

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

## **Lithuania**

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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?**

Lithuanian laws were amended in July 2021 to transpose the EU Directive. The most relevant amendments were made to the Law on Insolvencies of Legal Persons (JANI), a new insolvency law which has been in effect since 1 January 2020. However, the amendments to JANI only took effect on 15 July 2021. No completely new proceedings were introduced. JANI offers two different main categories of proceedings: (i) restructuring proceedings and (ii) bankruptcy proceedings. While the former aim to rescue the legal person (debtor), the latter usually results in the winding-up of the debtor. Please note that different kinds of bankruptcy proceedings do exist (standard, simplified, out-of-court).

### **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...)**

One of the explicitly regulated proceedings under JANI are out-of-court bankruptcy proceedings. In contrast to this, JANI does not offer specific out-of-court restructuring proceedings, nor is there a particular category of preventive restructuring proceedings. This does not prevent debtors from trying to agree with their creditors on out-of-court restructuring solutions, however, court approval remains necessary for a restructuring plan that would also be binding on dissenting creditors and shareholders.

JANI does not include provisions for ad-hoc court involvement during the proceedings, except for the involvement of the court during the standard restructuring proceedings (for instance: formal acceptance of a

petition to open proceedings, the opening decision, the formal approval of the restructuring plan (Art 24 and 111(1) JANI), the termination of the restructuring proceedings (Art 114 JANI), and decisions on cross-class cram-downs (Art 111 JANI)).

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

In brief, a legal entity may initiate restructuring proceedings under JANI if it is not in liquidation due to bankruptcy and is facing financial difficulties while still carrying on a viable business activity. Financial difficulties means that there must at least be a likelihood of insolvency:

- Restructuring proceedings under JANI can be opened if all the following conditions are met (Art 21 para 1 JANI):
  - the legal person (debtor) is facing financial difficulties
  - the legal person (debtor) is viable
  - the legal person (debtor) is not being wound up by reason of bankruptcy

Financial difficulties of a legal person means that the legal person is insolvent or that there is a likelihood of insolvency (Art 2 para 5 JANI). A legal person is insolvent if it is unable to meet its financial obligations in a timely manner or if the legal person's liabilities exceed the value of its assets (Art 2 para 7 JANI). A likelihood of insolvency exists if there is a realistic possibility that a legal entity will become insolvent within the next three months (Art 2 para 7-1 JANI).

Viability of a legal person is defined as the state in which the legal person carries on business activities that enable it to meet its future obligations (Art 2 para 6 JANI).

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

JANI does not contain specific regulation on international jurisdiction for preventive restructuring proceedings, however, it refers to the EU Recast Regulation on Insolvency and its centre of main interest†(COMI) concept. Therefore, proceedings under the Lithuanian JANI can be used by foreign companies at least to the extent the EU Recast Regulation on Insolvency applies, and their COMI is in Lithuania, or the conditions for opening secondary insolvency proceedings in Lithuania are met. For all other cases there remains legal uncertainty.

### **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?**

In restructuring proceedings under JANI, the debtor remains in possession. Usually, an IP (administrator) is appointed, although this is not mandatory. The IP performs supervisory functions, ie the IP replaces the management of the debtor.

### **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?**

There is a certain moratorium on claims. The standard duration is 4 months from the moment the decision to open restructuring proceedings comes into effect. This term can be extended up to 6 months upon request from the administrator or the debtor, provided that the creditors support the prolongation and can show clear progress in the deliberations of the draft restructuring plan (cf Art 110 JANI).

It is important to note that, under Lithuanian law, for the opening decision to take effect, no appeal must have been filed during the appeal period, and existing appeals must have been dismissed.

Before the opening decision takes effect, protection of the debtor from enforcement actions of creditors is more limited. The formal acceptance by the court of the petition to open insolvency proceedings (including restructuring proceedings) means that enforcement actions based on enforceable decisions and documents may be continued, and assets can be arrested/impounded. However, realisation of such assets by way of forced sale is stayed (cf Art 19 para 5 JANI). In addition to this, the debtor or other interested parties may request the court to order interim protective measures either on an ad-hoc basis or based on general rules under the Civil Procedure Code (cf Art 144 CPK et al). Obtaining a positive ruling by the court is difficult and the exception rather than the rule.

As regards the content of the moratorium/stay:

- JANI in Art 28 provides that from the date of entry into force of the court's decision to open insolvency (restructuring) proceedings until the date of entry into force of the court order confirming the restructuring plan or terminating the insolvency proceedings, it is, among other things, prohibited to:
  - recover pre-insolvency debts from the debtor;
  - set-off claims (with a specific exception);
  - impose compulsory mortgages, servitudes, usufruct;
  - sell or otherwise transfer the assets of a legal person undergoing the restructuring which are necessary for its viability

Under certain conditions, the court may allow deviation from the above restrictions if this helps to further the restructuring.

In addition, JANI prohibits creditors from terminating essential contracts or changing conditions to work in their favour before the decision approving the restructuring plan comes into effect, provided that these essential contracts were concluded before the entering into effect of the opening decision, and the terms for performing obligations under the agreement have not expired. Upon the request of the creditor, the court may disapply this restriction if the creditor can show that this restriction would unjustifiably violate the interests of the creditor (cf Art 102-1 JANI).

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

Creditors are placed into classes for voting purposes (cf Art 107 et seq JANI). JANI recognises just 2 creditor classes, secured and unsecured creditors (Art 108 JANI). Unlike some other jurisdictions, JANI does not allow the forming of creditor classes, eg by the IP.

'Affected creditors' are defined as follows: 'Creditor affected by the Restructuring Plan of a Legal Entity (hereinafter referred to as "Creditor affected by the Restructuring Plan")—a Creditor whose civil rights and/or obligations as a result of the assistance provided to the Legal Entity to overcome its financial difficulties are directly created, altered or eliminated by the Restructuring Plan' (Art 2 para 9 JANI).

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

The relevant norm is Art 107 JANI (disregarding specific rules for cram-downs):

- Article 107 Creditors' approval of the draft restructuring plan:
  - the draft restructuring plan shall be subject to the approval of the creditors affected by the restructuring plan voting in groups

- creditors shall be deemed to have approved the draft restructuring plan if, in each group of creditors, creditors affected by the restructuring plan have approved the draft restructuring plan, whose claims amount in value to more than 1/2 of the total amount of the claims of creditors in that group approved by the court

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

If initiated by creditors, dissenting shareholders can be bound by the plan if certain conditions are met (cf Art 111-1, 104, 105, 110 JANI). For this to work, a qualified majority of the votes in the creditor groups must be obtained. In each group of creditors, creditors affected by the plan must approve the plan with more than 2/3 of the value of the confirmed claims in the group.

Note that a debt-to-equity swap against the will of creditors is not possible under JANI (cf Art 111-1 para 1 Nr 2).

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

Secured creditors enjoy preferential treatment in various regards.

First, secured creditors are placed in one of the two groups which must be formed for voting purposes (cf Art 108 JANI).

Second, secured creditors are satisfied prior to other creditors from the proceeds of the realisation of the object of security (cf Art 94, 113 para 1 JANI).

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

Relations between the legal person (debtor) and its employees are regulated both in JANI and the Labour Code of Lithuania (LC).

Firstly, JANI states that the manager of the legal person (debtor) must inform and consult the employees' representatives in accordance with the procedures set in the LC before applying to the court for the opening of restructuring procedures (Art 102-3 para 1 JANI).

The insolvency administrator must also inform the employees' representatives of the opening of the restructuring proceedings and provide them with all relevant information related to the restructuring procedures of the legal person (debtor) (Art 102-3 para 2 JANI).

JANI also states that if the restructuring plan includes structural changes in the organisation of work, such changes shall be carried out in accordance with LC (Art 102-3 para 5).

Claims of employees of the legal person (debtor) are satisfied in the first rank before claims of unsecured creditors without special priority (Art 94, 113-1 JANI, cf; also see Question 15 for information on rankings)

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

Yes, to a certain extent, (holdout) creditors can be crammed down. As mentioned in the answer to Question 9, if shareholders of the legal person (debtor) do not agree with the restructuring plan, the plan might still be approved by the court following the request of the creditors if certain conditions are met, including a qualified voting majority.

In addition, a cross-class cram down is foreseen by JANI in cases in which the plan does not get the mandatory support in one of the two statutory groups, ie it does not get the votes in such a group by creditors affected by the plan of more than 2/3 of the value of the claims in this group.

However, since JANI does not allow forming of groups other than the two statutory groups, it is not possible to cram down particular creditors by forming specific groups for such creditors (eg suppliers, employees).

Under JANI the absolute priority rule is in principle applied, as a cross-class cram down is only possible if dissenting creditors affected by the plan receive satisfaction on their claims in accordance with the statutory ranking of their claims (cf Art 111-1 para 2 Nr 3), Art 94 para 4 JANI).

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

- the creditors of a legal person may not, before the date of entry into force of the court's order approving the restructuring plan:
  - terminate essential contracts or modify their terms to the detriment of the legal person
  - terminate contracts which are not classified as essential contracts or modify their terms to the detriment of the legal person solely on the grounds that the court has issued an order accepting a petition for the opening of restructuring proceedings or that the legal person is the subject of restructuring proceedings
- paragraph 1 shall apply to contracts concluded before the date of entry into force of the court's order opening restructuring proceedings and which are not time-barred
- at the request of a creditor, the court may grant an exemption from the provisions of paragraph 1(1) of this Article if evidence is provided that the performance of an essential contract would unreasonably prejudice the creditor's interests
- the list of essential contracts shall be approved by the court in the order opening the restructuring proceedings. The prohibition referred to in paragraph 1 shall apply from the date of entry into force of that order

Art 2 para 2-1 JANI defines 'essential contract' as follows: Essential contract—a contract concluded between a legal person and another entity which is necessary to ensure the continuity of the legal person's business and the termination of which would render the legal person incapable of carrying on its business activities.

### **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?**

In Lithuania, the transposition of the EU Directive has not changed the general types of proceedings under JANI. JANI only recognises two types of proceedings: restructuring and bankruptcy proceedings. Both were and are listed in Annex A of the EU Recast Regulation on Insolvency 2015/848.

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

Yes, new money in the form of new financing and interim financing enjoys certain protection and priority. This can be seen in Art 102-2, Art 94, 113 JANI.

Art 102-2 JANI states that:

- transactions granting new and/or interim funding to a legal person shall not be voidable unless they are in breach of the law or fraudulent
- a creditor who has provided new financing and/or interim financing shall not be subject to civil, administrative, or criminal liability on the grounds that such financing has adverse consequences for the interests of all creditors
- transactions which are reasonable and necessary for the approval of the restructuring plan and/or the implementation of the restructuring plan as approved by the court shall not be invali-

- dated on the grounds that such transactions adversely affect the interests of all creditors, except where they have been entered into in violation of the law or fraudulently
- the transactions referred to in paragraph 3 of this Article shall relate to the costs of drawing up the restructuring plan, the costs of consulting on the drawing up of the restructuring plan, the payment of the salaries of the employees of the legal person, and other settlements necessary for the normal course of the business of the legal person

As regards the ranking for interim and new financing, Art 94 JANI, to which the satisfaction rules for restructuring plans make reference, states:

Article 94. Order of priority of creditors' claims:

- in the event of the liquidation of a legal person due to bankruptcy, the claims of the pledgee shall be satisfied first from the pledged assets
- the claims of other creditors shall be satisfied in the following order:
  - the claims of the following creditors shall be satisfied in the first rank:
    - (a) claims of creditors who have provided new and/or interim financing, unsecured by pledge and/or mortgage, which arise from the failure of the legal person to repay the loans within the time limits set out in the loan agreements
    - (b) claims by employees relating to employment relationships
    - (c) claims for national social security contributions, compulsory health insurance contributions and contributions to the Guarantee Fund and the Long-Term Employment Benefit Fund
    - (d) claims in respect of outstanding debts arising from business activities carried on during the insolvency proceedings
- the second rank is used to satisfy all remaining creditors' claims

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

The number of restructuring proceedings has always been minimal when compared to bankruptcy proceedings. For instance, nine restructuring proceedings were commenced in 2021 in Lithuania compared to 808 bankruptcy proceedings. There is hardly any experience with restructuring proceedings that commenced after the most recent amendments to JANI (concerning EU Directive implementation). Whether these amendments will have any noteworthy effect is highly doubtful but remains to be seen. Usually, restructuring proceedings are terminated and slip into bankruptcy proceedings. If restructurings are seriously carried out, then the duration is usually approximately four years, excluding the opening proceedings before the plan approval which also can last 8–12 months or even longer.

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

I have no reliable information on this.