

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

## **Hungary**

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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?**

July 2022. The Hungarian Restructuring Act (HRA) was passed by the Parliament in Spring 2021 and was published on 3 June 2021.

The names of the new proceedings are 'szerkezetátalakítási eljárás' (restructuring proceedings) and 'nyilvános szerkezetátalakítási eljárás' (public restructuring proceedings).

#### **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...)**

Yes, the court opens the restructuring proceedings at the request of the debtor. Further important competencies of the court include: approval, appointment and discharge of the restructuring practitioner; ordering and extending stay of individual enforcement actions; supervising the classification of creditors' claims by the debtor; approval of the restructuring plan.

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

The debtor must be in the state of 'likelihood of insolvency'. The HRA defines 'likelihood of insolvency' as follows: 'a situation in which there are reasonable grounds for believing that the debtor will be unable to meet their outstanding payment obligations when they fall due, without taking further measures'.

The explanatory memorandum to the HRA suggests that it was necessary to introduce a new concept by which the possibility and necessity of restructuring can be judged. As with the concept of imminent insolvency in the Hungarian Insolvency Act (a concept comparable to Section 214 of the English [Insolvency Act 1986](#)), the likelihood of insolvency cannot be defined in an exact way, either. However, it is important to note that, in contrast to imminent insolvency, the concept of likelihood of insolvency does not require that the debtor's directors foresee (or with due diligence should foresee) that the debtor will foreseeably be unable to meet its debts when they fall due. In the context of the likelihood of insolvency, it is necessary that there are reasonable grounds for believing that the debtor will subsequently default.

Recital 28 to the EU Directive also underlines that the scope of preventive restructuring frameworks provided for by this Directive to situations in which debtors face non-financial difficulties, provided that such difficulties give rise to a real and serious threat to a debtor's actual or future ability to pay its debts as they fall due. This may be the case, for example, where the debtor has lost a contract which is of key importance to it. The likelihood of insolvency may be established by a deterioration in the debtor's financial situation, a foreseeable or actual change in market conditions, or even by difficulties in its operations which need to be addressed in order to maintain its viability and operational capacity.

Creditors are allowed to object that the debtor is in the state of likelihood of insolvency. In that case the court decides whether or not this entry criterium is met.

**Question 4: Can foreign companies use the process?**

The scope of the HRA includes companies (debtors) with a registered office or COMI situated in Hungary.

**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 appointment/approval of the restructuring practitioner is not automatic but there are several scenarios when it is mandatory and we expect that in most of the cases a practitioner is going to be involved.

**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?**

Yes there is. There is no minimum length. The maximum length is four months but it can be extended up to 12 months.

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

Yes, the HRA sets up four classes: (1) secured claims, (2) claims arising in connection to economic activity, (3) other claims, (4) subordinated claims.

Affected creditors are those creditors whose claims or interests are directly affected by the restructuring plan.

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

A restructuring plan shall be deemed to be approved if it obtains (i) the support of a numerical majority of all the affected creditors with recognised or uncontested claims in each creditor class and (ii) a majority of the votes in proportion to the total number of votes that may be cast by the affected creditors in the creditor class.

Note that different rules apply for micro, small and medium-sized enterprises and cross-class cram-down.

**Question 9: Can shareholders be bound?**

No, they cannot.

**Question 10: How are secured creditors treated?**

- the pledged asset of the debtor may not be sold without the written permission of the lien holder (secured creditor)
- the secured creditor may request the approval or appointment of the restructuring practitioner
- secured creditors have their own voting class
- interim financing and other restructuring related transaction are protected only if the secured creditors approved (with some exceptions).

**Question 11: How are employees treated?**

- the representatives of the employees shall have access to the debtor's business secrets and other private information and documents only to the extent necessary for the exercise of their rights and the fulfilment of their obligations, and shall be bound by a confidentiality undertaking to preserve such information and documents
- the representatives of the employees are provided with relevant and up-to-date information on the availability of the early warning tools and on the restructuring process and measures
- during the restructuring the protection of the interests of employees, both individually and collectively, shall be ensured as provided by law. As regards the interests of employees, particular attention shall be paid to the right of employees to information and to the rules applicable in the event of transfers of undertakings and redundancies

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

No affected creditors can hold out. The RPR applies.

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

The debtor/restructuring practitioner have no *ex lege* power to terminate onerous contracts.

As for essential executory contracts the HRA generally follows the pattern of Article 7(4) of the EU Directive: During the moratorium period, creditors subject to the moratorium may not suspend the performance of essential contracts which have not yet been performed, may not cancel such contracts or modify them in any way on terms unfavourable to the debtor, on account of the debtor's debts arising from non-payment of debts which arose before the moratorium and have fallen due.

This provision shall not affect the exercise of the creditor's rights under the contract if the debtor fails to fulfil any contractual obligation other than the obligation to make payment. An essential contract is a contract which is necessary for the day-to-day running of the business of the debtor, including a service contract the performance of which, if suspended, would lead to the cessation of the debtor's business activities.

As for the restriction of the ipso facto clauses, the HRA generally follows Article 7(5) of the EU Directive: Creditors may not, irrespective of whether their claim is covered by the moratorium, withhold or suspend performance of contracts not yet performed, or cancel or modify them in any way on terms unfavourable to the debtor, by invoking a clause in the contract with the debtor, on the ground that (a) the debtor has decided to restructure, (b) has initiated restructuring proceedings, (c) the debtor has requested a moratorium in the restructuring proceedings; or (d) the court has ordered a moratorium in the restructuring proceedings.

**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?**

‘Nyilvános szerkezetátalakítási eljárás’ (public restructuring proceedings) will be listed in Annex A of the Recast Regulation on Insolvency 2015/848.

By contrast, ‘szerkezetátalakítási eljárás’ (ie non-public restructuring proceedings) will not be listed.

The recognition of the Hungarian restructuring proceedings in other countries is a question to be answered on the basis of the law of that other country thus it is out of the scope of this questionnaire.

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

§ 65 of the HRA provides as follows:

(1) New financing, interim financing and the payment of expenses, other payments, the conclusion or performance of a contract (for the purposes of this Chapter, hereinafter referred to collectively as ‘transactions’) which are immediately necessary for the immediate negotiation of a restructuring plan shall not be considered void or voidable in the event of the debtor’s possible subsequent insolvency on the grounds that they are detrimental to the creditors as a whole, unless other circumstances justifying the nullity or voidability of the transaction existed.

(Paragraph 1 shall also apply to reasonable transactions which are necessary for the immediate implementation of the restructuring plan and which are implemented in accordance with the restructuring plan approved by the court).

(3) No civil, administrative or criminal proceedings may be brought against the person providing the new financing or the bridging finance in the event of the debtor’s possible subsequent insolvency on the grounds that the financing is detrimental to the creditors as a whole. This provision shall be without prejudice to the case where other circumstances justifying the contestation of the transaction make it necessary to initiate proceedings.

(4) The provision of paragraph (3) shall not apply to temporary or new financing granted after the occurrence of imminent insolvency within the meaning of the Hungarian Insolvency Act.

(5) The grantors of interim and new financing have a prioritized position in the waterfall in the event of a subsequent liquidation.

(6) The provisions of subsections (1) to (3) and (5) relating to the financing, the transaction and the person providing the financing shall apply only if:

- in the case of new financing, the restructuring plan has been approved by the court
- in the case of interim financing, it has been approved by a majority of at least 75% of the votes of all secured affected creditors and affected creditors other than secured creditors or has been approved by the court as part of the restructuring plan, or
- in the case of a transaction necessary for the immediate negotiation of the restructuring plan, it has been approved by a majority of at least 75% of the votes of all the secured affected creditors and the affected creditors other than the secured creditors or has been approved by the court as part of the restructuring plan

(7) Transactions that are immediately necessary for the negotiation of a restructuring plan include the following:

- payment of fees and expenses payable for the negotiation, adoption or approval of the restructuring plan,
- the payment of fees and expenses incurred in obtaining professional advice in close connection with the restructuring,
- payment of wages for work already carried out; and
- payments and reimbursement of costs incurred in the normal course of business other than those referred to in points (a) to (c)

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

1 year maximum.

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

The court fee amounts to HUF 80,000 (~ EUR 200).

The fee of the restructuring practitioner appointed by the debtor and/or creditor(s) is subject to the parties' agreement. The fee of the restructuring practitioner appointed by the court depends on the book value of the assets of the debtor: an estimate would be in the range between 0.25–2%.

Lawyer's fees are difficult to estimate since the proceedings are untested.