



An Roinn Gnó,
Fiontar agus Nuálaíochta
Department of Business,
Enterprise and Innovation

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

January 2020

Overview

Introduction

The Department of Business, Enterprise and Innovation invites submissions to a public consultation on the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, amending Directive (EU) 2017/1132 on restructuring and insolvency¹.

This Directive, which must be transposed by 17 July 2021, aims to reduce barriers for cross border investment, reduce the cost of insolvency and support efforts to reduce non-performing loans.

This consultation is seeking views on the aspects of the Directive that relate to Company Law only. Entrepreneurial and personal insolvency aspects will be considered separately by the Department of Justice and Equality.

Objective of the Directive

The objective of the Directive is to contribute to the proper functioning of the internal market of the European Union (EU) and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating, and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.

There are differences between Member States as regards the range of procedures available to debtors in financial difficulties in order to restructure their business. The overall objective of the directive is to reduce the most significant barriers to the free flow of capital stemming from differences in member states' restructuring and insolvency frameworks, and to enhance the rescue culture in the EU based on the principle of second chance. The new rules also aim to reduce the amount of non-performing loans (NPLs) on banks' balance sheets and to prevent the accumulation of such NPLs in the future. In doing so, the proposal aims to strike an appropriate balance between the interests of the debtors and the creditors.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=EN>

Key aspects of the Directive

The new rules aim to contribute to more streamline insolvency and restructuring processes across the EU.

The Directive contains several key measures:

- **Early warning and access to information** to help debtors detect circumstances that could give rise to a likelihood of insolvency and signal to them the need to act quickly.
- **Preventive restructuring frameworks:** debtors will have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, thereby protecting jobs and business activity. Those frameworks may be available also at the request of creditors and employees' representatives.
- **Facilitating negotiations on preventive restructuring plans** with the appointment, in certain cases, of a practitioner in the field of restructuring to help in drafting the plan.
- **Restructuring plans:** the new rules foresee a number of elements that must be part of a plan, including a description of the economic situation, the affected parties and their classes, the terms of the plans, etc.
- **Stay of individual enforcement actions:** debtors may benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.
- **Discharge of debt:** over-indebted entrepreneurs will have access to at least one procedure that can lead to a full discharge of their debt after a maximum period of 3 years, under the conditions set out in the directive.

Ireland's current legal framework

Ireland has two primary frameworks for short term relief for companies in financial difficulties; schemes of arrangement and examinership. The schemes of arrangement are not a relevant preventive restructuring process as no stay is attached to the order. However, Ireland does have a preventive restructuring framework in examinership, which in the current format complies with many requirements under the Directive.

Provisions related to examinership are contained in Part 10 of the Companies Act 2014.

Under section 509 of the Act, an examiner can be appointed where three conditions are met:

- (1) it appears to the court that the company, is, or is likely to be, unable to pay its debts;
- (2) there is no winding up in being, compulsory or voluntary; and
- (3) the court is satisfied that there is 'a reasonable prospect' of the survival of the company and the whole or any part of its undertaking as a going concern.

The effect of examinership is that it protects a company for a set period. This time is commenced by a court appointing an examiner. During that period the company cannot be wound up and its assets cannot be seized by creditors. Initially the period of protection is 70 days, but this can be extended, on one occasion only, by a further 30 days. Additionally, a court can defer its decision and extend the protection until it has reached its decision regarding the examiner's proposals.

The role of the examiner is to undertake a thorough examination of the affairs of the company and to report back to the court outlining the best course of action which he proposes for the company. It may involve debt restructuring and/or a scheme of arrangement which formalises a settlement with the creditors of the company for less than the full amount due to them. The examiner's proposals can also extend to the sale of some of the assets of the company or changes in its management. It is not necessary that every class of creditor agree with the proposals. Under section 541 the court may confirm proposals where they are supported by at least one class of creditors whose claims are impaired. Ultimately, it is for the court to make the final decision regarding the outcome for the company.

Implementation of provisions with options for Member States

The Department of Business, Enterprise and Innovation is consulting on the use of Member State options, being matters in respect of which Member States can or must make a choice. Interested parties are asked to bear in mind that, except for the exercise of options, Member States are obliged to implement the Directive.

While this consultation is focused on Member State options views are welcome from respondents on any aspect of the Directive they may wish to raise. The provision of such views will facilitate the Department's work of transposition of the measures. The current system of examinership reflects many of the provisions within the Directive, including the Member State options. The text of each Article with Member State options from Directive (EU) 2019/1023 of the European Parliament and Council are inserted in the tables that follow. The options in each Article are shown in ***bold italicised text***. The numbering on each question relates to the subsection of the relevant Article.

As stated above, this consultation is not seeking views on the personal insolvency aspects of the Directive, namely Articles within Title III. Separately, we are not consulting on Articles 2, 25 and 28, or 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 Articles of the Directive. There is also capacity to comment on Articles without Member State options.

Please use the separate response template for your response to the consultation.

Implementation of the Directive

Directive (EU) 2019/1023 must be implemented in Irish law by the 17th July 2021. As noted above, this consultation is seeking views on the company law implications of the Directive only.

Submissions

Submissions are invited on the transposition of the Directive in Irish law, in particular answers to the questions raised are sought. A separate response template is attached, completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

Respondents are requested to make their submissions by email or by post to –

Email: companylawconsultation@dbei.gov.ie

Post: Helen Curley
Company Law (Development and EU)
Department of Business, Enterprise and Innovation,
Earlsfort Centre,
Lower Hatch Street,
Dublin 2,
D02 PW01

The closing date for receipt of submissions is 5pm, 6 March 2020. Please clearly mark your submission, email or post, as ‘Public Consultation on the Transposition of Directive (EU) 2019/1023’.

General Data Protection Regulation

The Department of Business, Enterprise and Innovation is subject to the provisions of the Regulation in relation to personal data collected by it.

Any personal information which you volunteer to this Department will be treated with the highest standards of security and confidentiality, in accordance with the Data Protection Act 2018.

Responses to the consultation may be made publicly available by the Department of Business, Enterprise and Innovation. Any material contained in your submission to the consultation which respondents do not wish to be made public should be clearly identified as confidential in their submission.

Freedom of Information Act 2014

Respondents should also be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Act 2014. Any information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information Act, the Department will consult with respondents about information identified as commercially sensitive before making a decision on such a request.

Article 1

Subject matter and scope

1. This Directive lays down rules on:

- (a) preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor;
- (b) procedures leading to a discharge of debt incurred by insolvent entrepreneurs; and
- (c) measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

2. This Directive does not apply to procedures referred to in paragraph 1 of this Article that concern debtors that are:

- (a) insurance undertakings or reinsurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC;
- (b) credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;
- (c) investment firms or collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013;
- (d) central counter parties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;
- (e) central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014;
- (f) other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU;
- (g) public bodies under national law; and
- (h) natural persons who are not entrepreneurs.

3. Member States may exclude from the scope of this Directive procedures referred to in paragraph 1 that concern debtors which are financial entities, other than those referred to in paragraph 2, providing financial services which are subject to special arrangements under which the national supervisory or resolution authorities have wide-ranging powers of intervention comparable to those laid down in Union and national law in relation to the financial entities referred to in paragraph 2. Member States shall communicate those special arrangements to the Commission.

4. Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to insolvent natural persons who are not entrepreneurs.

Member States may restrict the application of point (a) of paragraph 1 to legal persons.

5. Member States may provide that the following claims are excluded from, or are not affected by, preventive restructuring frameworks referred to in point (a) of paragraph 1:

(a) existing and future claims of existing or former workers;

(b) maintenance claims arising from a family relationship, parentage, marriage or affinity; or

(c) claims that arise from tortious liability of the debtor.

6. Member States shall ensure that preventive restructuring frameworks have no impact on accrued occupational pension entitlements.

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.

Article 4

Availability of preventive restructuring frameworks

1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2. Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4. Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5. The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

6. Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

7. Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8. Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Questions

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.

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.

4. Should Ireland avail of this option? If so, what limit should be imposed in your view? Please provide reasons for your answer.

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.

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.

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.

2. Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

3. Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:

(a) where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross- class cram-down, in accordance with Article 11; or

(c) where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

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.

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

(a) enforcement is not likely to jeopardise the restructuring of the business; or

(b) the stay would unfairly prejudice the creditors of those claims.

5. Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7. Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall

be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

(a) relevant progress has been made in the negotiations on the restructuring plan;

(b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or

(c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

8. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9. Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

(a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;

(b) at the request of the debtor or the practitioner in the field of restructuring;

(c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or

(d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Member States may provide for a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

Questions

3. Examinership provides for a general stay on actions. Do you believe this should be amended? Please provide reasons for your answer.
4. Irish law generally provides for this option under examinership, do you believe further exclusions should be made? Please provide reasons for your answer.
5. Do you believe this option should be taken? Please provide reasons for your answer.
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.
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.

Article 7

Consequences of the stay of individual enforcement actions

1. Where an obligation on a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of that stay.

2. A stay of individual enforcement actions in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor.

3. Member States may derogate from paragraphs 1 and 2 in situations where a debtor is unable to pay its debts as they fall due. In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.

4. Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean 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.

The first subparagraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.

Member States may provide that this paragraph also applies to non-essential executory contracts.

5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

- (a) a request for the opening of preventive restructuring proceedings;
- (b) a request for a stay of individual enforcement actions;
- (c) the opening of preventive restructuring proceedings; or
- (d) the granting of a stay of individual enforcement actions as such.

6. Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets, even in circumstances where Article 31(1) does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement.

The first subparagraph shall not apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value.

7. Member States shall ensure that the expiry of a stay of individual enforcement actions without the adoption of a restructuring plan does not, of itself, give rise to the opening of an insolvency procedure which could end in the liquidation of the debtor, unless the other conditions for such opening laid down by national law are fulfilled.

Questions

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.

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.

6. Should Ireland avail of this option? Please provide reasons for your answer.

Article 9

Adoption of restructuring plans

1. Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans, and provide for conditions under which they may do so.

2. Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3. Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

(a) equity holders;

(b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or

(c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

4. Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.

Member States may also provide that workers' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5. Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6. A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7. Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

Questions

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.

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.

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.

5. Do you believe that this option should be taken? Please provide reasons for your answer.

7. Do you believe that this option should be taken? Please provide reasons for your answer.

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in Article 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

(a) it complies with Article 10(2) and (3);

(b) it has been approved by:

(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,

(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;

(c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

By way of derogation from the first subparagraph, Member States may limit the requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2. By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties

Questions

Irish law provides for a cramdown in section 541 of the Companies Act 2014 as the court may confirm the examiner's proposals where they have been supported by at least one class of creditors whose interests would be impaired by the proposals. The examiner will usually have been appointed to the debtor company, on petition of the debtor. This Article introduces some new provisions in relation to the "cramdown" compared to Irish law and provides for a number of options:

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.
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.

Article 12

Equity holders

1. Where Member States exclude equity holders from the application of Articles 9 to 11, they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan.

2. Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan.

3. Member States may adapt what it means to unreasonably prevent or create obstacles under this Article to take into account, inter alia: whether the debtor is an SME or a large enterprise; the proposed restructuring measures touching upon the rights of equity holders; the type of equity holder; whether the debtor is a legal or a natural person; or whether partners in a company have limited or unlimited liability.

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).

Article 17

Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

(a) new financing and interim financing shall not be declared void, voidable or unenforceable; and

(b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to ex ante control.

3. Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.

4. Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.

Questions

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.

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.

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.

Article 18

Protection for other restructuring related transactions

1. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of a debtor, transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 only applies where the plan is confirmed by a judicial or administrative authority or where such transactions were subject to ex ante control.

3. Member States may exclude from the application of paragraph 1 transactions that are carried out after the debtor has become unable to pay its debts as they fall due.

4. Transactions referred to in paragraph 1 shall include, as a minimum:

(a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan;

(b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring;

(c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;

(d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).

5. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of the debtor, transactions that are reasonable and immediately necessary for the implementation of a restructuring plan, and that are carried out in accordance with the restructuring plan confirmed by a judicial or administrative authority, are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

Questions

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.

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.