, n° 200i3, p. 44.
[112] C. com., Art. R. 626-52.
[113] Dir. (EU) 2019/1023, Rec. 45 and Art. 9, § 4, al. 3.
[114] C. com. Art. L. 628-4.
[115] C. com., Art. L. 626-29, al. 4.
[116] C. com., Art. R. 626-54.
[117] C. proc. civ., Art. 537.
[118] C. com., Art. R. 626-53.

supervising the debtor in the restructuring process (see *supra* 3).

3.2.1.2 Definition of affected parties

Echoing to Article 2 of Directive (EU) 2019/1023, French law envisages two categories of affected parties: on the one hand, creditors "whose rights are directly affected by the draft plan", and on the other hand, equity holders (*détenteurs de capital*) if their shareholding in the debtor's capital, the articles of association or their rights are modified by the draft plan.

With regards to creditors in particular, Regulation (EU) n° 2015/848 on insolvency proceedings aims to ensure the equal treatment of creditors[119], a principle from which it results in particular that European insolvency proceedings law "does not distinguish between public and private law creditors"[120]. Both public and private creditors can therefore logically constitute affected parties to be divided into classes in France.
However, in order to protect them, French law expressly provides that claims arising from the employment contracts and alimentary claims are not affected by the plan[121]. This confirms the status as super-privileged creditors for the employees, and "*hors procédure*" creditors for the alimentary creditors who are paid on the assets non seized in the procedure[122].
Only the affected parties decide on the draft plan[123].

3.2.1.3 Composition of classes of affected parties

The composition of the classes of affected parties is determined taking into account the claims and rights existing prior to the judgment opening the proceedings[124].

The *administrateur* must group the affected parties according to verifiable objective criteria and in such a way that each class is representative of a sufficient communality of economic interest. The French regulations faithfully reproduce the terminology of the Directive[125]. Formulated in general terms, these conditions have the merit of flexibility but will certainly also be a source of litigation. Although the *administrateur* has important leeway, he is guided by several guidelines. Firstly, creditors with security *in rem* must necessarily be placed in a separate class from other creditors[126]. Secondly, the classification must take into account any subordination agreements concluded before the opening of the procedure[127]. This implies that the affected parties must inform the *administrateur* of these agreements within ten days of receipt or publication of the notice informing the affected party that it is a member of a class; otherwise, the subordination agreements would not be enforceable within the procedure[128]. Finally, equity holders form one or more classes[129].
Beyond these guidelines, bondholders are also likely to be divided into one or more classes of affected parties, where appropriate[130]. Preferential public creditors might also be grouped into one or more classes[131].

The *administrateur* shall inform each affected party about the modalities of division into classes, as well as the modalities of calculation of the votes corresponding to the claims or rights affected enabling them to express a vote[132], by a notification made at

[119] Reg. (EU) n° 2015/848, Rec. 63.
[120] CJEU, 9 nov. 2016, aff. C-212/15, *Enefi*, pts 39 : *JCP* E 2017, 1198, spéc. n° 13, obs. M. Menjucq ; *Rev. proc. coll.* 2017, comm. 60, obs. Th. Mastrullo.
[121] C. com., Art. L. 626-30, IV.
[122] Cass. com., 8 oct. 2003, n° 00-14.760, *Bull. civ.* IV, n° 152. – Cass. com., 13 juin 2019, n° 17-24.587. – See A. Jacquemont, N. Borga et Th. Mastrullo, *op. cit.*, spéc. n° 495.
[123] C. com., Art. L. 626-30, I.
[124] C. com., Art. L. 626-30, III.
[125] Dir. (EU) 2019/1023, Art. 9, § 4.
[126] C. com., Art. L. 626-30, III, 1°.
[127] C. com., Art. L. 626-30, III, 2°.
[128] C. com., Art. L. 626-30, II and Art. R. 626-55, al. 4.
[129] C. com., Art. L. 626-30, III, 3°.
[130] C. com., Art. R. 626-61.
[131] See Report to the President of the Republic on Ordinance n° 2021-1193 of 15 September 2021; NOR: JUSC2127016P.
[132] C. com., Art. L. 626-30, V.

least twenty-one days before the date of the vote[133]. Moreoverboth the *mandataire judiciaire* and the public prosecutor shall be informed thereof. In the event of dispute about the status of affected party, the modalities of division into classes or the modalities of calculation of the votes corresponding to the claims or rights enabling to express a vote, each affected party, the debtor, the public prosecutor, the *mandataire judiciaire* or the *administrateur* may lodge a challenge with the *juge-commissaire* by request within ten days of notification. The *juge-commissaire* decides within ten days from the date of his referral. If the juge-commissaire does not decide within this period, the court may be seized by any person mentioned above; in this case, the court exercises the powers of the *juge-commissaire* and decides within ten days from the date of its referral.The *juge-commissaire* or court's decision may be appealed within five days of notification and the Court of Appeal shall give its decision within fifteen days of the date of its referral[134]. These short deadlines favours the speed of the process. Besides, only the appeal from public prosecutor has in principle suspensive effect[135].

3.2.1.4 Convening and voting of classes of affected parties

The right to vote in a class constitutes an accessory to the claim of the affected party which passes by operation of law to successive holders of the claim, notwithstanding any clause to the contrary[136]. In *sauvegarde* procedure, the debtor, with the assistance of the *administrateur*, shall submit proposals to the classes of affected parties with a view to drawing up the draft plan[137]. In the context of *redressement judiciaire* procedure, on the other hand, it is the *administrateur*, with the assistance of the debtor, who shall be responsible for drawing up the draft plan and, where appropriate, presenting the proposals to the classes of affected parties[138]. In the case of *sauvegarde accélérée*, the plan will necessarily have been prepared during the *conciliation* preceding the opening of the procedure, the observation period of which lasts only four months (see *infra* 3.2.2.2).

The draft plan may provide for payment deadlines, remissions and, where the debtor is a limited liability company, debt-equity swaps. However, certain claims cannot be remitted or deferred, unless their holders agree, such as claims resulting from new financing granted during the *conciliation* ("new money" privilege; see *supra* 3.1.2.2), during the observation period (see *supra* 3.1.2.2) or during the plan ("post money" privilege; see *infra* 3.2.3)[139].

The draft plan includes a certain number of minimum requirements: 1° the identity of the debtor; 2° the assets and liabilities of the debtor at the time of the presentation of the restructuring plan, including the net carrying amount of the assets, a description of the economic situation of the debtor and the situation of the employees, and a description of the causes and extent of the debtor's difficulties; 3° the affected parties and their claims; 4° the classes into which the affected parties have been grouped; 5° the parties that are not affected by the plan; 7° the terms of the restructuring plan (restructuring measures, duration, possible new financing); 8° a statement of reasons explaining why the restructuring plan offers a reasonable prospect of avoiding the debtor's cessation of payments or ensuring its viability[140].

In the context of the treatment of a cross-border insolvency subject to Regulation (EU) n° 2015/848, these provisions on the content and presentation of the draft plan apply to draft plans proposed by the insolvency practitioner of the main insolvency proceedings within a secondary insolvency

[133] C. com., Art. R. 626-58, I, al. 2.
[134] C. com., Art. R. 626-58-1.
[135] C. com. Art. R. 661-1.
[136] C. com., Art. L. 626-30-1.
[137] C. com., Art. L. 626-30-2.
[138] C. com., Art. L. 631-19, I, al. 2.
[139] C. com., Art. L. 626-30-2, al. 2.
[140] C. com., Art. D. 626-65.

proceedings opened in France[141]. Indeed, according to Article 47 of Regulation (EU) n° 2015/848, the insolvency practitioner in the main insolvency proceedings is empowered to propose a restructuring plan in the secondary insolvency proceedings in accordance with the procedure of Member State where the secondary proceedings have been opened, when the law of that Member State allows such a measure.

The classes of affected parties shall be convened to vote on the draft plan[142], knowing that each affected party shall be informed of the draft plan no later than ten days before the class vote[143].

The *administrateur* alone shall be competent to decide on the procedures for convening classes[144] and the procedures for voting by the classes, with the exception of the equity holders, who shall decide under the conditions provided for in Article L. 626-30-2 of *Code de commerce* (reference to the provisions applicable to equity holder's meetings)[145].

The classes shall decide on the draft plan, amended if necessary, within twenty to thirty days of the transmission of the draft plan[146]. This period may be increased or reduced (but not below fifteen days) by the *juge-commissaire*, at the request of the debtor or the *administrateur*.

The decision shall be taken by each class by a two-thirds majority of the votes held by the members having cast a vote[147].

3.2.1.5 Court control

In accordance with Article 10 of Directive (EU) 2019/1023 on confirmation of restructuring plans, the court must carry out several verifications once the plan has been adopted by each class[148]:

> 1° the plan has been adopted in accordance with Article L. 626-30 of the *Code de commerce* (related to the composition of the classes);
> 2° the affected parties within the same class are treated equally and in proportion to their claim or right;
> 3° the notification of the plan has been duly made to all affected parties;
> 4° where affected parties have voted against the draft plan, none of these parties is in a less favourable position, as a result of the plan, than they would be if either the order of priority for the distribution of assets or the sale price of the business in *liquidation judiciaire* were applied, or a better alternative solution were applied if the plan were not confirmed. This is the French expression of the "best-interest-of-creditors test".
> 5° Where applicable, any new financing is necessary to implement the plan and does not unduly affect the interests of the affected parties.

If the plan does not offer a reasonable prospect of avoiding the debtor's cessation of payments or of ensuring the viability of the business, the court may refuse to confirm it[149]. Here, French law follows Directive (EU) 2019/1023 almost word for word[150].

In general, the court must ensure that the interests of all affected parties are sufficiently protected[151].

Once the plan has been confirmed (*arrêté*) by judgment, it is enforceable against all persons (*opposable à tous*)[152].

A *commissaire à l'exécution du plan* is then appointed. The *commissaire*'s mission does not end until the last payment due under the plan has been made (if this is later than the

[141] C. com., Art. L. 692-5, II.
[142] C. com., Art. L. 626-30-2, al. 4.
[143] C. com. Art. R. 626-60, al. 2.
[144] Without prejudice to the provisions of Articles R. 626-61 and R. 626-62 concerning bondholders and equity holders respectively.
[145] C. com., art. R. 626-60, al. 1er.
[146] C. com., Art. L. 626-30-2, al. 4.
[147] C. com., Art. L. 626-30-2, al. 5.
[148] C. com., Art. L. 626-31, al. 1.
[149] C. com., Art. L. 626-31, al. 2.
[150] Dir. (EU) 2019/1023, Art. 10, § 3.
[151] C. com., Art. L. 626-31, al. 3.
[152] *Ibid.*

deadline stipulated by the parties before the procedure was opened)[153].

3.2.1.6 Introduction of cross-class cram-down

The introduction of the cross-class cram-down mechanism was undoubtedly one of the most important issues of the transposition of Directive (EU) 2019/1023 in France, given its novelty in French law.
Again as a matter of prudence, the new Article L.626-32 of the *Code de commerce* largely follows the scheme of Article 11 of the Directive.
Under the terms of Article L.626-32, where the plan has not been approved in accordance with the provisions of Article L.626-30-2 (see *supra* 3.2.1.4), it may be adopted by the court at the request of the debtor[154] or the *administrateur judiciaire*, with the agreement of the debtor, and be imposed on the classes that voted against the draft plan.

The plan must still meet certain requirements. Firstly, the plan must meet the conditions that the court is obliged to verify in order to adopt a plan approved by the classes of affected parties (see *supra* 3.2.1.5). In this respect, it should be remembered that the court must in particular check that the plan offers a reasonable prospect of avoiding the debtor's cessation of payments or of ensuring the viability of the business (see *supra* 3.2.1.5).

Secondly, the plan must have been approved:
- by a majority of the classes of affected parties entitled to vote, provided that at least one of those classes is a class of creditors with security *in rem* or ranks ahead of the class of unsecured creditors;
- failing that, by at least one of the classes of affected parties entitled to vote, other than a class of equity holders or any other class which it is reasonable to assume, after determining the value of the debtor as a going concern, would not be entitled to any payment, if the order of priority of creditors for the distribution of the assets in *liquidation judiciaire* or of the sale price of the business were applied.

Thirdly, the absolute priority rule (APR)[155] applies under French law: cross-class cram-down is only possible if the claims of affected creditors of a class that voted against the plan are satisfied in full by the same or equivalent means when a more junior class is entitled to a payment or retains an interest under the plan.

The adoption of the APR does not seem favourable to the confirmation of the plan through a class-cross cram-down. Fortunately, as allowed by the Directive (EU) 2019/1023[156], it is possible for the court to derogate from the APR, at the request of the debtor or the *administrateur judiciaire* and with the agreement of the debtor, where such derogations are necessary in order to achieve the objectives of the plan and if the plan does not unduly prejudice the rights or interests of the affected parties[157]. Certain claims may then benefit from special treatment, in particular claims of suppliers of goods or services and claims arising from the debtor's tortious liability, as well as equity holders[158]. More broadly, there appears to be nothing to prevent the court from choosing to apply the relative priority rule (RPR), according to which one class should be treated as well as another class of the same rank and better than a more junior class, if RPR is justified by the objectives of the plan and if it does not unduly prejudice the rights or interests of the affected parties.

Thus, if the French legislator has adopted the APR as a principle, this principle is likely to admit very important exceptions whose extent will have to be determined by case law.

[153] C. com., Art. L. 626-31-1.
[154] If the debtor is a company, it acts through its legal representative. – See Report to the President of the Republic on Ordinance n° 2021-1193 of 15 September 2021; NOR : JUSC2127016P.
[155] About this rule : O. Debenne et E. Rosier, *La règle de priorité absolue*, Rev. proc. coll. nov.-déc. 2021, étude 20.
[156] Dir. (EU) 2019/1023, Rec. 56 and Art. 11, § 2, al. 2
[157] C. com., Art. L. 626-32, II.
[158] *Ibid.*

Fourth, no class of affected parties may, under the plan, receive or retain more than the total amount of its claims or interests.

Fifth, where one or more classes of equity holders have been constituted and have not approved the plan:
- the company has 250 employees and a net turnover of 20 million euros or a net turnover of 40 million euros, as assessed at the date of the application to open the procedure[159];
- it is reasonable to assume, after determining the value of the debtor as a going concern, that the equity holders of the dissenting class(es) would not be entitled to any payment or retain any interest if the order of priority of creditors for the distribution of the assets in *liquidation judiciaire* or of the sale price of the business were applied;
- if the draft plan provides for a capital increase subscribed by cash contribution, the shares issued shall be offered in preference to the shareholders, in proportion to the part of the capital represented by their shares;
- the plan does not provide for the transfer of all or part of the rights of the class or classes of equity holders who have not approved the draft plan.

The decision of the court shall constitute approval of the changes in the shareholding or the rights of the equity holders or in the articles of association provided for in the plan, and a *mandataire de justice* may be appointed to carry out the acts necessary for the implementation of such changes[160]. This rule may prove useful in the presence of equity holders with a blocking minority in the general meeting[161], even if its implementation is reserved for large companies. It thus meets the requirements of the Directive (EU) 2019/1023, which recommends that Member States ensure that equity holders cannot unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan[162].

3.2.1.7 Appeal

At the latest within 10 days from the vote of the classes on the draft plan, a dissenting party may challenge the satisfaction of the "best-interests-of-creditors" test, arguing that it is in a less favourable situation as a result of the plan than it would be if either the order of priority for the distribution of assets in *liquidation judiciaire* or the sale price of the business were applied. The court then determines the value of the debtor's business by ordering an expert valuation, if necessary[163], as provided for in Article 14 of Directive (EU) 2019/1023. Even if the French provisions are not totally clear on that point, we can assume that the going-concern value should be taken into account at this stage, as indicated in the Directive[164].

Besides, as required by the European text[165], the court's decision taken pursuant to Articles L. 626-31 (confirmation or rejection of the plan after a favourable vote of the classes of affected parties) or L. 626-32 (cross-class cram-down application) may be appealed to the court of appeal within ten days of either its notification or, in the case of an appeal by the public prosecutor's office, its communication. This appeal may be lodged by either party, the debtor, the insolvency practitioner (the *administrateur* or the *mandataire judiciaire*) or the public prosecutor[166].

The short duration of appeal deadlines favours the efficiency of the procedure and the adoption of restructuring plans, especially since only the appeal from public prosecutor has suspensive effect[167].

[159] C. com. Art. R. 626-63.
[160] C. com., Art. L. 626-32, I, al. *in fine*.
[161] See N. Borga et J. Théron, *op. cit.*, n° 30.
[162] Dir. (EU) 2019/1023, Art. 12, § 1.
[163] C. com., Art. L. 626-33, I, and Art. R. 626-64, I.
[164] Dir. (EU) 2019/1023, Rec. 49.
[165] Dir. (EU) 2019/1023, Art. 16.
[166] C. com., Art. R. 626-64, II.
[167] C. com. Art. R. 661-1.

3.2.2 The new "sauvegarde accélérée" preventive procedure[168]

Prior to the transposition of Directive (EU) 2019/1023, French law provided for two "subspecies" of *sauvegarde* procedure: *sauvegarde accélérée* and *sauvegarde financière accélérée*[169] (*supra* 1.1). These proceedings allowed large enterprises[170] to negotiate a plan with all their creditors (*sauvegarde accélérée*) or only their financial creditors, as bondholders and credit institutions (*sauvegarde financière accélérée*). *Sauvegarde accélérée* and *sauvegarde financière accélérée* were necessarily preceded by a *conciliation*, and could therefore be opened even if the debtor was (not from more than forty-five days) in a state of cessation of payments. Their objective was the adoption of a restructuring plan, previously prepared by an amicable agreement, with the required majority of creditors and, therefore, enforceable against minority creditors who were against the plan. These two proceedings introduced the pre-pack plan in French Law. *Sauvegarde accélérée* and *sauvegarde financière accélérée* had a short duration: the plan had to be adopted within three months for the *sauvegarde accélérée* and within one month extendable once for the *sauvegarde financière accélérée*.

This being said, from the point of view of the procedural organization of restructuring, the main innovation of the Ordinance of 15 September 2021 is certainly the introduction of new *sauvegarde accélérée* procedure governed by Articles L. 628-1 to L. 628-8 and R. 628-1 to R. 628-13 of the *Code de commerce*. This new procedure results from the merger between *sauvegarde financière accélérée* and *sauvegarde accélérée*. The modernized *sauvegarde accélérée* is intended to become the preferred French framework for the preventive restructuring sought by Directive (EU) 2019/1023. Annex A of Regulation (EU) n° 2015/848 will have to be amended to take account of this change in the typology of French insolvency proceedings.

3.2.2.1 Opening of "sauvegarde accélérée"

Sauvegarde accélérée is a voluntary preventive procedure whose opening must be requested by the debtor.
The opening of *sauvegarde accélérée* is subject to several conditions.

Firstly, in accordance with the general provisions on *sauvegarde*, the debtor must justify difficulties that he is not able to overcome[171].

Secondly, the debtor must meet the specific conditions of *sauvegarde accélérée*. On the one hand, the debtor must be involved in *conciliation* procedure[172]. This explains why, unlike *sauvegarde*, *sauvegarde accélérée* can be opened against a debtor in cessation of payments, provided that this situation does not precede for more than forty-five days the date of the request for the opening of the preliminary *conciliation* (see *supra* 2.2)[173]. This condition is imperative: if it is established that the debtor had been in a state of cessation of payments for more than forty-five days when he applied for *conciliation*, the public prosecutor's office shall refer the matter to the court in order to put an end to *sauvegarde accélérée*[174]. Secondly, the debtor must justify having drawn up a draft plan aimed at ensuring the enterprise's survival... It should be noted that this draft plan must be likely to receive sufficiently

[168] M. Menjucq et Ch. Peugnet, *La « nouvelle » procédure de sauvegarde accélérée*, Rev. proc. coll. nov.-déc. 2021, dossier 7.
[169] C. com., art. L. 628-1 et s. – About the main features of these two insolvency proceedings: A. Jacquemont, N. Borga et Th. Mastrullo, *op. cit.*, n° 302.
[170] Enterprises with more than 20 employees, 3 million euros in turnover excluding tax or 1,5 million euros in total assets, according to the former Articles L. 628-1 and D. 628-3 of Commercial Code.
[171] C. com., Art. L. 620-1.
[172] C. com., Art. L. 628-1, al. 2.
[173] C. com., Art. L. 628-1, al. 5.
[174] C. com., Art. L. 628-5.

broad support from the affected parties in respect of whom the opening of the procedure will take effect, to make its adoption likely within a maximum period of four months[175].
Thirdly, the procedure can only be opened against a debtor whose accounts have been certified by an auditor or drawn up by a chartered accountant[176].

As evidence that new *sauvegarde accélérée* has absorbed the former *sauvegarde financière accélérée*, the debtor may request the opening of *sauvegarde accélérée* whose effects will be limited to creditors having the status of finance companies, credit institutions and the like, where the nature of the indebtedness makes it likely that a plan will be adopted by these creditors only[177]. Thus, *sauvegarde accélérée* can be a "semi-collective" procedure.

The court decides on the opening of *sauvegarde accélérée* in consideration of a report by the conciliator on the progress of *conciliation* and the prospects of adoption of the draft plan by the affected parties concerned[178]. The opening of the procedure is examined in the presence of the public prosecutor[179].

Once the opening is decided, the court appoints one or more *administrateurs judiciaires*[180].

It should be noted that the opening of *sauvegarde accélérée* is necessarily accompanied by the formation of classes of affected parties; this formation is ordered in the opening judgment[181].

3.2.2.2 Effects of *sauvegarde accélérée*

Sauvegarde accélérée has the same effects as *sauvegarde* procedure, the most important of which is the stay of individual enforcement actions.
However, it is characterised by several specific effects.
Above all, *sauvegarde accélérée* aims at a rapid adoption of the restructuring plan. Indeed, the court must adopt the plan within only two months from the opening judgment. This period can certainly be extended at the request of the debtor and the *administrateur judiciaire*. But in any case, the total duration of *sauvegarde accélérée* cannot exceed four months. If a plan is not drawn up within this period, the court is obliged to terminate the procedure[182].

French law thus responds to Directive (EU) 2019/1023, which promotes the limitation of the initial duration of a stay of individual enforcement actions to a maximum period of up to four months[183]. This very short period, which encourages diligence and reactivity, favours the effectiveness and attractiveness of *sauvegarde accélérée*. It also underlines the need for prior *conciliation* procedure, which allows the plan to be negotiated upstream.

Another notable effect of *sauvegarde accélérée* is its relative effect: the opening of this procedure only has an effect on the parties directly affected by the draft plan[184] that is to say, in practice, the creditors who participated in the previous *conciliation* and, if applicable, equity holders[185]. On the contrary, *sauvegarde* concerns necessarily all the creditors who must submit their claims in the procedure.

In these circumstances, the parties directly affected by the draft plan of *sauvegarde accélérée* must be identified. Thus, it is up to the debtor to draw up a list of the claims of

[175] C. com., Art. L. 628-1, al. 2.
[176] C. com., Art. L. 628-1, al. 4.
[177] C. com., Art. L. 628-1, al. 3.
[178] C. com., Art. L. 628-2.
[179] *Ibid.*
[180] C. com. Art. L. 628-3. If registered on the list provided for in Article L. 811-1 of *Code de commerce* or on the list provided for in Article L. 811-2, the conciliator is designated as a *administrateur judiciaire* or *mandataire judiciaire*, depending on the profession she or he exercises.
[181] C. com., Art. L. 628-4.
[182] C. com., Art. L. 628-8.
[183] Dir. (EU) 2019/1023, Rec. 35 and Art. 6, § 6.
[184] C. com., Art. L. 628-6.
[185] See Report to the President of the Republic on Ordinance n° 2021-1193 of 15 September 2021; NOR: JUSC2127016P.

each affected party involved in the *conciliation* that must be submitted in the *sauvegarde accélérée*. This list includes, *inter alia*, the subordination agreements brought to the debtor's attention by the creditors before the opening of the procedure. Certified by the auditor or, failing that, certified by the chartered accountant, the list is filed at the court registry by the debtor[186].

This deposit is equivalent to a declaration of claims on behalf of the affected parties unless they send their own declaration under the legal conditions[187]. To this end, each affected party shall be informed by the *mandataire judiciaire*[188]. Here again, it is the efficiency and speed of the procedure that is sought.
The characteristics of the new *sauvegarde accélérée* finally make it the French standard procedure for preventive restructuring frameworks within the meaning of Directive (EU) 2019/1023. Prior to the reform, the number of *sauvegarde accélérée* and *sauvegarde financière accélérée* was very limited: for instance, only four *sauvegardes financières accélérées* were opened in 2020 and no *sauvegarde accélérée* – while 833 *sauvegardes* and 8 030 *redressements judiciaires* were opened during the same period[189]. Obviously, it is still too early to say if the new *sauvegarde accélérée* will be a success. We know that only large enterprises, which exceed at least one of the thresholds defined by decree[190], could benefit from *sauvegarde accélérée* or *sauvegarde financière accélérée*; Ordinance n° 2021-1193 has abolished these thresholds and more enterprises will now be able to benefit from this new procedure. However, the fact that the opening of *sauvegarde accélérée* necessarily implies the formation of classes of affected parties might discourage, at least in a first instance, the use of this procedure.

3.2.3 Financing and amendment of restructuring plans

The adoption of restructuring plans is also facilitated and modernized thanks to more liberal rules on their financing and amendment.

With regards to financing, the French legislator decided to reward those who financially support the adoption of the restructuring plan by granting a privilege, known as "post money" privilege, to the cash contributions made for the execution of the plan, under the same conditions as the financing granted during the observation period (see *supra* 3.1.2.2)[191]. These contributions must be mentioned in the draft plan[192] and "in a separate manner" in the plan[193].

Contributions made by the debtor's shareholders and partners in the context of a capital increase, as well as creditors in respect of their contributions prior to the opening of the procedure, are expressly excluded from this privilege[194].
The same "post-money" privilege applies, however, to cash contributions intended to support the amendment of the restructuring plan[195].

Concerning the amendment of the plan post-confirmation, French law now provides, when the request for a substantial modification of the plan concerns the methods of discharging the liabilities, that the creditors concerned are "consulted" and that their lack of reply – within a period of twenty-one days from the information given to them[196] – shall be

[186] C. com., Art. L. 628-7, al. 1.
[187] C. com., Art. L. 628-7, al. 3.
[188] C. com., Art. L. 628-7, al. 2.
[189] See *L'entreprise en difficulté en France en 2020. Des entreprises asymptomatiques face à la pandémie ?*, Deloitte, mai 2021, pp. 47 to 51.
[190] 20 employees, 3 million euros in turnover excluding tax and 1,5 million euros in total assets (former C. com. Art. L. 628-1 and Art. D. 628-3).
[191] C. com., Art. L. 626-10.
[192] C. com., Art. L. 626-2, al. 2.
[193] C. com., Art. L. 626-10, al. 1.
[194] C. com., Art. L. 626-10, al. 5.
[195] C. com., Art. L. 626-26, al. 3.
[196] C. com., Art. R. 626-45, al. 3.

understood as acceptance of the proposed modifications[197]. A similar rule was already known at the stage of the preparation of *sauvegarde*[198] or *redressement judiciaire*[199] plan.
This new rule tends to simplify the amendment of the restructuring plan.
However, the principle of "silence is worth acceptance" is framed as it is excluded in the case of debt remissions or debt-equity swaps[200]. Moreover, this principle applies only if the plan has not been adopted in the presence of classes of affected parties; otherwise, the substantial modification of the plan implies reuniting the classes according to the division into classes and calculation of votes decided for the adoption of the plan, "unless justified by the circumstances"[201] – a pragmatic reservation that will probably raise interpretation difficulties.

4. Progress regarding second chance of entrepreneurs and efficiency of procedures

Although it places less emphasis on these aspects, the Ordinance n° 2021-1193 contains interesting contributions concerning the second chance of entrepreneurs (4.1) and the efficiency of procedures (4.2).
These advances are directly in line with the provisions of the Directive (EU) 2019/1023.

4.1 Second chance of entrepreneurs

French law has already several procedures that allow for debt discharge and a second chance for debtors.
This is firstly the case with *liquidation judiciaire*[202] – the French liquidation proceedings, and its subspecies *liquidation judiciaire simplifiée* [203] which has a maximum duration of 6 months or one year[204] – extendable for a maximum of three months by a specially reasoned judgment of the court[205]. Indeed, the judgment closing *liquidation judiciaire* for lack of assets does not allow creditors to exercise their individual enforcement actions against the debtor, except in exceptional cases – in particular, when the debt originates from an offence for which the debtor's guilt has been established or when it originates from fraud committed to the detriment of social protection bodies[206].
A second example is *rétablissement professionnel*[207], a procedure opened for the benefit of a debtor in good faith[208] for a period of four months[209] and whose closure leads in principle to the erasing of debts with regards to creditors whose claims existed before the procedure was opened[210].
This being said, Directive (EU) 2019/1023 requires Member States to provide honest insolvent entrepreneurs with access to at least one procedure that can lead to a full discharge of debt[211], within a maximum period of three years from the decision confirming the plan or the decision opening the procedure[212].
In these conditions, the transposition of the Directive into French law provided an opportunity to extend the scope of application of *liquidation judiciaire simplifiée* and *rétablissement professionnel* and to allow the second chance for an increased number of entrepreneurs[213].

Thus, *liquidation judiciaire simplifiée* is in principle intended for debtors whose assets do not include real estate. It is compulsory for

[197] C. com., Art. L. 626-26, al. 2.
[198] C. com., Art. L. 626-5, al. 2.
[199] C. com., Art. L. 631-19, al. 1, by reference to Art. L. 626-5, al. 2.
[200] C. com., Art. L. 626-26, al. 2.
[201] C. com., Art. L. 626-31-1, al. 2.
[202] C. com. Art. L. 640-1 to Art. L. 643-13.
[203] C. com., Art. L. 644-1 to Art. L. 644-6.
[204] For debtors with a turnover excluding tax of more than 300 000 euros and more than 1 employee; C. com., Art. D. 641-10, al. 2.
[205] C. com.,Art. L. 644-5.
[206] C. com., Art. L. 643-11.
[207] C. com., Art. L. 645-1 to Art. L. 645-12.
[208] C. com., Art. L. 645-9.
[209] C. com., Art. L. 645-4, al. 4.
[210] C. com., Art. L. 645-11. In particular, wage claims and maintenance claims are not affected by the erasing of debts.
[211] Dir. (EU) 2019/1023, Art. 20.
[212] Dir. (EU) 2019/1023, Art. 21.
[213] In this matter, Ordinance of 15 September 2021 follows the inspiration of Ordinance of 20 May 2020 adapting the insolvency Law to Covid-19 pandemic.

debtors who do not employ more than five employees during the six months preceding the opening of the procedure and whose turnover excluding tax does not exceed 750 000 euros[214]. The reform abolished these thresholds for individual entrepreneurs (natural persons) who can now benefit from *liquidation judiciaire simplifiée*, and thus from the end of individual enforcement actions if they have been honest, on the sole condition that they have no real estate assets[215].

Similarly, *rétablissement professionnel* is open to any debtor, natural person, exercising an independent professional activity, if he is in cessation of payments and his recovery is clearly impossible, if he has not ceased his activity for more than one year and has not employed any employee during the last six months[216].

Before the Ordinance of 15 September 2021, it was added that the declared assets of the debtor had to have a value of less than 5 000 euros. French law has changed on this point, in line with the transposition of the Directive (EU) 2019/1023: from now on, *rétablissement professionnel* applies to any debtor whose declared assets are less than 15 000 euros (and no longer 5 000 euros), knowing that assets declared unseizable by operation of law – as the main residence according to Article L. 526-1 of Code de commerce[217] – are not taken into account when determining the value of assets[218].

Here again, the changes are intended to increase the scope of *rétablissement professionnel*, the main effect of which is to discharge the debtors from their debts and, consequently, to give them a second chance.

4.2 Efficiency of procedures

Directive (EU) 2019/1023 aims to enhance the efficiency of national procedures concerning restructuring, insolvency and discharge of debt, in particular through "appropriate" provisions on supervision and remuneration of practitioners[219] and the use of electronic means of communication[220].
French law already partly addresses these concerns. To take just one example, there are several professions in France specializing in insolvency law and regulated by the *Code de commerce*. We can mention in particular the *administrateur judiciaire* and the *mandataire judiciaire* (see *supra* 3,) who are subject to strict recruitment and ethical rules[221].

That being said, the Ordinance n° 2021-1193 has sought to further meet the requirements of the Directive.

The transparency of *conciliation* has been improved as regards the remuneration of practitioners, in accordance with Article 27 of the Directive (EU) 2019/1023[222].
Indeed, a statement of the full costs to be borne by the debtor must now be prepared by the latter assisted by the conciliator[223]. This statement shall include: the remuneration of the conciliator or, at least, the conditions of such remuneration; the remuneration of any intervener or expert designated by the judge or used by the conciliator; the fees of the debtor's advisers and of the creditor's advisers when they are charged to the debtor[224].

The statement is signed and deposited at the registry by the debtor. This is not a trivial formality, as the president of the court or the court must ensure that the statement is filed before noting or homologating the *conciliation* agreement. It should be noted that only the

[214] C. com., Art. L. 641-2 and Art. D. 641-10.
[215] C. com., Art. L. 641-2, al. 1.
[216] C. com. Art. L. 645-1.
[217] See Report to the President of the Republic on Ordinance n° 2021-1193 of 15 September 2021; NOR: JUSC2127016P.
[218] C. com. Art. L. 645-1 and Art. R. 645-1.
[219] Dir. (EU) 2019/1023, Art. 27.
[220] Dir. (EU) 2019/1023, Art. 28.
[221] C. com., Art. L. 814-1 to Art. L. 814-14.
[222] J.-L. Vallens, *Quelques innovations bienvenues en marge des classes des créanciers*, *op. cit.*, p. 1.
[223] C. com., Art. R. 611-39-1.
[224] For instance, a convention can provide that a proportion of the fees of the creditor's adviser will be charged to the debtor by the sole fact of the opening of the *conciliation* (see C. com., art. L. 611-16, al. 2).

conciliator, the president of the court, the court and the public prosecutor can take note of this statement.

The court that opens *sauvegarde*, *redressement judiciaire*, *rétablissement professionnel* or *liquidation judiciaire* procedure for the debtor may, *ex officio* or at the request of the public prosecutor's office, obtain communication of the statement.
The Ordinance of 15 September 2021 also promotes the use of electronic means of communication, in accordance with Article 28 of the Directive.

Thus, the *administrateur* must inform each affected party of the modalities for communicating by electronic means; and shall constitute consent to electronic transmission the use of these methods[225].
In addition, the notification to the affected parties of the modalities for the division into classes and the calculation of the votes retained shall be transmitted by electronic means, with certain exceptions[226].

Finally, the *administrateur* is solely competent to decide on the modalities of voting by the classes, with the exception of the equity holders classes: if he decides that the vote takes place remotely or by electronic means, his decision cannot be contested[227].

These advances favour remote exchanges between the *administrateur* and the affected parties, and clearly support the efficiency of procedures sought by Directive (EU) 2019/1023.

5. Conclusion

In conclusion, the transposition of Directive (EU) 2019/1023 has undoubtedly been a source of progress and modernization for French law. The attractiveness of French procedures, in particular *conciliation* and *sauvegarde accélérée*, has been strengthened by this reform. However, some of the changes are highly technical, such as the rules on the classes of affected parties or cross-class cram-down, and are unprecedented in French law. The future will tell how these new provisions will be received in practice and adapted to the French culture of restructuring and insolvency treatment. The Ministry of Justice is prudent on this subject and has already accepted the idea that an assessment of the application of Ordinance n° 2021-1193 of 15 September 2021 will be necessary as soon as sufficient statistical data is available[228].

[225] C. com. Art. R 626-55.
[226] C. com., Art. R. 626-58, II. Exceptions include lack of consent by the addressee or a cause beyond the control of the notifying *administrateur*.
[227] C. com., Art. R. 626-60.
[228] P. Rossi, *op. cit.*, p. 1.