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# Briefing
# Important Changes to Corporate Restructuring Law

INSTITUTE OF DIRECTORS IN IRELAND

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The EU Directive on Preventive Restructuring Frameworks (the "**Directive**") precipitated a pan-European review by Member States of their corporate restructuring statutes. Several Member States (including Germany and the Netherlands), as well as the United Kingdom, made sweeping changes to their insolvency processes, in some cases introducing entirely new restructuring mechanisms. By contrast, Ireland preserved its examinership regime, introduced over 30 years ago. Ministerial regulations - the European Union (Preventive Restructuring) Regulations 2022 (the "**Regulations**") – have made the changes to that regime required to effect the first phase of a process designed to bring examinership in line with the Directive. Modelled on Chapter 11 Bankruptcy in the US, examinership is a process familiar to international debtors and their advisors, and while the Directive has necessitated changes, the core principles of this well-established process remain.

## Process of Transposition: A Phased Approach

The Directive envisages a two-phased transposition process in Member States. The Regulations represented Ireland's approach to Phase 1, and were signed on 27 July 2022. Phase 2 will entail a broader re-evaluation of Member States' restructuring statutes by reference to the optional provisions in the Directive, which include further protections of employees and measures facilitating new financing.

## Application and Scope

Not all companies are captured by the Directive. The Directive identifies a broad category of entities to which the Directive does not apply, including authorised investment firms, credit institutions, collective investment undertakings and (re) insurance firms. Although not specifically mentioned in the Regulations, the amendments to the examinership regime effected by the Regulations would be interpreted so as to give effect to the Directive in this regard.

## Early Warning Mechanisms

The Directive introduces a concept of "early warning mechanisms" designed to warn directors of pending insolvency. Examples provided in the Directive include alert mechanisms to highlight certain missed payments, advisory services provided by public or private organisations, and state-funded incentives for accountants and tax authorities to advise directors of negative developments. The Regulation empowers directors to have regard to these mechanisms in the exercise of their duties. It has been indicated that further details on the early warning system will shortly be available on the Corporate Enforcement Authority website.

## Directors' Duties

The Regulations codify in statute pre-existing common law duties owed to creditors by directors where they believe, or have reasonable cause to believe, that the company is or is likely to be unable to pay its debts which, in this context, is broadly defined and includes both "cash flow", and "balance sheet", insolvency.

## Qualifications of the Examiner

As a pre-requisite to the appointment of an examiner in cases involving cross-border elements, the court must now be satisfied that the proposed examiner has "sufficient experience and expertise to perform the role". Currently affidavits confirming the suitability of nominees are furnished with every petition for the appointment of an examiner, and can be adapted to address this point.

## Notification to creditors

The Regulations now provide that an examiner's scheme shall not be binding on creditors whose interests will be impaired by the scheme and who were not given notice of a meeting which they would have been entitled to attend; an examiner is further required to ensure that all such impaired creditors are invited to attend such a meeting. These changes may result in examiners more routinely seeking directions from the Court on the convening and notification of creditors' meetings.

## Employee claim carve-out

Examinership bars new proceedings being brought, and existing proceedings being advanced, against the company without leave of the Court. The Regulations provide a specific carve-out for proceedings brought by employees against the company, which can be brought without Court approval.

## Contracts

The most significant change made by the Regulations is the restriction on the exercise of certain rights, including early termination rights, under contracts during the examinership. Counterparties to "executory contracts" are precluded from withholding performance of, terminating, accelerating or in any other way modifying their contract to the detriment of the company, solely because of the appointment of, or petition for the appointment of, an examiner or interim examiner to the company or a related company.

Further provision is made for "essential executory contracts", which are defined as 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. Counterparties to these contracts are precluded for the duration of the examinership from taking the steps referred to above with respect to executory contracts solely because the company is deemed unable to pay its debts (again, this is interpreted broadly and includes both "cash flow", and "balance sheet" insolvency).

Importantly, the Directive expressly ringfences and maintains all protections afforded by the EU Collateral Directive (Directive 2002/47/EC) for certain collateral and related close-out netting arrangements, and by the EU Settlement Finality Directive (Directive 98/26/EC) for the finality of transfer orders, and certain related netting and collateral arrangements, under certain payment and securities settlement systems. Although not specifically addressed by the Regulations, the amendments to the examinership regime effected by the Regulations would be interpreted so to give effect to the Directive in this regard.

Further, the protections afforded to certain netting and related collateral arrangements by Ireland's Netting of Financial Contracts Act 1995 are expressed by that Act to apply notwithstanding anything contained in the companies legislation in which the restrictions referred to above are now incorporated.

These amendments will precipitate a review of termination provisions in contracts. There are broadly similar provisions in the UK and the US (although the UK provisions exempt a range of financial services contracts), and it remains to be seen how these provisions will be interpreted by the Irish Courts.

## Confirmation Thresholds

Formerly, an examiner's scheme could be confirmed by the court with the approval of at least one class of impaired creditors.

The Regulations have introduced two alternative approval thresholds. In the first, a majority of the voting classes of impaired creditors have accepted the proposals, provided that at least one of those classes is a secured creditor or is senior to the ordinary unsecured creditors. In the second, the proposals are accepted by at least one class of creditors whose interests are impaired. However this is subject to the caveat that the approving class must be "in the money" i.e. a class that would receive some payment or interest in the event that the company were liquidated.

These changes can in certain circumstances give increased influence to secured and preferential creditors, and examiners will have to be mindful of this in formulating creditor classes.

## Long-stop date

The Regulations do not impact the 100-day period[1] within which the examiner must lodge proposals in court. The court can extend this period beyond 100 days pending the confirmation hearing and compliance with any conditions precedent to the scheme. The Regulations introduce a "long-stop" date of 12 months of court protection from the presentation of the petition.

## Conclusion

The increased harmonisation of restructuring regimes across Europe is welcome. The Directive and Regulations have preserved the central features of examinership. The comprehensive moratorium on creditor action, the strict time limits within which a scheme must be proposed and the central powers of the examiner all remain intact. The provisions on pre-petition contracts bring our regime more in line with the UK and the US.

The focus on Ireland by corporates and their advisors seeking to carry out cross-border restructurings continues. The process has a proven track record both on the domestic and international stages and has been used as a primary restructuring tool or in parallel with other processes in other jurisdictions. Examinership is readily recognised in the UK, throughout Europe and in the US. The limited changes implemented by the Regulations preserve the central features of examinership and ensures that Ireland remains firmly on the map as a restructuring destination.

1 This period is currently extended to 150 days until the end of this year under the Companies (Miscellaneous Provisions) (Covid-19) Act 2020.

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***Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.***

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