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# European Union (Preventive Restructuring) Regulations 2022

## Information Note

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## 1. Introduction

This note provides information on the key provisions of the recently transposed Directive (EU) 2019/1023 (the PRD) as regards corporate insolvency through the European Union (Preventive Restructuring) Regulations 2022.

The PRD sets down minimum rules for Member State preventative restructuring frameworks, in order to remove barriers to effective preventive restructuring of viable debtors in financial difficulties across the EU.

The Directive ensures that across the EU viable enterprises that are in financial difficulties have access to effective national preventive restructuring frameworks that will enable them to continue to operate. Its aim is not to interfere with what already works well in a Member State but to establish an EU-wide framework to ensure effective restructuring processes that are efficient both at national and cross border level.

The Directive is effective from 17th July 2022 after which parties can rely on its provisions. However, without Regulations, it would remain unclear how the Directive applies in an Irish context. Ireland's examinership framework is generally viewed internationally as an example of best practice on preventive restructuring and it already complies in numerous respects with the requirements of the Directive. The Directive is being transposed through the Regulations in a manner which integrates with our existing examinership regime to minimise disruption.

The Regulations provide clarity on how the Directive impacts on existing Irish law. The Regulations amend Parts 5, 10 and 11 of the Companies Act 2014 and insert a new Part 5A to transpose the requirements of the PRD not already provided for in Irish examinership law.

## 2. Summary of key provisions

This is a summary of the new requirements and should be read in conjunction with the European Union (Preventive Restructuring) Regulations 2022.

Further details on how the Regulations amend the original Part 10 of the Companies Act can be sought from [info@enterprise.gov.ie](mailto:info@enterprise.gov.ie).

### 2.1. Definitions

Certain new terms are defined in the regulations including:

- '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). See also note associated with Regulation 12 below.
- 'Best-interest-of-creditors test' means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed.
- 'Restructuring' means measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements
- 'New financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan
- 'Essential executory contracts' means 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

Further defined terms can be found in Article 2 of the Directive. The text of the directive can be found at the following link: Directive (EU) 2019/1023 (EUR-Lex - 32019L1023 - EN - EUR-Lex (europa.eu)).

## 2.2. Director's Duties

### EARLY WARNING SYSTEM

**Regulation 7** provides that a company director may have regard to an Early Warning System (EWS). The purpose of an EWS is to alert companies of a situation, so that they can act to prevent insolvencies and allow them to take steps to avoid or overcome insolvency.

The EWS being made available by the Corporate Enforcement Authority on its website sets out useful information and corrective steps that viable businesses need to take in order to respond and recover thereby helping such companies to maintain employment or minimise job losses.

### DIRECTOR'S DUTIES TO CREDITORS

Prior to the Regulations, a directors' duty to creditors in the period approaching insolvency, often referred to as 'the twilight zone', was a common law duty only and was not provided for in the Companies Act 2014 or in any statute.

**Regulation 4** provides, on a statutory basis, that the director's duty to creditors be imposed where there is a likelihood of insolvency. This duty is owed by the directors to the company and will be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

**Regulations 5 and 6** provide further amendments to the Companies Act to include this duty to creditors in the list of fiduciary duties owed to the company and to allow for a director in breach of this duty to face liability.

## 2.3. Appointment of Examiner

### EXPERIENCE AND EXPERTISE OF EXAMINERS

**Regulation 9** provides that, in addition to the qualification requirements, the court consider the proposed examiner's experience and expertise, including cross border elements, to perform the role.

### BEST-INTEREST-OF-CREDITORS TEST

**Regulation 10** provides that the independent expert's report include a view on whether the best-interest-of-creditors test is met with respect to the continuation of the undertaking.

### EXCLUSION OF EMPLOYEES' CLAIMS

**Regulation 11** provides for the exclusion of employees' claims from the stay provided to companies when a petition for examinership is approved.

## **RESTRICTIONS ON CERTAIN CONTRACTS**

**Regulation 12** explicitly prevents creditors from withholding performance or terminating executory contracts, including essential executory contracts, to the detriment of the company by reason of them commencing an examinership. In practice many creditors continue to supply essential services/supplies in the knowledge that the liabilities incurred by the company are certified as expenses of the examiner.

With regard to financial contracts, article 31 makes clear that a number of existing EU legal instruments, including the EU Collateral Directive (Directive 2002/47/EC) and EU Settlement Finality Directive (Directive 98/26/EC) are not impacted by Directive 2019/1023. Therefore, the same scope applies to the European Union (Preventive Restructuring) Regulations 2022.

## **2.4. Powers of Examiner**

### **CERTIFICATION OF LIABILITIES**

**Regulation 13** alters the discretion the examiner has to certify any liabilities during the protection period as expenses to include at least:

- the payment of fees for and costs of negotiating or confirming a scheme of arrangement and of seeking professional advice connected with the examinership;
- the payment of employees' wages for work already carried out;
- any other payments and disbursements made in the ordinary course of business.

It also provides for how liabilities incurred during the period of protection are treated during a subsequent winding up. Where the court deems the liabilities were reasonable and were immediately necessary for the negotiation of the scheme of arrangement they cannot be deemed void, voidable, or unenforceable solely because they are detrimental to the general body of creditors. This rationale is also applied to the validity of floating charges and unfair preferences in Regulations 22 and 23.

### **MAXIMUM LENGTH OF STAY**

**Regulation 14** provides for an explicit 12-month cap on the total duration of the stay.

### **IMPAIRED CREDITORS**

The Directive provides that only creditors who will be impaired by a plan are to have a vote and the amount owed to them count towards any value threshold required to approve a scheme. It further provides that creditor who has not been invited to a meeting considering a scheme where they would have a right to vote on the acceptance of the scheme cannot be impaired by that scheme. Where an examiner cannot obtain contact details of a creditor, then the solutions currently used for this type of issue will remain available e.g. court permitting/directing public notices.

**Regulation 14** ensures that all impaired creditors and members are invited to attend a meeting of creditors and members.

**Regulation 16** provides that creditors who will not be impaired by the proposed scheme of arrangement will not have rights to vote on the approval of the scheme.

### **PROPOSED SCHEME OF ARRANGEMENT**

**Regulation 15** sets out the additional information that must be included in the proposed scheme of arrangement, for example:

- identify the company concerned;
- identify the examiner;
- explain why it is proposed not to impair interests or claims;
- identify the terms of the proposals;
- provide a statement of reasons which explains why the proposals provide a reasonable prospect of facilitating the survival of the company as a going concern;
- include in the statement of assets and liabilities 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.

### **CROSS-CLASS CRAM-DOWN**

A cross-class cram-down allows the court to confirm a scheme of arrangement despite there being one or more classes of dissenting creditors or other affected parties. This mechanism allows for schemes of arrangement to be approved where it may otherwise have been rejected due to the exercise of veto-rights by dissenting classes in particular junior creditors or out of money classes – often the company’s members.

While Irish law provides for a cross-class cram-down in terms that closely align with the PRD in that court confirmed proposals will be binding on all classes of creditors, some amendments to the Companies Act have been necessary to ensure there is full alignment.

Regulation 17 allows the Court to approve proposals, on the application of the examiner, which have not been accepted by all classes of creditors so long as at least one class of creditors whose interests or claims would have been impaired has accepted the proposals.

## **2.5. Conclusion of Examinership**

**Regulation 19** outlines what a court may consider when it is making an order with respect to section 552 of the Companies Act 2014. Such an order may be made where: the protection granted by section 520 no longer supports the negotiation of a scheme; the company or the examiner has requested the court to make the order; creditors would be unfairly prejudiced

by the continuation of the protection; or where the continuation of the protection would likely cause the insolvency of a creditor.