

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

Slovenia

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Restructuring & Insolvency analysis: This article looks at how Slovenia 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 deadline to transpose the EU Directive into the member states' national legislation had passed on 17 July 2021. The Republic of Slovenia requested an extension of the implementation period for one year under Article 34 of the EU Directive. A draft bill introducing amendments to the Slovenian Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (the Slovenian Insolvency Act) had been introduced by the Ministry of Justice in December 2020, but has not been passed yet. The proposal is currently in the inter-ministerial coordination without any concrete timeline. Therefore, the draft that we reviewed for the purposes of responding to these questions may be subject to further amendments. Once adopted, the new restructuring law will enter into force on the 30th day after its publication in the Official Gazette of the Republic of Slovenia.

The Slovenian insolvency legislation had already implemented the preventive restructuring procedure at the end of 2013. Rather than adapting the existing procedure to the rules under the EU Directive, Slovenia decided to add another restructuring procedure. Therefore, in addition to the existing preventive restructuring procedure (*postopek preventivnega prestrukturiranja*), the proposal provides for another pre-insolvency restructuring, namely a judicial restructuring procedure to remedy threatened insolvency (*postopek sodnega prestrukturiranja zaradi odprave grozeče insolventnosti*) (the proposed judicial restructuring procedure). Both are available to the debtor if it is not yet insolvent, but is likely to become insolvent within a period of one year. The main difference between these two procedures is that the proposed judicial restructuring procedure will be applicable to all companies and entrepreneurs and for the restructuring of all claims, ie both financial and commercial claims (*poslovne terjatve*). The existing preventive restructuring procedure is only available to small, medium and large companies pursuant to Slovenian Companies Act and only financial claims may be restructured thereunder. Furthermore, under the current regulation, a debtor threatened with insolvency may apply for preventive restructuring, but is not obliged to. However, under the proposed new legislation, threatened insolvency will trigger similar obligations for the debtor's management as currently

apply to the management of the company that is already insolvent, including the preparation of financial restructuring plan.

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...)

In accordance with the current proposal, the proposed judicial restructuring procedure will mirror the procedural rules applicable to the compulsory settlement proceedings (available when the debtor is already insolvent). The court's involvement will thus be much more intense than in existing preventive restructuring proceedings. In addition to decisions on initiating the proposed judicial restructuring procedure and approving the settlement, the court will also supervise and verify stakeholders' actions, as well as decide on possible appeals and disputes. This is in stark contrast to the existing preventive restructuring proceedings, which takes place without much involvement of the court.

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

Both pre-insolvency proceedings (ie the existing preventive restructuring procedure and the proposed judicial restructuring procedure) are applicable in the event of threatened insolvency, ie if the debtor is likely to become insolvent within a period of one year. The draft legislation does not further specify how the assessment on whether the debtor will become insolvent or not is done. However, pursuant to the new legislation, threatened insolvency will be presumed if the creditors holding at least 30% of all claims against the debtor consent to the opening of restructuring proceedings to remedy the threatened insolvency. Such definition is already being criticised as the criteria for establishing the existence of threatened insolvency should be based on objective criteria (as eg in Germany and Austria) and not on the mere subjective judgement by the creditors. Moreover, the purpose of the restructuring rules is to assist the restructuring and not to allow unjustifiable interference with the debtor.

The proposed judicial restructuring procedure will be available to all companies and entrepreneurs, and (unlike the existing preventive restructuring procedure) not only to limited liability companies, joint stock companies, European public limited liability companies and partnerships limited by shares, which are classified as small, medium and large capital companies under the Slovenian Companies Act. Moreover, both financial and commercial claims (*poslovne terjatve*) will be subject to restructuring, whereby the existing restructuring procedure only allows the restructuring of financial claims. The idea of the proposed judicial restructuring procedure is that the debtor continues its business operations, whereby the debtor's creditors are provided with more favorable conditions for repaying their claims as they would be in case of bankruptcy. As a rule, provisions on compulsory settlement apply, *mutatis mutandis*, save for those explicitly excluded. Unlike the compulsory settlement, only the debtor or its personally liable shareholder will be able to initiate the proposed judicial restructuring procedure (and not the creditors). Moreover, the proposed restructuring procedure may not be conducted if the debtor has:

- failed to comply with its obligations to submit annual reports (in accordance with the Slovenian Companies Act)
- provided untrue, incorrect or incomplete information required by the tax authority, resulting in (additional/subsequent) obligation to pay taxes or contributions amounting to at least €4,000, or
- been convicted of a certain criminal offence

The debtor will have to submit a report on its financial performance, a financial restructuring plan and a report on the company's valuation. Similar to the existing preventive restructuring proceedings, an (initial) advance for the costs of proceedings has to be paid by the debtor (or its personally liable shareholder).

Therefore, the proposed judicial procedure will actually constitute the next phase of already initiated (out-of-court) preventive restructuring procedure, which was not successful due to lack of consent by certain creditors. According to the draft legislation, the proposed judicial restructuring procedure shall encourage creditors to approach the restructuring earlier, as otherwise the stay on enforcement is triggered and the creditors can be crammed down.

Note that where there is insolvency, none of these procedures (ie the existing preventive restructuring or the proposed judicial restructuring procedure) may be initiated and a compulsory settlement or bankruptcy must be commenced.

Question 4: Can foreign companies use the process?

The Slovenian courts are only competent to rule on (pre-)insolvency proceedings over legal entities/entrepreneurs if their registered seat or the centre of its main interests (COMI) is located in the Republic of Slovenia.

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 principle, the draft foresees that the debtor retains the management of the company in the proposed judicial restructuring procedure, however, it will be supervised by the court and an administrator (*upravitelj*) will be appointed. On the other hand, provisions governing compulsory settlement will apply *mutatis mutandis* to the proposed judicial restructuring procedure. After a compulsory settlement procedure is initiated, the debtor may engage only in regular operations relating to the performance of its business, unless it obtains the court's approval. A provision that provides for such limitations is not explicitly excluded from the provisions that apply *mutatis mutandis* to the proposed judicial procedure. Therefore, it is presumed that it will apply to the proposed judicial restructuring procedure as well. However, as the proposed judicial restructuring procedure, unlike the compulsory settlement proceedings, is available when the debtor is not yet insolvent, such restrictions seem too strict for the company that is only likely to become insolvent. Furthermore, the draft legislation explicitly distinguishes between the obligations of the debtor's management arising in the event of threatened insolvency and those arising in the event of insolvency. The insolvent debtor is not permitted to make any payments, unless they are necessary for its operation. No such restrictions are mentioned within the obligations for debtors which are not yet (but likely to become) insolvent; the debtor is only obliged to avoid any actions that would result in unequal treatment of creditors, jeopardise the company's assets or survival, and to consider interests of creditors, equity holders and other stakeholders. Although it is not entirely clear from the draft (that may still be subject to further amendments) whether the debtor will remain in (full) possession or not, we consider that, in particular in the light of the Article 5 of EU Directive, the provisions on the compulsory settlement, which so severely restrict the debtor's operations, should not apply to the proposed judicial restructuring procedure.

The court involvement is much less intensive in the existing preventive restructuring procedure, as the court merely verifies that the formal requirements have been met (eg the required majority). Moreover, no administrator (*upravitelj*) is appointed.

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?

The opening of the proposed judicial restructuring procedure will also trigger a stay on all enforcement actions, except for employees' claims arising from the employment relationship. A moratorium in favor of the debtor will be granted for up to four months, and be extendable for no longer than eight months. The court will be entitled to lift the stay at any time if there will be no prospect of an agreement with the creditors.

When the court issues a decision on opening of the existing preventive restructuring proceedings, a stay on enforcement actions is triggered, granting a moratorium in favor of the debtor until the final decision ending the preventive restructuring proceedings. A stay on enforcement only applies to financial claims, included in the basic list of financial claims submitted to the court. Commercial claims and other non-financial claims are not subject to restructuring and are thus not affected by the moratorium. Furthermore, the preventive restructuring proceeding triggers a standstill for secured and unsecured financial claims that are included in the list of financial claims, which is submitted by the debtor when initiating the proceedings.

Note that the stay on enforcement does not apply to out of court realisations of the debtor's assets (as provided for in Article 6 of the EU Directive) neither in the existing preventive restructuring nor in the proposed judicial restructuring procedure.

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

In terms of voting in the proposed judicial restructuring procedure, rules applicable to the compulsory settlement apply. As a rule, the compulsory settlement (that has to be approved in the proposed judicial restructuring procedure) affects only unsecured claims. Therefore, only creditors of unsecured claims may vote on the settlement. Creditors of secured and priority claims are excluded; however, if the creditor's secured claim is also subject to restructuring (which is permitted under certain conditions), such creditor is entitled to vote. Moreover, a creditor who is considered an affiliate of the debtor (as defined in the Slovenian Companies Act) or a person closely related to the debtor (as defined in the Slovenian Insolvency Act), also does not have the right to vote on the compulsory settlement. The Slovenian Insolvency Act explicitly sets out how the voting rights are calculated—the share of voting rights depends on the amount of the registered claim which existence is proven as probable, and on the type of claim (secured, unsecured, subrogated etc). For the voting threshold please see our response to Question 8.

If the proposed judicial restructuring procedure will be initiated by the debtor who is deemed a small, medium or large company (under provisions of the Slovenian Companies Act), special rules governing compulsory settlement that are applicable to such companies, will apply. Thus, in case of restructuring secured claims, the voting will be subject to a two-class vote—the unsecured creditors will vote on the unsecured claims, whereas the secured creditors will vote on the secured claims. The compulsory settlement will have to be confirmed by a prescribed majority in both classes. Please also refer to our response to Question 12 below.

The existing preventive restructuring proceeding requires the approval of the debtor and creditors holding at least 75% of financial claims (which are included in the basic list of financial claims submitted to the court). A separate majority of 75% of secured financial claims is required for the restructuring of secured claims (by deferring the maturity date or changing the interest rate). Further consents required for the approval of the agreement on financial restructuring may be determined therein. As in the compulsory settlement proceedings (and consequently, in the proposed judicial restructuring procedure), creditors related to the debtor are not entitled to vote on the agreement on financial restructuring.

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

The general required majority for confirmation of the settlement in the proposed judicial restructuring procedure is the consent of the creditors which together hold at least 60% of the weighed claims subject to compulsory settlement. As mentioned under Question 7 above, the method for calculating voting shares is explicitly specified in the Slovenian Insolvency Act.

The agreement on financial restructuring in the existing preventive restructuring procedure has to be approved by the debtor and creditors whose claims represent at least 75% of the aggregated amount of unsecured financial claims (included in the list of claims). If the secured financial claims are also restructured, a separate majority of creditors holding 75% of such claims is required. Please also see our response under Question 7 above.

Question 9: Can shareholders be bound?

Yes, shareholders can be bound the same as other creditors. However, as explained above in our response to Question 7 above, a creditor that is considered an affiliate of the debtor (as defined in the Slovenian Companies Act) or a person closely related to the debtor (as defined in the Slovenian Insolvency Act), is excluded from voting on the financial restructuring agreement.

The draft also provides for a new provision under which the debtor may not, inter alia, distribute any profits or repay subsequent payments or repay any loans (even if secured) to the benefit of shareholders until the claims of all creditors have been paid in accordance with the approved compulsory settlement. As per loans granted to the debtor by its shareholders (assuming the debtor is a limited liability company), note that in

case they were given at a time when the shareholders should have provided the debtor with equity capital, such loans shall be considered as the debtor's assets in the compulsory settlement proceedings. The draft legislation does not elaborate on this question with respect to the proposed judicial restructuring procedure, however, the same rule will probably apply in the proposed judicial restructuring procedure as well.

Question 10: How are secured creditors treated?

Pursuant to provisions applicable to the proposed judicial restructuring procedure, the consent of creditors holding secured financial claims will be required if the secured claims are going to be restructured in addition to the unsecured financial claims (ie secured claims may be restructured if the creditor explicitly agrees to defer maturity of its claim). This may only be available to small, medium and large companies under the Slovenian Companies Act. Under special provisions regulating compulsory settlement proceedings with special rules for small, medium and large company (*postopek prisilne poravnave s posebnimi pravili za majhno, srednjo in veliko družbo*), which apply to proposed judicial restructuring procedure *mutatis mutandis*, the maturity of secured claims may be deferred or the interest rates may be reduced. Alternatively, secured claims may also be restructured in a way that the creditors' right to a separate settlement (*ločitvena pravica*) are modified into joint right to a separate settlement (*skupna ločitvena pravica*) to the benefit of all holders of secured claims, meaning that all collateral is pooled together for the benefit of all holders of secured claims. As a result, a community (*skupnost*) is created among the holders of the right to a separate settlement, regulated by the Slovenian Obligations Code. The holders' shares on the joint right to a separate settlement (*skupna ločitvena pravica*) equals the share representing the amount of its pre-conversion share in the sum of all collateral.

In the (existing) preventive restructuring proceedings the secured financial claims may only be restructured by deferring the maturity date or changing the interest rate. A consent of creditors holding at least 75% of all secured financial obligations included in the list of debtor's financial obligations is required in order for the agreement on financial restructuring to affect the secured financial obligations (in addition to the unsecured claims).

Question 11: How are employees treated?

Pursuant to the Slovenian Insolvency Act, all wage compensations and other employment-related payments, including taxes relating to such payments and social security contributions, are considered as priority unsecured claims.

The new legislation provides that the confirmed compulsory settlement in the judicial restructuring procedure has no effect on the claims of employees. Furthermore, the stay on enforcement does not apply to proceedings for enforcement of claims arising from the employment relationship (please also see our response under Question 6 above).

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

Dissenting creditors may be crammed down in both the existing preventive restructuring proceedings and in the proposed judicial restructuring procedure. Assuming that the prescribed majority of creditors consent to the restructuring or the compulsory settlement and other procedural rules are observed, the financial restructuring agreement or compulsory settlement also binds the dissenting creditors.

The secured financial creditors may also be crammed down. The general required majority for confirmation of compulsory settlement (which will have to be approved in the proposed judicial restructuring procedure) is the consent of the creditors which together hold at least 60% of the weighed claims subject to compulsory settlement (please refer to our response under Question 8 above). The financial restructuring agreement is binding for all financial creditors, if confirmed by the financial creditors whose claims represent at least 75% of the aggregated amount of unsecured financial claims. As a rule, the financial restructuring agreement does not affect secured financial claims, unless it is additionally confirmed by financial creditors whose claims represent at least 75% of the aggregated amount of secured financial claims.

Note that the initial proposal of the new restructuring law provided for additional provisions allowing the court to approve the compulsory settlement notwithstanding the lack of confirmation by any class of creditors (please refer to our response to Question 7 regarding the two-class vote) under certain conditions. However, such provision was not included in the last draft published.

The absolute priority rule is already incorporated in the Slovenian Insolvency Act and applies in proposed judicial restructuring procedure as well. The debtor's shareholders may not retain the share capital exceeding the value of the debtor's assets they would receive in the bankruptcy proceedings over the debtor. Moreover, the priority order and other rules regarding the payments of preferential, ordinary, subordinated and secured claims shall be considered with the creditors.

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

The draft legislation provides for a statutory override of the ipso facto clauses in the 'essential/key contracts'. According to the proposal, a party to any such essential/key contract (ie a contract the performance of which is necessary for continuous operation of the debtor's undertaking, including contracts for supplies, the termination of which would stop the performance of the debtor's business) shall not be permitted to withhold performance, terminate or otherwise detrimentally modify the contract solely due to the debtor's threatened insolvency or the initiation of the compulsory settlement proceedings, notwithstanding contractual regulation. However, such prohibition will not apply if the debtor has not paid its debts, occurred after initiation of such proceeding.

Apart from the foregoing, the restructuring proceedings have no impact on existing contracts. However, upon the commencement of the proposed judicial restructuring procedure, the debtor will acquire the right to withdraw from mutually unfulfilled bilateral contracts provided that the debtor obtains the court's consent. The latter will be given if termination of an agreement is required for the implementation of the financial restructuring plan.

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?

This is not specifically provided in the draft legislation; however, we consider that the proposed judicial restructuring procedure should be listed in Annex A of the EU Recast Regulation on Insolvency 2015/848 as it is foreseen as an additional procedure to remedy the threatening insolvency. Since the existing restructuring procedure is already listed in Annex A, the proposed judicial restructuring procedure should be listed as well.

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

Pursuant to the Slovenian Insolvency Act, new financing extended to the debtor already enjoys statutory super seniority and is protected against voidability (*izpodbojnost*). Namely, all claims that are incurred in the period from the opening of the preventive restructuring procedure/compulsory settlement proceedings until the opening of bankruptcy proceedings, are repaid before priority claims. Moreover, legal acts done by the debtor for the purpose of paying creditors' claims or to comply with other obligations under the approved financial restructuring agreement/compulsory settlement, may not be challenged. Such provision will apply to the proposed judicial restructuring procedure as well, since provisions regulating compulsory settlement shall be applied thereto *mutatis mutandis*.

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

There is no statistical data on the duration of restructuring proceedings. Since the Slovenian Insolvency Act limits the period of the stay on enforcement in the proposed judicial restructuring procedure to maximum of 12 months (taking into account the extension of the initial four months' period), the legislator likely anticipates that the proceedings shall be completed in this timeframe.

Moreover, within the existing preventive restructuring procedure the debtor must submit a request for approval of the agreement on financial restructuring within three months (applies to small and medium companies) and five months (applies to large companies) within the initiation of the proceedings. These deadlines can be extended with the creditors' consent, but such extensions cannot exceed two months for small and medium companies and three months for large companies.

Based on the above, we estimate that the process of pre-insolvency restructurings shall take from six to 12 months.

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

By our rough estimation, major expenses (including in particular remuneration of the administrator, attorney's fees, court fees, filing fees and fees of other professionals involved, such as financial advisors, accountants, appraisers and auditors) in the proposed restructuring procedure, shall amount from €40,000 to €100,000, depending on the length and complexity of the procedure, the level of attorney's involvement, etc.