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

Malta

27/02/2023

Restructuring & Insolvency analysis: This article looks at how Malta has implemented Directive (EU) 2019/1023 as part of the Joint Project between INSOL Europe and LexisPSL to track implementation.

Written by Luisa Cassar Pullicino and George Bugeja at Ganado Advocates in Valletta, Malta.

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 EU Directive 2019/1023 was implemented in Malta by:

- Act XXIII of 2022, an act to amend the Commercial Code (Chapter 13 of the laws of Malta)
- Act XXIV of 2022, an act entitled the Pre-Insolvency Act (Chapter 631 of the laws of Malta), and
- Act XXV of 2022, an act entitled the Insolvency Practitioners Act (Chapter 632 of the laws of Malta)

Each of these Acts came into force on 23 December 2022.

The Pre-Insolvency Act complements existing insolvency and rescue procedures contained in the Companies Act (Cap 386 of the Laws of Malta) and the Commercial Code (Cap 13 of the Laws of Malta), and introduces a new procedure called the ‘Preventive Restructuring Procedure’. The Preventive Restructuring Procedure can take one of three forms:

- the Standard Preventive Restructuring Procedure;
- the Pre-Formulated Preventive Restructuring Procedure; or
- the Pre-Approved Preventive Restructuring Procedure

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…)

Court approval is required at every stage of the procedure, including for commencement of the preventive restructuring procedure, termination, as well as for final approval of the restructuring plan. Notwithstanding this, the Pre-Approved Preventive Restructuring Procedure assumes that the proposed restructuring would have already been approved by the affected parties before the commencement of proceedings.

Court involvement is also possible during the course of preventive restructuring proceedings, and varies depending on the form of preventive restructuring chosen. Court involvement may be required for the appointment of alternative insolvency practitioner, for an order for the inclusion of certain creditor claims in the restructuring plan, as well as for an extension of the stay of individual enforcement action.

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 (whether natural or legal person) must be exposed to a 'likelihood of insolvency, having regard to the debtor's business circumstances and its actual, contingent, and prospective assets and liabilities'.

In order to be eligible to make use of a preventive restructure procedure, the debtor:

- must have reasonable prospects of viability
- must not have been declared insolvent by a court, or who have otherwise allowed more than 24 weeks to lapse from the enforcement of an executive title for an unpaid debt, and
- must not have been admitted to preventive restructuring procedures in the preceding three years

The preventive restructuring application must be made or endorsed by an insolvency practitioner.

Question 4: Can foreign companies use the process?

The Pre-Insolvency Act refers to 'debtors' as being eligible to make use of this process—subject to a few exceptions which are similar to those found in Article 1(2) of the EU Directive, the term 'debtors' includes 'any legal organisation in terms of the Second Schedule to the Civil Code, including, but not being limited to, any commercial partnership formed and registered under the Companies Act'.

Though foreign companies are not formed in terms of the Maltese Companies Act, the provisions on 'legal organisations' in terms of the Maltese Civil Code, also refer to foreign and international organisations. Though the Pre-Insolvency Act does not, therefore, specifically mention that this process may be used by foreign companies, it appears that it might be open to them to try.

One must however highlight that the Act does not contain any conflict-of-laws rules.

Should the Preventive Restructuring Procedure be included in Annex A of the EU Insolvency Regulation Recast 2015/848, then potentially, foreign companies deemed to be insolvent would be able to apply for this procedure if they have their centre of main interests (COMI) in Malta.

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?

As a general rule, the debtor remains in possession. However, the insolvency practitioner who makes the preventive insolvency procedure application or endorses it is afforded a vital role in assisting and overseeing the procedure. For instance, a debtor would require the prior approval of the insolvency practitioner to make any employees redundant; to dispose of, or provide as security, any assets or property or to enter into any contractual commitment having a duration of more than six months.

Moreover, shortly following their appointment, the insolvency practitioner must examine the assets, liabilities, and affairs of the debtor and rank all claims against it, convening meetings with officials as well as creditors.

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 broad and automatic moratorium on claims and precautionary and executive measures against the debtor the moment an application for the preventive restructuring procedure is made for a period of four months from the date of the application, with the exclusion of employees' claims. The Court is given the power to suspend or reject any such proceedings ex officio. The four-month period can be extended until a maximum of 12 months from the date of the application.

The moratorium excludes actions in rem against ships and aircraft, warrants of arrest of ships and aircraft, as well as rights of action held by the holders of registered mortgages over ships and aircraft.

Essential executory contracts are protected, and there is also a moratorium on the exercise of various rights, including rights of termination, acceleration, modification, or suspension of performance of obligations.

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

Yes, the creditors are placed into classes for voting purposes. The classes are not strictly defined, but must essentially distinguish between the holders of secured and unsecured claims, privileged claims for wages, subordinated claims, and holders of shares or other ownership rights.

The Pre-Insolvency Act defines 'affected parties' as creditors, equity holders, or employees including an employees' representative, whose claims or interests are, or may be, directly affected by a restructuring plan.

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

A restructuring plan shall be adopted if it is approved by not less than two-thirds of the affected parties in each class, by reference to the value of their claims.

Question 9: Can shareholders be bound?

Yes. Shareholders should be placed into a dedicated class of affected persons if the plan affects their rights, and they can subsequently be bound by the restructuring plan.

Question 10: How are secured creditors treated?

Secured creditors will be included in a dedicated class of affected persons if the plan affects their rights, and may consequently be bound by the restructuring plan.

Question 11: How are employees treated?

Employees are included in the definition of 'affected party', and thus, would be included in a dedicated class of affected persons and must consequently vote on the restructuring plan. They may be bound by the restructuring plan only to the extent that it impacts wages not constituting privileged wages protected by the Employment and Industrial Relations Act. The restructuring plan may not include or affect the ranking of privileged employees' wages owed by the debtor.

Where the restructuring plan includes changes in work organisation, employment conditions or contractual relationship with workers, then legal requirements as well as requirements in any collective agreements must be respected. Employee representatives are also given the right to be given information regarding the debtor's activities and progress in the preventive restructuring procedure and negotiations.

Moreover, during the course of preventative restructuring procedure, the consent of the insolvency practitioner is required before any employees can be made redundant.

Ipso facto clauses in employment contracts, even if considered essential to the survival of the debtor, are not caught by the moratorium and may be enforced by employees during the preventive restructuring procedure to the detriment of the debtor.

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

If the required majority is not reached in every class, cross-class cramdown is possible. the restructuring plan can still be adopted provided the following cumulative conditions are satisfied:

- it has been approved for adoption by at least one class of affected parties who would otherwise have received payment of their claims in a liquidation scenario (even partly)
- it satisfies the best-interest-of-creditors test (which requires the Court to be reasonably satisfied that no dissenting creditor would be worse off, under the specific restructuring plan, than such a creditor would be if the normal ranking of liquidation priorities were applied, or in the event of the next-best-alternative scenario, if the restructuring plan were not confirmed)
- no class of affected parties will receive more than the full amount of its claims, and
- dissenting classes of affected parties are treated at least as favourably as other equal-ranking classes of affected parties, and more favourably than lower-ranking classes of affected parties

The Maltese legislator therefore implemented both the absolute priority rule and the relative priority rule.

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

The Pre-Insolvency Act states that officials of the debtor (in consultation with the insolvency practitioner) shall review any ongoing executory contracts in order to evaluate how the termination or re-negotiation of any such executory contracts will affect the economic viability of the debtor. Where it is identified that the re-negotiation or termination would benefit a debtor's prospects of economic viability, the insolvency practitioner may invite the counterparty to engage in bona fide negotiations to seek to reach a mutual agreement as to the re-negotiation or termination of the said executory contract.

In the event that the parties are unable to agree on a re-negotiation or termination, the debtor may propose to unilaterally terminate the executory contract, which will render the debtor liable only to compensate the counterparty for losses incurred as a result of the said unilateral termination (with the claim for such losses being included as part of the restructuring plan). The Pre-Insolvency Act specifically excludes the application of unilateral termination in relation to set-off or netting arrangements.

With regards to ipso facto clauses in executory contracts, there is a moratorium on the enforcement of rights of termination, acceleration, modification, suspension of performance of obligations, and repossession of property for the duration of the preventive restructuring procedure.

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?

As at the date of writing, the procedure is not listed in Annex A of the EU Insolvency Regulation Recast 2015/848.

To the extent that the procedure impacts a debtor considered to be insolvent, any recognition in other countries will depend on the conflict-of-laws rules in force in the particular country in which recognition is requested.

To the extent, however, that the procedure may be undergone by a debtor considered solvent, there is the possibility that this may be recognised in other EU Member States in accordance with the Brussels Regulation Recast 1215/2012. However, whether or not such a procedure would fall within the exclusion contained in Article 1(2)(b) of the Brussels Regulation Recast 1215/2012 remains uncertain.

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

Interim financing can be sought provided the officials of the debtor and insolvency practitioner consider it necessary to preserve economic viability until the restructuring plan is confirmed. Secured interim financing can be obtained, provided it is approved by at least 50% of the affected parties in each class. Interim financing can be included in the restructuring plan and shall not be subject to any reduction.

New financing may also form part of the restructuring plan.

New and interim financing are afforded avoidance protection in the event of the later insolvency of the debtor, and may not form the basis of a claim for wrongful trading.

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

There has not been any information on this process in practice. The law specifies that the Preventive Restructuring Procedure shall last for four months from the date of the application, which can be extended to a maximum of 12 months in the case of standard preventive restructuring.

Once an approved restructuring plan has been submitted to the court, it must decide whether to approve or reject it within 30 days.

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

There has not been any information or guidance on the costs of this procedure. Court registry costs for the mere filing of similar procedures invariably cost around €900. The costs of the procedure itself, once a preventive restructuring order has been obtained, will vary depending on the individual case, the insolvency practitioner appointed, and experts consulted.