Public Consultation on the Transposition of Directive (EU) 2019/1023 of the European Parliament and Council on preventive restructuring frameworks, insolvency and discharge of debt

Response Template

As set out in the consultation, the Department of Business, Enterprise and Innovation is not seeking views on the entrepreneurial and personal insolvency aspects of the Directive, namely Articles within Title III. Separately, we are not consulting on Titles V and VI. Please note that we are not specifically seeking views on the options in Articles 1(3), 1(4), 16.

Respondents have the opportunity to comment generally on the Directive should they wish to express any views on these sections of the Directive. There is also capacity to comment on Articles without Member State options.

Please include your response in the space underneath the relevant option, to set out/ explain your views on each. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of response.

When responding please indicate whether you are providing views as an individual or representing the views of an organisation.

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| Name(s): |  |
| Organisation: |  |
| Email address: |  |
| Telephone number: |  |

## *Article 1*

## Subject matter and scope

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| **Question:**5. Should all or any of these claims be explicitly excluded from preventive restructuring frameworks for corporate entities? Please provide reasons for your answer.**Response:** |
| **Please indicate any general comments or recommendations you may have on Article 1:** |

## *Article 3*

## Early warning and access to information

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| **Please indicate any general comments or recommendations you may have on Article 3:** |

## *Article 4*

## Availability of preventive restructuring frameworks

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| **Question:**2. Petitioners for the appointment of an examiner must exercise utmost good faith and the courts have a wide discretion. Is this sufficient or would you suggest any additional provisions? Please provide reasons for your answer. **Response:** |
| **Question:**3. Part 10 of the Companies Act 2014 provides for a “viability test” in section 509(2) under the ‘reasonable prospect of survival’ test. Should any changes be made to this test? Please provide reasons for your answer. **Response:** |
| **Question:**4. Should Ireland avail of this option? If so, what limit should be imposed in your view? Please provide reasons for your answer. **Response:** |
| **Question:**5 and 6. Examinership is a preventive restructuring procedure accessible through the court. The court may appoint an examiner to a company with a reasonable prospect of survival after affording creditors an opportunity to be heard. The court must adjudicate on the proposals for a compromise or scheme of arrangement contained in the examiner’s report. The court may confirm the proposals provided at least one class of creditors whose claims would be impaired by the proposals has accepted them. Do you believe any amendments or changes are required to the current provisions? Please provide reasons for your answer.**Response:** |
| **Question:**8. Irish law provides that creditors (which could include employees) may apply for examinership. Do you consider that this option should be extended to employees’ representatives? The need to obtain the consent of the debtor is required by the Directive but this can be restricted to cases where the debtor is an SME. Should this option be exercised? Please provide reasons for your answers. **Response:** |
| **Please indicate any general comments or recommendations you may have on Article 4:** |

## *Article 5*

## Debtor in possession

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| **Question:**2. The Companies Act 2014 provides for the mandatory appointment of a practitioner (examiner) and a petition to the court must nominate a person to be appointed as an examiner. If the petition is granted the company will be under court protection for 70 days, “a general stay” as described in the Directive. The court also has the ability to confirm the examiner’s proposals provided they have been accepted by at least one class of creditors whose interests are impaired (i.e. “a cramdown”). Are there any changes or amendments that you would suggest to the current practice? Please provide reasons for your answer. **Response:** |
| **Please indicate any general comments or recommendations you may have on Article 5:** |

## *Article 6*

## Stay of individual enforcement actions

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| **Question:**3. Examinership provides for a general stay on actions. Do you believe this should be amended? Please provide reasons for your answer. **Response:** |
| **Question:**4. Irish law generally provides for this option under examinership, do you believe further exclusions should be made? Please provide reasons for your answer. **Response:** |
| **Question:** 5. Do you believe this option should be taken? Please provide reasons for your answer. **Response:** |
| **Question:**7. Irish law currently complies with this option; an extension of 30 days is permissible upon application to the court, and permit proceedings to occur during examinership, with the permission of the court under section 520 of the 2014 Act. Do you believe any amendments are required under this article? Please provide reasons for your answer if so. **Response:** |
| **Question:**9. Creditors’ right to be heard is set out in Irish examinership process under section 515 of the 2014 Act, this option is part of Irish law. Do you believe any amendments are required under this article? Please provide reasons for your answer if so. **Response:** |
| **Please indicate any general comments or recommendations you may have on Article 6:** |

## *Article 7*

## Consequences of the stay of individual enforcement actions

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| **Question:**3. Irish examinership law provides that so long as a company is under court protection no proceeding for winding up may be commenced (Section 520(4)). The option would be at variance with that section. Do you have views on the use of this option? Please provide reasons for your answer. **Response:** |
| **Question:**4. Should either or both of these options be adopted? Please provide reasons for your answers. Please refer to recital 41 of the Directive when considering this provision. **Response:** |
| **Question**6. Should Ireland avail of this option? Please provide reasons for your answer.**Response** |
| **Please indicate any general comments or recommendations you may have on Article 7:** |

## *Article 8*

## Content of restructuring plans

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| **Please indicate any general comments or recommendations you may have on Article 8:** |

## *Article 9*

## Adoption of restructuring plans

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| **Question:**1. Currently under examinership the examiner (practitioner) submits a restructuring plan on behalf of the debtor company. Allowing creditors to submit restructuring plans would be at variance with this position. Do you have views on this option? Please provide reasons to support your answer. **Response** |
| **Question:**3. Examinership does not exclude affected persons from voting, where those persons are members or creditors. Do you propose any amendments under this option? Please provide reasons for your answer. **Response:** |
| **Question:**4. Section 539 of the Act of 2014 provides that the proposals for compromise must specify each class of members and creditors of the company. Examiners have some latitude in class formation. Do you believe that either or both of these options should be taken? Please provide reasons for your answer. **Response:** |
| **Question:**5. Do you believe that this option should be taken? Please provide reasons for your answer.**Response:** |
| **Question:**7. Do you believe that this option should be taken? Please provide reasons for your answer.**Response:** |
| **Please indicate any general comments or recommendations you may have on Article 9:** |

## *Article 10*

## Confirmation of restructuring plans

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| **Please indicate any general comments or recommendations you may have on Article 10:** |

## *Article 11*

## Cross-class cram-down

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| **Question:**1. Should the option to limit the requirement to obtain the debtor’s agreement to cases where the debtors are SMEs be taken? In relation to the second option, should there be any increase in the number of classes required to approve the plan? (Such an increase would be at variance with current law). Please provide reasons for your responses.**Response:** |
| **Question:**2. Irish law would be at variance with the option set out in the first subparagraph which provides for “an absolute priority rule”. The second subparagraph provides for a derogation where it is necessary to achieve the aims of the restructuring plan. Do you consider either option should be taken? Please provide reasons for your responses. **Response:** |
| **Please indicate any general comments or recommendations you may have on Article 11:** |

## *Article 12*

## Equity holders

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| **Question:**3. Irish law does not exclude equity holders and members may vote on the examiner’s proposals for a compromise or scheme of arrangement. Do you support taking this option under the Directive? Please provide reasons for your response. This option should be considered in conjunction with Article 9(3). **Response:** |
| **Please indicate any general comments or recommendations you may have on Article 12:** |

## *Article 13*

## Workers

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| **Please indicate any general comments or recommendations you may have on Article 13:** |

## *Article 14*

## Valuation by the judicial or administrative authority

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| **Please indicate any general comments or recommendations you may have on Article 14:** |

## *Article 15*

## Effects of restructuring plans

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| **Please indicate any general comments or recommendations you may have on Article 15:** |

## *Article 17*

## Protection for new financing and interim financing

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| **Question:**2. Proposals for a compromise or scheme of arrangement must be confirmed by a court (section 541 of the Companies Act 2014). Do you think any amendments are required under this option? Please provide reasons for your answer.**Response:** |
| **Question:**3. This option would be at variance with examinership law which requires that for an examiner to be appointed, a company is or is unlikely to be able to pay its debts. Do you have views on whether any change would be appropriate? Please provide reasons for your answer.**Response:** |
| **Question:**4. Section 554(4) provides a priority for liabilities properly incurred by an examiner over other claims (other than claims secured by a fixed mortgage or charge etc) in a subsequent receivership or winding up of the company. This option is reflected in Irish law. Do you have views on whether any change would be appropriate? Please provide reasons for your answer. **Response:** |
| **Please indicate any general comments or recommendations you may have on Article 17:** |

## *Article 18*

## Protection for other restructuring related transactions

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| **Question:**2. Proposals for a compromise or scheme of arrangement must be confirmed by a court (section 541 of the Companies Act 2014). Do you think any amendments are required under this option? Please provide reasons for your answer.**Response:** |
| **Question:**3. This option would be at variance with examinership law which requires that for an examiner to be appointed, a company is or is unlikely to be able to pay its debts. Do you have views on whether any change would be appropriate? Please provide reasons for your answer.**Response:** |
| **Please indicate any general comments or recommendations you may have on Article 18:** |

## *Article 19*

## Duties of directors where there is a likelihood of insolvency

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| **Please indicate any general comments or recommendations you may have on Article 19:** |

## *Article 26*

## Practitioners in procedures concerning restructuring, insolvency and discharge of debt

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| **Please indicate any general comments or recommendations you may have on Article 26:** |

## *Article 27*

## Supervision and remuneration of practitioners

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| **Please indicate any general comments or recommendations you may have on Article 27:** |

## General Question

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| **Question**Do you believe general changes / amendments are required to current examinership procedure? Please provide reasons for your answer. **Response:**  |