

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 (Directive on restructuring and insolvency) (Text with EEA relevance)

TITLE II

PREVENTIVE RESTRUCTURING FRAMEWORKS

CHAPTER I

Availability of preventive restructuring frameworks

Article 4

Availability of preventive restructuring frameworks

1 Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2 Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3 Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4 Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5 The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

6 Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

7 Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8 Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

CHAPTER 2

Facilitating negotiations on preventive restructuring plans

Article 5

Debtor in possession

1 Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.

2 Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

3 Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:

- a where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;
- b where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11; or
- c where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

Article 6

Stay of individual enforcement actions

1 Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2 Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3 Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4 Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

- a enforcement is not likely to jeopardise the restructuring of the business; or
- b the stay would unfairly prejudice the creditors of those claims.

5 Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6 The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7 Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

- a relevant progress has been made in the negotiations on the restructuring plan;
- b the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or
- c insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

8 The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9 Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

- a the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;
- b at the request of the debtor or the practitioner in the field of restructuring;

- c where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or
- d where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Member States may provide for a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

Article 7

Consequences of the stay of individual enforcement actions

1 Where an obligation on a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of that stay.

2 A stay of individual enforcement actions in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor.

3 Member States may derogate from paragraphs 1 and 2 in situations where a debtor is unable to pay its debts as they fall due. In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.

4 Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill.

The first subparagraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.

Member States may provide that this paragraph also applies to non-essential executory contracts.

5 Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

- a a request for the opening of preventive restructuring proceedings;
- b a request for a stay of individual enforcement actions;
- c the opening of preventive restructuring proceedings; or

d the granting of a stay of individual enforcement actions as such.

6 Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets, even in circumstances where Article 31(1) does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement.

The first subparagraph shall not apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value.

7 Member States shall ensure that the expiry of a stay of individual enforcement actions without the adoption of a restructuring plan does not, of itself, give rise to the opening of an insolvency procedure which could end in the liquidation of the debtor, unless the other conditions for such opening laid down by national law are fulfilled.

CHAPTER 3

Restructuring plans

Article 8

Content of restructuring plans

1 Member States shall require that restructuring plans submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain at least the following information:

- a the identity of the debtor;
- b the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor;
- c the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;
- d where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;
- e where applicable, the parties, whether named individually or described by categories of debt in accordance with national law, which are not affected by the restructuring plan, together with a description of the reasons why it is proposed not to affect them;
- f where applicable, the identity of the practitioner in the field of restructuring;
- g the terms of the restructuring plan, including, in particular:
 - (i) any proposed restructuring measures as referred to in point (1) of Article 2(1);
 - (ii) where applicable, the proposed duration of any proposed restructuring measures;

- (iii) the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;
 - (iv) where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar;
 - (v) the estimated financial flows of the debtor, if provided for by national law; and
 - (vi) any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan;
- h a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed.

2 Member States shall make available online a comprehensive check-list for restructuring plans, adapted to the needs of SMEs. The check-list shall include practical guidelines on how the restructuring plan has to be drafted under national law.

The check-list shall be made available in the official language or languages of the Member State. Member States shall consider making the check-list available in at least one other language, in particular in a language used in international business.

Article 9

Adoption of restructuring plans

1 Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans, and provide for conditions under which they may do so.

2 Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3 Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

- a equity holders;
- b creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or
- c any related party of the debtor or the debtor's business, with a conflict of interest under national law.

4 Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with

national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.

Member States may also provide that workers' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5 Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6 A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7 Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

Article 10

Confirmation of restructuring plans

1 Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:

- a restructuring plans which affect the claims or interests of dissenting affected parties;
- b restructuring plans which provide for new financing;
- c restructuring plans which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law.

2 Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

- a the restructuring plan has been adopted in accordance with Article 9;
- b creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;
- c notification of the restructuring plan has been given in accordance with national law to all affected parties;
- d where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;
- e where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

3 Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.

4 Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.

Article 11

Cross-class cram-down

1 Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in Article 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

- a it complies with Article 10(2) and (3);
- b it has been approved by:
 - (i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,
 - (ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;
- c it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and
- d no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

By way of derogation from the first subparagraph, Member States may limit the requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2 By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring

plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

Article 12

Equity holders

1 Where Member States exclude equity holders from the application of Articles 9 to 11, they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan.

2 Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan.

3 Member States may adapt what it means to unreasonably prevent or create obstacles under this Article to take into account, inter alia: whether the debtor is an SME or a large enterprise; the proposed restructuring measures touching upon the rights of equity holders; the type of equity holder; whether the debtor is a legal or a natural person; or whether partners in a company have limited or unlimited liability.

Article 13

Workers

1 Member States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:

- a the right to collective bargaining and industrial action; and
- b the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:
 - (i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;
 - (ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;
 - (iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10;
- c the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.

2 Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

Article 14

Valuation by the judicial or administrative authority

1 The judicial or administrative authority shall take a decision on the valuation of the debtor's business only where a restructuring plan is challenged by a dissenting affected party on the grounds of either:

- a an alleged failure to satisfy the best-interest-of-creditors test under point (6) of Article 2(1); or
- b an alleged breach of the conditions for a cross-class cram-down under point (ii) of Article 11(1)(b).

2 Member States shall ensure that, for the purpose of taking a decision on a valuation in accordance with paragraph 1, judicial or administrative authorities may appoint or hear properly qualified experts.

3 For the purposes of paragraph 1, Member States shall ensure that a dissenting affected party may lodge a challenge with the judicial or administrative authority called upon to confirm the restructuring plan.

Member States may provide that such a challenge can be lodged in the context of an appeal against a decision on the confirmation of a restructuring plan.

Article 15

Effects of restructuring plans

1 Member States shall ensure that restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties named or described in accordance with point (c) of Article 8(1).

2 Member States shall ensure that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan.

Article 16

Appeals

1 Member States shall ensure that any appeal provided for under national law against a decision to confirm or reject a restructuring plan taken by a judicial authority is brought before a higher judicial authority.

Member States shall ensure that an appeal against a decision to confirm or reject a restructuring plan taken by an administrative authority is brought before a judicial authority.

2 Appeals shall be resolved in an efficient manner with a view to expeditious treatment.

3 An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan.

By way of derogation from the first subparagraph, Member States may provide that judicial authorities can suspend the execution of the restructuring plan or parts thereof where necessary and appropriate to safeguard the interests of a party.

4 Member States shall ensure that, where an appeal pursuant to paragraph 3 is upheld, the judicial authority may either:

- a set aside the restructuring plan; or
- b confirm the restructuring plan, either with amendments, where so provided under national law, or without amendments.

Member States may provide that, where a plan is confirmed under point (b) of the first subparagraph, compensation is granted to any party that incurred monetary losses and whose appeal is upheld.

CHAPTER 4

Protection for new financing, interim financing and other restructuring related transactions

Article 17

Protection for new financing and interim financing

1 Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

- a new financing and interim financing shall not be declared void, voidable or unenforceable; and
- b the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2 Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to *ex ante* control.

3 Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.

4 Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.

Article 18

Protection for other restructuring related transactions

1 Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of a debtor, transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2 Member States may provide that paragraph 1 only applies where the plan is confirmed by a judicial or administrative authority or where such transactions were subject to *ex ante* control.

3 Member States may exclude from the application of paragraph 1 transactions that are carried out after the debtor has become unable to pay its debts as they fall due.

4 Transactions referred to in paragraph 1 shall include, as a minimum:

- a the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan;
- b the payment of fees for and costs of seeking professional advice closely connected with the restructuring;
- c the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;
- d any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).

5 Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of the debtor, transactions that are reasonable and immediately necessary for the implementation of a restructuring plan, and that are carried out in accordance with the restructuring plan confirmed by a judicial or administrative authority, are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

CHAPTER 5

Duties of directors

Article 19

Duties of directors where there is a likelihood of insolvency

Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following:

- (a) the interests of creditors, equity holders and other stakeholders;
- (b) the need to take steps to avoid insolvency; and
- (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.