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French Accelerated Financial Safeguard Procedure (AFS): The Nanterre Court Gives Green Light to the First Safeguard Plan Presented under the AFS Regime

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Since its creation in October 2010, academics and legal practitioners had been waiting for the first application of the AFS and, to some extent some of them had probably started considering that the AFS would end up as a theoretical topic for university students, rather than an efficient restructuring tool. But recently, this wait came to an end. The first filing to open an AFS procedure came through in February 2013 and the financial restructuring plan was approved by the financial creditors and upheld by a decision from the Nanterre commercial Court within one month from the filing.

This decision was rendered by the second largest commercial court in France, thereby giving it a good start in terms of recognition and quality of drafting. It was also made within a very short period from the filing, showing that the AFS procedure can be used efficiently and expeditiously when certain conditions are fulfilled. Finally, the procedure was successfully applied to restructure the financial debt of the troubled holding company of one of the leaders in the French packing and logistics business, named Hejenion S.A., thus showing that some of the recent changes in the AFS regime have at last allowed it to go off the starting block.

I. Essential background on the AFS regime

The Accelerated Financial Safeguard Procedure (*Procédure de Sauvegarde Financière Accélerée*) ('AFS'), was introduced in France in late 2010, but by drafting oversight missed its original target, i.e LBO holding companies. At that times, the AFS was only applicable to operational companies employing 150 employees or generating an annual turnover of EUR 20 million or more.

The AFS is subject to the general regime of the safeguard procedure (implemented in January 2006), supplemented by the specific provisions applicable to the AFS, being Articles L. 628-1 et seq. of the French Commercial Code.

Almost two years after the creation of the AFS, a Decree extended the AFS to holding companies, subject to certain thresholds being met.

Only financial creditors (mainly banking establishments and bondholders) are affected by, and involved in an AFS procedure. Trade creditors remain unharmed and their claims need not being filed and ought to be paid when due.

To be eligible to this procedure, the debtor experiencing financial difficulties must have already requested the opening of a confidential conciliation procedure and prove that it is not in cessation of payments, and that the plan to be presented to the financial creditors will solve the difficulties that it is facing. The debtor must also convince the Court that a qualifying majority of the financial creditors will vote in favour of the plan, as under Article L. 628-1 of the French Commercial Code.

A number of documents need to accompany the filing, and more importantly, the debtor must fulfil different thresholds to be eligible for the AFS filing and procedure:

- the debtor's accounts must be certified by a statutory auditor or prepared by an accountant; and
- the debtor's annual turnover must equal or exceed EUR 20 million; or
- the debtor must employ 150 or more employees on the date of filing for the ASF.

Alternatively, and this is the change brought about the Decree made in September 2012, a troubled debtor may also ask the commencement of an AFS procedure, if its balance sheet total is more than EUR 25 million, or EUR 10 million if the debtor controls another company for which the number of employees and the turnover are respectively more than 150 employees and EUR 20 million. The purpose of this alternative threshold was to allow holding companies, financed by LBO, to benefit from an AFS procedure.

The AFS procedure cannot last more than two months. If a restructuring plan is not approved by the creditors and upheld by the court within that time period, the court must bring the procedure to an end.

Finally, restructuring plans are approved by the creditors' committee and bondholders' assembly by a qualified majority of two thirds of the amount of the

claims held by the creditors and bondholders who cast a vote. It is therefore particularly important to attend and vote at these meetings. The plan then becomes enforceable against the members of the committee and assembly, including their dissenting members, when the court upholds the plan in accordance with the draft plan approved by the creditors and bondholders. This decision is always public and may refer for further details, which are not set out in the decision, to the draft plan and its attachments. The code is silent on whether the draft plan and attachments can be made available for inspection at the registry at the request of third parties. In practice, obtaining access may be difficult.

II. The Hejenion procedure and decision

This decision[1] is the first application of the AFS procedure.

As appears from the decision, Hejenion S.A is a subsidiary of Holding Saint-Augustin (HSA) and was created to acquire the company named SOFLOG-TELIS in 2005. The acquisition was financed by LBO.

Hejenion S.A is a holding company, with 18 employees, essentially managing its participation in, and its supply services to SOFLOG-TELIS. The latter is one of the French leaders in industrial packing, employing around 1200 people.

In 2012, the accumulation of poor performances of SOFLOG-TELIS, due to the economic downturn and termination of important contracts, forced Hejenion S.A and SOFLOG-TELIS to each begin a conciliation procedure on 26 September 2012. These two procedures were extended to 26 February 2013.

Whereas SOFLOG-TELIS succeeded in reaching an agreement with its main financial creditors prior to the end of the conciliation procedure, Hejenion S.A failed due to the unwillingness of one of its senior lenders to agree, as a matter of principle, to a restructuring plan presented under a conciliation procedure. Hejenion S.A therefore requested the commencement of an AFS procedure prior to the end of the conciliation and an AFS procedure was opened by the Nanterre Court on 27 February 2013.

On the same day as the commencement of the AFS procedure, Ms Bourbouloux, the court appointed administrator filed a motion to shorten the time period between the sending of the draft restructuring plan to the creditors and their vote on the draft plan. This motion was approved on 27 February and the financial creditors, i.e five senior lenders and two bondholders were convened by the administrator, also on 27 February, to specific and separate meetings on 8 and 11 March respectively with a view to vote on the draft restructuring plan, the latter being the same as the one which had initially been submitted to their approval during the conciliation procedure.

At the creditors' committee, the senior lenders, each holding an identical share in the senior loan, voted on and approved the restructuring plan with an 80% majority. One of them voted against the plan, as it had done previously during the conciliation procedure.

The bondholders, i.e the main shareholder of Hejenion S.A and one of its key managers, unanimously voted in favour of the plan.

No recourse against the votes and related steps was lodged by the financial creditors between the date of the meetings and the hearing at which the Court examined and upheld the financial restructuring plan, thereby rendering it enforceable vis a vis the financial creditors as per Article L 626-31 of the French Commercial Code.

III. Key aspects of the restructuring plan upheld by the Court

It essentially provided that:

(a) Except in the event of unforeseen available cash flows, the senior loan would not be amortised before the end of 2016 and would mature at the end of 2019, instead of 2017;

(b) Interest would be reduced and progressive rates, from 0.5 to 2.00%, throughout the period would be applied until 2019;

(c) None of the initial test ratios provided in the loan documentation would apply until the end of 2014 and thereafter they would be limited only to debt service cover ratio and an EBITDA and a minimum cash requirement;

(d) The Hejenion group would not be sold prior to mid-2017 unless a portion of the senior loan had been paid up;

(e) As from mid-2018, the main shareholder agreed to sell the group under specific conditions and the senior lenders to transfer the residual amount of their outstanding loans for a nominal value, if the purchase price were to be insufficient to reimburse the remaining amount of the senior loan;

(f) The bonds, which were issued as convertible bonds, would remain unsecured, bear no interest and be converted into bonds, redeemable only in shares, maturing on the same date as the senior loan; the decision provides no information as to the

Notes

1 Tribunal de Commerce de Nanterre, 27 March 2013, Hejenion S.A, RG :2013L00611.

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conversion ratio of the bonds into shares, the latter being set out in the draft plan filed at the registry;

(g) New money in the amount of EUR 4 million would be loaned by the main shareholder to refinance a loan of same amount granted to SOFLOG-TELIS in the agreement entered into between that company and its creditors in the course of the conciliation procedure; this loan would be interest free and mature on the same date as the senior loans;

(h) The new money lender would subscribe to preferred shared to be issued by Hejenion S.A granting it specific rights in case of sale of the group and its EUR 4 million loan would be secured by a pledge registered over the shares held in SOFLOG-TELIS;

(i) Hejenion S.A would be merged into HSA.

The draft plan was upheld by the Nanterre Court in its decision of 27 March 2013. According to Ms Bourbouloux, no recourse has been filed against the decision after it was handed down and it is now final.

IV. Main reasons for the success of this first AFS procedure and restructuring

As per the decision and according to Ms Bourbouloux, the main reasons for the successful restructuring of Hejenion's financial debt can be summarised as follows:

(a) Prior to the filing and commencement of the AFS, the debtor thoroughly prepared all the steps and the relevant documents (motion and draft order to shorten procedural time limits, list of and letters to the creditors, reports, draft plan, letters to the other bodies involved in the procedure ..) and worked closely with the conciliator with a view to his filing and sending them immediately after his appointment as administrator;

(b) The good coordination between the key players (i.e the administrator, court and registrar, management, main creditors and lawyers) in order to meet the deadline set by the court, which was to hold a hearing at the end of the first month following the commencement of the procedure;

(c) The EUR 4 million cash contribution made by the main shareholder, showing confidence in the feasibility of the restructuring, incentivised the creditors in accepting the financial conditions set out in the plan;

(d) The fact that the creditors were limited in number. None of the five senior lenders had traded their debt in various tranches and multiplied the number of financial creditors prior to the commencement of the AFS. Moreover the two bondholders had close ties to the company and this obviously made it easier to convince them to accept the restructuring plan;

(e) None of the creditors, who had committed during the conciliation procedure to vote in favour of the restructuring plan, changed their minds when they voted in the course of the AFS procedure;

(f) Finally all of the creditors were French or represented by their French subsidiaries. This probably contributed to a more consensual approach in contrast to foreign creditors who sometimes tend to adopt a more litigation driven approach.

Conclusion

Obviously the AFS works and works efficiently when certain conditions are met, as in the Hejenion case.

The positive side of this first AFS experience is that most of the French LBO market consists of small and medium-sized transactions with a financial debt which rarely exceeds EUR 150 million. These transactions usually involve mostly French banks or banks with operations in France. Taken together, this potentially paves the way for other successful AFS procedures in the event creditors cannot reach unanimous agreement during the conciliation phase of a restructuring process.

That said, there is certainly also room for improvement in the AFS regime. As stated by Ms Bourbouloux and Mr Couturier,[2] the prohibition for debtors in 'cessation of payments' to file for an AFS procedure may prevent some of them from taking advantage of this procedure, particularly where hard lined creditors refuse any concession in relation to the payment of their claims when they fall due and this may torpedo the functioning of this new restructuring tool.

Providing for an easy conversion of an AFS procedure into the standard safeguard procedure, in case of failure of the AFS within the statutory two month period allowed, would also be worth considering. As the law currently stands, a new process must be commenced.

It goes without saying that there will be further developments in relation to the AFS. In particular, a question arises whether the AFS procedure will be qualifying under the European Regulation on Insolvency Proceedings, which was not an issue in this case.

Notes

2 Bulletin Joly Entreprises en difficulté – Mai-Juin 2013, pages 134 and 135, Hélène Bourbouloux, and Gaël Couturier.

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