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

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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 law transposing the EU Directive is Law Nº 9/2022 of 11 January 2022 which came into force on 11 April 2022.

Law Nº 9/2002 did not create any new proceedings, it simply amended existing proceedings, mainly the pre-insolvency / restructuring proceedings which go by the name of 'Processo Especial de Revitalização' (Special Revitalisation Proceedings). The answers in this article will therefore focus on the Processo Especial de Revitalização' (PER).

It must be noted that the PER only applies to businesses. Nevertheless, proceedings based on the PER (and very similar to them) are available for natural persons.

The relevant provisions are Articles 17.°-A to 17°-J of the Insolvency Act (IA).

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…)

The proceedings are hybrid proceedings (both out-of-court and judicial), which means that they must involve the intervention of the court at some point.

The court plays an important role in three key stages: (i) the opening of the proceedings (assessing the pre-requisites necessary to enter the proceedings), (ii) the recognition of the claims (ruling on conflicts regarding

claims and challenging the claims) and (iii) the confirmation of the restructuring plan (assessing the conditions to confirm the plan and thereby cram-down dissenting creditors).

Depending on the circumstances, the court may be asked to intervene in other stages of the proceedings.

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

The entry criterion rests upon two prerequisites: pre-insolvency and the ability to recover (cf. Article 17.º-A, 1, IA).

Pre-insolvency has two features: imminent insolvency and economic difficulties (cf. Article 17.º-A, 1, IA).

Economic difficulties are defined as a situation where the debtor faces serious difficulties in relation to fulfilling their obligations (cf. Article 17.º-B IA).

Imminent insolvency is not legally defined, but it is commonly understood that the notion refers to a situation where the debtor anticipates that they will not be able to fulfill their obligations in the near future (ie when the debts become due).

Regarding the ability to recover, it is a concept which is not defined by the law or in any corresponding literature.

Question 4: Can foreign companies use the process?

Nothing in the Insolvency Act prevents foreign companies from using the aforementioned proceedings.

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?

On the one hand, the debtor remains mostly in possession, ie the debtor maintains the right to administrate and dispose of their assets, with one exception: the so-called 'acts of special relevance' (cf. Article 17.º-E, 5, IA) (1).

On the other hand, an insolvency professional—referred to as the provisional insolvency administrator—is automatically appointed. The appointment of the provisional insolvency administrator marks the opening of the proceedings (cf. Article 17.º-E, 5, IA). Despite this nomenclature, the provisional insolvency administrator's role is less like an asset administrator and more akin to a mediator in the debtor-creditors' negotiations.

To qualify as an act of 'special relevance' the interpreter should consider the risk the act involves and its repercussions on subsequent stages of the proceedings, the perspectives of creditors' satisfaction, and the ability of the business to recover (cf. Article 161.º-IA). The Law provides an example of acts of special relevance. In such instances, the debtor must ask for the provisional insolvency administrator's consent in advance. Otherwise, the acts will be deprived of legal effect.

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?

As soon as the proceedings are opened there is an automatic stay of individual enforcement actions (cf. Article 17.º-E, 1, IA).

There is no statutory minimum length, with the law referring only to the 'maximum period of four months' (cf. Article 17.º-E, 1, IA).

This appears to be the maximum length, however, the court may, upon a reasoned request of the debtor, allow (under certain conditions) any creditor or the provisional insolvency administrator to extend the stay for another month (cf. Article 17.º-E, 2, IA).

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

There are two possible outcomes: ether the debtor opts for the (new) formation of classes which reflect sufficient commonality of interest, or the debtor does not.

In the first instance, the law provides a list of example classes: employees, irrespective of the type of contract; shareholders; banking entities which have financed the business; providers of goods and services; and public creditors [cf. Article 17.º-C, 3, d), IA].

In both instances, the claims must be divided into the (traditional) four classes: secured; privileged; ordinary; and subordinated [cf. Articles 17.º-C, 3, d), and 17.º-F, 1, c), IA].

This option is given to any debtor (irrespective of the debtor being a small to medium-sized enterprise (SME) or a large enterprise).

The phrases 'affected creditors' or 'affected parties' are used in several provisions, but are not defined, not even for the purpose of the formation of classes. The legislator appears to assume that the debtor knows who they are.

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

This a difficult question to answer considering the new law.

The first and most serious problem is that there is no provision (exclusively) on the approval of the restructuring plan. The only provisions dealing with the approval of the plan deal with the approval as a condition for the judicial confirmation of the plan (cf. Article 17.º-F, 5, ex vi Article 17.º-F, 7, a), IA).

But there are additional difficulties as the law allows for numerous combinations which are not absolutely clear for the interpreter, thus potentially giving rise to conflicting interpretations.

That being said, the threshold will depend on whether the debtor opts for the formation of classes or not:

- If the debtor does opt for formation, the approval of the restructuring plan requires the approval, in each class, of more than two thirds of members. There are then four possible outcomes:
  - the approval of every class
  - the approval of the majority of classes, provided at least one is of secured creditors
  - if there is no class of secured creditors, the approval of the majority of classes, provided at least one is of unsubordinated creditors, or
  - if there is a tie, the approval of at least one class of unsubordinated creditors

- The relevant provisions are Article 17.º-F, 5, a), i), ii), iii) and iv), IA. If the debtor does not opt for the formation of classes there may be two possible outcomes:
  - provided there is a voting quorum of one third of the total (recognised) claims which cast votes, the approval of more than two thirds of the claims which effectively casted votes and of more than 50% of the claims which effectively casted votes corresponding to unsubordinated claims. The relevant provisions are Article 17.º-F, 5, b), i) and ii), IA
  - the approval of more than 50% of the total (recognised) claims which cast votes and of more than 50% of the claims which effectively casted votes corresponding to unsubordinated claims. The relevant provisions are Article 17.º-F, 5, c), i) and ii), IA

Question 9: Can shareholders be bound?

Shareholders can be bound, both when they form a class and when they do not.

Question 10: How are secured creditors treated?

Besides the conditions that must be met in order for the plan to be confirmed by the court, there are no special rules on treatment of secured creditors.

Question 11: How are employees treated?

There are no special rules addressing employees, apart from when (admitted *expressis verbis*) employees form a separate voting class.

Under labour law, employees are secured creditors but this does not guarantee them any special treatment under the restructuring plan, provided the plan's clauses do not violate (mandatory) law.

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

Creditors (holdout creditors) may be crammed down, either as a class or as individual creditors, in the terms previously mentioned in the answer to question 8.

There is no reference to the absolute priority rule (the only reference is to the relative priority rule—on Article 17.º-F, 7, c), IA).

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

Unlike in insolvency proceedings, there is no special provision allowing the provisional insolvency administrator (or the debtor) to disclaim contracts (either onerous or gratuitous) arbitrarily. *Pacta sunt servanda* applies as the general principle in this regard.

Ipso facto clauses are to be declared void (cf. Article 17.º-E, 13, IA).

Ipso facto clauses may refer either to the request for the opening of the proceedings or the actual opening of the proceedings, and to the request for the extension of the stay of individual enforcement actions, or the granting of this request.

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?

It is already listed on the EU Recast Regulation on Insolvency.

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

New money is granted both protection (from avoidance actions) and priority (they rank ahead of other claims both if insolvency proceedings are later opened and if they are not) (cf. Article 17.º-H IA).

These guarantees apply, albeit only to some extent, to shareholders and other special related persons who provide new or interim financing to the company. This is one measure of the new law which was most welcome.

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

The average duration of the proceedings is 168 days, ie, just over 5 months.

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

Roughly, the process is likely to cost no less than €4.000 [€1.000 for court fees + €2.664,00 for the IP's fixed remuneration + the IP's variable remuneration].

It may be much higher though, depending on the IP's variable remuneration (which is basically a success fee).