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

the UK

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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 UK introduced the Part 26A restructuring plan from 26 June 2020 under the Corporate Insolvency and Governance Act 2020 (CIGA 2020) to comply with the EU Directive, even though the UK later exited the EU on 31 December 2020.

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 process usually involves two court hearings:

- the convening hearing (where factors including: class, jurisdiction and procedural issues are considered), and
- sanction hearing (where factors including whether there was: fair representation of the classes, a fair scheme which a creditor could reasonably approve, any ‘blot’ or defect in the scheme, any change of circumstances since the plan meeting(s), whether the Explanatory Statement was true, accurate and not misleading, whether the plan is likely to be recognised in the relevant jurisdictions where creditors/members reside and key company assets are located)

If there is a dispute on matters such as classes/valuation, further interim/direction hearings may take place before the final sanction hearing.

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

Conditions A and B must be met (section 901A of the Companies Act 2006 (CA 2006)):

- condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern (no further guidance is provided on the meaning or scope of the term ‘financial difficulties’, which is potentially very broad. Insolvency does not need to be proved, rather that the company ‘has encountered or is likely to encounter financial difficulties’ (and Hurricane Energy shows the need for a burning platform)
- condition B is that:
    - a compromise or arrangement (arrangement includes a re-organisation of the company’s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods) is proposed between the company and (i) its creditors, or any class of them, or (ii) its members, or any class of them, and
    - the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned

Question 4: Can foreign companies use the process?

Yes—The jurisdiction test is simply the lower sufficient connection test, rather than ‘centre of main interests (COMI)’. In the last year alone (2021), the English courts approved schemes and plans from companies incorporated in countries such as: Peru, Spain, Mauritius, Norway, Malaysia and the Netherlands.

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?

Yes the company’s management and directors remain in control; although not mandatory, an insolvency practitioner may be appointed to oversee the implementation of more complex plans, but even here, the directors remain in control.

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?

No there is no automatic moratorium; however this has not been a problem in practice, perhaps given the tendency to bind key financial creditors with lockup agreements early in negotiations. In any event, a standalone moratorium can be applied for under CIGA 2020 while a plan is negotiated for an initial period of 15 business days (extendable up to 12 months).

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

Yes—it is the responsibility of the applicant to (i) determine whether more than one meeting of creditors and/or members is required and (ii) if so, to ensure those meetings are properly constituted; the court will review these classes and may sometimes order the convening of meetings of further classes where necessary.

Creditors/members may challenge class formation if they think the company’s classes do not accurately reflect the rights and interests of different classes. Note that although there is no specific guidance in the CIGA 2020 on how classes are formed, the courts are following the existing scheme caselaw on this ie stakeholders should vote in the same class where their rights are ‘not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

The applicant must ensure such notification is given in a concise form and is communicated to all persons affected by the Part 26A plan in the manner which is most appropriate to the circumstances of the case (Practice Statement 2020, para 7). In practice, ‘affected by’ probably means those negatively affected by the plan and not trade creditors/employees to the extent they are not impacted (as reportedly discussed during the Hurricane Energy hearing).

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

Voting simply requires 75% in value of all those present and voting in each class to vote in favour of the plan (although dissenting classes can be crammed down under Cross Class Cram Down, see below) and there is no numerosity requirement.

Question 9: Can shareholders be bound?

Yes shareholders can be bound under the plan, provided the requisite 75% majority (referred to above) is achieved.

Question 10: How are secured creditors treated?

Secured creditors usually form a separate class and will be bound if the requisite majorities are attained or if Cross Class Cram Down is used (see further below).

Question 11: How are employees treated?

Employee claims are not generally compromised under a Part 26A plan.

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

Yes—Cross Class Cram Down can be used to impose the plan on dissenting classes, provided that: (i) the dissenting classes are no worse off than in the relevant alternative and (ii) the plan has been approved by a class who have a genuine economic interest in the company.

The absolute priority rule is not expressly applied.

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

There are no special powers to disclaim onerous contracts (cf powers of liquidators to disclaim).

Yes ipso facto clauses are restricted; under section 233B of the Insolvency Act 1986, suppliers of goods or services are unable to rely on contractual clauses allowing for termination in the event of the counterparty’s insolvency or restructuring (which includes a restructuring plan).

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?

No the restructuring plan does not (and has never, even pre-Brexit) appeared in Annex A of Regulation (EU) 2015/848, the EU Recast Regulation on Insolvency.

Recognition will depend on local law procedures. INSOL Europe and LexisPSL have produced a helpful research paper summarising recognition in each EU Member State: https://www.insol-europe.org/technical-content/recognition-in-third-states (the findings are also summarised in INSOL Europe’s journal: Eurofenix, Winter 2021).

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

No

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

It will depend from case to case, particularly on the level of consent or dissent and any use of Cross Class Cram Down /challenges to classes/valuation. However, generally:

- 21 days' notice of the convening hearing is given
- 21 days' notice of the class meeting(s) is given
- 21 days' notice of the sanction hearing is given

So on average, it can take 2–5 months from the commencement of initial negotiations to having a final binding plan in place. Once sanctioned, the plan is binding (a) in the case of an overseas company that is not required to register particulars under CA 2006, s 1046, once published in the Gazette, or (b) in any other case, once delivered to the Registrar of Companies.

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

A straight-forward restructuring plan for a 'small to medium-sized entity (SME)' would likely cost in the region of £100k, but of course that will increase depending on the complexity of the company/group, any challenge from creditors/members/the Financial Conduct Authority (FCA) (for FCA regulated companies) to classes/valuation/share of the surplus etc particularly if Cross Class Cram Down is being used or where two alternative plans are being proposed etc (as in the Amigo/All Scheme).