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Thinking about cessation of payments: a flexible and adaptable concept to procedures

Plan

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Introduction

1. Cessation of payments remains a conventional concept.¹ It follows from article 437 of the 1807 Commercial Code that “any merchant who ceases his payments is in bankruptcy.” In the past, the decisive element of preventive and collective procedures, both at the opening and at the execution, raised questions as to its adaptation.
2. In order to gain a clearer understanding of the cessation of payments, we need to define its definition, its limits, its alternatives and its legal scope within the overall system of preventive and collective procedures.
3. As a *de jure* and *de facto* flexible concept, does cessation of payments retain its influence in the operational framework of preventive and collective procedures?
4. In any case, and *per se*, having reviewed only the legal perception of cessation of payments (§ 1), its impact on preventive and collective procedures inevitably calls for observations that are as subjective as they are objective (§ 2).

§ 1. Flexible interpretation of cessation of payments

The characterization of cessation of payments is based on flexible legal (I) and procedural (II) criteria.

I. The legal definition of cessation of payments

The cessation of payments appears to be legally defined (A), while at the same time consisting of inseparable criteria (B), subject to rational control by the Court of Cassation (C).

A) The legal basis for the definition of cessation of payments

5. In the field of case law, the Court of Cassation judges that a company which has ceased to pay is “unable to meet all its liabilities with the assets available”.² The High Court consistently recalls this formula.³
6. In the legislative field, the first reference to the notion of cessation of payments is provided for in article 427 of the Code de commerce: “Any merchant who ceases his payments...”. The

¹ JACQUEMONT André, BORGA Nicolas and MASTRULLO Thomas, “Droit des entreprises en difficulté”, LexisNexis, 12nd edition, Collection « Manuel », september 2022, p. 146.

² Cass. com., 1 june 1965, Bull. civ. III, n°350; RTD com. 1966, p. 392, obs. R. Houin, in BESSE Jean, «Réflexions critiques sur la formule “Passif exigible et exigé”», LexisNexis, RPC, may 2000, p. 39.

³ Cass. com., 5 june 1972, request n°71-10.637; Cass. com., 14 february 1978, request n°76-13.718; Cass. com., 14 january 2004, n°01-02.877; Cass. com., 25 september 2019, n°18-18.657.

definition of the above-mentioned concept is contained in Article 3 of the Law n°85-98 of 25 January 1985 on the reorganization and judicial liquidation of companies in difficulty.

7. By *lex lata*, following the adoption of the law n°200-845 of 26 July 2005 on safeguarding companies in difficulty, the legislator has carried out reforms concerning prevention mechanisms and treatment of these. Therefore, the cessation of payments is a matter for the Commercial Code, in particular articles L. 621-1, L. 631-1, para. 1, L. 640-1, etc. This list cannot be exhaustive. More concretely, it follows that the solution of the Court of Cassation of 1978, referred to above,⁴ is legally enshrined in article 631-1, specifying that cessation of payments constitutes “the impossibility of meeting the liabilities with its available assets”.

8. Otherwise, cessation of payments is a legal definition.⁵ It does not refer to the accounting concept that can be calculated from the static elements of the balance sheet but consists of a simple comparison between the dynamic elements of the cash.⁶ However, its definition is presented in an accounting manner.⁷ It constitutes a “low balance sheet *ratio*” or “cash *ratio*”.⁸

In addition, the debtor is out of cash.⁹ More generally, it is applicable to preventive alternatives and collective proceedings.

However, there are exceptions to the cessation of payments.¹⁰ Since this concept is defined, its components, specifically the available assets and liabilities, suffer inappropriately from legal consecration.

B) The central elements of cessation of payments

Cessation of payments is not a unitary concept. It is made up of two criteria, as set out in the legal definition, namely available assets **(1)** and current liabilities **(2)**.

⁴ *Supra*, notes 2 et 3.

⁵ SAINTOURENS Bernard and SOINNE Bernard, “Le traitement judiciaire de l’entreprise”, in MENJUCQ Michel, SAINTOURENS Bernard, SOINNE Bernard (dir.), *Traité des procédures collectives*, LexisNexis, 3th edition, 2020, p. 295; DELENEUVILLE Jean-Michel, “Cessation des paiements”, RPC, n°2, may 2000, p. 53; MONTÉLAN Thierry, “L’état de cessation des paiements, clef de voûte des procédures collectives”, RPC, n°1, march 2001, p. 1.

⁶ CA de Toulouse, 2nd ch., sect. 1, 25 January 1999: JurisData, n°0440865, LexisNexis, RPC, n°2, may 2000, Étude, DELENEUVILLE Jean-Michel, *ibid*.

⁷ SAINTOURENS Bernard and SOINNE Bernard, “Le traitement judiciaire de l’entreprise”, MENJUCQ Michel, SAINTOURENS Bernard and SOINNE Bernard (eds.), *Traité des procédures collectives, op. cit.*, p. 286.

⁸ VIDAL Dominique and CESARE GIORGINI Giulio, *Cours des entreprises en difficulté*, Gualino, Éd. Lextenso, 2nd edition, Collection « Amphi LMD », 2016-2017, p. 268.

⁹ PÉROCHON Françoise, *Entreprises en difficulté*, LGDJ, 11th edition, Collection « Manuel », 2022, p. 270.

¹⁰ Monetary code, article L. 613-26: “By way of derogation from the provisions of article L. 631-1 of the French Commercial Code, credit institutions or financing companies that are not able to secure their payments immediately or at short notice shall be in a state of cessation of payments.”

1) The legal delimitation of available assets

Available assets remain a component of cessation of payments. Its definition **(a)** and indicators **(b)** merit particular attention.

a) Definition of available assets

9. The word “active” is derived from the term *activus, actus*¹¹, meaning valuable assets and values in cash or cash. In addition, the term “available” means “immediately usable”. The available asset therefore implies the liquidity of the debtor¹² and the availability¹³ as well as its investment security.¹⁴

Therefore, the own of available assets covers the positive *ratio* of cash (the sum of money, furniture and immovable property) that is achievable and accessible without delay, excluding any dispute.

b) The scope of the available asset

In order to delineate the perimeters of the available asset, the approach of the case law allows a schematic positive **(i)** and negative **(ii)** conception.

i) The constituent values of the available asset

10. It was considered that the available asset is the current account advance made by an associate,¹⁵ the cash offered by the executive to assist the company,¹⁶ the provisional credit balance,¹⁷ unblocked cash advances for which repayment is not requested.¹⁸ The same applies to the provision of a bank cheque until the expiry of the limitation period for bearer shares, where the certainty of payment makes the cheque an available asset.¹⁹

¹¹ CORNU Gérard, *Vocabulaire juridique*, PUF, 13th ed., Collection « Quadrige », december 2019, p. 23.

¹² PÉROCHON Françoise, *Entreprises en difficulté*, *op. cit.*, p. 272.

¹³ SAINT-ALARY-HOUIN Corinne, MONSÉRIÉ-BON Marie-Hélène and HOUIN-BRESSAND Caroline, *Droit des entreprises en difficulté*, LGDJ, Lextenso, 13th edition, Collection « Précis de Domat », 2022, p. 776.

¹⁴ DELATTE Christophe, “La notion de l’actif disponible au sens de l’article L. 621 devenu L. 631-1, alinéa 1 du Code de commerce”, LexisNexis, RPC, september 2007, p. 110.

¹⁵ Cass. com., 12 may 2009, n°08-13-471, F-D: BRDA, 2009, n°10, p. 6; LexisNexis, RPC, october 2009, p. 39, note SAINTOURENS Bernard.

¹⁶ Cass. com., 24 march 2004, FS-P+B: JurisData, n°2004-022980, LexisNexis, Fasc. 2155, APC, n°9, 21 may 2004, comm. 110, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

¹⁷ Cass. com., 7 february 2018, n°16-26404, LexisNexis, RPC, 2018, obs. SAINTOURENS B.

¹⁸ Cass. com., 16 november 2010, n°09-71.278, F-D: JurisData, n°2010-021622, LexisNexis, APC, n°2, 2011, n°33, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

¹⁹ CA Caen, 2nd ch. civ., and com., 24 march 2016, n°15/0207, LexisNexis, APC, n°9, 24 may 2016, comm. 115, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; Cass. com., 5 february 2013, n°11-28.194, F-D: JurisData, n°2013-001604, LexisNexis, RPC, october 2013, p. 24, obs. SAINTOURENS Bernard; Cass. com., 18 december 2007, n°06-16.350, FS-P+B: JurisData, n°2007-042003; LexisNexis, Fasc. 2155, 20 february 2008, n°3, comm. 36 and 39, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

Available assets also include listed securities and notes receivable if they are available in the very short term,²⁰ and the repayment of a loan that is not required.²¹

ii) Non-current assets

11. Case law has established that the debtor's unsold real estate is not available for sale.²² In the same vein, a business that has not yet been sold but has been on the market for three years does not constitute an available asset.²³ Furthermore, sales and earnings are not synonymous with available assets.²⁴ Available assets do not consist of an artificial²⁵ current account advance of the unpaid portion of the share capital, nor of a credit reserve likely to prevent the cessation of payments.²⁶ Proof of insufficient assets may result from an increase in liabilities.²⁷

2) Defining current liabilities

Determining current liabilities involves defining them (a), determining their decisive nature (b) and applying case law (c).

a) Definition of current liabilities

12. The term “current liabilities” is made up of two words: “passif” derives from *passivus*,²⁸ and “exigé” or “exigible”²⁹ (i.e. “to require”) derives from the Latin *exigere*. In simple terms, it's the negative *ratio* of the balance sheet. It's a combination of “required liabilities” and “non-required liabilities”.³⁰

²⁰ PÉROCHON Françoise, *Entreprises en difficulté*, *op. cit.*, p. 273.

²¹ Cass. com., 14 december 2022, n°21-17.706, FD, LexisNexis, RPC, march-april 2022, p. 16, note SAINTOURENS Bernard.

²² Cass. com., 17 june 2020, n°18-22.747, F-PB, Lextenso, Bull. Joly Entreprises en difficulté, APC, september-october 2020, p. 17, comm. MARTINEAU-BOURGNINAUD Véronique; Cass. com., 27 february 2007, n°06-10.170, F-P+B+R: JurisData, n°2007-037791, RPC, september 2007, p. 109, note DELATTE Christophe, and RPC, december 2007, comm. 221, obs. SAINTOURENS Bernard; D. 2020, 13.56, 2 july 2020; Rev. des sociétés, 507, 5 september 2020, note ROUSSEL GALLE Philippe.

²³ Cass. com., 15 february 2011, n°10-13.625, F-P+B: JurisData, n°2011-001726, LexisNexis, APC, n°6, 25 march 2011, comm. 98, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

²⁴ Cass. com., 26 March 2013, n°12-13.391, F-D, LexisNexis, APC, n°8, 3 may 2013, comm. 99, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

²⁵ Cass. com., 12 may 2009, n°08-12.505: JurisData, n°2009-04826; CA Caen, 2nd ch. civ. and com., 13 september 2018, n°16/03480, LexisNexis, APC, n°16, 14 october 2018, comm. 228, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence. Cash flow artificially maintained by advances on account of the parent company delays the characterization of the cessation of payments. (See Cass. com., 17 may 2011, n°10-30-425: JurisData, n°2011-009000, RPC, march-april 2012, p. 51 and following, obs. SAINTOURENS Bernard).

²⁶ Cass. com., 12 july 2011, n°10-19.604, F-D: JurisData, n°2011-014379, LexisNexis, APC, n°15, 20 september 2011, comm. 226, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

²⁷ Cass. com., 12 july 2011, n°10-19.604, F-D: JurisData, n°2011-014379, LexisNexis, APC, n°15, 20 september 2011, comm. 226, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

²⁸ CORNU Gérard, *Vocabulaire juridique*, *op. cit.*, p. 739.

²⁹ *Ibid.*, p. 431-432.

³⁰ BESSE Jean, « Réflexions critiques sur la formule “Passif exigible et exigé” », *op. cit.*, p. 39.

Current liabilities cover all non-litigious debts contracted by the debtor for business purposes, the repayment of which is immediately required by law.

b) The decisive nature of current liabilities

13. Current liabilities must be liquid, certain and due.³¹ The due and payable nature of a claim may result from its age.³² Payment schedules granted by creditors in no way detract from the fact that their debts were previously due and payable and cannot contradict the fact that payments have ceased.³³

c) The scope of the liability payable

The definition of liabilities can be understood as positive **(i)** or negative **(ii)**.

i) The receivables constituting the liabilities payable

14. The disputed claim must be challenged in accordance with a specific procedure.³⁴ Current liabilities consist of a tax debt not contested before the administrative judge³⁵ and the amount of a provisional condemnation in summary proceedings whose summary order has been confirmed and whose claim is not the subject of proceedings on the merits.³⁶ Lastly, the intervention of a third party to pay off liabilities has no impact on current liabilities.³⁷

ii) Receivables that do not constitute current liabilities

15. In order to take into account current liabilities, the court must determine whether or not the advances on the partners' current account were blocked, or whether their repayment was required³⁸. It has been ruled that in the event of opposition to a payment order, the claim in question cannot be included in current liabilities.³⁹ The French Supreme Court has consistently

³¹ Cass. com., 28 june 2017, n°16-10.025, FS-P+B+I: JurisData, n°2017-012578, LexisNexis, APC, n°15, 22 september 2017, § 227, obs. CAGNOLI Pierre; MONTÉLAN Thierry, "L'état de cessation des paiements, clef de voûte des procédures collectives", *op. cit.*, p. 2.

³² Cass. com., 26 March 2013, n°12-13.391, F-D, LexisNexis, APC, n°8, 3 may 2013, comm. 100, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

³³ CA Paris, 3rd ch. B, 20 november 1998: JurisData, n°023547, LexisNexis, Fasc. 2155, APC, n°5, 12 march 1999, comm. 63, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

³⁴ Cass. com., 11 april 2018, n°16-23.019, F-B+I: JurisData, n°2018-005809, LexisNexis, APC, n°9, 14 may 2018, comm. 120, obs. FIN-LANGER Laurence.

³⁵ *Idem*, p. 57 and 58, obs. SAINTOURENS Bernard.

³⁶ Cass. com., 16 january 2019, n°17-18450, F-PB, Lextenso, Bull. Joly Entreprises en difficulté, Act. des entreprises en difficulté, may-june 2019, p. 17 et seq., obs. MARTINEAU-BOURGNINAUD Véronique.

³⁷ Cass. com., 27 october 1998, JurisData, n°004071, LexisNexis, Fasc. 2155, APC, n°12, 4 december 1998, § 157, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

³⁸ Cass. com., 10 january 2012, n°11-10.018: JurisData, n°2012-000221, LexisNexis, APC, n°2, 3 february 2012, n°20, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

³⁹ CA Paris, 3th ch., 31 march 2009, n°08/18321: RJDA, 2009, n°761, RPC, october 2009, p. 41, obs. SAINTOURENS Bernard.

ruled that uncertain debts,⁴⁰ in this case disputed claims being appealed to the Court of Appeal, even if this decision is subject to provisional execution,⁴¹ do not constitute current liabilities.

This being the case, current liabilities should not be confused with liabilities due on the date of the judgment opening the judicial liquidation and liabilities made due as a result of the liquidation.⁴²

C) The legal characterization of cessation of payments

16. In addition to the judge's duty to establish the existence of a state of cessation of payments,⁴³ the decision characterizing the latter must be substantiated with regard to both available assets and current liabilities.⁴⁴ In addition, the situation of a subsidiary company must be assessed objectively and objectively. Furthermore, the situation of a subsidiary company must be objectively and autonomously assessed.⁴⁵ The fact that a company is dormant is not sufficient

⁴⁰ Cass. com., 9 december 2020, n°19-14.437, F-P+B: JurisData, n°2020-020170, LexisNexis, RPC, may-june 2021, p. 27, note SAINTOURENS Bernard; and Lextenso, Bull. Joly Entreprises en difficulté, APC, march-april 2021, p. 12, note MARTINEAU-BOURGNINAUD Véronique; Cass. com., 5 may 2015, n°14-11.381, F-D: JurisData, n°2015-010231, LexisNexis, APC, n°10, 10 june 2015, comm. 146, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; Cass. com., 13 april 2010, n°09-12.410, F-D: JurisData, n°2010-004015, APC, n°14, 17 september 2010, comm. 197, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; Cass. com., 9 february 2010, n°9-10.880, F-D: JurisData, n°2010-051546, LexisNexis, APC, n°5, 12 march 2010, § 71, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; Cass. com., 16 march 2010, n°9-12.539, F-P+B, LexisNexis, APC, n°7, 9 april 2010, § 97; Cass. com., 9 february 2010, n°9-10.880, F-D: JurisData, n°2010-051546, LexisNexis, APC, n°5, 12 march 2010, § 71, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; Cass. com., 9 february 2009, n°08-12.054; Cass. com., 9 february 2010, n°09-10.880, LexisNexis, RPC, august 2010, p. 46, note SAINTOURENS Bernard; Cass. com., 25 november 2008, n°07-20.972, F-D: JurisData, n°2008-045024, LexisNexis, APC, n°2, 2 february 2009, comm. 30, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; CA Paris, 18 february 1997: JurisData, n°020203, LexisNexis, RPC, n°1, p. 21, *in* JPC, Fasc. 2155, n°10, obs. CADIOU Maurice.

⁴¹ Cass. com., 13 may 2014, n°13-12.489, F-D: JurisData, n°2014-009789, LexisNexis, APC, n°10, 13 june 2014, 189, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; Cass. com., 22 november 2023, F-D: JurisData, n°2023-021108, LexisNexis, APC, n°20, 8 december 2023, n°259, note FIN-LANGER Laurence, GHANDOUR Bertile and PETIT Florence; Cass. com., 13 september 2023, n°22-10.211, F-D: JurisData, n°2023-015578, LexisNexis, APC, n°16, 6 october 2023, n°204, obs. FIN-LANGER Laurence, GHANDOUR Bertile and PETIT Florence; Cass. com., 2 march 2022, n°20-22.021, F-D: JurisData, n°2022-003065, LexisNexis, RPC, july-august 2022, p. 30-31, obs. SAINTOURENS Bernard.

⁴² Cass. com., 16 march 2010, n°08-15.963, F-D: JurisData, n°2010-002197, LexisNexis, Fasc. 2352, APC, n°8, 25 april 2010, § 114, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

⁴³ Cass. com., 22 march 2011, n°10-14.889, F-D: JurisData, n°20114394, LexisNexis, APC, n°9, may 2011, comm. 132, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

⁴⁴ Cass. com., 13 may 2014, n°13-12.489, F-D: JurisData, n°2014-009789, LexisNexis, APC, n°10, 13 june 2014, § 183, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; Cass. com., 25 november 2008, n°07-20.972, F-D: JurisData, n°2008-046024, LexisNexis, Fasc. 2155, APC, 2 february 2009, comm. 31, obs. REGNAUT-MOUTIER Corinne, VALLANSAN Jocelyne and CAGNOLI Pierre; Cass. com., 18 march 2008, n°06-20-749, F-D: JurisData, n°2008-043273, LexisNexis, Fasc. 2155, APC, n°7, 18 april 2008, § 107, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁴⁵ Cass. com., 7 january 2003, n°00-15.316: JurisData, n°2003-017226; Cass. com., 3 july 2012, n°11-18.026: JurisData, n°2012-15231; Cass. com., 15 november 2017, n°16-19.690, P+B+I: JurisData, n°2017-022848, RPC, mars-april 2018, p. 29-30, obs. SAINTOURENS Bernard.

to characterize the cessation of payments.⁴⁶ It does not therefore appear necessary to open insolvency proceedings.⁴⁷

17. To do so, the comparison of balance sheet items is not such as to characterize the state of cessation of payments.⁴⁸ Moreover, the deficit is not equivalent to⁴⁹ and does not suffice to characterize a cessation of payments.⁵⁰ It is established when the only existing asset is not available for a liability that is due.⁵¹ The Court of Cassation censures decisions of the judges of the case that do not specify the substance of the assets available on the day it decides.⁵² However, the cessation of payments is not characterized by the absence of activity and assets to meet the deadlines.⁵³

18. The state of cessation of payments can only be characterized by the existence of a certain, liquid and payable debt⁵⁴ whose all attempts to recover have proved unsuccessful.⁵⁵ On this point, if the liability is not in dispute, the cessation of payments is established by the absence of a claim on the liability.⁵⁶

19. Unpaid bills⁵⁷ or non-payment of debts⁵⁸ are not necessarily a feature of the cessation of payments status. The latter appears distinct from refusal of payment and must be demonstrated by the person requesting the opening of judicial reorganization.⁵⁹

⁴⁶ CA Toulouse, 2nd ch., 2nd sect., 14 january 1999, JurisData, n°041409, Fasc. 2155, APC, 16 november 1999, n°17, § 223, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁴⁷ CA Toulouse, 2nd ch., 2nd sect., 14 january 1999, JurisData, n°041409, Fasc. 2155, APC, 16 november 1999, n°17, comm. 223, note REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁴⁸ Cass. com., 2 february 1999, JurisData, n°000612, LexisNexis, Fasc. 2155, APC, 26 march 1999, comm. 76, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁴⁹ Cass. com., 17 october 2000, F-D: JurisData, n°006467; LexisNexis, Fasc. 2155 and 2910, APC, n°19, 8 december 2000, comm. 238, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁵⁰ Cass. com., 19 march 2002, F-D: JurisData, n°2002-013740, LexisNexis, Fasc. 2150, APC, 7 june 2002, n°120, note REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁵¹ Cass. com., 7 april 2004, F-D: JurisData, n°2004-023372, Fasc. 2155.

⁵² Cass. com., 10 february 2015, n°13-24.056, F-D: JurisData, n°2015-002362, LexisNexis, APC, n°6, 27 march 2015, comm. 84, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

⁵³ Cass. com., 17 september 2013, n°12-17.657, F-D: JurisData, n°2013-019853, LexisNexis, RPC, april 2014, p. 30, comm. SAINTOURENS Bernard.

⁵⁴ Cass. com., 14 march 2018, n°16-27.187, JurisData, n°2018-003678, LexisNexis, APC, n°8, 20 april 2018, comm. 106, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence; RPC, july-august 2018, comm. 132, note SAINTOURENS Bernard.

⁵⁵ Cass. com., 14 march 2018, n°16-27.187: JurisData, n°2018-003678, LexisNexis, RPC, july-august 2018, p. 56, obs. SAINTOURENS Bernard.

⁵⁶ Cass. com., 5 may 2015, n°14-11.706, F-D; and Cass. com., 5 may 2015, n°14-13.935, F-D, LexisNexis, APC, n°10, 10 june 2015, p. 2, comm. 147, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

⁵⁷ CA Dijon, ch. civ. B, 25 june 2002, JurisData, n°2002-179034, LexisNexis, Fasc. 2155, APC, 7 june 2002, n°120, note REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁵⁸ Cass. com., 18 march 2003, JurisData, n°2003-01857, Fasc. 2150, APC, 4 july 2003, n°154, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁵⁹ Cass. com., 23 november 1999, JurisData, n°004206, LexisNexis, Fasc. 2155, APC, n°1, 14 january 2000.

20. In the final analysis, cessation of payments is not deemed to have occurred where the debtor benefits from a credit reserve resulting from a bank loan which enables it to cover its outstanding debts.⁶⁰ *In fine*, this solution is enshrined in article L. 631-1 of the French Commercial Code.

II. The procedural qualification of cessation of payments

There are procedural obstacles to adapting proof of cessation of payments **(A)**, and the procedure for setting the date is complex and uncertain **(B)**.

A) The need to reorganize proof of cessation of payments

21. Proof of cessation of payments is governed by the French Commercial Code, the French Civil Code⁶¹ and the French Code of Civil Procedure. Moreover, the burden of proof may be confirmed by discovery **(1)**, and its adaptation to general principles comes up against procedural obstacles **(2)**.

1) The adjustment of the burden of proof in the case of cessation of payments

22. The Code of Civil Procedure applies to civil and commercial matters. Thus, on the basis of its articles 6 and 9, the parties are responsible for establishing the facts on which their claim is based. In collective proceedings, the burden of proof for cessation of payments rests primarily on the parties involved in the referral, including the debtor, the public prosecutor and creditors. It is settled case law that the burden of proof of cessation of payments must be borne by the applicant at the commencement of proceedings.⁶²

23. What about the preliminary investigation? It is worth noting the question of investigations carried out by the investigating judge into the debtor's cash flow problems for safeguard proceedings (C. com., article L. 621-1, para. 3) and for receivership and liquidation proceedings (C. com., article L. 631-7), raising the question of the balance between the parties as regards the burden of proof. This will strengthen the claims of creditors and the public prosecutor, clearly derogating from the principle of the burden of proof.

⁶⁰ Cass. com., 8 january 2002, F-D: JurisData, n°2002-012636, Fasc. 2155, LexisNexis, APC, n°68, 29 march 2002, note REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁶¹ MONTÉLAN Thierry, "L'état de cessation des paiements, clef de voûte des procédures collectives", *op. cit.*, p. 2.

⁶² Cass. com., 30 june 2009, Gaz. proc. coll., 2009, n°4, p. 3, Études, J. L. VALLENS, "La preuve de la cessation des paiements", RPC, 2009, p. 19.

24. Consequently, when the public prosecutor's office or creditors are behind the initiation of the receivership, the conclusions of the preliminary investigation should not be the arguments on which they base their claim for the opening of the procedure. In any event, it would seem necessary to preserve the debtor's rights with regard to the triggers of the proceedings. The debtor could be allowed to vigorously oppose discovery.

2) Adapting proof of cessation of payments to general principles

The absence of any real rules governing the cessation of payments should be emphasized, as this is the source of the inadequacy of the guiding principles governing the burden of proof,⁶³ which has an impact on the freedom of proof (a), the fairness of proof (b) and contradiction (c).

a) The principle of freedom of proof relating to the cessation of payments

25. Under article 1353 of the French Civil Code, the principle of freedom governs the demonstration of cessation of payments⁶⁴ in collective proceedings. *A fortiori*, the law does not prescribe *ad probationem* or *ad validitatem formalities*.

What about professional secrecy? Demonstrating the cessation of payments is free, but there are legal and judicial limits. For all intents and purposes, the court must preserve the debtor's confidential information. It must be kept out of the proceedings to prevent it from falling into the hands of the company's competitors, while respecting the fundamental freedoms of the debtor and the company as a legal entity, in accordance with article 6 of the European Convention on Human Rights.

b) The contradiction between the legality of evidence and the fairness of evidence

The information provided to the public prosecutor in insolvency proceedings by the economic and social committee (i), but also by the president of the court (ii), has procedural implications.

i) The limits of information provided to the public prosecutor with regard to the fairness of evidence

26. Members of the economic and social committee are entitled to report to the president of the court and to the public prosecutor “any fact revealing the cessation of payments by the debtor”,

⁶³ VALLENS Jean-Luc, “La preuve de la cessation des paiements”, LexisNexis, RPC, september-october 2009, p. 22.

⁶⁴ Dans le même sillage, VALLENS Jean-Luc, *ibid.*, p. 19.

in the context of reorganization (C. com., article L. 631-6) and judicial liquidation (C. com., article L. 640-6).

27. *Juris et de jure*, as a general observation, members of the economic and social committee are employees of the company. By authorizing them to report the cessation of payments to the public prosecutor's office without their employer's knowledge or consent, in this case the debtor is fundamentally breaching the general principle of good faith, a principle of public policy prescribed in article 1104 of the French Civil Code and article L. 1222-1 of the French Labor Code. This principle seems ineradicable.

28. It should be noted that, pursuant to article L. 2315-3, para. 2, members of the social and economic committee and union representatives “are bound by an obligation of discretion with regard to information of a confidential nature and presented as such by the employer”.

29. As a result, the loyalty of economic and social committee members to their employer would be seriously questionable. The legislator could extend to members of the economic and social committee the right to bring a case before the court if they hold evidence of the cessation of payments. It should be borne in mind that bringing a case before the court for the purposes of receivership or compulsory liquidation is not a debt collection action.

Furthermore, it is noteworthy that the legislator has struck a balance between informing the public prosecutor's office, in order to produce proof of the debtor's cessation of payments, and the principle of fair proof.

ii) The limits of information transmitted to the public prosecutor's office with regard to the secrecy of amicable proceedings

30. Article L. 631-3-1 of the French Commercial Code stipulates that: “When the president of the court is made aware of information showing that the debtor is in a state of cessation of payments, the president shall inform the public prosecutor's office by means of a note setting out the facts that justify referring the matter to the court”.

31. This raises the question of whether the confidentiality of amicable proceedings is preserved vis-à-vis the public prosecutor. In fact, the debtor may request the appointment of a *ad hoc* trustee under article L. 611-3 of the French Commercial Code, or the opening of a conciliation procedure under article L. 611-4 of the same Code. In the event of difficulties, he or she transmits all relevant information to the Chairman to ensure the success of the preventive

mechanism. He may request these preventive treatments even if he has been in cessation of payments for less than 45 days prior to the opening of a conciliation procedure. Conversely, the president of the court communicates this information to the public prosecutor without the debtor's knowledge or consent. Would the debtor trust the amicable procedures (conciliation and mandate *ad hoc*) in the knowledge that the information would be passed on to the public prosecutor's office? Communication between the president and the public prosecutor objectively hinders the effectiveness of amicable procedures.

c) The adversarial principle resulting from the declaration of cessation of payments

32. The problem with filing for bankruptcy is equality of arms and equality of context.⁶⁵ Under articles 16 and 431 of the CPC, all evidence of cessation of payments must be subject to adversarial debate. Respect for this principle applies to all parties involved in the proceedings.

However, article 75 of order no. 2008-1345 of December 18, 2008, introduced a mechanism enabling debtors to contest the existence of cessation of payments. Article L. 631-1 of the French Commercial Code states that “a debtor who establishes that the credit reserves or moratoria he enjoys from his creditors enable him to meet his current liabilities with his available assets is not in cessation of payments”.

In truth, proof of cessation of payments is a question of equality of arms in adversarial proceedings. The current system is unfavorable to the debtor. The characterization of the cessation of payments can take place between the debtor and the public prosecutor, the creditors, the administrator, the trustee and the representative of the economic and social committee. This shows that the litigation framework is difficult to apply to insolvency proceedings.

The real rule of evidence must be adapted. Additional defences must be given to the debtor in order to defend his rights under the right to a fair trial, in accordance with Article 6 of the ECHR.

B) Determination *ratione temporis* of the cessation of payments

The cessation of payments must be fixed **(1)**, with the possibility of deferral **(2)** and open to the exercise of remedies **(3)**.

⁶⁵ THEVENOT Christophe, “Le secret des affaires et la confidentialité des procédures”, RPC, february 2015, p. 73.

1) The *ab initio* fixing of the date of cessation of payments in collective proceedings

33. The determination of the date of cessation of payments is a matter for the court, after hearing the debtor's observations. This date is determined on the day the court makes its decision.⁶⁶ It is set under the conditions of article L. 631-8 for receivership. In the light of this article, it is applicable to judicial liquidation (C. com., article L. 641-1-IV). Moreover, it is enforceable *erga omnes partes*.⁶⁷

However, if the date of cessation of payments is not fixed, it is “deemed to have occurred on the date of the judgment opening the proceedings” (C. com., articles L. 631-8, al. 1, and L. 641-1-IV)

34. The date of cessation of payments, in both reorganization and liquidation, takes place under identical conditions. Wouldn't it be useful to extend the date used in receivership to liquidation, in the event of conversion? This would have the effect of standardizing the date of cessation of payments. A legislative provision to this effect would be welcome.

35. On the other hand, the court cannot set the date beyond 18 months from the date of the judgment ruling on the opening of the business (C. com., articles L. 638, para. 2 RJ, and 641-1 IV LJ). Accordingly, a decision by a court of appeal overturning a liquidation judgment for the recovery of a debtor “may not use a cessation of payments date that is more than 18 months earlier”.⁶⁸

2) Postponing the date of cessation of payments

36. The debtor, administrator or agent may request a postponement of the date on which the cessation of payments is determined (C. com., article L. 631-8, para. 3) for purposes of judicial reorganization. This applies to the treatment of judicial liquidation.⁶⁹ The debtor subject to collective proceedings has a right of defence against the action for postponement of the date on which he ceases his payments.⁷⁰

⁶⁶ Cass. com., 20 may 1997, n°95-10.185.

⁶⁷ Cass. com., 13 february 2007, n°05-13.526, JurisData, n°2007-037368; Cass. com., 19 march 2002, F-D: JurisData, n°2002-013740, Fasc. 2155 and 2502, LexisNexis, APC, 20 march 2007, n°5; comm. 120, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁶⁸ Cass. com., 12 january 2022, n°2022, n°20-16.394: JurisData, n°2022-000278, LexisNexis, APC, n°4, 18 february 2022, comm. 44, obs. FIN-LANGER Laurence, GHANDOUR Bertile and PETIT Florence.

⁶⁹ C. com., article L. 640-1.

⁷⁰ Cass. com., 19 may 2015, n°14-14258, F-D, Lextenso, Bull. Joly Entreprises en difficulté, APC, september-october 2015, p. 303-304, obs. FAVARIO Thierry.

37. In order to comply, the writ of postponement must mention the capacity of the addressee.⁷¹ The postponement or maintenance of the date relating to the determination of the cessation of payments is a matter for the judge to decide.⁷² The postponement of the date of cessation of payments may be effected by petition.⁷³ The request to modify the date of cessation of payments must be presented to the court one year after the opening judgment (C. com., article L. 631-8).

38. The date of cessation of payments is provisional. This is the reason why it may be deferred, but it cannot exceed an earlier date of 18 months from the judgment of initiation (C. com., article L. 631-8). It may not be postponed until a date prior to the conciliation agreement.

39. By way of derogation, in the case of fraud, it may be extended beyond a date prior to the amicable agreement, that is, more than 18 months. The initiation of the amicable settlement procedure does not preclude the postponement of the date of cessation of payments.⁷⁴

3) The appeal against the decision to postpone the date of cessation of payments

40. Since the texts are silent, recourse is governed by ordinary law.⁷⁵ The debtor has a legitimate interest in contesting the date set by the court.⁷⁶ Secondly, it has been ruled that the former directors and creditors of a debtor company have an interest in lodging third-party objections to the judgment postponing the date of the company's cessation of payments, as soon as it is published in the BODACC.⁷⁷ The request to postpone the date of cessation of payments may be initiated by the public prosecutor, the trustee or the administrator. However, the commissaire à l'exécution du plan is not empowered to act in this matter.⁷⁸

41. The inadmissibility or rejection of an application to postpone the date of cessation of payments, even if *res judicata*, does not preclude a new application based on article L. 521,

⁷¹ Cass. com., 3 february 2021, n°19-16426, F-D, Lextenso, Bull. Joly Entreprises en difficulté, APC, may-june 2021, p. 24, obs. MARTINEAU-BOURGNINAUD Véronique.

⁷² Cass. com., 3 april 2019, n°17-283359, Lextenso, Bull. Joly Entreprises en difficulté, APC, july-august 2019, p. 16, obs. MARTINEAU-BOURGNINAUD Véronique.

⁷³ COURTIER Jean-Loup, "Les modalités procédurales de la demande de report de la date de cessation des paiements", RPC, Étude, n°4, 1999, p. 139.

⁷⁴ Cass. com., 14 may 2002, FS-P: JurisData, n°2002-014350, LexisNexis, Fasc. 2155, APC, 5 july 2002, n°120, obs. REGNAUT-MOUTIER Corinne and VALLANSAN Jocelyne.

⁷⁵ PÉROCHON Françoise, *Entreprises en difficulté*, op. cit., p. 301.

⁷⁶ CA Paris, Pôle 5, 8th ch. February 23, 2010, n°09/12128, LexisNexis, RPC, december 2010, p. 25, obs. SAINTOURENS Bernard. With regard to liquidation: "The debtor subject to collective proceedings has a right of its own to defend the action tending to postpone the date of cessation of payments, the nature of which is contentious"; Cass. com., may 19, 2015, n°14-14258, F-D, Lextenso, Bull. Joly Entreprises en difficulté, APC, september-october 2015, p. 301 et seq., obs. FAVARIO Thierry.

⁷⁷ Cass. com., june 17, 2020, appeal no. 18-25.262.

⁷⁸ Cass. com., 4 october 2005, n°x 04-10.432, JurisData, n°2005-030078.

paragraph 1 of the French Commercial Code.⁷⁹ A decision to open conciliation proceedings does not preclude an action to postpone the date of cessation of payments.⁸⁰ Consequently, the admissibility of the deferral action is not subject to the prior verification of claims.⁸¹

42. Litigation against decisions to postpone the determination of the date of cessation of payments is abundant. As a matter of principle, it is essential to clearly define the recourse against these decisions (actors, channels) in insolvency proceedings. They cannot be based exclusively on ordinary law.

§ 2. Cessation of payments as a pivotal but flexible concept

43. The cessation of payments remains a concept omnipresent at the opening, execution and termination of collective proceedings,⁸² making it a key element of the overall arrangement or even the keystone,⁸³ the essential anchor point⁸⁴ or cornerstone⁸⁵ in failure procedures **(I)**. However, since the 2005 reform, it has been relaxed on a consistent basis **(II)**.

I. Cessation of payments, a key element in collective proceedings⁸⁶

Cessation of payments has an impact on safeguard **(A)**, reorganization **(B)** and liquidation **(C)** by the court.

A) Cessation of payments as an exclusive and cardinal criterion of safeguarding

⁷⁹ Cass. com., 29 september 2021, n°20-10.105, F-B: JurisData, n°2021-015221, APC, n°18, 17 november 2021, n°248, note FIN-LANGER Laurence, GHANDOUR Bertile and PETIT Florence; Cass. com., 8 july 2003, F-D: JurisData, n°2003-020049.

⁸⁰ Cass. com., 22 may 2013, n°12-18.509, F-P+B: JurisData, n°2013-009956, LexisNexis, APC, n°10, 14 june 2013, comm. 131, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

⁸¹ C. com., 3 octobre 2018, n°17-14.759.

⁸² VOINOT Denis, *Procédures collectives*, LGDJ, Lextenso edition, Collection “Cours”, 2013, p. 45; SAINT-ALARY-HOUIN Corinne, MONSÉRIÉ-BON Marie-Hélène and HOUIN-BRESSAND Caroline, *Droit des entreprises en difficulté*, LGDJ, Lextenso edition 13, 2022, p. 773; ROUSSEL GALLE Philippe, “Une seule date de cessation des paiements”, RPC, december 2014, p. 1; SAINTOURENS Bernard, “Conditions d'ouverture, Ouverture des procédures : Conditions de fond”, RPC, 1 march 2006, p. 43.

⁸³ VALLANSAN Jocelyne, *Guide des procédures collectives*, LexisNexis, Collection “Guide”, 3rd edition, 2022/2023, p. 7; TEBOUL Georges, “La cessation des paiements : un critère malmené mais vivace”, RPC, april 2015, p. 17; VALLANSAN Jocelyne, “Que reste-t-il de la cessation des paiements?”, LexisNexis, RPC, june 2012, p. 79.

⁸⁴ SAINTOURENS Bernard and VALIERGUE Julien, “La notion et l'utilité de la cessation des paiements”, in ZENNAKI Dalila and SAINTOURENS Bernard (eds.), *Droit des entreprises en difficulté : Perfectionnement juridique et efficacité économique*, Presses universitaires de Bordeaux, Collection “Droit”, 2015, p. 32; SAINTOURENS Bernard, “La cessation des paiements, hier, aujourd'hui, demain”, RPC, 2016, p. 56.

⁸⁵ JOUIN Cécile, ROUSSEAU Vincent and SAUTONIE-LAGUIONIE Laura, “Peut-on en finir avec le critère de la cessation des paiements?”, LexisNexis, RPC, no. 1, january-february 2023, p. 9.

⁸⁶ VOINOT Denis, *Collective Proceedings*, *op. cit.*, p. 45; SAINT-ALARY-HOUIN Corinne, and *alae*, *Droit des entreprises en difficulté*, *op. cit.*, p. 773; ROUSSEL GALLE Philippe, “One single cessation of payments date”, *op. cit.*, p. 1; SAINTOURENS Bernard, “Conditions for opening, Initiation of proceedings: Substantive conditions”, *op. cit.*, p. 43.

De jure, only the debtor in good standing is entitled to apply for the opening of the safeguard (1). However, the cessation of payments leads to its conversion (2).

1) The exclusion of payment cessation in the safeguard

44. Admission to the common law safeguard requires no cessation of payments (C. com., article L. 620-1, para. 1). Furthermore, this negative condition is of public policy. The cessation of payments prevents the opening of the safeguard.⁸⁷

For the rest, the interest of the backup is indisputable. The legislator's desire to make the conditions for access to the common law safeguard more flexible must be approved. In addition, the legislator is free to consider relaxing the criterion of cessation of payments upon admission.

2) Cessation of payments as a criterion for conversion to safeguard status

45. Conversion is part of a series of developments in the procedure, acting as a bridge between procedures in which cessation of payments remains the trigger.⁸⁸ Its purpose is to dissuade debtors acting in good faith.⁸⁹ It constitutes a safeguard against any circumvention or misuse of the safeguard procedure (a) and liquidation (b).

a) Conversion of the safeguard procedure into judicial reorganization

46. The initiative of conversion shall be taken by the administrator, the agent, the public prosecutor or *ex officio* to the court,⁹⁰ the creditors.⁹¹ The conversion of the safeguard into judicial reorganization is operable in the case of a cessation of payments (i), but also in its absence (ii). However, it may be converted into liquidation due to cessation of payments (iii). Therefore, the decision is subject to appeal (iv).

i) The conversion of the safeguard into a settlement resulting from the cessation of payments

⁸⁷ SAINT-ALARY-HOUIN Corinne, MONSÈRIÉ-BON Marie-Hélène and HOUIN-BRESSAND Caroline, *Droit des entreprises en difficulté*, *op. cit.*, p. 273.

⁸⁸ MASTRULLO Thomas, "La conversion de la sauvegarde en redressement judiciaire", LexisNexis, RPC, june 2008, p. 42 et seq.

⁸⁹ LIENHARD Alain, *Procédure collective*, Ed. Delmas, 9th edition, Collection « Encyclopédie Delmas », 2020-2021, p. 153.

⁹⁰ Cons. const., janyary 16, 2015, n°2014-438 QPC (Cass. com. Return on Reference, october 21, 2014, no. 14-40.038), JurisData, no. 2015-000746, LexisNexis, APC, no. 4, 27 february 2015, comm. 51, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

⁹¹ Cass. com., 26 february 2020, n°18-18680, FS-PB, Lextenso, Bull. Joly Entreprises en difficulté, APC, May-June 2020, p. 19-20, note VINCENT Catherine. The creditor must justify a certain, liquid and payable claim under penalty of inadmissibility, "when the cessation of payments leads to the resolution, plan and opening of a procedure for reorganization or judicial liquidation of the debtor".

47. The conversion of the safeguard into a settlement resulting from the cessation of payments takes place under several assumptions. First, the procedure may be opened in error.⁹² If the cessation of payments was discovered at the time of the judgment, the court converts the safeguard into judicial reorganization (C. com., article L. 621-12). This conversion implies that the state of cessation of payments, as recorded on the day of the opening of the procedure, continues thereafter.⁹³ Secondly, during the execution of the plan, if the court finds that payments have been discontinued, after notice from the public prosecutor, it converts the reserve into “a judicial reorganization proceeding or, if the reorganization is manifestly impossible, a judicial liquidation proceeding” (C. com., article L. 626-27, para. 3). The slide effect, appropriately removed from the backup, resurfaces here: in case of cessation of payments, adjustment after adjustment is not worth.⁹⁴

Furthermore, the judgment ordering the resolution of the plan puts an end to the safeguard procedure (C. com., article L. 626-27, para. 4).

ii) The conversion of the safeguard into a recovery, excluding the cessation of payments

48. The court may order the conversion of the sauvegarde proceedings into reorganization in two distinct cases, where the debtor is not in cessation of payments.

On the one hand, the adoption of a sauvegarde plan is manifestly impossible and the closure of the proceedings would lead, in a certain manner and within a short period of time, to the cessation of payments (C. com., article L. 622-10, al. 3). On the other hand, the court may refuse to approve the plan if it does not offer serious prospects of avoiding the cessation of payments and ensuring continued employment (C. com., article L. 626-30). It should be emphasized that if the debtor is not in a state of cessation of payments, a court-ordered reorganization is imposed.

49. In the light of articles L. 622-10 and L. 622-12 of the French Commercial Code, the judgment recording the cessation of payments is a conversion judgment⁹⁵ and not an opening

⁹² PÉROCHON Françoise, *Entreprises en difficulté*, *op. cit.*, p. 774.

⁹³ CA Orléans, 28 June 2012, n°11/03096 and n°11/003291, LexisNexis, APC, n°13, 27 July 2012, § 190, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

⁹⁴ PÉROCHON Françoise, *Entreprises en difficulté*, *op. cit.*, p. 812.

⁹⁵ MASTRULLO Thomas, “La conversion de la sauvegarde en redressement judiciaire”, *op. cit.* p. 45.

judgment.⁹⁶ It does not constitute a new procedure,⁹⁷ as the observation period of a receivership falls within that of a safeguard.⁹⁸

But what about the conditions of application of the chosen procedure? It would be wise, in the interests of the latter and of the law, in this case reorganization or liquidation, to observe compliance with the conditions of implementation.

iii) Conversion from safeguard to liquidation on cessation of payments

50. As with the conversion of safeguard proceedings into judicial recovery, the 2008 Order specifies that at any time during the observation period, at the request of anybody involved in the proceedings or *ex officio*, if the debtor is unable to meet its liabilities with the assets available, the court may convert safeguard proceedings into liquidation judiciaire.⁹⁹ Conversion of the sauvegarde into liquidation requires a double condition: cessation of payments and impossibility of recovery.¹⁰⁰

51. Moreover, the Court of Cassation states that “since the cessation of payments has already been established at the time the judicial reorganisation is opened, the reference made by this text to Article L. 640-1 of the same code can only be made to the condition that there is a manifest impossibility of reorganisation”.¹⁰¹ In the same wake, the Court notes that there is no need to declare cessation of payments¹⁰² and we are now from safeguard to liquidation¹⁰³ without a declaration of the above mentioned concept.

52. The fulfilment of the conditions for the implementation of the liquidation is a pressing issue. The texts provide for the passage of the safeguard to judicial reorganization but do not specify more concretely if the conditions already verified must be re-established. If so, what is the relevance of assessing a condition already verified? The legislator could provide clarifications.

⁹⁶ PÉROCHON Françoise, *Entreprises en difficulté*, *op. cit.*, p. 772.

⁹⁷ VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence, “Cessation des paiements - Rôle et notion”, LexisNexis, APC, n°1, January 17, 2009, § 9.

⁹⁸ MASTRULLO Thomas, “La conversion de la sauvegarde en redressement judiciaire”, *op. cit.* p. 48.

⁹⁹ C. com., article L. 631-15, al. 3.

¹⁰⁰ CA Aix-en-Provence, 8th Ch. A, 22 march 2018, n°17/12703, LexisNexis, RPC, july-august 2018, p. 64, SAINTOURENS Bernard.

¹⁰¹ Cass. com., 23 april 2013, n°12-17.189, FS-P+B: JurisData, n°2013-007935, LexisNexis, APC, n°9, 24 may 2013, comm. 116, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

¹⁰² Cass. com., 28 february 2018, n°16-19.422: JurisData, n°2018-002729, RPC, march-april 2018, p. 1, obs. ROUSSEL GALLE Philippe.

¹⁰³ ROUSSEL GALLE Philippe, “Être en cessation des paiements sans l’être tout en l’étant”, RPC, march-april 2018, p. 1.

In our view, the conversion of the safeguard into a judicial reorganization or liquidation procedure requires a new examination of the conditions, in the interest of the law.

iv) Appeals against the decision on the conversion of the safeguard

53. The judgment converting the safeguard procedure into judicial reorganization is served on persons entitled to appeal, excluding the public prosecutor (article R. 621-27 of C. com.). The bodies entitled to exercise the remedies are the debtor, creditors, the representative of the social and economic committee and the public prosecutor (C. com., article L. 661-1 4). Is the list exhaustive? It is necessary to grant the agent and the administrator access to this remedy.

B) Cessation of payments: a trigger and not a conversion factor in the adjustment

Judicial reorganization is a procedure with cessation of payments as the criterion for commencement **(1)** and not its conversion **(2)**.

1) Cessation of payments: an *ab initio* trigger for recovery¹⁰⁴

The court may order the debtor **(a)**, the public prosecutor **(b)** or the creditors **(c)**.

a) Initiation of the relief at the initiative of the debtor

The prescribed obligation to declare a cessation of debt **(i)** is accompanied by sanctions **(ii)**.

i) The requirement of a declaration of cessation of payments

54. The debtor must apply for the commencement of the relief to the competent court (commercial or judicial). This statement is more commonly known as “filing for bankruptcy”. The director of a public limited company does not have authority to make the declaration of cessation of payments himself on the grounds that this decision belongs to the board of directors.¹⁰⁵

55. The declaration must be made “no later than 45 days after the cessation of payments if, within that period, he has not requested the opening of a conciliation procedure” (article L. 631-

¹⁰⁴ VALLANSAN Jocelyne, “Cause d’ouverture des procédures de défaillance”, RPC, june 2012, p. 78.

¹⁰⁵ Cass. com., 16 february 1999, JurisData, no. 000795, Fasc. 2155.

4 of the Code).¹⁰⁶ The debtor, bound by the obligation to report, is not relieved by the issue of a summons for this purpose by a creditor.¹⁰⁷

56. The late declaration of cessation of payments, although a management error, cannot have contributed to the occurrence of a liability noted before the expiry of the legal period of 45 days.¹⁰⁸ Failure to make such a declaration within the required time shall result in a prohibition from managing.¹⁰⁹ Article L. 631-1, s. 1 states that “this condition shall be assessed, if applicable, solely for the assets incurred by the professional activity or activities”.

ii) Towards a flexibility of the sanctions for the failure to declare cessation of payments

57. The debtor in an advanced stage of conciliation will use the conciliation procedure over the declaration of cessation of payments. In perspective, the latter tends to lose its sanctioning character in view of its decline. Future reforms may confirm this approach.

Like the debtor, other actors have a right to trigger the opening of the recovery.

b) Initiation of the remedy at the initiative of the public prosecutor

58. The Public Prosecutor’s request must be substantiated (C. com., article R. 631-4). In the case of deceased persons whose estates are in the course of professional activities, the court may be seized by the public prosecutor or by creditors within one year from the date of death (C. com., articles L. 631-3 and R. 631-34).¹¹⁰

c) Initiation of the reorganization at the initiative of the creditor

59. The summons of the creditor shall specify the nature and amount of the claim and contain any evidence that may characterize the debtor’s cessation of payments (C. com., article R. 631-1). In the absence of conciliation, the creditor may be served with the opening of a judicial reorganisation procedure, without any distinction being made as to the nature of the claim (C. com., article L. 631-5, para. 2). The summons of a creditor, the nature, amount of the claim and

¹⁰⁶ For the judicial liquidation, see C. com., article L. 640-4.

¹⁰⁷ Cass. com., 9 june 2022, no. 21-11.083, F-D: JurisData, no. 2022-9009470, RPC, march-april 2022, p. 17-18, obs. SAINTOURENS Bernard.

¹⁰⁸ Cass. com., 17 june 2020, n°18-11737, D. 2020, PB, rapport VALLANSAN Jocelyne, rapporteur Mme VAISSETTE; Lextenso, Bull. Joly Entreprises en difficulté, APC, september-october 2021, p. 39-40, note MARTINEAU-BOURGNINAUD Véronique.

¹⁰⁹ C. com., L. 653-8.

¹¹⁰ This option is available to the public prosecutor, creditors and heirs in the case of judicial liquidation, in accordance with article L. 640-3, para. 2 of the Commercial code.

any evidence may characterize the debtor's cessation of payments.¹¹¹ It must comply with the requirements of the Code of Civil Procedure under penalty of nullity, more particularly article 56. The assignment of the debtor for the purpose of correction is not a payment action and shall not be used to pressure the reluctant debtor.¹¹²

60. By means of a lawsuit, the creditor may initiate the proceedings by subpoenaing the debtor in the event of death (C. com., article L. 631-3, para. 2) and in the absence of conciliation (C. com., article L. 631-5, para. 2). The application must specify the nature and amount of its claim as well as the evidence characterizing the cessation of payments (C. com., article R. 631-2, para. 1).

61. In the case of a farm, the creditor must apply to the president of the court for an order to initiate conciliation prior to the summons (C. com., article L. 631-5, para. 6). The applicant must attach to his application a certificate issued by the registry pursuant to section 351-2 of the Rural Code (C. com., article R. 631-2, para. 1).

2) Cessation of payments, a relative criterion for conversion of the reorganization into liquidation

62. Order 2008-1345 of 18 December 2008 provides for the conversion of the reorganisation into a judicial liquidation. It gives the court the option of ordering a “partial cessation of activity” or of declaring a “liquidation” (C. com., article L. 631-15-II). This provision has been referred to the Constitutional Council.¹¹³ The aforementioned article is declared in conformity with the Constitution.¹¹⁴

63. It is settled case law that Regardless of the circumstances in which the judicial recovery proceedings were opened, the conversion of the latter into a liquidation procedure [...] does not require the establishment of the state of cessation of payments, only the manifest impossibility of a remedy to be characterized.”¹¹⁵

¹¹¹ C. com., article R. 631-2.

¹¹² DELENEUVILLE Jean-Michel, “L'exécution provisoire : l'appel et la publicité des jugements rendus en matière de redressement et de liquidation judiciaires”, LexisNexis, RPC, march 1999, p. 2.

¹¹³ Cass. com., 8 april 2014, n°14-40.011, QPC, F-D: JurisData, n°2014-007137, LexisNexis, APC, n°8, 13 May 2014, comm. 153, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

¹¹⁴ Cons. const., 6 june 2014, DC no. 2014-399, JurisData no. 2014-012345.

¹¹⁵ Cass. com., 28 february 2018, n°15-19422, Lextenso, Bull. Joly Entreprises en difficulté, APC, may-june 2018, p. 13-15, note LE MESLE Laurent; F-PBI: JurisData, n°2018-002729, RPC, n°3, may-june 2018, p. 11, note PETIT Florent.

It is clear that liquidation does not depend only on a significant liability, but also on the existence or otherwise of a real possibility of recovery¹¹⁶. It also depends on the sovereign judgement of the judges of the case.¹¹⁷ The judgment of conversion into liquidation requires the opinion of the public prosecutor and not a visa.¹¹⁸

C) Cessation of payments: an *ab initio* criterion for liquidation and professional recovery

64. Any debtor who is in default may apply directly for the opening of a judicial liquidation (C. com., article L. 640-1). The same applies to the occupational rehabilitation.¹¹⁹ The application must be made no later than 45 days after the cessation of payments (C. com., article L. 640-4). It must be assessed before the applicant is admitted to liquidation or to a professional recovery. Furthermore, “When the state of cessation of payments is established, the judge who receives an application for the opening of a collective proceeding cannot reject it because of the mobile nature of the debtor, who is legally obliged to declare this state.”¹²⁰

II. Flexibility of the cessation of payments in the procedures

65. As it stands, is the rate of cessation of payments declining? It no longer appears as the dividing line between preventive and collective proceedings since 2005.¹²¹ Its rigidity is gradually abandoned by both the legislator and the case law. The tolerance of the debtor’s cessation of payments to direct access to preventive devices **(A)** and accelerated backup **(B)** would be screened.

A) Flexibility of the cessation of payments in amicable proceedings

66. The condition before cessation of payments of the safeguard is identical to the mechanisms of prevention: the *ad hoc* mandate (C. com., article L. 611-3) and conciliation (C. com., article 611-4).¹²²

¹¹⁶ CA Rouen, 2nd ch., 28 may 2009, n°08/03485, JurisData, no°2009-004444; CA Paris, 3rd ch., sect. B, 26 march 2009, n°08/19748: JurisData, n°2009-004180; Cass. com., 30 june 2009, n°08-18.123, F-D: JurisData, n°2009-004180; Cass. com., 30 june 2009, n°08-16.096, F-D: JurisData, n°2009-049182, LexisNexis, Fasc. 2155, APC, n°14, 18 september 2009, § 212, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

¹¹⁷ Cass. com., 30 june 2009, n°08-18.123, F-D: JurisData, n°2009-004180; Cass. com., 30 june 2009, n°08-16.096, F-D: JurisData, n°2009-049182, LexisNexis, Fasc. 2155, APC, n°14, 18 september 2009, § 212, obs. VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

¹¹⁸ Cass. com., 24 june 2014, n°13-14.690, FS-P+B, note VALLANSAN Jocelyne, CAGNOLI Pierre and FIN-LANGER Laurence.

¹¹⁹ C. com., article L. 640-1.

¹²⁰ Cass. com., 3 july 2012, no. 11-18.026, LexisNexis, RPC, february 2013, p. 29, obs. SAINTOURENS Bernard.

¹²¹ ROUSSEL GALLE Philippe, “To be in cessation of payments without being in cessation of payments”, *op. cit.* p. 1.

¹²² In the same vein, see SAINTOURENS Bernard, “Conditions of Opening, Initiation of Proceedings: Substantive Conditions,” *op. cit.* p. 44.

On the other hand, in the case of conciliation, if the company is in default, the claimant may request that the conciliation be opened provided that the time limit does not exceed 45 days (C. com., article L. 611-4).

Very quickly, regarding the appointment of the *ad hoc* mandate, article L. 611-3 of the Commercial Code does not clearly specify whether the debtor in default for less than 45 days can request it. However, the issue is highly debated. Given the similarity between the *ad hoc* mandate and conciliation, recourse to such a procedure is possible unless the legislator decides otherwise.

67. During the conciliation, should not the business owner who has ceased to pay make the declaration required by article L. 631-1 of the Commercial Code? According to Professor Françoise Pérochon, in the guise of *lege ferenda*, when a company is at an advanced stage of conciliation, it must have every chance of recovery.¹²³ The application for conciliation is *a fortiori* an obstacle to the opening of the reorganisation and, possibly, the judicial liquidation (C. com., articles L. 631-4 and 640-4). This approach is largely justified. It is useful to emphasize preventive procedures over curative procedures on the grounds that an old adage says “prevention is better than cure”. This is the basic principle of the salaries of firms in difficulty.

B) The flexibility of payment cessation in the accelerated backup

68. *A priori*, it should be made clear that the common law safeguard is distinct from the accelerated safeguard. Like the 2005 law, Order n°2021-1193 of 15 September 2021¹²⁴ provides for the accelerated safeguard procedure.¹²⁵ It introduces a new concept of the usefulness of the notion of cessation of payments in collective proceedings for the first time.

In short, it follows from article L. 628-1, paragraph 5 of the French Commercial Code that the fact that the debtor is in default does not prevent admission to accelerated recovery if this situation is earlier than 45 days before the conciliation was opened.

In fact, if the admission of the accelerated safeguard procedure is tolerated when the existence of a cessation of payments is recent, this does not prevent us from wondering whether the

¹²³ PÉROCHON Françoise, *Entreprises en difficulté*, *op. cit.*, p. 313.

¹²⁴The history of the accelerated backup is based on the law n°2010-1249 of 22 October 2010 on bank regularisation. This text was used as a toolkit for the Order 2014-326 of 12 March 2014 on reform of the prevention of corporate difficulties and collective proceedings. Order n°2021-1193 of 15 September 2021 provides for the standardization of accelerated safeguard procedures. It is important to note that the above-mentioned order disconnects the requirement of no cessation of payments from the accelerated safeguard.

¹²⁵ The accelerated backup procedure has been in effect since October 1, 2021.

starting point can be known with precision, but also to question the taking into account of the 45 or 46 days period.¹²⁶ Legal clarifications would be very seriously desirable for this purpose.

69. More significantly, the admission of the company in default at the opening of the conciliation for accelerated backup must be approved on the grounds that it is compatible with the legislators will as regards the application of this concept flexibly. In addition, it is compatible with the will of the legislator, in this case, as regards the continuation of the activity of the company, the maintenance of employment and the discharge of liabilities.¹²⁷

70. It is interesting to note that there have been some serious objections. It follows that the accelerated safeguard procedure and the cessation of payments do not seem compatible, merely reinforcing a preferential regime.¹²⁸ Therefore, it does not seem to be consistent with collective proceedings.¹²⁹ It will not escape our reflection that this inconsistency is apparent with the safeguard of common law.

By *lex ferenda*, in view of the architecture of safeguard procedures, it is desirable that the legislator should standardize their condition of access on the issue of the debtor's cessation of payments which does not exceed 45 days from the opening of the conciliation.

¹²⁶ DEGENHARDT J. Ernst, "Accelerated Safeguard in Cessation of Payments: Undue Favours for Natural Persons", Lextenso, Bull. Joly Entreprises en Difficulté, APC, january-february 2015, p. 63.

¹²⁷ C. com., articles L. 621-1, al. 2, L. 631-1, al. 3.

¹²⁸ DEGENHARDT J. Ernst, *op. cit.*, p. 63.

¹²⁹ *Ibid.*

Conclusion

71. More classically, being rigid, the cessation of payments is constantly evolving.¹³⁰ It is particularly stable, but as reforms and the diversity of procedures have evolved, its role has changed considerably towards more flexible solutions.¹³¹ Its legibility in the procedures is delicate. In light of the diagnosis made, it is essential that, because of its flexible nature, it be better adapted to the procedural framework in order to safeguard the interests of the debtor, creditors, justice and the general interest. In addition to the consecration of the definition of its criteria *stricto sensu* (1), its unification both with regard to the system of evidence (2) and the fixing of its date (3), as well as its conversion (4) in *extenso* are unavoidable.

1) The necessary legal definition of the elements of the notion of cessation of payments

72. The 2005 reform explicitly defined cessation of payments. Therefore, neither the Commercial Code nor any other law defines its decisive criteria. It is very seriously desirable that the terms of available assets and liabilities be defined by the legislator through the *acquis de la jurisprudence* and the opinions of the doctrine.

2) The desirable unification of proof of cessation of payments

73. The proof of cessation of payments in collective proceedings has special characteristics compared to the demonstration of evidence of common law. It is highly significant that, in view of this particularity, it is useful to refocus the evidentiary aspects under a heading of the Commercial Code (the legislative or regulatory part) for greater readability. It is also useful to explicitly refer to the provisions of the Civil Code and the Code of Civil Procedure.

3) The unification of the determination of the date of cessation of payments

74. For all intents and purposes, it would be commendable to have a legal regime for the setting and deferral of the cessation date covering aspects of the conversion from safeguard to other procedures, the opening *ab initio* of the judicial reorganization and liquidation, including the

¹³⁰ JACQUEMONT André, and *alii*, *Droit des entreprises en difficulté*, LexisNexis, 12th edition, Manuel Collection, september 2022, p. 146; VOINOT Denis, *Collective Proceedings*, *op. cit.*, p. 72; SAINTOURENS Bernard and VALIERGUE Julien, "La notion et l'utilité de la cessation des paiements", *op. cit.*, p. 40.

¹³¹ PÉROCHON Françoise, *Entreprises en difficulté*, *op. cit.*, p. 281.

professional recovery. Only standardization could streamline the office of judge and restrict litigation to that end.

4) The need to clarify the conversion regimes for collective proceedings

75. The conversion of the safeguard into a judicial reorganization or liquidation is legally prescribed by law. It would be advisable to specify the legal regime of each converted procedure: the nature of the conversion judgment, the conditions for application as regards the procedure chosen.

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