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

France

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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 text transposing the EU Directive entered into force on 1 October 2021 (Ordinance n∞ 2021-1193 of 15 September 2021, art. 73). The transposition text does not create a new proceeding but implements the recommendations of the EU Directive into the current proceedings: safeguard (*sauvegarde*), accelerated safeguard (*sauvegarde accélérée*) and judicial reorganisation (*redressement judiciaire*).

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

Court approval is required in the following cases:

- the opening of safeguard proceedings, to check the level of difficulties of the debtor and the absence of suspension of payments (C com, art L 621-1)
- the approval of a safeguard plan or of a judicial reorganisation plan (C com, art L 626-31, L 628-8 and L 631-19)
- the authorisation of new financing (C com, art L 622-17, 2∞)
- the authorisation of the disposal of assets (C com, art L 622-7, II)

and, if classes of affected parties exist:

- challenges relating to the formation of those classes (C com, art L 626-30, V)
- disputes relating to the conditions of approval of the plan (C com, art L 626-32)

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

For safeguard proceedings, the relevant criterion is the existence of financial difficulties which may lead to the cessation of payments; the criterion has to be checked by the commercial court (C com, art L 620-1).

For judicial reorganisation proceedings, there are two cumulative criteria, namely a state of cessation of payments and the possibility of recovery (C com, art L 631-1).

The cessation of payments is defined by the insufficiency of available assets and reserves that would allow the debtor to meet the liabilities due (C com, art L 631-1).

Question 4: Can foreign companies use the process?

A foreign company can benefit from preventive or insolvency proceedings if it has an establishment in France (C com, art R 600-1).

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?

The debtor remains in control of the business in the context of a safeguard or of a judicial reorganisation (C com, art L 622-1, L 622-3 and L 631-12). In judicial liquidation, the debtor is divested in favor of a judicial practitioner, the court-appointed liquidator (C com, art L 641-9 and L 641-10).

In all cases a judicial practitioner is appointed to defend the interests of the creditors (C com, art L 621-4 and L 622-20).

Within the framework of safeguard or judicial reorganisation, a court-appointed administrator is only mandatorily appointed for companies reaching certain thresholds: more than 20 employees and more than €3m of turnover (C com, art L 621-4 and R 621-11).

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?

In insolvency proceedings (safeguard, judicial reorganisation or judicial liquidation), the opening judgment stops all enforcement procedures and individual lawsuits aiming at a payment (C com, art L 622-21). In a preventive proceeding (conciliation), the provisional suspension of proceedings can be ordered by the commercial judge for the duration of the negotiation; the conciliation cannot last more than four months and, if necessary, an additional month (C com, art L 611-10-1 and L 611-7).

In safeguard proceedings, the duration of the observation period is a maximum of 12 months (C com, art L 621-3 and R 621-9).

In judicial reorganisation proceedings, the observation period is a maximum of 18 months (C com, art L 631-7).

If an accelerated safeguard proceeding is opened following a conciliation, its duration is limited to two months (with a maximum of four months) (C com, art L 626-8).

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

The constitution of classes of affected parties is mandatory for:

- companies of significant size (250 employees and €20m in turnover—or €40m in turnover)

- for parent companies which, together with their subsidiaries, reach these same thresholds, and
- for companies benefiting from an accelerated safeguard if the conciliation has not led to an agreement (C com, art L 626-29, R 626-52 and L 628-1)

The affected creditors or, more broadly, the affected parties are the creditors whose claims are prior to the opening of the proceedings and the holders of capital whose rights are affected by a draft plan. Affected Creditors who cannot be affected by a plan are employees, the 'Wage guarantee Fund (AGS)' for sums paid to employees, holders of maintenance claims and holders of small claims of a maximum of €500 (C com, art L 626-30, and R 626-34).

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

A percentage of two thirds of the amount of the claims is provided for the vote of the affected parties assigned in classes. If classes are not constituted, the same percentage is required (C com, art L 626-30-2).

Question 9: Can shareholders be bound?

The shareholders are bound by the rule of cross-class cram-down and by the rule of absolute priority, retained by French law, at the time of the vote (C com, art L 626-31).

Question 10: How are secured creditors treated?

The creditors holding security interests are grouped in at least one class of affected parties (C com, art L 626-30, III). If the plan is not adopted by a majority of classes, it can be approved by the court if at least one class of secured creditors has voted in favor of it and another class has also voted in the same way (C com, art L 626-32).

Question 11: How are employees treated?

Employees may be affected by a restructuring plan due to job cuts in the context of judicial reorganisation proceedings. The draft plans are presented to the employee representatives who may present observations (C com, art L 631-13 and L 631-19, III). However, their claims cannot be affected by a plan (C com, art L 626-30, IV; see above Question 7).

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

The application of the absolute priority rule makes it possible to make a plan opposable to all if the majority of the classes have not voted in favor of it under certain conditions: the agreement of a majority of classes including at least one class of creditors holding securities or any other class having a higher rank than the unsecured creditors, or, failing that, by a class which would not be entitled to any payment in the event of a judicial liquidation (C com, art L 626-32).

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

Contracts are pursued by the debtor and by the court-appointed administrator. During the proceedings, only the court-appointed administrator may decide to terminate them. Claims for termination indemnities must be included in the liabilities as claims prior to the opening judgment. An automatic termination clause of a contract is not enforceable (C com, art L 622-13).

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

Safeguard proceedings are already listed in Annex A of Regulation (EU) 2015/848, EU Recast Regulation on Insolvency, and are recognised in other Member States pursuant to this Regulation. The same applies to the accelerated safeguard opened after a conciliation.

Conciliation proceedings, on the other hand, which are confidential, are not listed into Annex A and are not automatically recognised in the other Member States. They are recognised under the Private International Insolvency law of each Member State where such recognition is sought (for example, for the recognition of conciliation proceedings in the UK under the Cross-Border Insolvency Regulations 2006, SI 2006/1030, [2021] EWHC 1029 (Comm) (23 April 2021)).

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

A payment privilege is granted to creditors for financial contributions provided to the debtor during the observation period and for those provided to the debtor for the execution of a plan (C com, art L 622-17 and L 626-10, 3∞).

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

Accelerated safeguard proceedings are necessarily brief, as the plans have been prepared during the conciliation phase. Their maximum duration is two months, or four months maximum (C com, art L 626-8).

Safeguard proceedings (limited by law to 12 months) generally require about six to eight months (C com, art L 621-3 and R 621-9).

Judicial reorganisation proceedings (limited by law to 18 months) generally require between eight months and one year. In this context, creditors can present an alternative reorganisation plan to the one proposed by the debtor (C com, art L 631-19, I).

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

The cost of insolvency proceedings cannot be estimated. It includes the eventual costs of an expertise of value (between €5000 and €15,000), and the fees of the conciliator. These fees are not regulated by law but must be described in a detailed statement attached to the amicable agreement (C com, art R 611-39-1) and are subject to the agreement of the President of the competent court.

The remuneration of court-appointed administrators and judicial practitioners is regulated by a scale (C com, art R 663-3 to R 663-13 for the court-appointed administrator; C com, art R 663-14 to R 663-17 for the commissioner for the execution of the plan; C com, art R 663-18 to R 663-40-4 for the judicial practitioners and the court-appointed liquidator, and C com, art R 663-41 to R 663-50 for the court-appointed liquidator for impecunious cases).