



STATUTORY INSTRUMENTS.

S.I. No. 380 of 2022



EUROPEAN UNION (PREVENTIVE RESTRUCTURING) REGULATIONS
2022

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I, LEO VARADKAR, Minister for Enterprise, Trade and Employment, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019¹ 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, hereby make the following regulations:

Citation

1. These Regulations may be cited as the European Union (Preventive Restructuring) Regulations 2022.

Definition

2. In these Regulations, “Principal Act” means the Companies Act 2014 (No. 38 of 2014).

Application

3. These Regulations shall apply to proceedings under Part 10 or Part 11 of the Principal Act that commenced on or after the date on which these Regulations come into operation.

Directors to have regard to certain matters where company is, or is likely to be, unable to pay its debts

4. The Principal Act is amended by the insertion of the following section after section 224:

“Directors to have regard to certain matters where company is, or is likely to be, unable to pay its debts

224A. (1) A director of a company who believes, or who has reasonable cause to believe, that the company is, or is likely to be, unable to pay its debts (within the meaning of section 509(3)), shall have regard to –

- (a) the interests of the creditors,
- (b) the need to take steps to avoid insolvency, and

¹ OJ No. L 172, 26.6.2019, p. 18.

- (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business of the company.

(2) The duty imposed by this section on a director shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.”.

Amendment of section 228 of Principal Act

5. Section 228 of the Principal Act is amended, in subsection (1) –
- (a) in paragraph (g), by the substitution of “which the director has;” for “which the director has; and”,
 - (b) in paragraph (h), by the substitution of “interests of its members; and” for “interests of its members.”, and
 - (c) by the insertion of the following paragraph after paragraph (h):
 - “(i) in addition to the duties under section 224A (directors to have regard to certain matters where company is, or is likely to be, unable to pay its debts), have regard to the interests of its creditors where the directors become aware of the company’s insolvency.”.

Amendment of section 232 of the Principal Act

6. Section 232 of the Principal Act is amended, in subsection (1), by the substitution of “(f), (g) or (i)” for “(f) or (g)”.

Chapter 7 - Early warning tools

7. The Principal Act is amended by the insertion of the following Chapter after Chapter 6 of Part 5:

“Chapter 7

Early warning tools

271A. (1) A director may have regard to early warning tools.

(2) For the purposes of this section, an early warning tool means a mechanism to alert the directors of the company to circumstances that could give rise to a likelihood that the company concerned will be unable to pay its debts (within the meaning of section 509(3)) and can identify the restructuring frameworks available to the company and signal to such directors the need to act without delay.”.

Amendment of section 508 of the Principal Act

8. Section 508 of the Principal Act is amended –
- (a) in subsection (1), by the insertion of the following definition:

“ ‘Preventive Restructuring Directive’ means Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019² 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;”, and
 - (b) by the insertion of the following subsection after subsection (1):

“(1A) A word or expression that is used in Chapter 2 or 7 of Part 5, this Part or Part 11 and that is also used in the Preventive Restructuring Directive shall have the same meaning in Chapter 2 or 7 of Part 5, this Part or Part 11, as the case may be, as it has in the Preventive Restructuring Directive.”.

Amendment of section 509 of the Principal Act

9. Section 509 of the Principal Act is amended –
- (a) by the substitution of the following subsection for subsection (2):

“(2) The court shall not make an order under this section unless it is satisfied that –

 - (a) there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern, and
 - (b) the individual to be appointed as examiner has, in cases including cross-border elements, in addition to meeting the requirements of section 519, sufficient experience and expertise to perform the role, having due consideration to the examiner’s experience and to the specific features of the case.”, and
 - (b) in subsection (3), by the substitution of “this section, sections 224A, 271A and 520A” for “this section”.

Amendment of section 511 of the Principal Act

10. Section 511 of the Principal Act is amended, in subsection (3), by the substitution of the following paragraph for paragraph (g):

² OJ No. L 172, 26.6.2019, p. 18

- “(g) his or her opinion as to whether an attempt to continue the whole or any part of the undertaking meets the best-interest-of-creditors test and would be likely to be more advantageous to the members as a whole than a winding-up of the company;”.

Amendment of section 520 of the Principal Act

11. Section 520 of the Principal Act is amended –

- (a) in subsection (5), by the substitution of “subsections (4) and (5A)” for “subsection (4)”, and
- (b) by the insertion of the following subsection after subsection (5):

“(5A) Notwithstanding subsections (4) and (5), nothing in this section shall prevent an employee of the company from seeking to commence or advance actions or proceedings falling within subsection (4) against the company.”.

Restrictions on certain contracts during examinership

12. The Principal Act is amended by the insertion of the following section after section 520:

“Restrictions on certain contracts during examinership

520A. (1) In respect of any executory contract concluded between a creditor and a company to which the circumstances in paragraphs (a) to (c) of section 509(1) apply, the creditor shall not –

- (a) withhold performance of,
- (b) terminate,
- (c) accelerate, or
- (d) in any other way modify,

the contract to the detriment of the company, notwithstanding any contractual clause to the contrary, solely by reason of –

- (i) the making of an application by petition to appoint an examiner to the company under section 509,
- (ii) the appointment of an interim examiner to the company under section 512,
- (iii) the appointment of an examiner to a related company to the company under section 517, or
- (iv) the company being placed under the protection of the court under section 520.

(2) For so long as a company is under the protection of the court in a case under this Part, any creditor with a claim to which

section 520 applies shall not, in respect of any essential executory contract concluded between that creditor and the company –

- (a) withhold performance of,
- (b) terminate,
- (c) accelerate, or
- (d) in any other way modify,

the contract to the detriment of the company, solely by virtue of the fact that the company is deemed to be unable to pay its debts within the meaning of section 509(3).

(3) In this section –

‘executory contract’ means a contract between a company and one or more creditors under which the parties still have obligations to perform at the commencement of the period referred to in section 520(2);

‘essential executory contract’ shall have the same meaning as it has in Article 7(4) of the Preventive Restructuring Directive.”.

Amendment of section 529 of Principal Act

13. Section 529 of the Principal Act is amended –

- (a) by the substitution of the following subsection for subsection (2):

“(2) The liabilities referred to in subsection (1) are those certified in writing by the examiner, at the time they are incurred, to have been incurred in circumstances where, in the opinion of the examiner, the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced, and shall include, at least:

- (a) the payment of fees for and costs of negotiating or confirming a scheme of arrangement;
- (b) the payment of fees for and costs of seeking professional advice connected with the examinership;
- (c) without prejudice to other protections provided in any other enactment, the payment of employees’ wages for work already carried out;
- (d) any payments and disbursements made in the ordinary course of business other than those referred to in paragraphs (a), (b) or (c).”, and

- (b) by the insertion of the following subsection after subsection (2):

“(2A) In the event of any subsequent winding up of a company under Part 11 within 6 months of the end of the protection period, liabilities referred to in subsection (1) incurred as part of a transaction that was –

- (a) reasonable, and
- (b) immediately necessary for the negotiation of the scheme of arrangement,

shall not be declared void, voidable or unenforceable on the ground that the transaction is detrimental to the general body of creditors unless there are other reasons why the transaction should be declared void, voidable or unenforceable.”.

Amendment of section 534 of Principal Act

14. Section 534 of the Principal Act is amended –

- (a) in subsection (2) –
 - (i) in paragraph (a), by the substitution of “section 540,” for “section 540, and”, and
 - (ii) by the insertion of the following paragraph after paragraph (a):

“(aa) ensure that every member or creditor, or class of members or creditors, whose interests or claims will be impaired by the proposals is invited to attend a meeting convened in accordance with paragraph (a), and”, and

- (b) in subsection (4), by the substitution of “section 541, but the total duration of the period referred to in section 520(2), any extended period allowed under subsection (3), any further extended period allowed under subsection (3A), and any further extended period allowed under this subsection, shall not exceed 12 months.” for “section 541.”.

Amendment of section 539 of Principal Act

15. Section 539 of the Principal Act is amended –

- (a) in subsection (1) –
 - (i) by the insertion of the following paragraphs after paragraph (a):

“(aa) identify the company concerned,

- (ab) identify the examiner,”
- (ii) in paragraph (b), by the substitution of “by the proposals, including the reasons why it is proposed not to impair such interests or claims” for “by the proposals”,
- (iii) in paragraph (c), by the substitution of “by the proposals, including the interests or claims impaired by such proposals” for “by the proposals”,
- (iv) by the insertion of the following paragraph after paragraph (d):

“(da) identify the terms of the proposals including, in particular –

- (i) any proposed restructuring measures,
 - (ii) where applicable, the proposed duration of any proposed restructuring measures,
 - (iii) the arrangements with regard to informing and consulting employees or employees’ representatives,
 - (iv) where applicable, the overall consequences as regards employment such as dismissals, short-time working arrangements or similar, and
 - (v) any new financing anticipated as part of the restructuring measures and the reason why the new financing is necessary to implement the plan,” and
- (v) by the insertion of the following paragraph after paragraph (e):

“(ea) provide a statement of reasons which explains why the proposals provide a reasonable prospect of facilitating the survival of the company and the whole or part of its undertaking as a going concern, and

includes details of the necessary pre-conditions for the success of the proposals,”

- (b) by the insertion of the following subsection after subsection (1):
 - “(1A) As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of the proposals under subsection (1).”
- (c) in subsection (2), by the substitution of “date of the proposals, including a value for the assets, a description of the economic situation of the company and the position of its employees, and a description of the causes and extent of the difficulties of the company,” for “date of the proposals”,
- (d) by the substitution of the following subsection for subsection (3):
 - “(3) There shall also be attached to each such copy of the proposals, for each class of members and creditors, a description of –
 - (a) the respective values of interests or claims in each class,
 - (b) the interests or claims impaired by the proposals, and
 - (c) the estimated financial outcome of a winding up of the company.”

and
- (e) by the insertion of the following subsection after subsection (6):
 - “(7) In this section, ‘restructuring measures’ has the same meaning as given to ‘restructuring’ in point (1) of Article 2(1) of the Preventive Restructuring Directive.”

Amendment of section 540 of Principal Act

16. Section 540 of the Principal Act is amended –

- (a) in subsection (4), by the substitution of “Subject to subsection (4A), proposals” for “Proposals”, and
- (b) by the insertion of the following subsection after subsection (4):
 - “(4A) Creditors or classes of creditors whose interests or claims will not be impaired by the proposals shall not have voting rights in the adoption of the proposals, and the majority calculated in accordance with subsection (4) shall not take into account the number and value of the claims of any such creditors.”

Amendment of section 541 of Principal Act

17. Section 541 of the Principal Act is amended –

- (a) by the insertion of the following subsections after subsection (3):

“(3A) Where the court confirms proposals under subsection (3) (with or without modification), the conditions of such confirmation shall be clearly specified by the court and shall confirm at least the following:

- (a) a majority in number of creditors whose interests or claims would be impaired by implementation of the proposals, representing a majority in value of the claims that would be impaired by implementation of the proposals, have accepted the proposals in accordance with section 540;
- (b) the exercise of voting rights has been carried out in accordance with section 540;
- (c) creditors with sufficient commonality of interest in the same class have been treated equally, and in a manner proportionate to their claim;
- (d) notice of the proposals has been given to all members and creditors whose interests or claims will be impaired by the proposals in accordance with subsection 540(11);
- (e) where there are dissenting creditors, that the proposals satisfy the best-interest-of-creditors test;
- (f) where applicable, that any new financing is necessary to implement the proposals and does not unfairly prejudice the interests of creditors.

(3B) Where any proposals have not been accepted in accordance with section 540, the court may, upon the application of the examiner or with the examiner’s agreement, confirm the proposals under subsection (3) (with or without modification) if –

- (a) the proposals have been accepted by –
 - (i) a majority of the voting classes of creditors whose interests or claims would be impaired by the proposals, provided that at least one of those classes is a class of secured creditors,

or is senior to the class of ordinary unsecured creditors, or

- (ii) where the classes of creditors specified in subparagraph (i) have not accepted the proposals, at least one voting class of creditors whose interests or claims would be impaired by the proposals other than a class of creditors which, upon a valuation of the company as a going concern, would not receive any payment or keep any interest, or which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities under sections 621 and 622 were applied,

and

- (b) the court is satisfied that –

- (i) the conditions specified in paragraphs (b) to (f) of subsection (3A) have been met, and
- (ii) no class of creditors whose interests or claims will be impaired by the proposals can, under the scheme of arrangement, receive or keep more than the full amount of its interests or claims.”,

- (b) in subsection (4), by the substitution of the following paragraph for paragraph (b):

- “(b) the court is satisfied that –

- (i) the conditions specified in subsection (3A) or (3B) have been met,
- (ii) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and
- (iii) the proposals are not unfairly prejudicial to the interests of any interested party,

and in any case shall not confirm any proposals if the sole or primary purpose of them is the avoidance of payment of tax due.”,

- (c) by the insertion of the following subsection after subsection (4):

“(4A) The court shall refuse to confirm any proposals where the proposals would not have a reasonable prospect of facilitating the survival of the company, or the whole or part of its undertaking as a going concern.”,

- (d) by the substitution of the following subsection for subsection (5):

“(5) Without prejudice to subsections (3B), (4) and (4A), the court shall not confirm any proposals in respect of a company to which an examiner has been appointed under section 517 if –

- (a) the proposals would have the effect of impairing the interests of the creditors of the company in such a manner as to unfairly favour the interests of the creditors or members of any company to which it is related, being a company to which that examiner has been appointed under section 509 or, as the case may be, section 517, or
- (b) the court is satisfied that the proposals do not satisfy the best-interests-of-creditors test where such proposals are challenged by one or more creditors on the basis that they do not satisfy the best-interests-of-creditors test.”,

- (e) by the substitution of the following subsection for subsection (6):

“(6) Where the court confirms proposals (with or without modification), the proposals shall be binding on –

- (a) all the members or class or classes of members, as the case may be, impaired by the proposals, unless the member or class or classes of members, as the case may be, was not given notice of a meeting they would have been entitled to attend under section 534, and
- (b) the company.”, and

- (f) by the substitution of the following subsection for subsection (7):

“(7) Where the court confirms the proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on –

- (a) all the creditors or the class or classes of creditors, as the case may be, impaired by the proposals in respect of any claim or claims against the company, unless the

creditor or class or classes of creditors, as the case may be, was not given notice of a meeting they would have been entitled to attend under section 534, and

- (b) any person other than the company who, under any enactment, rule of law or otherwise, is liable for all or any part of the debts of the company.”.

Amendment of section 543 of Principal Act

18. Section 543 of the Principal Act is amended –

- (a) in subsection (1) –
 - (i) in paragraph (d), by the substitution of “objector;” for “objector.”, and
 - (ii) by the insertion of the following paragraphs after paragraph (d):
 - “(e) that the proposals fail to satisfy the best-interest-of-creditors test;
 - (f) that the proposals breach the conditions specified in section 541(3B)(a)(ii).”, and

- (b) by the insertion of the following subsections after subsection (1):

“(1A) Where a member or creditor objects to the confirmation by the court of the proposals on the grounds set out in subsection (1)(e) or (1)(f), the court shall take a decision on the valuation of the company’s business.

(1B) For the purpose of taking a decision on a valuation in accordance with subsection (1A), the court may have regard to –

- (a) the report of the independent expert prepared in accordance with section 511,
- (b) the examiner’s report prepared in accordance with section 534, and
- (c) the evidence of any other properly qualified experts that it considers appropriate to appoint or hear.

(1C) For the purpose of subsection (1B)(c), any party entitled to be heard at a hearing under section 541 may place expert evidence before the court for its consideration.”.

Amendment of section 552 of Principal Act

19. Section 552 of the Principal Act is amended by the insertion of the following subsection after subsection (1):

- “(1A) Where the court is making an order in accordance with subsection (1)(b), it may take into account:
- (a) that the protection granted by virtue of section 520 no longer fulfils the objective of supporting the negotiations on a scheme of arrangement;
 - (b) where the company or the examiner has requested that the protection granted by virtue of section 520 be ceased;
 - (c) one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by the continuation of the protection granted by virtue of section 520;
 - (d) that the continuation of the protection granted by virtue of section 520 would likely give rise to the insolvency of a creditor of the company.”.

Amendment of section 597 of Principal Act

20. Section 597 of the Principal Act is amended, in subsection (1), by the substitution of “Subject to section 598A, where a company” for “Where a company”.

Amendment of section 598 of Principal Act

21. Section 598 of the Principal Act is amended, in subsection (1), by the substitution of “Subject to section 598A, where -” for “Where -”.

Validity of floating charge in certain circumstances

22. The Principal Act is amended by the insertion of the following section after section 598:

“Validity of floating charge in certain circumstances

598A. In any winding up of a company under this Part, a floating charge created as part of a transaction that was –

- (a) reasonable,
- (b) immediately necessary for the implementation of a scheme of arrangement under Part 10, and
- (c) carried out in accordance with a scheme of arrangement confirmed by a court under section 541,

shall not be declared to be invalid in full or in part under section 597 or section 598 on the basis that the transaction was

detrimental to the general body of creditors of the company unless there are other circumstances in which the transaction should be declared invalid.”.

Amendment of section 604 of Principal Act

23. Section 604 of the Principal Act is amended by the insertion of the following subsection after subsection (5):

“(6) In any winding up of a company under this Part, an act carried out as part of a transaction that was –

- (a) reasonable,
- (b) immediately necessary for the implementation of a scheme of arrangement under Part 10, and
- (c) carried out in accordance with a scheme of arrangement confirmed by a court under section 541,

shall not be deemed to be an unfair preference under this section on the basis that the transaction was detrimental to the general body of creditors of the company unless there are other reasons why the transaction should be deemed invalid.”.

Collection of certain data by Registrar

24. The Principal Act is amended by the insertion of the following section after section 890:

“Collection of certain data by Registrar

890A. (1) The Registrar shall collect and aggregate, on an annual basis, data on procedures concerning a process taken under Part 8, 9, 10, 10A, or 11 in compliance with Article 29 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019³ 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.

(2) The Registrar shall collect and aggregate the data referred to in subsection (1) for –

- (a) the full calendar year commencing on 1 January 2023 and ending on 31 December 2023, and
- (b) every full calendar year ending on 31 December thereafter.”.

³ OJ No. L 172, 26.6.2019, p. 18



GIVEN under my Official Seal,
27 July, 2022.

LEO VARADKAR,
Minister for Enterprise, Trade and Employment..

EXPLANATORY NOTE

(This is not part of the Statutory Instrument and does not purport to be a legal interpretation.)

These Regulations amend the Companies Act 2014 to transpose the requirements of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019. These Regulations transpose requirements of the Directive not already provided for in Irish law.

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