THE SAFEGUARD PROCEEDING IN THE FRENCH LEGAL SYSTEM – A SUCCESSFUL TOOL IN INSOLVENCY PREVENTION

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Abstract

From a historical point of view, the French Commercial Code from 1807 had been known for its punitive regulation regarding debtors who had become insolvent. However, nowadays, the French legal system has transformed into one of the most „debtor-friendly" legislations across Europe. The French Commercial Code provides four mechanisms destined to prevent insolvency – the ad-hoc mandate, the conciliation proceeding, the safeguard proceeding, the accelerated safeguard proceeding – and a formal judicial proceeding destined to prevent bankruptcy, known as the judicial recovery proceeding. This paper will analyze the safeguard proceeding since it is the most successful tool in the French legal system regarding insolvency prevention, according to statistics. We aim at identifying the incentives leading debtors to resort to this mechanism and the best practices which may consist of a source of inspiration for other Member States' legislations in matters of insolvency prevention. Moreover, France is one of the few countries having already implemented the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications and on the measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1123 (Directive on restructuring and insolvency). Thus, the French safeguard proceeding may be considered as one of the most modern tools offered by a Member States' legislation in matters of insolvency prevention.

Keywords: *safeguard proceeding, preventive restructuring, insolvency, insolvency prevention, the French Commercial Code.*

1. Introduction

This paper aims at analyzing the French safeguard proceeding, since it has been known to be a successful tool in insolvency prevention. At a European level, the legislator has quantified the effects of bankruptcies, which have led to the conclusion that insolvency prevention has become a necessity. Not only insolvency prevention could limit the negative outcome of bankruptcies, but it also passes the test of "the best interest of creditors", an American concept regulated by the US Bankruptcy Code[1] [Section 1129 (a) (7)], known in the Romanian insolvency Law no. 85/2014[2] as "the correct and equitable treatment of creditors". From a historical point of view, in the U.S.A., the concept of best interest of creditors had been firstly regulated by the Law regarding bankruptcy from the 1st of July 1898[3], more than a century ago, and the legislator's source of inspiration was England's law from 1883 regarding the preventive composition (concordat). The test of creditors' best interest translates into a higher recovery rate of claims in a formal judicial reorganization proceeding of an enterprise in comparison to a hypothetical Chapter 7 liquidation and is one of the conditions required by the US Bankruptcy Code in matters of a restructuring plan confirmation. "The American philosophy and techniques have attracted many countries, especially because statistics show that the American Law seems to be more efficient than other countries' laws in managing enterprises' insolvency. Thus, for decades and especially in the last decade, the European laws regarding insolvency have been inspired by American law and Chapter 11 thereof."[4] This is the case of the Directive (UE) 2019/1023 of the European Parliament and of the council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132[5] (thereby referred to as the Directive in matters of restructuring), which was inspired by the famous Chapter 11 of the US Bankruptcy Code. The Directive has entered into force on the 16th of July 2019 and had been implemented in

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[1] https://uscode.house.gov/browse/prelim@title11/chapter11/subchapter2&edition=prelim <Accessed 02.05.2022>.

[2] Law no. 85/2014 regarding insolvency prevention proceedings and insolvency proceedings, published in the Official Gazette of Romania no. 466/25.06.2014.

[3] https://en.wikipedia.org/wiki/Bankruptcy_Act_of_1898 <Accessed on 02.05.2022>.

[4] Diana Maria Ilie, *Efectele insolvenței asupra mediului economic și social din România,* Universul Juridic Publishing House, Bucharest, 2021, p. 231.

[5] Published in The European Union Official Journal, L 172/18, 26.06.2019: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri= CELEX:32019L1023&from=EN <Accessed on the 30th of April 2022>.

all Member States' national legislation at the latest of 17th July 2021. However, because of the COVID-19 pandemic, most of the Member States had requested and were granted a delay of maximum 1 year, meaning that the deadline is set at 17th of July 2022. On 21st of April 2021, The Europe Direct Contact Center has confirmed us[6] that the only countries which hadn't requested an extension of the deadline were Austria, France, Greece and Portugal. The French safeguard proceeding therefore complies with the European standards. The French Commercial Code[7] has been amended by the Ordonnance no. 2021-1193 of the 15th of September 2021 amending Book VI of the Commercial Code[8], which has entered into force of the 1st of October 2021. This is one of the reasons unveiling the importance of the studied matter, since many Member States are approaching the deadline of the implementation of the Directive's provisions. We intend to analyze the French law's view upon insolvency prevention through the safeguard proceeding, since the Directive in matters of preventive restructuring offers a high degree of flexibility regarding **how** Member States should achieve the Directive's objectives. It is important to underline that the Directive has settled three key objectives: (1) the regulation in insolvency prevention tools; (2) measures to increase the efficiency of insolvency prevention and insolvency proceedings; (3) regulation of debt discharge proceedings. Since the transposition of the Directive in matters of restructuring was implemented in the French law less than a year ago, The French doctrine isn't yet updated and very few published studies analyze the French pre-insolvency and insolvency proceedings after the Commercial Code's amendments, most of them being short articles.

2. A brief history of the French law in matters of financially distressed enterprises

At the European level, the legislator's vision in matters of the judicial treatment of financially distressed enterprises began changing in the last decade. Before this time, bankruptcy laws across European countries had been known to be characterized by a rather punitive treatment applied to both debtors and the natural persons who were the debtors' legal representatives. From a historical point of view[9], France had been known to organize fairs for traders and merchants starting from the 13th century. These fairs once benefited from the participation of Italian traders and merchants, hence the reason why France, especially Lyon city, had implemented Italian rules and customs regarding bankruptcy. A couple centuries later, these rules and customs had become even more punitive, until the point that bankrupt traders could face the risk of being sentenced to death, because bankruptcy was not considered to be a potential result of circumstantial causes, but only a result of fraud committed by bad-faith debtors. Because most large European fairs were organized in Lyon city, their local rules, regulations and customs were to be implemented across all cities in France. "Then Colbert, Louis XIV's reformist Minister of finance (1661-1683), used these customs as the main basis for the 1673 *Ordonnance du Commerce*"[10], which was considered to be the first complete regulation regarding bankruptcy, but which included the death penalty for bankruptcy. However, the death penalty was considered excessive and had never been applied in practice, which led to encouraging bad-faith debtors to commit fraud.[11] One of the most important reforms regarding bankruptcy law in France had taken place through the famous Commercial Code from 1807, also known as "Napoleon's Code". "At that time, the Code didn't regulate but a single proceeding, the bankruptcy proceeding, which ended with the sale of the debtor's assets in order to pay the liabilities according to a collective proceeding."[12] Only merchants could had been subject to a bankruptcy proceeding. Regarding the natural persons, as the legal representatives of the bankrupt debtors, the Code regulated, until 1838, that they would be arrested, no matter if they were of good-faith or of bad-faith. The merchants had a chance to prove that they were of good-faith and would then be released. Because of this reform, merchants who went bankrupt feared being arrested and would run away or would avoid being declared bankrupt, therefore deepening their financial difficulty and their liabilities. The first alternative to bankruptcy in the French law was regulated starting with 1856, when it had been admitted that not all debtors are of bad-faith and not all bankruptcies are caused by fraud. Therefore, starting with March 1889, good-faith debtors had the chance to be *liquidated*, and the natural persons who were the

[6] An e-mail received at our address office@insolpedia.ro, from EuropeDirectContactCentre@edcc.ec.europa.eu on the 21st of April 2021, 03:30 p.m.

[7] https://codes.droit.org/PDF/Code%20de%20commerce.pdf <Accessed on the 2nd of May 2022>.

[8] Published in the Official Journal of the French Republic no. 0126 of the 16th of September 2021.

[9] See M.A. Dumitrescu, *Codul de comerciu comentat*, vol. VI, art. 695-727, Ed. Librăriei Leon Alcalay, Bucharest, 1905, pp. 4-5.

[10] Jérome Sgard, *Bankruptcy Law, Majority Rule, and Private Ordering in England and France (Seventeenth – Nineteenth Century)*, September 2010, p. 7, https://spire.sciencespo.fr/hdl:/2441/5k7940uimfdf9c89869o94tj0/resources/bankruptcy-law-and-private-ordering-22sept2010.pdf <Accessed on 30.04.2022>.

[11] See M.A. Dumitrescu, *Codul de comerciu comentat*, vol. VI, art. 695-727, Ed. Librăriei Leon Alcalay, Bucharest, 1905, p. 5.

[12] Corinne Saint-Alary Houin, *Droit des entreprises en difficulté*, 10th ed., LGDJ, 2016, p. 23.

debtors' legal representatives could be rehabilitated in order to gain back their civil, administrative, professional and political rights. It is important to underline that the French law of 4th of March 1889 had been a source of inspiration for the Romanian legislator regarding the regulation of an alternative to bankruptcy, known as *the judicial liquidation of commercial **debts***. An essential difference however consist of the fact that the Romanian legislator created a rather unique proceeding, unknown to be regulated in any other country, which allowed the debtor to pursue its commercial activity while being subject of such a proceeding.[13] The political and economic context of the early 1900s, consisting in the First World War and its effects upon the global economy, bankruptcy had started to become more and more frequent. Because legislators across Europe had realized that even good-faith debtors were a victim of economic circumstances, they had started taking different measures aiming at regulating alternatives to bankruptcy and allowing financially distressed debtors to pursue their activity. Therefore, the French legislator had introduced a version of preventive composition (concordat), regulated by the Law of the 2nd of July 1919 which was repealed on the 11th of January 1923. Under this law, good-faith merchants who were in a critical financial distress because of the war's consequences could had reduce or reschedule their debts.[14] In our opinion, the economic consequences of the First World War had led to the conclusion that good-faith debtors could had become victims of unfavorable circumstances, therefore becoming bankrupt without committing fraud. Because of the devastating economic consequences, all European legislators began regulating temporary measures aiming at the safeguard of viable enterprises. However, in some countries, these temporary measures, alternatives to bankruptcy, had continued to be regulated even after the amelioration of the consequences of the war. It is important to underline that while alternatives to bankruptcy had emerged, the consequences of bankruptcy proceedings had been mitigated. The concept of "the law of financially distresses enterprises" has been marked by a reform in matters of bankruptcy, when the French Commercial Code from 1807 was repealed by the Law no. 67-563 of the 13th of July 1967.[15] The same year has marked the adoption of several other decrees and ordonnances, which introduced an innovative proceeding: the stay of individual enforcements initiated against a financially distressed debtor, but whose financial state was not completely irreparable. Starting from 1967, the French law has continuously evolved until it met the balance between both debtors' and creditors' interests. Today, it is known as one of the most debtor-friendly laws across European countries.

3. The safeguard proceeding

The first regulation of the safeguard proceeding had taken place in 2005. This insolvency prevention tool was introduced by the Law of safeguard on the 26th of July 2005[16] (entered into force on the 1st of January 2006) and was inspired by the Chapter 11 of the US Bankruptcy Code.[17] This tool's success was noticed by statistics, since "(…) the number of proceedings had exploded in 2009 (+ 99,7%) before decreasing by 11% in 2010."[18] "The use of this preventive proceeding was highly increased by micro-enterprises without workers (+ 23%) and the ones employing 1 or 2 workers (+17,7%)."[19] A part of the law's provisions had been reported of being unconstitutional; however, the French Constitutional Council has rejected the complains of unconstitutionality.[20] The purpose of the safeguard proceeding is, according to article L. 620-1 of the French Commercial Code, "to facilitate the reorganizations of the enterprise in order to allow the pursuit of the economic activity, the maintenance of employment and the clearance of liabilities." It is extremely important to highlight the fact that both the safeguard proceeding and the formal judicial reorganization proceeding have the same objective.[21] Moreover, the French Commercial Code's provisions specified below (in the next section) apply to both proceedings, with very few exceptions. This is one of the reasons that the French doctrine considers the safeguard proceeding to be "an anticipated judicial

[13] See Vasile V. Longhin, Ovidiu Sachelarie, *Legea pentru lichidarea judiciară a datoriilor comerciale. Comentarii, doctrină, jurisprudență*, Institutul de Arte Grafice „Eminescu" Publishing House, Bucharest, 1932, p. 43.

[14] See Paul Demetrescu, Marco Barasch, *Lege asupra concordatului preventiv din 10 iulie 1929, cu modificările aduse prin legea din 10 iulie 1930 și legea din 20 octombrie 1932*, Ed. Librăriei Universale Alcalay, Bucharest, 1932, p. 28.

[15] See Corinne Saint Alary Houin, *op. cit.*, p. 28.

[16] Published in the Official Journal of the French Republic no. 173 of the 27th of July 2005.

[17] See Alain Lienhard, *Procédures collectives. Prévention et Conciliation. Sauvegarde. Sauvegarde accélérée. Redressement judiciaire. Liquidation judiciaire. Rétablissement professionnel. Sanctions. Procédure*, 9th ed., Delmas, 2020-2021, p. 126.

[18] *Idem*, p. 127.

[19] *Ibidem.*

[20] The French Constitutional Council, Decision no. 2005-522 of the 22nd of July 2005, published in the Official Journal of the French Republic of the 27th of July 2005, p. 12225, text n8, ECLI: FR: CC: 2005: 2005.522.DC https://www.conseil-constitutionnel.fr/decision/2005/2005522DC.htm <Accessed on the 2nd of May 2022>.

[21] See André Jacquemont, Thomas Mastrullo, Régis Vabres, *Droit des entreprises en difficulté*, 10th ed., LexisNexis, 2017, p. 193.

reorganization proceeding."[22] Basically, the safeguard proceeding aims at preventing insolvency (known in the French legal system as "cessation of payments"), which is grounds to opening a judicial reorganization proceeding, or at increasing the chances of a judicial proceeding's success by accomplishing several formalities, including the assets' and liabilities' establishing and, most importantly, initiating negotiations with creditors. Another important aspect that doesn't apply to the formal judicial reorganization is the fact that the safeguard proceeding can only be initiated at debtors' request. Creditors may only request the opening of formal collective proceedings, after the debtor has ceased payments. Another important aspect is the fact that the French safeguard proceeding is characterized by *confidentiality*.

3.1. Debtors who may access the safeguard proceeding

The French safeguard proceeding is regulated by art. L. 620-1 – L. 627-4, R. 621-1 – R. 627-1 of the French Commercial Code, as it was amended by the Ordonnance no. 2021-1193 of the 15th of September 2021. The categories of debtors which may access the safeguard proceeding are debtors who are carrying out a commercial, an artisanal or an agricultural activity, and any other natural persons who are exercising an independent professional activity (including a liberal profession), as well as to any other juridical person of private law which is confronting with "insurmountable difficulties", but which isn't in a state of payment cessation. The French law, as well as many other European countries' law, is based on the principle of the uniqueness of the collective proceedings, which implies that one debtor cannot be simultaneously subject of more than one collective proceeding. The principle of the uniqueness of the collective proceeding is based on the principle of the uniqueness of the patrimony. However, there is only one exception to this rule that consists of separate patrimonies of the individual entrepreneur with limited liability, and it implies the possibility of a judicial person and a natural person to be subject of two separate collective proceedings. This exception is regulated by the Directive in matters of restructuring, which states that, in such a case, Member States may regulate a unique collective proceeding, or two separate collective proceedings, in function of Member States' national laws, the latter case having to respect the collective proceedings' coordination. It is important to highlight that the Romanian law doesn't yet provide the possibility of liberal activities and professions, regulated by specific laws, to be subject of collective proceedings. This shortcoming is about to be eliminated, since the Project of Law[23] regarding the implementation of the Directive's provisions is matters of restructuring aims at including this category of debtors in the law's sphere of application.

3.2. The bodies authorized to apply and to participate to the safeguard proceeding

The bodies that are legally authorized to apply the safeguard proceeding are the following: (1) the Court (at least one judge-commissioner); (2) the Public Ministry (in some cases); (3) the judicial administrator (in some cases); (4) the workers' representative, designated by the Social and Economic Committee; (5) at least one representative of the debtor; (6) one to maximum 5 creditors requesting to have supervisory attributions (if the debtor carries out a liberal activity, the control attributions will automatically be exercised by the professional body to which the debtor belongs) (7) other experts (evaluators, auditors, notaries, lawyers etc.). One important aspect we need to highlight is the fact that the Court's competence in judging the opening of the safeguard proceeding depends on the type of activity the debtor is carrying out. If the debtor unfolds a commercial or an artisanal (crafting) activity, the competent Court is the commercial Court, while in every other cases, the Competent Court is the judicial Court. In matters of territorial competence, the competent Court to judge the opening of the safeguard proceeding, the judicial reorganization proceeding, and the liquidation proceeding is: (1) either the Court in which jurisdiction the judicial person has registered its headquarters or (2) the Court in which jurisdiction the natural person has declared the address of its enterprise or it's activity.[24] "In judging the opening of the proceeding, the Court designates one judge-commissioner and, if necessary, several (Commercial Code, art. L 621-4)."[25] The judge-commissioner needs to be periodically informed about the progress of the proceeding by the debtor's legal representative, the judicial administrator and the Public Ministry, including the communication of any documents. The judge-commissioner may be replaced by the president of the Court, in specific cases. The Public Ministry has an active role in a safeguard proceeding and even may

[22] See Alain Lienhard, *Procédures collectives. Prévention et Conciliation. Sauvegarde. Sauvegarde accélérée. Redressement judiciaire. Liquidation judiciaire. Rétablissement professionnel. Sanctions. Procédure*, 9th ed., Delmas, 2020-2021, p. 126.

[23] http://www.cdep.ro/proiecte/2022/100/90/4/se242.pdf <Accessed on the 2nd of May 2022>. The Project of law implementing the Directive's provisions in matters of restructuring has been adopted by the Romanian Senate on the 11th of April 2022 and is set to be debated by the Romanian Chamber of Deputies.

[24] See Alain Lienhard, *Procédures collectives. Prévention et Conciliation. Sauvegarde. Sauvegarde accélérée. Redressement judiciaire. Liquidation judiciaire. Rétablissement professionnel. Sanctions. Procédure*, 9th ed., Delmas, 2020-2021, p. 160.

[25] Dominique Legeais, *Droit commercial et des affaires*, 27th ed., Sirey, 2021, p. 621.

propose the designation of one or more judicial administrators. Moreover, if the debtor has accessed an ad-hoc mandate or a conciliation proceeding in the 18 months prior to the safeguard proceeding, the Public Ministry may oppose to the designation of the judicial administrator having already been designated as the debtor's representative in those other insolvency prevention proceedings. If the judge-commissioner rejects the Public Ministry's request, the rejection must be motivated. These provisions don't apply to the rejection of the debtor's request. In regard to the Public Ministry's role in a safeguard proceeding, the French doctrine states that its participation has become a guarantee of the morality of operations.[26] Regarding the judicial administrator, art. R. 621-11-1 of the French Commercial Code states that its designation is required only in cases in which debtors' turnover surpasses 20 million euros, according to the last financial statements. "The mission and the powers of the judicial administrator include a fixed, intangible part, governed by the law, and a variable part, defined from case to case by the Court."[27] The judicial administrator's mandate may be modified at any time during the proceeding, at the request of the debtor's legal representative, the Public Ministry's or at its own request. Two judicial administrators need to be designated in the following cases: (1) the debtor has at least three secondary establishments located within the jurisdiction of a court where it is not registered; (2) the debtor either owns or controls at least two companies, one of which is subject to a collective proceeding; (3) is being owned or controlled by a company which is subject to a collective proceeding. The workers' representative must be at least eighteen years old to be able to be designated. If the Social and Economic Committee doesn't appoint a representative, the workers themselves may do so. If no representative has been elected, the debtor needs to draw up a report showing that no workers' representative could be appointed. "The controllers assist the judicial representative in his functions and judge-commissioner in its mission to surveil the enterprise's administration."[28]

4. The opening of the safeguard proceeding

4.1. The conditions for initiating the safeguard proceeding

The French Commercial Code imposes four major conditions upon the opening of a safeguard proceeding: (1) the opening of the proceeding must be requested by the debtor, since it is a voluntary proceeding; (2) the debtor must be part of the proceeding's champ of application; (3) the debtor must justify insurmountable difficulties of any nature; (4) the debtor needs not to have ceased payments. As the French doctrine[29] stated, the safeguard proceeding has an anticipated and a voluntary characteristic. The Directive in matters of restructuring recommended that insolvency prevention proceedings may be request by creditors, under the condition of having the debtor's authorization in this purpose. However, France has not implemented this recommendation, mostly because the safeguard proceeding is confidential, on one hand, and on the other hand, the debtor has not ceased payments, which translates into the fact that creditors are not yet experiencing the debtor's "insurmountable difficulties". Only the legal representative of the debtor or its director have the right to request the opening of the safeguard proceeding. In its request, the debtor's legal representative or its director needs to indicate the nature of the difficulties, as well as the reasons they are insurmountable. If the Court appreciates that the difficulties are not insurmountable, the debtor's request of opening a safeguard proceeding shall be denied. The second condition refers to the fact that the debtor must be a part of the proceedings' champ of application. In a contrary case, the Court could not have grounds for admitting the debtor's request. The third condition consists of the fact that the debtor needs to justify insurmountable difficulties. This condition needs to be proved in the light of two aspects: firstly, the debtor needs to invoke the difficulties it's facing and their nature and, secondly, the debtor needs to prove that it is not able to surpass these difficulties. Regarding the nature of the difficulties, it needs to be highlighted that France is one of the few European countries which regulates the possibility of opening an insolvency prevention proceeding based on difficulties *of any nature*. Most European countries, including Romania at the time, regulate the need of these difficulties to be of financial nature. The French doctrine stated that the Commercial Code voluntarily doesn't specify the nature of difficulties which may be grounds to opening a safeguard proceeding, since it aims to include all types of difficulty: "(…) *financial*: debts coming to due date, fragile cashflow; *economic:* the loss of a market, aggressive competition, increase of raw materials' prices…; *social*: strikes, staff underqualification, overstaffed; *judicial:* the difficulty of claims' recovery,

[26] Dominique Legeais, *Droit commercial et des affaires*, 27th ed., Sirey, 2021, p. 622.
[27] Françoise Pérochon, *Entreprises en difficulté*, 10th ed., LGDJ, 2014, p. 307.
[28] Dominique Legeais, *Droit commercial et des affaires*, 27th ed., Sirey, 2021, p. 621.
[29] Françoise Pérochon, *Entreprises en difficulté*, 10th ed., LGDJ, 2014, p. 257.

litigations etc."[30] In this matter, it is important to be noted that the Directive in matters of restructuring recommends, through Recital (28), that Member States should extend the scope of insolvency prevention proceedings as to include difficulties of other nature than financial, provided that those difficulties may be quantified in a foreseeable insolvency risk. As we see, the French law imposes that difficulties need to be not only determined from the perspective of their nature, but also from the perspective of their intensity, the latter meaning that the debtor needs to prove that it cannot surpass them on its own. The reasoning behind this legal condition is the fact that the French legislator considers that the debtor doesn't need the Court's protection unless it cannot surpass the difficulties on its own. If the Court determines that difficulties are not insurmountable, the debtor will be advised to request to the President of the Court the opening of a conciliation proceeding, an alternative proceeding aiming at avoiding insolvency through a settlement with the creditors. The last condition required by the French Commercial Code in matters of opening a safeguard proceeding is the absence of payment cessation. This is because, in this situation, the debtor needs to request the opening of a formal judicial reorganization proceeding, if there are safeguard chances or, if not, the opening of a liquidation proceeding. The French jurisprudence established that the analysis of the conditions imposed by the law to opening a safeguard proceeding needs to refer to the day when this opening takes place.[31] Of course, to have its request admitted, the debtor needs to file several documents listed by art. R. 621-1 of the French Commercial Code. The Court's decision regarding the opening of the safeguard proceeding may be appealed by third parties, as stated by art. R. 661-2 of the French Commercial Code. Except cases of fraud, the debtor cannot be refused the opening of a safeguard proceeding on grounds that it would thus seek to escape its contractual obligations, since it justified difficulties that it is not able to overcome, and which are likely to lead to payment cessation.[32]

4.2. The observation period

The observation period debutes once the safeguard proceeding has been opened by the Court. During the observation period, the debtor remains in possession, meaning that he is able to pursue the activity of his business. The judicial administrator may only supervise the debtor's activity, but may not intervene whatsoever in management operations. "If one difficulty occurs, the administrator cannot attack the acts concluded, he can only request the Court to empower him with another mission that would allow him to intervene in the enterprise's management."[33] The rule of "debtor in possession" implies the fact that the debtor is allowed to dispose of his patrimony and has the right to exercise all day-to-day management acts which are not included in the judicial administrator's mission. "The surveillance of management operations imply that the judicial administrator only controls *a posteriori* the acts concluded by the debtor who remains in management."[34] "The observation period is a phase of the proceeding in which the activity of the enterprise is continued as of right and the causes of difficulty are identified and, as far as possible, treated."[35] The French Commercial Code instituates a maximum duration of the period of observation, which is limited to 6 months and which may be extended only one time, for another 6 months, upon the debtor's, the judicial administrator's or the Public Ministry's request, meaning that the maximum period is set at 12 months. Before the entry in force of the Ordonnance transposing the dispositions of the Directive (UE) 2019/1023, the French Commercial Code provided that the Public Ministry could have requested another extension of the observation period for another 6 months, the total duration adding up to maximum 18 months. However, the French legislator limited the observation period at 12 months, having in consideration the urgency characterized by the safeguard proceeding. One of the proceeding's opening effects consist of the debtor's obligation to draw up its inventory. The inventory needs to sum up all of the debtor's assets, as well as information regarding instituated privileges. "In order to limit the proceeding's expenses, the debtor himself may do the inventory within a period fixed by the judge-commissioner (...)"[36] Along the inventory, the debtor needs to present the judicial administrator a list of creditors, summing up all debts coming to due date, as well as his ongoing contracts. If the information is incomplete or unclear, the judicial administrator has the right to obtain any needed information from any public or private institution, in order to clarify the debtor's current financial situation. If the debtor exercises a

[30] Corinne Saint-Alary Houin, *Droit des entreprises en difficulté*, 10th ed., LGDJ, 2016, p. 254.
[31] Cass. Com., 26.06.2007, n 06-20.820, https://www.legifrance.gouv.fr/juri/id/JURITEXT000017897831 <Accessed on the 2nd of May 2022>.
[32] Cass. Com., 08.03.2011, n 10-13.988, 10-13.989, 10-13.990, https://www.legifrance.gouv.fr/juri/id/JURITEXT000023694421/ <Accessed on the 2nd of May 2022>.
[33] Corinne Saint-Alary Houin (coord.), *Code des entreprises en difficulté*, 7th ed., LexisNexis, 2018, p. 146.
[34] André Jacquemont, Thomas Mastrullo, Régis Vabres, *op. cit.*, p. 212.
[35] Dominique Vidal, Giulio Cesare Giorgini, *Cours de droit des entreprises en difficulté*, 2nd ed., Gualino, 2016-2017, p. 153.
[36] André Jacquemont, Thomas Mastrullo, Régis Vabres, *op. cit.*, p. 204.

liberal profession, the law requires that the professional body the debtor is part of to be present at the inventory. The inventory needs to commence within 8 days of the opening of the proceeding and, if the debtor doesn't proceed to do so, the Court may appoint a third party (broker, notary etc.) to proceed to the commencement of the inventory. The period of 8 days from the opening of the proceeding may be extended by the judge-commissioner. Another effect of the opening of the safeguard proceeding consist of the debtor's interdiction to paying historical claims, meaning the claims arised before the proceeding's opening, except if an operation of claims' compensation intervenes, under the sanction of the payment's annulment. These provisions are justified by the fact that the French law instituates a certain order of claims' payment. If the debtor pays the creditors' claims contrary to the order instituated by the law, any interested thrid-party or the prosecutor, as a representative of the Public Ministry, may request to the Court the annulment of the payment, within a period of 3 years from the payment's date. During the period of observation, the debtor needs to carefully manage his liquidities because the safeguard proceeding can be converted by the Court in a formal judicial reorganization proceeding, which carries the permanent risk of liquidation, or even in a liquidation proceeding, if the judicial reorganization is not possible. The proceeding's convertion is conditioned by the occurance of payment cessation. This means that the debtor needs to pay his debts once they become due, in the order imposed by the Commercial Code, and needs to avoid taking unnecessary risks which would increase the chances of cessation of payments. The French Commercial Code states that the opening of a safeguard proceeding cannot be grouns for the termination of ongoing contracts. All parties must still fulfill their obligations resulting from ongoing contracts. The claims arising after the opening of the safeguard proceedings shall be paid as they fall due. As well as the case in the Romanian legislation, the French Commercial Code offers a priority regime to the payment of claims arising in the observation period. Regarding the creditor' historical claims, meaning the ones that arised before the opening of the proceeding, the French law imposes their obligation to declare their claims, calculated until the day of the opening of the proceeding (art. L. 622-26 French Commercial Code). Only the debtor's workers are excepted of this obligation. If creditors don't proceed to declare their claims, they will not be able to initiate enforcements upon the debtor. However, the debtor himself may declare creditors' claims and, by doing so, the French law instituates a presumption that the debtor has acted in the creditor' name. In such cases, the creditors' claims shall be taken into consideration when establishing the debtor's liabilities and they will be able to participate at the proceeding. In the Romanian preventive composition proceeding, at the time, creditors are not required to declare their claims, because the debtor has the obligation of drawing up a list of all its creditors. According to art. L. 622-17, the order of claims' payment is the following: (1) workers' claims; (2) claims resulting from a cashflow injection in order to ensure the continuation of the debtor's activity during the proceeding (new financing); (3) claims resulting from the execution of ongoing contracts; (4) other claims. It is important to highlight that a superpriority regime of new and interim financing of a debtor that is subject to either a preventive restructuring proceeding or a formal reorganization proceeding is one of the Directive's in matters of restructuring objectives. Of course, one of the most important effects of the opening of the safeguard proceeding consists of the stay of individual eforcements initiated against the debtor and of the interdiction of initiating other individual enforcements. These provisions also apply to co-debtors having affected a personal property as collateral. This effect is, at the moment, regulated by the Romanian law as well. Co-debtors may benefit from any measures established in the preventive concordat, according to art. 33 para. (2) of the Law no. 85/2014. However, the stay of individual enforcements may not be considered by the Court as a measure established in the preventive composition, but as a legal effect of the composition's approval, hence why the debtor who draws up a restructuring plan needs to negotiate with creditors the possibility of introducing such a measure in the restructuring plan. Creditors whose claims are not declared either by them, either by the debtor, are deprived of the right to initiate any legal action against the debtor. Any litigation a debtor is part of in order to establish a claim may continue, but the debtor is required to inform the creditor about the opening of the proceeding, in maximum 10 days. Another important effect consist of the fact that the opening of the safeguard proceeding stops the course of all legal and conventional interest related to the claims, with very few exceptions. In the period of observation, the debtor, along with the judicial administrator, need to draw up an economic and social statement, which will report the origin, the nature and the intensity of the enterprise's difficulties. It is important to highlight the fact that the Romanian legislator plans to regulate the necessity of a similar statement which will be drawn up by an insolvency practitioner and which will be used by the debtor to justify to the Court its request of opening a pre-insolvency proceeding. This statement shall also justify the nature and the intensity of the difficulties faced by the debtor but, more importantly, it will be an extremely helpful instrument for both the debtor, who shall be spared of the obligation to prove the fulfillment

of the condition of admissibility for the opening of the proceeding, and the creditors, which will have a better understanding of the debtor's need to restructure its activity. The period of observation ends when the Court confirms the safeguard plan or, by case, when the safeguard proceeding is converted to a judicial reorganization or liquidation proceeding.

5. The safeguard plan

5.1. The preparation of the safeguard plan

"In the legislation issued by the laws of the 25th of January 1985 and of the 10th of June 1994, two restructuring techniques were provided, which translate into two types of restructuring plan: the plan of business ongoing, or the plan of cessation of the enterprise."[37] It is however important to highlight the fact that this is one of the few differences between the safeguard proceeding and the judicial reorganization proceeding, meaning that only the latter may imply a total cession of the enterprise. The safeguard proceeding however may only propose a partial cessation of the debtor's enterprise. According to art. L. 626-1 of the French Commercial Code, if the debtors are likely to be safeguarded, the Court confirms the safeguard plan. However, the debtors still needs to be able to pay its debts as they fall due, because the cessation of payments represents grounds for converting the safeguard proceeding into a judicial reorganization proceeding or even a liquidation proceeding. Based on the social and economic statement, the debtor, with the assistance of the judicial administrator, shall draw up a project of plan which will be submitted to creditor' vote. The project of the safeguard plan is a rather complex instrument that needs to precisely determine the prospects of the debtor's recovery, by relating to the possibilities of the debtor's activity, the state of the market and the available means of obtaining new financing. Most importantly, the project of the safeguard plan needs to expose the way that the liabilities will be paid and, by case, the guarantees that the debtor shall submit for ensuring the execution of the plan. The safeguard plan elaborated by the debtor needs to be approved by the extraordinary general meeting of shareholders in case it proposes of the capital's structure. The conditions regarding summoning, quorum and decision adoption are regulated by Decree of the Council of State. If no decision may be adopted at the first meeting, the common law provisions regarding quorum and majority will be applied. If shareholders' equity is established at less than half of the value of the social capital, the Court may rule to replenish the capital with an amount proposed by the debtor's legal representative, but not less than half of the social capital. This possibility has been regulated by the Law no. 2015-990 of the 6th of August 2015[38] (named by the French doctrine "Macron Law"), which facilitates the adoption of a safeguard or judicial reorganization plan proposing the modification of the structure of social capital in favor of a person who commits to executing the plan. The safeguard plan may also propose delays in debt payments, remissions and even debt conversions into securities, the latter being known as an operation of *debt-to-equity swap.* After the project is completed, the safeguard plan shall be proposed to all creditors who have declared their claims or whose claims have been declared by the debtor. The legal representative of the debtor is in charge of collecting creditors' votes upon the safeguard plan. One very interesting particularity of the French legislation consist of the fact that the lack of the vote's communication within 30 days of receiving the project of the safeguard plan *instituates a presumption of the acceptance of the plan. De lege ferenda*, this presumption would need to be reintroduced in the Romanian legislation, at least in matters of pre-insolvency proceedings. It is important to mention that a presumption of the plan's acceptance had been regulated by the Law no. 381/2009 regarding the introduction of the preventive composition and of the ad-hoc mandate[39], currently revoked, but the presumption only applied to the budgetary creditor. The Law no. 381/2009 had been revoked by the entry in force of the Law no. 85/2014, which didn't maintain these provisions. The presumption of the plan's acceptance in the French legislation only operates if the plan proposes delays of payment. *Per a contrario*, if the plan proposes debt remission or debt-to-equity swap operations giving creditors access to capital, the lack of voting is considered to be a rejection of the plan. One important aspect is the fact that only affected creditors shall be given the right to vote the safeguard plan. The French Commercial Code considers to be unaffected those creditors for whom the plan does not propose a modification of the terms of payment, or creditors which will receive full payment upon the plan's approval or, by case, upon admission of their claims. The Directive (UE) 2019/1023 states, in recital (43), that affected creditors should be given the right to vote a restructuring plan, while unaffected creditors have no interest in this matter. The duration of a safeguard plan is established by the Court, from case to case, and it is limited to a maximum period of 10 years, with the exception of agricultors, in which case the maximum period is set at 15 years. In our opinion, a long-term

[37] Alain Lienhard, *op. cit.*, p. 204.
[38] Published in the Official Journal of the French Republic n 0181 of the 7th of August 2015.
[39] Published in the Official Gazette of Romania no. 870/14.12.2009.

safeguard plan increases the chances of the debtor's recovery. In the Romanian law, the preventive composition is limited to a period of 24 months, with the possibility of the extension of this duration with maximum 12 months, in some cases, while the judicial reorganization proceeding is limited to a period of 3 years, with the possibility of the extension of this duration with maximum one year.

5.2. The safeguard's plan adoption

One first important observation is the fact that before the transposition of the Directive's (UE) 2019/1023 provisions in the French law, creditors would be constituted in committees and the plan was submitted to their voting. However, in the present, the creditors' committee has been replaced with the classes of affected creditors. According to art. L. 626-30 from the French Commercial Code, the affected creditors are considered to be the following: (1) the creditors whose rights are directly affected by the project of the safeguard plan; (2) the members of the general extraordinary meeting of the debtor, only if their participation at the structure of the social capital would be affected by the plan. The conditions of the summoning of the classes of creditors, as well as the conditions of several mandatory elements of the safeguard plan are regulated by decree of the Council of State. Creditors need to cast their votes within a period of 20-30 days from the date on which they received the plan. The safeguard plan may be modified within this period of time. A class of claims shall be deemed to approve the plan if the votes cast represent either two thirds of the value of claims registered in that class, or two thirds of the votes cast by the members of that class of claims. In other words, the plan may be adopted by gathering two thirds of claim's value, or two thirds of the votes cast by the number of creditors registered in that class of claims. In our opinion, the possibility of gathering either the majority of claims' value or the majority of creditors' votes is a measure aiming at facilitating he plan's adoption and increases the chances of its success. To be adopted by creditors, the safeguard plan needs to be favorably voted by each class of claims. However, if this condition is not fulfilled, the Court may still confirm the plan, if the other conditions are being fulfilled, the most important of them being the following: (1) a majority of classes of creditor have voted the safeguard plan; (2) the best interest of creditors' test is passed. In order for the safeguard plan to be confirmed by the Court, the fulfillment of the following conditions shall be analyzed, according to art. L. 626-31 of the French Commercial Code: (1) the plan has been adopted by creditors accordingly; (2) the best interest of creditors' test has been passed; (3) no party will obtain more than the value of their declared claim; (3) the formalities of the notification and communication of the safeguard plan have been fulfilled; (4) no dissenting class of creditors shall be treated unfavourably, meaning that they would not be paid less than they would be in a hypothetical judicial reorganization or liquidation proceeding; (5) if applicable, new financing that is necessary for the plan's implementation does not excessively harm the interests of affected creditors. However, even if the plan fulfills the above-mentioned conditions, the Court may still reject the plan if it doesn't offer a reasonable perspective regarding the prevention of the debtor's cessation of payments, or if the interest of affected creditors are not sufficiently protected. In the Romanian law, the confirmation of a recovery plan by the Court, in a preventive composition proceeding, only requires an analysis of few conditions of legality, meaning that the syndic-judge doesn't have power of appreciation in means of the recovery plan's opportunity aspects. The French Commercial Code provides the confirmation of the safeguard plan in a second hypothesis, the one in which the safeguard plan hasn't been adopted accordingly by the creditors, meaning that some classes of creditors have not voted or have voted against the safeguard plan. In this scenario, in order for the plan to be confirmed, the Court needs to apply the cross-class cram-down mechanism, meaning that the Court will impose the plan to the minority of classes of dissenting affected creditors. The conditions for the confirmation of the plan in this scenario are regulated by art. L. 626-32 of the French Commercial Code. Once the safeguard plan has been confirmed by the Court, the judicial administrator's mission comes to an end, and the debtor shall execute the plan accordingly. The debtor's activity will be supervised by a commissioner appointed by the Court, which may be either by the debtor's legal representative, either by the judicial administrator. The commissioner may initiate any action which in in creditor' interest, may obtain any necessary documents and information needed and shall report the inexecution of the plan. The confirmation of the safeguard plan by the Court is conditioned by several formalities. Firstly, the Court will subpoena the debtor, its legal representative, the judicial administrator, the commissioner and the workers representative. For the Court to be able to confirm a safeguard plan, it shall previously request the Public Ministry's opinion. If more than one safeguard plans have been drafted, the Court has a full power of appreciation upon which plan should be confirmed.[40] If no safeguard plan has been proposed, the Court will convert the safeguard proceeding into a judicial

[40] Alain Lienhard, *op. cit.*, p. 305.

reorganization proceeding, or even into a liquidation proceeding, according to art. L. 631-1 and L. 640-1 of the French Commercial Code. However, if the debtor hasn't ceased payments, the Court will only close the safeguard proceeding and will not convert the safeguard proceeding into another collective proceeding. The safeguard plan needs to be confirmed ahead of time, before the period of observation expires. This is because the maximum period of the observation period is regulated imperatively, and no plan may be confirmed and implemented after this date.

5.3. The execution of the safeguard plan

If the Court confirms the safeguard plan adopted by the creditors, the period of observation comes to an end. Also, if the Court considers that some assets are essential for the debtor's activity, it may rule that these assets to not be alienated, for a duration which cannot surpass the plan's duration. The Court will also take into consideration the delays and debt remissions settled by the debtor with its creditors and will also approve debt-to-equity swap operations. The French Commercial Law instituates minimal annuities that must be met by the debtor for the good execution of the plan. The annuities are set at 5% starting with the third year of the plan, and 10% starting with the sixth year of the plan. Of course, the annuities are set in regard to the maximum duration of the safeguard plan provided by the French law – 10 years – but the Court has the prerogative of fixing the proceeding's duration from case to case. Therefore, the annuities shall be fixed from case to case, depending on the proceeding's duration. An interesting provision of the French law consist of the fact that the plan may provide a choice for creditors implying payments within shorter periods of time but conditioned by a proportional debt remission. The discharge of the debtor with the reduced amount shall be effective only after the full payment of the reduced claim. If the Court notices that all claims established in the safeguard plan have been paid, it will rule that the execution of the plan is completed. The persons who may seize the Court in this matter are the commissioner for the execution of the plan, the debtor and any other interested party.

5.4. The inexecution of the safeguard plan

"The causes of the failure of the safeguard plan are enumerated by art. L. 626-27 of the Commercial Code, and they are two in number: the breach of commitments made under the plan and the cessation of payments occurance during the execution of the plan."[41] However, the cause of the failure of the safeguard plan will determine how will the proceeding come to an end. When the safeguard plan fails because the inexecution of the assumed commitments, the proceeding shall end facultatively, but when the plan fails because of cessation of payments, the proceeding shall end *ope legis.* When the cessation of payments is being observed during the plan's execution, the Court shall consult with the public prosecutor and shall convert the safeguard proceeding into a judicial reorganization proceeding or, if the reorganization is not likely to succeed, into a liquidation proceeding. However, even if the proceeding is being converted, the safeguard plan shall be resolved. The court may be seized by a creditor, by the commissioner for the execution of the plan or the public prosecutor. Creditors whose claims have been registered in the safeguard proceeding are excepted from another declaration of claims. The remaining claims established in the safeguard plan will automatically be accepted in the new proceeding, after deducting the payments already made by the debtor. No matter the cause of the safeguard's plan failure, it will be resolved by the Court, a sanction "borrowed" from the French civil law.

6. Conclusions

As we saw from the historical perspective of the French law of distressed enterprises, debtors had faced a rather punitive system during the last centuries. However, the French legislator had realized that the effects weren't as expected and as efficient. Having inspired from the famous Chapter 11 from the US Bankruptcy Code, the French legislator began regulation alternative solution to bankruptcy, I order to increase the proceedings' efficiency. Furthermore, in many cases, the creditors' interest would have been more efficiently protected if also the debtors' interests would have been protected as well. In an attempt to find the best balance between these interests, the French legislator started regulating alternative proceedings, delimitated from bankruptcy, starting with 1985. Nowadays, the Directive's (UE) 2019/1023 provisions, which were also inspired by Chapter 11, had already been implemented in France's legislation, making the French collective proceedings one of the most debtor-friendly legal frameworks across Europe. However, even before the transposition of the Directive's provisions, the French law already complied with European standards. One of the best measures adopted by France is, in our opinion, the fact that their legislation had also kept the ad-hoc mandate proceeding and the conciliation proceeding, both being alternatives to formal collective proceedings, but which do not fully comply to the Directive's provisions. This is encouraged by the Directive itself because recital (16) provides that "(…) Member States should be able

[41] Sémia Saaied, *L'échec du plan de sauvegarde de l'éntreprise en difficulté*, LGDJ, 2015, p. 13.

to maintain or introduce in their national legal system preventive restructuring frameworks other than those provided by this Directive". This is justified by the fact that the more alternatives a debtors disposes of to avoid insolvency and / or bankruptcy, the more chances a recovery or restructuring plan would have to succeed. The main conclusion of this article consists of the fact that the French legislation in matters of distressed enterprises is one of the most modern ones across Europe. It may also constitute a model for the development of other European countries' legislation in this matter, especially since the deadline for transposing the Directive's provisions is approaching. As stated in this article, both the French legislation on matters of distressed companies and the Directive (UE) 2019/1023 were inspired by the famous Chapter 11 from the US Code. The success of the proceeding regulated by the latter had been proven by statistics. In the US, companies are filing to undergo the Chapter 11 reorganization proceeding not only when it is in distress, but also as a measure to prevent financial difficulty in cases such as a rapid expansion of activity which would carry the risk of bankruptcy. It is to be noted that no pre-insolvency proceeding is being regulated by the US Code, but only formal, collective proceedings. Still, companies use the judicial reorganization proceeding as a tool of prevention, even if it was not designed for this purpose. Because of the reasons above-mentioned, in our opinion, further research would need to be conducted to analyzing the Chapter 11 judicial reorganization proceeding, in order to identify the main elements that make it such a successful tool. Furthermore, since the Directive (UE) 2019/1023 itself has been inspired by the Chapter 11 proceeding, further research should be conducted in means of identifying the way that Member States have understood to implement its provision, given the fact that it offers a high degree of flexibility regarding the accomplishment of its objectives. Such research would conduct to a better understanding of the recorded success of the Chapter 11, which would help Member States to improve their legal framework in matters of distressed companies in the future. However, it needs to be highlighted that, in our opinion, the success of Chapter 11 is given by one key factor – its tradition. Considering the fact that the first judicial reorganization proceeding in the US had taken place in 1898, and the cross-class cram-down mechanism has been used since 1944[42], the US judicial reorganization proceeding has more than a century of tradition, which is not the case in Europe. From a social perspective, in the US, insolvency and bankruptcy are not stigmatized nowadays but considered as a natural effect of competition. Moreover, creditors are more open to participate to a Chapter 11 proceeding because they already know it's in their best interest, hence why most reorganization plans succeed. This tradition lacks in Europe, and this is the main reason why most pre-insolvency proceedings fail. Also, insolvency and bankruptcy are still highly stigmatized, and creditors are not as willing to participate to a safeguard proceeding, considering that they would sacrifice their claims. Still, the entry into force of the Directive (UE) 2019/1023 is the most important step taken in the process of safeguard proceedings' modernization. In time, when these proceedings will gain tradition, their chances of success will increase accordingly.

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