INSOL Europe/LexisPSL joint project on the implementation analysis of the Directive (EU) 2019/1023 in the EU Member States

Austria

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Restructuring & Insolvency analysis: This article looks at how Austria has implemented Directive (EU) 2019/1023 as part of the Joint Project between INSOL Europe and LexisPSL to track implementation.

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INSOL Europe/LexisNexis research on implementation of the EU Directive

LexisPSL are working with INSOL Europe on a joint project to obtain articles from the INSOL Europe membership and Country Coordinators showing how EU Member States have implemented Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (the EU Directive).

A consolidated table appears at Practice Note: INSOL Europe/LexisPSL Joint Project on EU Harmonisation Directive 2019/1023: consolidated table.

As always, you should contact local lawyers in the relevant jurisdiction to check the current measures in force and the impact of any particular circumstances or nuances of your case.

Question 1: When did/will the new restructuring law come into force? What is/are the name of the new proceedings which comply with the EU Directive?

The EU Directive was implemented in Austria by the '*Restrukturierungs- und Insolvenz-Richtlinien-Umsetzungsgesetz—RIRU*G' (Federal Law Gazette I 2021/147) which introduced the Restructuring Code (*Restrukturierungsordnung, 'ReO'*). The Restructuring Code came into force on 17 July 2021.

The Restructuring Code complements the existing regime, in particular the Insolvency Code (*Insolvenzordnung*). The Insolvency Code provides, in a nutshell, for rehabilitation proceedings without self-administration (*Sanierungsverfahren ohne Eigenverwaltung*), rehabilitation proceedings with self-administration (*Sanierungsverfahren mit Eigenverwaltung*) and bankruptcy proceedings (*Konkursverfahren*). These proceedings can serve to restructure but also to wind up/liquidate a business.

The Restructuring Code provides for 'regular' proceedings, details of which are further described in the answers to the further questions hereafter.

Besides the regular proceedings, the Restructuring Code provides for the following:

- European restructuring proceedings:
    - section 44 of the Restructuring Code offers the so-called European restructuring proceedings ('*Europäisches Restrukturierungsverfahren*') which is designed to benefit from the applicability of the EU Recast Regulation on Insolvency 2015/848

      Key aspects include:
        - the initiation of the proceedings is announced publicly upon request of the debtor
        - European restructuring proceedings are published in an online restructuring edict (other than regular proceedings or simplified proceedings (see hereafter)) which are non-disclosed

   - the European restructuring proceeding is part of Annex A of the EU Recast Regulation on Insolvency 2015/848, which therefore applies to this type of procedure under the Restructuring Code. Therefore, European restructuring proceedings can be opened in Austria if the debtor has its COMI in Austria. Automatic mutual recognition of (foreign) insolvency court decisions is ensured through the mechanisms of the EU Recast Regulation on Insolvency 2015/848
   - the debtor can ask the court to publish a request to the creditors to file their claims (*Forderungsanmeldung*). Affected creditors who do not file their claim in time may not participate in the proceedings, yet the restructuring plan can be binding on them
   - a stay of enforcement actions may be extended to all creditors which is only permissible within this type of procedure (in relation to the stay see also under Question 6)

- Simplified restructuring proceedings:
  - section 45 of the Restructuring Code introduces (quite innovative) so-called simplified restructuring proceedings (*Vereinfachtes Restrukturierungsverfahren*)

    Key aspects include:
    - the procedure is available if only financial creditors are affected, which may be interpreted in a broad way and may include any claims with a financial element, such as supply loans, for example. For such scenarios the simplified restructuring proceedings aim to provide a 'fast-track'
    - instead of the voting on a restructuring plan, the debtor shall present a restructuring agreement signed by the necessary creditor majorities. The majority requirements are higher than in normal proceedings as 75% of the claims in value in every creditor class must agree to the plan (as for regular majorities see Question 8). A cross-class cramdown is not possible in simplified proceedings
    - the proceedings are always debtor in possession, no restructuring expert can be appointed
    - safeguards such as the appropriateness of the class formation, or the best-interest test, shall be ensured through an expert opinion confirming that all statutory requirements are met
    - simplified proceedings do not allow for a stay (see Question 6)
    - this leaner process is expected to allow proceedings to begin and become legally effective within only a few weeks, due to the court being less involved and being put into a position to sanction the plan quickly
    - as with the Insolvency Code, there are no specific provisions for enterprise groups in the Restructuring Code. A court supported 'group restructuring', therefore, still requires separate restructuring proceedings for every affected group member

Question 2: Is court approval automatically required? Is court involvement possible during the course of the proceedings? (for e.g. to rule on short notice on conflicts regarding classes of creditors with voting rights, etc…)

The Restructuring Code does not provide for restructuring alternatives without court involvement, ie court approval of the restructuring plan is required in any event.

Court involvement depends mainly on the proceedings chosen (in particular whether simplified restructuring proceedings are pursued or not (see Question 1). In the regular proceedings and the European restructuring proceedings court involvement can occur at various stages of the proceedings, for instance when appointing a restructuring expert (*Restrukturierungsbeauftragter*) (see Question 5), deciding on disputes on voting rights, approving certain transactions (see Question 15) or granting a stay of enforcement of actions (*Voll-streckungssperre*) (see Question 6).

Question 3: What are the entry criteria (ie must insolvency be proved)? Could you please define the entry criteria under your national legislation?

The proceedings under the Restructuring Code have the aim to allow companies and entrepreneurs to restructure in order to prevent illiquidity and ensure the viability of the business (Section 1 (1) of the Restructuring Code).

Any proceedings under the Restructuring Code can only be initiated by the debtor (natural or legal persons); certain businesses—for example financial institutions or insurance companies as well as non-entrepreneurs are excluded.

Creditors are not entitled to apply for proceedings under the Restructuring Code or to propose an (alternative) restructuring plan. Creditors can (only) apply for the opening for proceedings under the Insolvency Code.

The Restructuring Code provides for some formal and material entry requirements, most importantly:

- the application requires the debtor to present (although not necessarily evidence or prove) its likelihood of insolvency (*wahrscheinliche Insolvenz*)
- a debtor is to be considered likely insolvent if the debtor's viability would be threatened without restructuring, in particular in case of imminent illiquidity
- likelihood of insolvency is (rebuttably) assumed to be in place if the crisis indicators known from the Austrian Business Reorganization Act (*Unternehmensreorganisationsgesetz*) are met, ie the equity ratio (*Eigenmittelquote*) is less than 8% and the notional debt repayment period (*fiktive Schuldentilgungsdauer*) is more than 15†years
- the Restructuring Code does not provide for an explicit viability test as an entry requirement. However, the debtor must (already when filing for the proceedings) present a fully prepared restructuring plan including evidence on the viability of the debtor or at least a restructuring concept showing that the viability of the debtor can be achieved
- finally, the application for the opening of restructuring proceedings under the Restructuring Code is, in any case impermissible if the debtor is illiquid. The liquidity of the debtor for at least the following 90 days of the proceedings must be presented by the debtor in the initial application through a liquidity plan (*Finanzplan*)

In relation to entering into proceedings, below are important points to consider:

- the court can reject the application only if the likelihood of insolvency or viability or liquidity is obviously not met (the barrier is arguably rather low in practice)
- in case of imminent illiquidity a debtor would also have the option to apply for rehabilitation proceedings under the Insolvency Code
- a debtor who is not illiquid, but over-indebted (*¸berschuldet*) within the meaning of the Insolvency Code (and hence being materially insolvent) could still choose to apply for a Restructuring Code-proceeding, provided that such proceedings can eliminate the over-indebtedness

Preparing the restructuring plan requires quite in-depth analysis, among others, in relation to intended financing, creditor class-formation/affected creditors, valuation of assets, proposed measures (and duration), an explanation as to why such measures will enable the restructuring and a comparison of the scenario in relation to insolvency proceedings (for the purpose of the best interest of creditors test).

Question 4: Can foreign companies use the process?

The jurisdiction for Restructuring Code-proceedings follows the rules for insolvency proceedings (Section 4 of the Restructuring Code, in connection with Section 63 of the Insolvency Code). This rule determines the jurisdiction within Austria. Whether it also determines the international jurisdiction is not clear yet.

Insofar as the EU Recast Regulation on Insolvency 2015/848 applies (ie in relation to European restructuring proceedings, see before under Question 1) the COMI (within the meaning of the European Insolvency Regulation 2015) is relevant.

The EU Recast Regulation on Insolvency 2015/848 is, however, not applicable to regular restructuring proceedings or simplified restructuring proceedings due to their confidentiality. One view is that Brussels I (Recast) would apply in such cases. The opposite view denies the applicability of the Brussels I (Recast) and argues that international jurisdiction is based on Austrian autonomous law. In the latter case, international jurisdiction of Austrian courts is primarily given if the debtor operates its business in Austria, but under certain circumstances the existence of an Austrian branch or, if this is not the case, assets of a debtor being located in Austria could be sufficient to establish jurisdiction (Section 27a of the Austrian '*Jurisdiktionsnorm'* in connection with section 63 of the Insolvency Code).

Question 5: Does the debtor (ie company's management) remain in possession or is an insolvency practitioner (or any other professional, in that case could you please specify) automatically appointed?

As a general rule the debtor shall stay in possession. There are still several exceptions to this rule as (i) certain tasks or responsibilities can be transferred to a court appointed restructuring expert (*Restrukturierungsbeauftragter*) or (ii) the court can decide that certain measures are only allowed if the court or the restructuring expert consents to them.

The appointment of a restructuring expert is mandatory:

- to support the debtor as well as the creditors in the negotiations and preparations of the restructuring plan if one of the requirements in Article 5 (3) of the EU Directive is met (the provisions are identically implemented in Section 9 (1) of the Restructuring Code), in brief, therefore, in connection with a stay of enforcement of actions (*Vollstreckungssperre*), a cross class cramdown or if the debtor or the majority of creditors apply for such an appointment
- if there are circumstances which lead to the expectation that the debtor staying in possession may lead to disadvantages to the creditors. In particular, if the debtor (i) violates duties to collaborate and communicate, (ii) acts to the detriment of the creditors, (iii) the debtor or a member of its board of directors is subject to criminal proceedings related to business operations, (iv) the information in the liquidity plan must be tested in the interests of the creditors or (v) the debtor does not pay liabilities incurred after the initiation of the proceedings

The court may appoint a restructuring expert if required: (i) to examine whether to approve an interim or new financing, (ii) for a report about the expected results of an alternative insolvency proceeding, (iii) in case of restrictions of the debtor in possession or (iv) to review creditor claims which have been contested.

Overall, the exceptions of the debtor in possession concept are more extensive than pursuant to Article 5 (3) of the EU Directive.

The selection of the expert lies with the court and neither the debtor nor creditors have a formal right to influence the selection process.

Question 6: Is there any moratorium on claims to protect the debtor during the process? What is the minimum and maximum length of the stay?

Section 19 of the Restructuring Code provides the debtor with the possibility to apply for a stay of enforcement of actions (*Vollstreckungssperre*). The stay is not permissible if it is not necessary to achieve the restructuring goal, not suitable to support the negotiations on the restructuring plan, or if the debtor is illiquid.

The stay can focus on individual creditors as well as creditor classes, who in any case must be informed about the stay. If certain higher requirements are met, secured creditors can also be subject to the stay. On the other hand, creditors whose claims cannot be part of the restructuring plan, eg employees' claims, are not subject to a stay.

A general stay is only possible in the European restructuring proceeding and therefore requires publicity of the proceedings (see Question 1). For a simplified restructuring proceeding, a stay is not possible (see Question 1).

The initial duration of the stay may not exceed three months. Upon application of the debtor, or the restructuring expert, the stay can be extended, or a new stay can be granted, as long as it does not exceed a total duration of six months.

In the context of the moratorium it shall be noted that the proceedings also involve an 'insolvency stay' for the insolvency trigger of over-indebtedness. The debtor's duty as well as the creditors' right to file for insolvency where there is illiquidity remain untouched.

Furthermore, it is worthwhile to note that essential executory contracts of the debtor are protected so that creditors subject to this protection shall not be entitled to withhold performance or terminate, accelerate or in any other way modify such contracts to the detriment of the debtor solely because of debts not paid by the debtor deriving from the time prior to the stay.

Question 7: Are creditors placed into classes for voting purposes? How are 'affected creditors' defined under your legislation?

Section 29 of the Restructuring Code provides a mandatory and conclusive list of classes to be formed (if existing). Such classes are:

- secured creditors
- unsecured creditors
- bondholders
- vulnerable creditors (particularly such with claims of less than EUR 10.000), and
- subordinated creditors

'Affected creditors' are (existing) creditors whose claims are to be directly and bindingly reduced or deferred or amended in relation to (re) payment terms by the restructuring plan. This in turn means that only those claims can be amended directly and bindingly by the restructuring plan which can be assigned to one of the creditor classes.

Within classes, the principal of equal treatment of creditors applies. Furthermore, the class formation must be appropriate (*sachgemäß*). It is impermissible to form further classes of creditors within the existing classes (eg by splitting the unsecured creditors into classes of 'financial creditors' and 'landlords').

SME debtors can choose whether to follow the above rules or whether to present a restructuring plan without creditor classes.

Question 8: What is the voting threshold to approve the restructuring?

Voting on the restructuring plan is made in a court hearing to be scheduled 30 to 60 days after the debtor presented the plan to the court.

The plan is adopted by the creditors, if in every creditor class: (i) the simple majority in number and (ii) a majority of at least 75 % in value (both calculated based on the creditors present at the hearing) vote in favour of the plan. If one or more creditor classes dissent, there is still the possibility to secure their consent via a cross-class cramdown (see Question 12).

The vote of the affected creditors is not the final step in the proceedings, but the court has to sanction the restructuring plan. The court must, inter alia, examine whether the statutory requirements such as the aforementioned majorities or the requirements for the class formation are met, whether the equal treatment of creditors within every class was complied with and whether the prohibition of special benefits (*Sonderbegns Sonderbegünstigung*) granted to individual creditors in connection with the restructuring plan was complied with and whether none of the statutory grounds for refusal (*Versagungsgründe*) applies; such statutory grounds for refusal concern, for example, the fact that the plan is not suitable to ensure the viability of the business, the non-existence of likelihood of insolvency or the existence of illiquidity of the debtor.

The best interests of creditors test (*Kriterium des Gläubigerinteresses*) is a further important confirmation requirement but must only be examined by the court upon application of a dissenting creditor. The test is defined very similar to the EU Directive, stating that a dissenting creditor shall not be treated worse than in the next best alternative scenario. This scenario can be a rehabilitation plan (*Sanierungsplan*) under the Insolvency Code, the sale of the entire business or the liquidation in an insolvency proceeding.

Question 9: Can shareholders be bound?

Shareholders are not 'affected creditors' and are not bound by the restructuring plan. This also means that the Restructuring Code does not provide for the option of a debt-to-equity swap against the will of the shareholders.

In relation to shareholders, it must be noted, that on the other hand the Restructuring Code in Section 37 mostly replicates Article 12 and recital 57 of the EU Directive stating that shareholders shall not be allowed to unreasonably prevent or create obstacles to the adoption, confirmation and implementation of a restructuring plan. At the same time, it is stated that, if the restructuring plan provides measures which require the consent of the shareholders, the provisions of corporate law must be respected. Only if the plan does not interfere with the legal or economic position (*rechtliche oder wirtschaftliche Stellung*) of the shareholder, can the court be asked to override the consent of non-consenting shareholders. The concept of court override of internal consents is new to Austrian insolvency laws and carries some uncertainty in relation to its scope, full requirements and enforceabilty.

Question 10: How are secured creditors treated?

Secured creditors can be included in the plan. The debtor (if it is not a small to medium-sized enterprise 'SME') has to form a creditor class for secured creditors, if they are to be bound (see also before under Question 7); they are to be included in this class (only) with the secured amount of the claim.

Security granted by third parties is not affected and can also not be included in the plan against the will of the secured creditor. However, as a general rule, it must be noted that the debtor still only has to pay once, meaning that payment of the agreed restructuring plan dividend by the debtor to 'its' creditor usually also releases the debtor from recourse claims towards third-party guarantors, pledgors etc.

Question 11: How are employees treated?

Claims of employees are excluded from restructuring proceedings (Section 3 (1) of the Restructuring Code) and the rights of employees under individual or collective agreements under labour law cannot be affected by the restructuring proceedings or the restructuring plan (Section 43 of the Restructuring Code). The debtor has to inform its employees' representatives about the proceedings.

Question 12: Can certain (holdout) creditors be crammed down? Is the absolute priority rule applied?

If the required majority is not reached in every class, the Restructuring Code allows for a cross-class cramdown (*klassen¸bergreifender Cramdown*). A plan, therefore, can still be confirmed if (i) the majority of classes including the secured creditors or the majority of the 'in the money' classes voted in favour of the plan and (ii) dissenting creditor classes are not treated worse than those of the same ranking and treated better than subordinated classes.

The Austrian legislator explicitly implemented the relative priority rule (and not the absolute priority rule).

For simplified proceedings (see Question 1) a cross-class cram down is not possible.

Question 13: Can onerous contracts be disclaimed? Are there any restrictions on ipso facto clauses?

The termination or amendment of (onerous) operational and other contracts cannot be amended by way of the restructuring plan but still follow the general rules of contract law.

Ipso facto clauses are unenforceable according to Section 26 (3) of the Restructuring Code. Although this provision is included in the fifth Section of the Restructuring Code overall dealing with the stay, the impermissibility of ipso facto clauses applies notwithstanding whether a stay was granted to the relevant contractual party or whether a stay was granted at all. It applies to all types of contracts and creditors (except for the types listed in Section 26 (4) of the Restructuring Code implementing the list also included in Article 7 (6) of the EU Directive).

Question 14: Will the new procedure be listed in Annex A of the EU Recast Regulation on Insolvency 2015/848? If not, how will it be recognised in other countries?

The European restructuring procedure (see Question 1) is listed in Annex A of EU Recast Regulation on Insolvency 2015/848. The regular proceedings and the simplified proceedings are not.

The recognition of confidential restructuring proceedings in the EU is neither addressed in the Restructuring Code nor in the EU Directive; similar to the international jurisdiction (see Question 4), the applicability of Brussels I (recast) comes into question. At the moment, there is a tendency in Austrian literature to argue that confidential restructuring proceedings cannot fall within the scope of Brussels I (recast) based on the exception of Article 1 (2) lit b of EU Recast Regulation on Insolvency 2015/848. As a result, recognition would depend on autonomous Austrian law. Until decided by the courts, significant uncertainty remains in confidential restructurings with cross-border implications in that regard.

Question 15: Are new money or other arrangements granted any protection/priority (eg DIP finance)?

Interim and new financings can be included in the restructuring plan. However, this does require the consent of the financier. There is no possibility to force or cramdown new financiers.

The Austrian legislator aimed to make new or interim financing more attractive by providing certain avoidance protection in case of a later insolvency of the debtor. However, this protection was made in a very restricted way, making it doubtful whether this aim will be achieved.

Question 16: How long should the process take (roughly)?

So far, there is little information on this process in practice. As aforementioned, a vote on the restructuring plan is to be held 30 to 60 days after it has been provided to court. Generally, therefore, the overall duration of the proceedings can be estimated to be (in a best case scenario) 2–3 months (not including preparation time prior to the application).

For simplified proceedings (see Question 1) the timeline is expected to be much shorter.

Question 17: How much is the process likely to cost (roughly)?

So far, there is little information on this process in practice. It is not possible to give a general cost estimate, as there is a risk of citing misleading figures. The costs depend very much on the individual case, the type of proceedings pursued, whether a restructuring expert is appointed, etc. In usual restructuring cases, a lot of preparatory work with experts is required. There may be an expectation that the costs for small cases may be too high in order to make the proceedings attractive for SMEs. Compared to the rehabilitation proceedings under the Insolvency Code, expectations are that the costs should not be higher, but might rather be the same or even lower.