Executive Summary

The research analyses and compares the implementation of Directive (EU) 2019/1023 (hereafter '**the Restructuring Directive**' or '**the Directive**') in Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and in the United Kingdom ('**the UK**'), predominantly from a legal perspective, but also in an economic context. The European Investment Bank is particularly interested in understanding what pre-insolvency proceedings are available in the nine jurisdictions, and what implementation discrepancies can be found in these countries, considering that the bank has ongoing projects in all the jurisdictions.

The fundamental principles of the Restructuring Directive are:

- Early warning systems
- Access to the procedure
- Debtor-in-possession
- Duties of directors
- Adoption of restructuring plans
- Confirmation of restructuring plans
- Stays of individual enforcement actions
- Protection of new financing
- Discharge of debts

As such, this executive summary will introduce (i) a comparison of the nine national pre-insolvency and insolvency proceedings, and (ii) a comprehensive table facilitating the overview and comparison of the nine jurisdictions.

1. Comparative analysis

Early warning systems

With the aim of the Directive targeted towards fostering a preventative environment, it can be observed that such sentiment was not reciprocated within every examined jurisdiction, with some countries such as Greece, Italy, Germany, and France taking a very direct approach in implementing the early warning structures while others like Finland, Portugal, the Netherlands, and the UK not touching upon them at all. A trend of caution and trepidation in tools used could be observed even within those countries who employed early warning mechanisms. Many countries with the notable exception of Italy employed a self-reflective and at best a change urging system where the debtors were encouraged to self-assess through warnings provided by the supervising authority once certain thresholds were crossed. This trend of apprehensive involvement could be linked to governments not wanting to pursue any reporting obligations and therefore pressuring companies and potentially eroding their trust towards the restructuring process and its voluntarily. Therefore, many states could have abstained from imposing any intrusive systems in order not to erode trust between the debtors and the supervising authority and to encourage initiative among debtors alongside with voluntary transparency. However, this approach was infamously averted within the Italian framework where the government decided upon a stricter and more reporting based early warning mechanism. In such framework in certain circumstances, non-compliance with the advice of the supervising authority could lead to an involuntary entry into the restructuring procedure or even liquidation. Moreover, any external or internal auditors had an obligation to report any significant economic troubles of the debtor. This tighter approach although in the short term effective could potentially disincentivise frequent and voluntary audits by the debtor, therefore increasing chances of insolvencies. Finally, the last and potentially most significant trend among debtors were complaints regarding compliance costs, where in Italy the costs surged by billions of euros across the country and put a strain on already struggling and debt-ridden entrepreneurs. The early warning mechanism was not a tool that was employed often across the examined jurisdictions, however, remains one of the preventative walls within the new restructuring system across the EU in many states.

Access to the procedure

After conducting the research, it has become evident that the Member States have taken different approaches when it comes to access to the restructuring procedure. Some Member States have opted for stricter rules on access to these procedures. For instance, within Greece the restructuring procedure is available to a natural or legal person with an insolvency capacity; however, it rules out several cases where 90% of the debt is owed to one creditor (financial institution) or the amount of his/her debt does not exceed 10.000 euros. On the other hand, within Germany debtors must provide comprehensive documentation attached to the insolvency filing, such as "a six-month financial plan, a restructuring plan, the state of creditor negotiations, and compliance with commercial disclosure obligations for the last three years", which could aid the approval and later procedure. While in Spain to access the restructuring procedure, there must be a likelihood that a debtor, both natural and legal person, will not be able to pay his debts. This shows significant differences regarding which debtors have access to this procedure and which do not. Furthermore, there seems to be a consensus on making the Courts role within the procedure voluntarily. Within Great Britain, an application can be submitted before the court by the representatives of the company itself, any creditor, or in cases of administration or liquidation the administrator and liquidator, respectively. The initial court summoned meeting must further satisfy administrative requirements. Within the Netherlands, the application must be done at the Court, however court approval is not required.

Debtor-in-possession

In our research it became apparent that, in most of the jurisdictions, the debtor remains in control of its assets during restructuring procedures. For example, at the core of the Dutch restructuring procedure is that the debtor remains fully in control over his assets during the entire process and within Spain the debtor keeps the right to administrate or dispose of his assets. Germany decided to leave debtors in charge and control during the entire restructuring process, while shareholders will not be directly involved and without the debtor being supervised by the relevant court or a restructuring professional. They must exercise prudent and diligent care over the planned restructuring. Nevertheless, "on application of the debtor and in very sensitive cases", such as for small- and medium-sized enterprises, an adviser in the field can be appointed by the court to "support and supervise the debtor." There are two exceptions within our research, both France and Finland. The French framework leaves the right to apply for proceedings to the debtor and possibly negotiate with creditors however entrusts the Court to mandate and supervise the used procedures with the aim of protecting the debtor's and the creditors' interests. A conclusion can be made that in principle, the debtor remains in possession of his assets with a notable exception of France and Finland.

Duties of directors

Different jurisdictions have stated the importance of a board of directors and how their behaviour is of significance for the corporation. According to the Finnish Companies Act the directors have statutory duties towards the company, thus, a general duty of care and to act in the best interests of the company and its shareholders. The Dutch legislation takes this a step further and states that Directors could be responsible and liable for the bankruptcy when they are found to be negligent. The same goes in Italy where if the directors are found to be responsible for continuation of business operations without due regard for the forward financial interests of the company and its financial prudency, may also be liable. Additionally, the Italian framework aims to enable self-regulation in directors by obliging them with early detection and early prevention obligations. It is remarkable that only in Germany the duties of directors change within the restructuring procedure, where they now "have to protect the interests of creditors when illiquidity is imminent".

Adoption of the plan

The adoption of the plan is the decision taken by the stakeholders of the company in financial difficulties. The Directive, thus, laid down (i) the requirements of formation of at least two classes, and (ii) the maximum threshold of vote of 75% for the approval of the plan.

In France, as it is a new system, the classification of claims is yet only separated into the two basic classes. In Spain, there must be a justification for the separation of classes within secured claims based on the common interests of the classes' members. This element is determined by the order of payment within a bankruptcy. However, such classes can further be divided if there is a reasonable justification to do so. Portugal implemented the Directive's measures. The jurisdiction indicated that the debtor can submit for the approval of the plan and afterwards, creditors having filed their claims or are listed by the debtor can vote on the adoption. Already at this stage, the diversity of situations as well as the necessity of appropriate treatment will be considered. The Netherlands, like Portugal, allowed for the debtor to submit the plan for adoption. However, they went further and added creditors, shareholders, work councils or the representative body of employees to have such a right too, with the added requirement of appointing a restructuring expert to arrange the procedure and when certain conditions are met. Additionally, the Netherlands did not just implement the minimum requirements for class division, as when a right of a specific class is affected by the plan, this class must be an agreeing party. Finland differentiates between many categories of claims, including even unsecured creditors and creditors with lowest-priority claims. This gives more assurance and say to stakeholders with the restructuring plan in discussion. Also, in Germany four classes are mentioned in their legislation, including general insolvency creditors, subordinated creditors, preferential creditors, and secured creditors, giving them the same result as in Finland. When it comes to the United Kingdom, the Court is more involved than in other jurisdictions. They must summon the involved parties, such as representatives of the company, creditors and other parties affected by the plan, to discuss the plan and find a fair balance between the parties. As such, balanced protection is given to stakeholders and debtors. A voting majority is required for the plan to be binding on the debtor and the stakeholders.

It is worth noting, however, that within the formation of classes, secured creditors have the most protection in comparison to "lower ranking" creditors, such as unsecured creditors. Thus, there is more protection for investors if they have securities established in the contract when investing in the respective company.

In matter of thresholds, Spain implemented a general 2/3 majority in each class, except for secured claims, where a 75% majority is required in each class. Exceptionally, the Court will have to approve the restructuring plan as well. Portugal also implemented the requirement of the 2/3 majority in each class. The Greek jurisdiction implemented that only 50% of each class must approve the plan, whether they are classes with special liens or other claims even if these were not due yet. However, to have a voting right on the matter, the creditor must be deemed a participating creditor. Additionally, Greece gave less power to the debtor by removing the requirement of the debtor's consent if deemed unnecessary when they are in cessation of payments. Such a required majority might result in not all claims being represented equally in the plan; thus, stakeholders have less protection over their claims in the process. Italy implemented the minimum majority of creditors representing 60% of the debtor's indebtedness. Just as in Greece, a simple majority is required in Finland. This might have the opposite effect of involving more categories of claims, as these can easily be overturned by a smaller majority than in other jurisdictions, where a 75% majority in each class is required, such as in Germany and the United Kingdom. In France, a 2/3 majority, without quorum, is required for the approval of the plan, however, an agreement between creditors can replace the consent.

Confirmation of the plan

When the restructuring plan has been approved by the stakeholders, further requirements have to be met for the plan to be confirmed. As such, Spain implemented the minimum requirements as set out by the Directive, thus, the creditors within the same class must be treated equally, the form and requirements of the plan are in accordance with the law and all the affected creditors must be notified of the plan. Portugal, on the other hand, fully implemented the Directive by indicating that the Court can refuse the approval of a restructuring agreement in certain cases. Such refusal can be appropriate in cases where the restructuring plan proposed is not a viable and credible recovery plan. The judge also must assess whether creditors with common interest in the same class are treated equally, and in a manner proportionate to their claim. This process is urgent and should be handled with expediency. The Netherlands used the negative approach for the confirmation of the plan, where conditions under which the proposal will be denied are laid down in their legislation. As such, it gives a control function to the Court, and gives more power to the adoption of the plan by the debtor and the stakeholders. Germany used the same approach but added the condition that the judicial or administrative authority should act within certain deadlines.

France gives the Court more power over the final confirmation of the restructuring plan, as even if the conditions laid down by the Directive are not met, the respective authority can still confirm the plan at the request of the debtor, the judicial administrator with the debtor's consent, or at the request of any member of the affected classes. When this situation arises, the plan will be binding on dissenting classes, thus, leaving a large probability that stakeholders, which were against the plan, will not have their claims protected in a fair manner. As the adoption of a plan takes place before a Court, the power it holds over the confirmation is more prominent than in France. Finland implemented the minimum requirements of the Directive, thus, not giving more or less power or protection to any parties.

Stays of individual enforcement actions

The emerging trends within the examined jurisdictions could be pinpointed to two categories of protections granted, the protection provided only for the purposes of promulgating negotiation and providing such protection mostly to the extent of such negotiations and the protections given to the debtor to have a short payment holiday as a means for recovery and a restructuring process free of intervention. This duality in trends is displayed within some jurisdictions such France, Greece and Italy providing for periods of stay for up to 12 months while in Germany the protections could only be extended for up to 4 months. Moreover, such stark difference between these two categories is not only exemplified through the length of the protection but also its intensity, with some countries like Greece providing expansive protections not only from contractual creditors but also to non-contractual creditors for the period of up to 120 days, while in the United Kingdom such protection is not provided automatically but rather should be applied through a separate procedure to the restructuring one and only grants limited protections for a short period of time.

Protection of new financing

While the United Kingdom does not provide anything on the protection of new financing, Spain does not bring much more guidance on it. Portugal, Greece and Finland stay along the lines of keeping it to a minimum through seeing it as collateral requirement or keeping it to strict necessity so that creditors' interests remain protected. In Germany, any new financing remains largely protected against insolvency clawback and "lender liability" risks. However, this is only applicable to first-time loans and securities falling under new financing. In the Netherlands and in Italy, the creditor must request the relevant Court's authorization to get new financing to assist the creation of a restructuring agreement and to help the continuity of the corporation, as well as to protect creditors with an interest in such financing. France has the highest level of implementation and highest level of creditors' protection through the implementation of the "new money" or "post-money" privilege. As such, priority repayment is ensured, as well as the principle and proceeding in the Netherlands and Italy.

A common feature amongst all the jurisdictions is the fact that the protection of new and interim financing has not been extensively described within legislation. Ultimately, all jurisdictions provide for protection on finance even for interim finance guarantors after the illiquidity. There are multiple risks that come with the protection of finance, such as opportunistic use within the interim finance, the loan-to-own strategy, and the risk of overinvestment.

Discharge of debt

Many of the examined jurisdictions approached debt discharge with some conservatism, ensuring that there are appropriate barriers and requirements that must be passed and met in order to attain such procedure, however some differences could be noted regarding how liberal the criteria for entry is. Where in certain countries like the Netherlands, the debt discharge mechanism acts to provide debtors with a second chance, in places like Germany and Portugal the debtor is required to not only exhaust all other mechanism but also repay a certain amount of its debt before such procedure could be accessed. Therefore, although mostly uniform the severity and in some cases the purpose, the debt discharge mechanisms differ within the examined jurisdictions.

2. Comparative table

One of the main goals of this research was to analyze the Restructuring Directive, through a comparative lens in order to ascertain the extent of implementation in the states of Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the UK and to compare and contrast the level of implementation. The table demonstrates the comparative factors that have been ascertained to show the potential differences and similarities in the implementation of the Directive across jurisdictions. The order of the main features of the Directive in the comparative table follows the same order a restructuring procedure would undertake. Furthermore, the articles of the Directive have been summarized and are divided into provisions which were mandatory for implementation (blue) and non-mandatory provisions (white). The jurisdictions are classified based on the presence of certain risks that may be a result of incomplete implementation, which the left-most jurisdiction presenting the lowest risks. When the table mentions that a certain feature of the Directive is not implemented it corresponds to the fact that the necessary elements were not mentioned within legislation or literature during within our research.

Principles/Risk	No/Low Risk	Medium Risk	High Risk
Early warning systems	On-going monitoring by internal party	Assessment by third party on initiation by debtor or self-assessment by debtor	Not included in legislation
Access to procedure	Viability test available; No access if high amount of debt is owed to creditors; Access by creditors; Mandatory access by debtors	Viability filter; Access by creditors with debtor consent; Access by workers' representatives; Access by workers' representatives with debtor consent	No viability test; No further clarification on *likely insolvency*; Not clarified in legislation
Debtor-in-possession	Protection of creditors through the Court's involvement	Only debtor is in control, i.e. stakeholders are not directly involved	Only debtor is in control, i.e. stakeholders are not involved

Duties of directors	Duties of directors implemented in national legislation as disposed in the Directive; Duties of directors include early detection and early prevention obligations	Statutory duties, but directors can be held responsible and liable for bankruptcy if they are found to be negligent	Statutory duties, i.e. general duty of care and to act in the best interest of the company
Adoption of restructuring plans	High threshold to adopt plan	Medium threshold to adopt plan	Low threshold to adopt plan
Confirmation of restructuring plans	Best interest of creditors' test resulting in protection of individual creditors, protection against receiving less value than in liquidation, and when it is mandatory	Absolute priority rule, resulting in protection of classes, protection of dissenting classes by denying any payment to junior classes, and when it is optional and/or when exceptions are possible	Relative priority rule, resulting in protection of classes, protection of only the dissenting class by ensuring junior classes do not receive more, and when it is optional and/or when no exceptions are possible
Stays of individual enforcement actions	Limited stay; Balanced period of stay (4 months); Start of period of stay with commencement of procedure Extension not possible; Lifting of stay for unfair prejudice for creditors or if it does no longer support negotiations	Only affected creditors; Only certain classes of creditors; General stay; Short period of stay; Possibility of extension up to 12 months; Allowing commencement of insolvency proceedings during stay	Long period of stay; Start of stay period with debtor's request; Period established during which stay cannot be lifted; Limit lifting of stay to when creditors have not had the opportunity to be heard
Protection of new financing	Priority repayment is ensured; Court authorization for assistance on creation of restructuring agreement	Minimum threshold of Directive, i.e. collateral requirement and/or strict necessity to protect creditors' interests	No protection of new financing

Discharge of debt	Criterium of repayment of minimum amount by debtor, and long period to apply for discharge	No criterium to repay minimum, but period of application for discharge is relatively long	No criterium to repay minimum and short period to apply for discharge