



**INSOL
EUROPE**

**INSOL Europe
Guidance Note
on the Implementation of
Preventive Restructuring
Frameworks under
EU Directive 2019/1023**

*Stay of individual
enforcement actions*

**Ben Schuijling
May 2020**



**INSOL EUROPE GUIDANCE NOTE ON
THE IMPLEMENTATION OF PREVENTIVE RESTRUCTURING FRAMEWORKS
UNDER EU DIRECTIVE 2019/1023**

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Foreword

It is with great pleasure that INSOL Europe presents the second in a series of Guidance Notes on the Implementation of Preventive Restructuring Frameworks under EU Directive 2019/1023 on Restructuring and Insolvency.

In March 2019, during Alastair Beveridge's presidency, the Council of INSOL Europe launched a "Directive Project" with the specific objective of preparing a helpful guide for legislators in the Member States who are in the process of turning the EU Directive into updated or brand new national legislation.

As you will be aware, the objectives of INSOL Europe are to take and maintain a leading role in European business recovery, turnaround and insolvency issues, to facilitate the exchange of information and ideas amongst its members and to discuss business recovery, turnaround and insolvency issues with official European and other international bodies who are affected by those procedures.

As the leading pan-European association of practitioners, academics and judiciary within the field of insolvency and restructuring, and whose members have between them thousands of years of experience, INSOL Europe is well-positioned to take a close look at and provide a pan-European perspective on those tools which would be beneficial in delivering successful restructurings and those tools which may be counter-productive.

We would like to extend our immense gratitude to the following INSOL Europe members who bravely undertook the huge and highly important task of drafting a series of Guidance Notes on the Directive:

Adrian Thery (Chair), Garrigues, Madrid, Spain

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The first Guidance Note deals with **Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down**. The main authors of the first Note are **Adrian Thery** and **Tomas Richter**.

This second Guidance Note deals with **Stay of Individual Enforcement Actions**. The main author of this Note is **Ben Schuijling**.

It is our hope that this Guidance Note, as well as the preceding and subsequent Notes that will be published over the coming months, will be considered to be a significant and useful contribution to enhancing the harmonization of the pre-insolvency restructuring regimes across the Member States. It is our sense that, in the wake of the unfolding Covid-19 pandemic, the

restructuring frameworks envisaged by the Directive might need to be in place rather sooner than originally envisaged by the EU legislator. We hope that our Guidance Notes will assist in that.

April, 2020

On behalf of INSOL Europe

Alastair Beveridge
Immediate Past President

Piya Mukherjee
President

Introduction by the author

The Guidance Notes are written in order to provide assistance to legislative drafters in the 27 Member States of the European Union tasked with implementing into their national laws the restructuring frameworks envisaged in Title II of EU Directive 2019/1023 on restructuring and insolvency.

The First Guidance Note, which was written by Tomáš Richter & Adrian They dealt with claims, classes, voting, confirmation and the cross-class cram-down. This Second Guidance Note treats the stay of individual enforcement actions. A stay can be instrumental in the preparation of a restructuring plan. In the context of implementing the Directive, Member States have considerable discretion in relation to the procedural aspects of a stay, its scope and its legal effects.

As with the First Guidance Note, it is the purpose of this Second Guidance Note to flag some of the key issues that national legislators will want to consider in this particular context when implementing the restructuring frameworks prescribed by Title II of the Directive, and, at least at times, also to respectfully suggest which approaches, in the author's humble opinion, might perhaps be explored more productively than others.

Nijmegen, April 2020

Ben Schuijling

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Defined Terms

"Directive" means 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).

"EU Restructuring Framework" means one or more of the preventive restructuring frameworks to be implemented into Member States' laws pursuant to Title II of the Directive.

"Member State" means member states of the European Union.

"Stay" or **"Stay of individual enforcement actions"** means a temporary suspension of the right of a creditor to enforce its claim in the context of a judicial, administrative or other procedure, or of the right to seize or realise out of court the assets or business of the debtor.

When this Note refers to **"Articles"** and **"Recitals"** it is referring to Articles and Recitals of the Directive, unless indicated otherwise.

I. GENERAL

A. Purpose and meaning

1. The Directive contains an extensive regulation of the Stay of individual enforcement actions, which is an important element of the EU Restructuring Framework. Member States have some discretion to decide on the details of the granting, the effects and the limits of a Stay. These margins of discretion are discussed in this Guidance Note.
2. The purpose of a Stay is to support the negotiations of a restructuring plan in a preventive restructuring framework.¹ A Stay enables the debtor to continue operating or at least preserve the value of its estate during these negotiations.² The preparation of a restructuring plan may take some time. During these preparations one or more creditors, who are aware of the financial difficulties of the debtor, may decide to not await the plan but rather take individual enforcements measures or request the opening of formal insolvency proceedings. Such individual and uncoordinated actions threaten the viability and value of the debtor's business and the realization of a preventive restructuring. A Stay can prevent such actions and support the main idea of the EU Restructuring Framework to enable debtors to restructure effectively at an early stage and to avoid insolvency.³
3. A Stay means a temporary suspension of the right of a creditor to enforce its claim in the context of a judicial, administrative or other procedure, or of the right to seize or realize out of court the assets or business of the debtor.⁴ Such an instrument can also be referred to a "moratorium" or a "suspension". The Stay, as a principle, has to cover all types of claims, including secured claims and preferential claims, but with the exception of workers' claims.⁵

B. Scope

4. Member States may provide that a Stay can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.⁶ Where a Stay is limited, it shall only apply to creditors that have been informed of the Stay, in or of negotiations on the restructuring plan.⁷
5. A general stay is often not necessary and may create unnecessary negative publicity and harm. A stay for one or more specific (groups of) creditors may suffice to effectively support the negotiations. It is therefore recommended that the Stay can be tailored to the specific circumstances. As a rule of thumb, the Stay does not need to affect more or other claims than would be affected under the restructuring plan. A limited stay may provoke the affected creditor to sidestep the Stay, for example through a transfer of its affected claim to a third party. Member States may consider the introduction of countermeasures against these forms of evasion.

¹ Article 6(1)(1st subparagraph).

² Recital (32).

³ Cf. Recital (2).

⁴ Article 2(1)(4).

⁵ Article 6(2) and Article 6(4)(1st subparagraph).

⁶ Article 6(3)(1st subparagraph) and Recital (34).

⁷ Article 6(3)(2nd subparagraph).

6. Member States should consider in what manner the creditors affected by a Stay are informed of the Stay or the negotiations on the restructuring plan. A public announcement will in principle suit a general Stay. However, in the case of a more limited Stay unnecessary publicity may better be avoided and the affected creditors could be notified privately.
7. A Stay can cover all types of claims, including secured claims and preferential claims. Member States can determine whether claims that fall due or that come into existence after an application to open a preventive restructuring procedure has been submitted or after the procedure has been opened are included in the Stay.⁸
8. Member States may exclude certain claims or categories of claims from the scope of the Stay 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, such as claims which are secured by assets the removal of which would not jeopardise the restructuring of the business; or (b) the Stay would unfairly prejudice the creditors of those claims, such as by way of an uncompensated loss or depreciation of collateral.⁹
9. Workers' claims are in principle left unaffected by a Stay.¹⁰ This is irrespective of whether those claims arise before or after the stay is granted.¹¹ However, Member States may apply the stay to workers' claims to the extent that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.¹² This means that a stay of enforcement of workers' outstanding claims should be allowed only for the amounts and for the period for which the payment of such claims is effectively guaranteed at a similar level by other means under national law. Where national law provides for limitations on the liability of guarantee institutions, either in terms of the length of the guarantee or the amount paid to workers, workers should be able to enforce any shortfall in their claims against the employer even during the stay period.¹³
10. Member States can extend the protective effect of a Stay to third-party security providers, including guarantors and collateral givers.¹⁴ This effect of the Stay can be of key importance for the effective restructuring of groups as well as SMEs, where director-shareholders generally have guaranteed parts of the company's debts. This element of the Stay can be a first step towards the release of third party guarantees under the plan.

II. PROCEDURAL ASPECTS

A. Granting

11. The Directive gives Member States freedom as to how a Stay will be granted. The Stay could be applied automatically (by operation of the law) or at the discretion of a judicial or administrative authority.¹⁵ A Stay, for example, may be granted automatically

⁸ Recital (25).

⁹ Article 6(4) and Recital (34).

¹⁰ Article 6(5).

¹¹ Recital (61).

¹² Article 6(5).

¹³ Recital (61).

¹⁴ Article 2(1)(4) and Recital 32.

¹⁵ Art. 2(1)(4).

with the filing of a petition for the application of a measure under the EU Restructuring Framework.¹⁶

12. An automatic stay at an early stage will not be necessary in many cases. There might not be a threat that creditors will undertake enforcement actions or the debtor may be able to agree with the relevant creditors to a standstill. It is therefore respectfully recommended that a Stay is only granted (either automatically or by official order) to the extent it is requested by the applicant.

B. Requesting

13. A Stay can be requested by the debtor.¹⁷ This right may be restricted in certain cases, which are described in Article 4, paragraphs (2), (3) or (4). A Member State may provide that a debtor that has been sentenced for serious breaches of accounting or bookkeeping obligations under national law is not allowed to access a preventive restructuring framework, unless that debtor has taken adequate measures to remedy the issues that gave rise to the sentence.¹⁸ Another possible limitation lies in the existence of a viability test with the purpose of excluding debtors that do not have a prospect of viability and that can be carried out without detriment to the debtors' assets.¹⁹ A third limitation may be introduced in relation to the number of times within a certain period the debtor can access a preventive restructuring framework.²⁰ Member States should consider if this right should be limited in conformity with.
14. Company law may hinder the debtor in effectively request a Stay. If such is the case, Member States are to consider the disapplication of rules of company law that may frustrate restructuring efforts. Member States should attach particular importance to the effectiveness of provisions relating to a Stay which should not be unduly impaired by calls for, or the results of, general meetings of shareholders.²¹ It is recommended that such provisions are disapplied to the extent and for the period necessary to ensure the effectiveness of a Stay.
15. The Directive provides that Member States may allow *third parties* to access a preventive restructuring procedure regarding the debtor.²² If such third parties are given access, Member States should consider whether and under what conditions these parties may also request a Stay to support the restructuring procedure. As an alternative, Member States may e.g. introduce a right for third parties to appoint (or request the judicial appointment of) an insolvency practitioner who may apply for the Stay on their behalf.

C. Refusal

16. To the extent a Stay is granted by judicial or administrative authority, the Member States are allowed to formulate refusal grounds.

¹⁶ Cf. Section 362 US Bankruptcy Code, which provides for an automatic stay when a petition is filed for the opening of a Chapter 11 procedure.

¹⁷ Cf. Article 4(1).

¹⁸ Article 4(1)(2).

¹⁹ Article 4(1)(3).

²⁰ Article 4(1)(4).

²¹ Recital (96).

²² Cf. Article 4 and 9(1).

17. A Stay may e.g. be refused on the basis that is not necessary or that it would not achieve the objective of supporting the negotiations of a restructuring plan in a preventive restructuring framework.²³ Another ground for refusal can be a lack of support by the required majorities of creditors or the debtor's actual inability to pay debts as they fall due.²⁴
18. In order to facilitate and accelerate the course of proceedings, Member States may establish rebuttable presumptions for the presence of grounds for refusal of the Stay. For example, where the debtor shows conduct that is typical of a debtor that is unable to pay debts as they fall due, such as a substantial default vis-à-vis workers or tax or social security agencies. Another example is where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that a majority of creditors would not support the start of the negotiations.²⁵

D. Duration

19. The initial duration of a stay of individual enforcement actions is limited to a maximum period of no more than four months.²⁶ This is in order to provide for a fair balance between the rights of the debtor and those of creditors.²⁷ However, Member States can provide for an indefinite stay where an insolvency proceeding is opened against the debtor.²⁸
20. Complex restructurings may require more time than the initial period. The judicial or administrative authority must be able to grant extensions of the initial period of the Stay.²⁹ Member States may enable judicial or administrative authorities to extend the duration of a Stay or to grant a new Stay at the request of the debtor, a creditor or a practitioner in the field of restructuring. The extension or a new Stay shall be granted only if well-defined circumstances show that such extension or new stay is duly justified. These circumstances are that: (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.³⁰ Another ground for extension or renewal may be the suspensive effect of an appeal against the decision to confirm a restructuring plan.³¹
21. The total duration of a Stay, including extensions and renewals, shall not exceed 12 months.³² Member States may decide on a shorter maximum duration of the Stay. Where a judicial or administrative authority does not take a decision on the extension of a Stay before it lapses, the Stay should cease to have effect automatically upon expiry of the stay period.³³

²³ Article 6(1)(2nd subparagraph).

²⁴ Recital (32).

²⁵ Recital (33).

²⁶ Article 6(6).

²⁷ Recital (35).

²⁸ Recital (35).

²⁹ Article 6(7) and Recital (35).

³⁰ Article 6(7).

³¹ Recital (65).

³² Article 6(8)(1st subparagraph) and Recital (35).

³³ Recital (35).

22. If a Member State chooses to implement the Directive in a procedure that is not covered by the European Insolvency Regulation, the duration of the Stay is limited to four months in case 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.³⁴ This restriction acts as a safeguard against abusive “COMI shifting”.³⁵
23. The expiry of a Stay 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.³⁶

E. Lifting

24. Member States have to ensure that judicial or administrative authorities can lift a Stay in the following two cases: (i) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan; or (ii) at the request of the debtor or the practitioner in the field of restructuring.³⁷ An example of the first case is if it becomes apparent that a proportion of creditors which could prevent the adoption of the restructuring plan do not support the continuation of the negotiations. In the case the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, Member States may limit the power 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.³⁸
25. Member States may decide who is entitled to request the lifting of the Stay.³⁹ Member States may also provide for a minimum period during which a Stay cannot be lifted. This period cannot exceed four months.⁴⁰ Additionally, Member States may limit the power to lift a Stay to situations where creditors have 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.⁴¹
26. Member States may introduce two additional grounds for lifting for lifting a Stay. The first additional ground is that the Stay gives rise to the insolvency of a creditor.⁴² The second additional ground is that one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions.⁴³ If a Member States allow for the lifting of a Stay because of unfair prejudice against one of more creditors, the Stay may be lifted in full or only in favor of the prejudiced creditors.⁴⁴ In establishing whether there is unfair prejudice to creditors, judicial or administrative

³⁴ See Article 6(8)(2nd subparagraph).

³⁵ Cf. Recital (14).

³⁶ Article 7(7).

³⁷ Article 6(9)(3rd sentence) and Recital (36).

³⁸ Article 6(9)(1st subparagraph)

³⁹ Recital (37).

⁴⁰ Article 6(9)(3rd subparagraph) and Recital (36).

⁴¹ Article 6(9)(2nd subparagraph) and Recital (36).

⁴² Article 6(9)(1st subparagraph) and Recital (36).

⁴³ Article 6(9)(1st subparagraph) and Recital (36).

⁴⁴ Recital (37).

authorities should be able to take into account whether the stay would preserve the overall value of the estate, and whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors.⁴⁵ A single creditor or a class of creditors would be unfairly prejudiced by a Stay if, for example, their claims would be made substantially worse-off as a result of the Stay than if the Stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position.⁴⁶

III. LEGAL EFFECTS

A. General

27. A Stay is defined in the Directive as a temporary suspension of the right of a creditor to enforce its claim in the context of a judicial, administrative or other procedure, or of the right to seize or realize out of court the assets or business of the debtor.⁴⁷ The reference to “other procedures” should cover enforcements action brought before an arbitral tribunal.
28. Although the definition is not completely clear, the Stay seems apply to all remedies and proceedings available to a creditor against the debtor and its assets, including self-help remedies. The Stay therefore would suspend the creditor’s right to commence or continue any enforcement actions or proceedings against the debtor or in relation to its assets, including the execution of a judgement and actions to enforce security interests. It also covers a creditor’s right to recovery property from under the debtor.
29. The Directive explicitly states some specific legal effects of the Stay, which are discussed in more detail below. They include a suspension of rights and obligations to file for the opening of insolvency proceedings, the protection of executory contracts, the payment of claims

B. Rights and obligations to file for the opening of insolvency proceedings

30. If under national law, the debtor has on obligation file for the opening of insolvency proceedings which could end in the liquidation of the debtor, and that obligation arises during the stay, the obligation shall be suspended for the duration of that stay.⁴⁸
31. The opening of insolvency proceedings at the request of one or more creditors and which could end in the liquidation of the debtor is suspended for the duration of the stay.⁴⁹ This suspension should apply not only in case of a Stay that covers covering all creditors, but in case the Stay covers only a limited number of creditors.⁵⁰ The Stay does not have to suspend the right to file for an insolvency proceeding that could lead to a restructuring of the debtor.⁵¹ Member States may provide that during a Stay insolvency proceedings can

⁴⁵ Recital (36).

⁴⁶ Recital (37).

⁴⁷ Article 2(1)(4).

⁴⁸ Article 7(1).

⁴⁹ Article 7(2).

⁵⁰ Recital (38).

⁵¹ Cf. Recital (38).

be opened at the request of *public authorities* which are not acting in a creditor capacity, but in the general interest, such as a public prosecutor.⁵²

32. However, Member States may decide that a Stay shall not suspend obligations and rights to file for the opening of insolvency proceedings which could end in the liquidation of the debtor in the case 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, 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.⁵³

C. Payment of claims and the accrual of interest

33. To ensure that creditors with claims that came into existence before the Stay do not put pressure on the debtor to pay those claims, which otherwise would be reduced through the implementation of the restructuring plan, Member States can provide for the suspension of the obligation of the debtor to pay those claims.⁵⁴ However, the Directive does not prevent debtors from paying, in the ordinary course of business, claims of unaffected creditors, and claims of affected creditors that arise during the Stay.⁵⁵
34. Member States can decide what effect the Stay of individual enforcement actions has on the interest due on claims.⁵⁶ For example, a Member State may provide for a rule that no interest shall accrue during a Stay on claims that are affected by that Stay. Such a rule may function in case of a general Stay, but may lead to unfair discrimination of creditors in case of a limited Stay.

D. Protection of essential executory contracts

35. Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card payment services are concerned.⁵⁷ Licenses to industrial property and real estate leases are other key examples.
36. Creditors affected by a Stay are prevented 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.⁵⁸ The protection of these essential executory contracts requires that the debtor complies with its obligations under such contracts which fall due during the Stay.⁵⁹
37. An executory contract is a contract between a debtor and one or more creditors under which the parties still have obligations to perform at the time the Stay is granted or

⁵² Recital (38).

⁵³ Article 7(3).

⁵⁴ Recital (39).

⁵⁵ Recital (39).

⁵⁶ Recital (25).

⁵⁷ Recital (41).

⁵⁸ Article 7(4).

⁵⁹ Recital (41).

applied.⁶⁰ Examples can be lease and license agreements, long-term supply contracts and franchise agreements.⁶¹ Such an executory contract is considered “essential” if it is 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.⁶²

38. Member States may extend the protection to some or all non-essential executory contracts.⁶³

39. Member States may decide to provide creditors under protected executory contracts with appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.⁶⁴

E. Protection against ipso facto clauses

40. During a Stay 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.⁶⁵

41. Such *ipso facto* clauses that are invoked when the debtor is merely negotiating a restructuring plan or requesting a Stay, can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, it is necessary to provide that creditors are not allowed to invoke these clauses.⁶⁶

F. Exemption for netting arrangements

42. Member States may provide that a Stay does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets. The exemption requires that such arrangements are enforceable under national insolvency law. The amount resulting from the operation of netting arrangements is, however, subject to the effects of the Stay.⁶⁷

43. This exemption from the effects of the Stay does 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.⁶⁸

G. No “adequate protection” for secured creditors

⁶⁰ Article 2(5).

⁶¹ Recital (41).

⁶² Article 7(4)(1st subparagraph).

⁶³ Article 7(4)(3rd subparagraph).

⁶⁴ Article 7(4)(2nd subparagraph).

⁶⁵ Article 7(5).

⁶⁶ Recital (40).

⁶⁷ Article 7(6)(1st subparagraph) and Recitals (94) and (95).

⁶⁸ Article 7(6)(2nd subparagraph).

44. The Directive does not contain provisions on the compensation or the provision of guarantees for creditors whose collateral is likely to decrease in value during the Stay.⁶⁹ As such, the Directive does not introduce a rule of “adequate protection” for secured creditors.⁷⁰ Member States, however, could consider introducing such forms of protection.

⁶⁹ Cf. Recital (37).

⁷⁰ Cf. § 361 US Bankruptcy Code.