CEA

Údarás Forfheidhmithe Corparáideach

Corporate Enforcement Authority

Information Note 2023/1

European Union (Preventive Restructuring) Regulations 2022
Early Warning Tools & Restructuring Frameworks

Introduction
EU Directive 2019/1023, known as the Preventive Restructuring Directive ("the PRD"), was transposed into Irish law by the European Union (Preventive Restructuring) Regulations 2022 ("the Regulations") with effect from 27 July 2022[1].

The purpose of the PRD is to ensure that, across the EU, there are restructuring frameworks in place to assist viable business that are in financial difficulty to continue to operate. The Regulations give effect to the PRD in Irish law.

The PRD and Regulations are, therefore, primarily concerned with companies that are in financial difficulties. The purpose of this Information Note is to assist company directors in understanding certain aspects of the Regulations, i.e., those aspects having a particular bearing on directors' duties and responsibilities. It is recommended that directors of companies to whom the PRD applies should carefully consider seeking professional advice at the earliest appropriate opportunity.

Importance of maintaining adequate accounting records
Under section 281 of the Companies Act 2014 ('the 2014 Act')(here) every company is required to keep (or cause to be kept) adequate accounting records. Ensuring that a company complies with this obligation is the legal responsibility of the company's directors.

For the above purpose, adequate accounting records are those that:

a) correctly record and explain the transactions of the company,

b) enable, at any time, the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy,

c) enable the directors to ensure that any financial statements of the company…are prepared in accordance with the relevant legal requirements (i.e., company law and relevant accounting standards).

In addition, those accounting records should be kept on a continuous and consistent basis, i.e., the entries should be made in a timely manner and should be consistent form one period to the next.

Clearly, if the directors are not maintaining adequate accounting records on a timely basis, they will not have a sufficient and up to date understanding of, amongst other things:

- whether the company is profitable (i.e., whether the business is actually generating profit),
- whether the company is generating cash and, if not, why not,
- the level of the company's debts and whether the company is in a position to discharge those debts as they fall due.

Timely and accurate management information – including budgets and cashflow projections - will also allow company directors to look to the future and to plan accordingly. That, in turn, will allow directors to determine whether, for example:

- current lines of business should be discontinued and others explored,
- short/medium/long term funding is likely to be necessary into the future, and if so to make the necessary arrangements,
- whether surplus cash is likely to accumulate in the business and, if so, to make appropriate investment decisions.

[1] S.I. 380 of 2022 (available at https://enterprise.gov.ie/en/legislation/legislation-files/si-no-380-of-2022.pdf)

For the reasons outlined above, maintenance of adequate accounting records and proper budgeting and cashflow forecasting is always important. In addition, having regard to the challenging environment within which companies are currently operating – in which increasing interest rates, significant currency fluctuations, supply chain challenges, energy pricing/supply constraints and uncertainty in the UK's economic outlook etc. are all features – it would be responsible of directors to incorporate consideration of these matters into the review and assessment of current and future likely profitability, cash generation and capacity to discharge debts etc. as they fall due. Clearly, the prevailing conditions will alter from time to time and those changing conditions should, similarly, be incorporated as appropriate in planning and taking necessary risk mitigation measures.

Financial difficulties – preliminary definitions

Definitions of inability to pay debts and insolvency

Given that the Regulations are concerned with companies that are in financial difficulties, it is useful to first consider what constitutes financial difficulties. In that regard, the 2014 Act provides relevant definitions of both inability to pay debts and insolvency.

In general terms, financial difficulties arise in a situation where a debtor is facing or about to face difficulties in meeting its financial commitments.[2]

In circumstances where, having regard to the individual circumstances of a company, the directors have reasonable cause to believe that a company is, or is likely to be, unable to pay its debts, the duties under sections 224A and 228 of the 2014 Act are triggered. These duties however take effect at different points in time. Section 224A applies where insolvency is merely likely and where the directors merely have '*reasonable cause to believe'* that the company is insolvent. In contrast, section 228 requires actual insolvency, and the directors have an actual awareness of that insolvency. In such circumstances and as stated above, consideration should be given by the directors to seeking professional advice.

Inability to pay debts

Section 570 of the 2014 Act provides that a company shall be deemed to be unable to pay its debts

a) if:

   i. a creditor who is owed more than €50,000[3] has served a demand for payment (in writing) on the company, and

   ii. the company has, for 21 days after the service of that demand, failed to pay the amount owed (or secure or compound for it to the reasonable satisfaction of the creditor), or

b) if:

   i. two or more creditors who are owed, in aggregate, more than €50,000[4] have served a demand for payment (in writing) on the company, and

   ii. the company has, for 21 days after the service of that demand, failed to pay the amount owed (or secure or compound for it to the reasonable satisfaction of each of the creditors), or

c) any judgement or order of any court in favour of a creditor is returned unsatisfied in whole or in part, or

[2] The concept of financial difficulties is defined in paragraph 163 of the Draft Implementing Technical Standards on Supervisory Reporting on forbearance and non-performing exposures under Article 99(4) of Regulation (EU) No 575/2013 as a situation where the debtor is facing or about to face difficulties in meeting its financial commitments.
2014_1493 Financial Difficulties | European Banking Authority (europa.eu)

[3] Whereas section 570(a) specifies a figure of €10,000, that amount has been increased to €50,000 until 31 December 2023 by virtue of S.I. No. 648/2022 - Companies Act 2014 (Section 12A(1)) (Covid-19) (No. 2) Order 2022

[4] Whereas section 570(b) specifies a figure of €20,000, that amount has been increased to €50,000 until 31 December 2023 by virtue of S.I. No. 648/2022 - Companies Act 2014 (Section 12A(1)) (Covid-19) (No. 2) Order 2022

d) if it is proved to the satisfaction of a court that the company is unable to pay its debts.

Insolvency
Section 818 of the 2014 Act defines an "*insolvent company*" as "*a company that is unable to pay its debts*".

General duties of company directors
Chapter 2 of Part 2 of the 2014 Act sets out the general duties of company directors. More detailed information on directors' duties is available in the CEA's *"Company Directors"* information booklet.

Statutory directors' duties
The Regulations insert a new section 224A into Chapter 2 of Part 2 of the 2014 Act. Section 224A(1) provides that:

"A director of a company who believes, or 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*

c) ***the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business of the company****"* (emphasis added).

The first thing to note about the above is the duty applies where a director believes, or 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) of the 2014 Act. It is necessary, therefore, to consider the provisions of that section.

Section 509(3) provides that:

> *(3) For the purposes of this section, sections 224A, 271A and 520A, a company is unable to pay its debts if—*
>
> *(a) it is unable to pay its debts as they fall due,*
>
> *(b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities, or*
>
> *(c) the circumstances set out in section 570(a), (b) or (c) are applicable to the company.*

Therefore, the directors' duties under section 224A apply if (i) the company is unable to pay its debts as they fall due, (ii) the value of the company's assets is less than the value of the company's liabilities (including contingent and prospective liabilities), or (iii) the conditions set out in section 570(a), (b) or (c) (as set out above) are applicable.

The above duties are supplemented by section 228 of the 2014 Act which, provides that

> "***A company director shall****…in addition to the duties under section 224A (directors to have regard to certain matters where company* [sic] *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****".*

It should be noted, however, that these directors' duties are owed to the **company** as opposed to the creditors.

"*Early warning tools*"
The Regulations insert Chapter 7 into Part 5 of the 2014 Act. Chapter 7 comprises of one section, i.e., section 271A. That section provides as follows

> "*(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 and can identify the restructuring frameworks available to the company and signal to such directors the need to act without delay*".

Circumstances that could give rise to a likelihood that the company will be unable to pay its debts
Clearly, every company is different, as are the circumstances within which it operates and, as such, there is no precise mathematical formula by which insolvency can be predicted. That said, there are:

- certain steps that the directors can take to ensure that they are aware, on an ongoing basis, of the company's financial position; and

- certain indicators that would, or at least might, suggest to the directors of a company that a situation might be developing in which the company will experience difficulties in paying its debts.

Steps that can be taken to ensure that the directors are aware, on an ongoing basis, of the company's financial position
Two key steps that the directors can take to ensure that they are aware, on an going basis, of the company's financial position are to ensure that:

- adequate accounting records are maintained (which, as outlined earlier herein, is a legal requirement); and

- management accounts are prepared and considered by the directors on a regular basis. Management accounts will give the directors a clear picture of, amongst other things, whether the company is making a profit or loss, whether it is generating cash, the relative value of the company's assets in comparison to its liabilities and whether the company is in a position to meet its liabilities as they fall due.

The above steps can be supplemented by the regular production of budgets and cashflow forecasts, which, if prepared having regard to realistic assumptions, will provide the directors with information on whether it is operating within budget and whether its future cashflows are likely to be sufficient to meets its obligations.

Indicators that would, or at least might, suggest to the directors of a company that a situation might be developing in which the company will experience difficulties in paying its debts
Over and above adequate accounting records, regular management accounts and budgets and cashflow forecasts, for the purpose of assisting company directors to identify at an early stage whether a situation might be developing in which the company would be unable to pay its debts, a (non-exhaustive) list of indicators is set out in Appendix 1 to this Information Note.

Potential consequences of non-compliance with directors' duties
As referenced above, company directors have a series of fiduciary duties to the company of which they are a director. Those responsibilities are significant – and for that reason the CEA has published a series of information and guidance documents for the purpose of assisting company directors (and other key actors under company law) to understand their duties, obligations and rights.

Directors can be penalised for breaching their statutory duties (for example, they may be subject to restriction or disqualification) and may be made personally liable for some or all of a company's debts.

In certain circumstances, company directors can also be held criminally liable for breaches of company law. It is, therefore, imperative that directors are aware of their duties and obligations under company law.

For further information on the principal duties of company directors, see CEA Information Book 3 on Company Directors.

Restructuring

The earlier that a company can detect its financial difficulties and take appropriate action in response, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process is likely to be. This recognises the position that companies can experience challenges and difficulties which may ultimately lead to insolvency, and the loss of the business. It is (and has always been) advisable for company directors to identify difficulties at an early stage and, where possible, to take steps to either avoid or overcome insolvency, or manage it in an orderly fashion.

There are many reasons why a company might face financial difficulties, and while unforeseen challenges may arise, a company that is alert to early warning signs, and takes appropriate and swift action, may stand a better chance of avoiding insolvency. Professional advisors can advise what mechanisms are available to a company, including statutory restructuring plans and company directors should consider seeking the advice of their professional advisor at the earliest available opportunity if they have concerns that the company is facing financial difficulties.

Where a company is experiencing financial difficulties, or where a situation is developing that would suggest that the company is on that trajectory, there are certain restructuring options that may, depending upon the circumstances, be available to the company. The purpose of this section of the Information Note is to assist company directors in understanding those restructuring options in order that they can be explored at an early stage.

Company restructuring involves a reorganisation of a company's finances and/or business in order to enable the company to continue trading. A reorganisation typically includes claims against the company (i.e., the company's debts) being compromised (i.e., reduced/written off). In essence, restructuring will endeavour to encourage the company's creditors (or certain of them) to agree to partial payment rather the alternative of in all likelihood receiving nothing in the event that the company is wound up (i.e., put into liquidation).

Restructuring options

There are a number of restructuring options available to viable companies that may be experiencing financial difficulties, i.e., examinership and the Small Company Administrative Rescue process ("SCARP").

Examinership

Under Part 10 of the 2014 Act, where a company is, or likely to be, unable to pay its debts, and no resolution or order has been made to wind it up, and if there is a reasonable prospect of survival of the company as a going concern, the High Court (or Circuit Court for a small company[5]), upon application to it[6], can give protection to a company against actions by creditors for an initial period of 70 days to allow an examiner appointed to the company by the court to conduct an examination of the affairs of the company and report to the court on the prospects of the company's survival.[7] It is important to note that, if not satisfied that there is a reasonable prospect of survival, the court will not appoint an examiner to a company.

[5] Section 280A of the Companies Act 2014 defines a "*small*" company as a company which in a financial year fulfils two or more of the conditions set out in section 280A(3), i.e., (a) the amount of turnover does not exceed €12 million; (b) the balance sheet total does not exceed €6 million; (c) average number of employees does not exceed 50.
[6] Section 509 of the Companies Act 2014.
[7] Part 10 of the Companies Act 2014.

During the period of court protection, no further legal proceedings can be initiated against the company without the court's permission. On application by the examiner appointed to the company, the court can extend the period of protection to the company by a further 30 days[8] and, if exceptional circumstances exist, by an additional period of 50 days[9]. Company directors, in addition to the company, a member or members (i.e., shareholders) holding not less than 10% of the paid-up share capital, and any creditor can apply to the High Court to have an examiner appointed. Following an assessment of the company's affairs, the examiner will attempt to negotiate with creditors and formulate a scheme to allow for the survival of the business.

SCARP

SCARP[10] allows small and micro[11] companies who are unable to pay their debts, to restructure with creditor consent, without the necessity for court approval. There must be a reasonable prospect of survival of the company. A director of the company must make a full enquiry into the affairs of the company and prepare a prescribed statement which is submitted to a process advisor who will then consider the statement to determine if there is a reasonable prospect of the survival of the company and submit a rescue plan – which is submitted to the company and then to the creditors. Once it is agreed to, and a cooling off period (facilitating objection to the plan) passes, it becomes operative. The process is similar to that that of examinership, but with reduced court oversight (and, consequently, scope for lower cost) and shorter time periods.

Informal restructuring arrangements

Private restructuring arrangements are sometimes negotiated between a debtor and some, or all, of its creditors. These flexible and informal restructurings are not a matter of public record.

Schemes of arrangement

Under Chapter 1 of Part 9 of the 2014 Act it may be possible for a company to enter a scheme of arrangement with its creditors. This allows a company to reach an arrangement with its members or creditors or any class of them. Schemes of arrangement are *"commonly used for solvent restructurings and takeovers, and* [are] *being deployed with increased regularity for large-scale debt restructurings"*[12]

For further information please on examinership and SCARP see CEA Information Book 8. The FAQs section of the CEA's website (https://cea.gov.ie/FAQs) also provides further information on the examinership and SCARP processes.

CHECKLIST FOR RESTRUCTURING PLANS

The PRD[13] calls for the development of comprehensive checklists for restructuring plans, adapted to the needs and specific circumstances of SMEs. The rationale behind this measure in the PRD is that, in restructuring, SMEs can face costs that are disproportionately higher than those faced by larger enterprises. The call for restructuring plans is a harmonising measure as recital 17 notes that there are more efficient restructuring procedures available in some EU Member States. Through the examinership and SCARP regimes (described briefly at Appendix 1 to this Information Note), Ireland has restructuring mechanisms in place that companies can avail of in certain circumstances.

[8] Section 534(3) of the Companies Act 2014.
[9] Section 534(3A)(b) of the Companies Act 2014.
[10] Introduced under the Companies (Rescue Process for Small and Micro Companies) Act 2021. For further information see small-company-administrative-rescue-process.pdf (enterprise.gov.ie).
[11] Section 280D of the Companies Act 2014 sets out the qualifying conditions for a "*micro*" company, which are set out at subsection 3: (i) amount of turnover does not exceed €700,000; (ii) balance sheet total does not exceed €350,000; (iii) average number of employees does not exceed 10. The company must fulfil at least two of these conditions to qualify as a micro company.
[12] Global Restructuring Review "Corporate restructuring in Ireland in 2022" Rynn and Ennis; (Here)
[13] At Recital 17 of the Directive

At Appendix 2 to this Information Note, a brief checklist - adapted from Article 8 of the PRD - is available.

Many of the provisions in Article 8 of the PRD are now contained in Article 15 of the Regulations, which amend section 539 of the Companies Act 2014 "*Proposals for compromise or scheme of arrangement*"[14].

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[14] See link to Law Reform Commission administrative consolidation of Section 539 of the Companies Act 2014 (as amended) here.

APPENDIX 1

INDICATORS OF FINANCIAL DIFFICULTIES

Revenue/sales	- declining/rapidly declining sales - loss of key contract(s) - insufficient capital to meet sales growth - contractual obligations to fulfil loss making contract(s) - growing number of dissatisfied customers/customer complaints - market saturation, new/increased competition
Expenses	- substantial/unsustainable increases in business expenses
Debtors	- aged debtor profile deteriorating (i.e., customers taking progressively longer to pay) - increasing/unsustainable bad debt levels - key debtor(s) going out of business
Suppliers	- company exceeding agreed credit terms without supplier approval - suppliers reducing, or withdrawing, credit terms - suppliers unwilling/unable to supply - increased reliance on a small number of suppliers - key supplier(s) going out of business, or themselves being in financial difficulty
Inventory	- company holding high volumes of slow moving/obsolete stock - company unable/failing to meet customer orders due to stock management / supply chain issues
Employees	- high turnover of key staff - inability to retain/attract staff - directors/key management personnel foregoing salary payments
Cashflow/Funding	- depleted/non-existent of cash reserves - late payment of essential services (e.g. rent, electricity) - receipt of reminders/final demands increasingly a feature

	- late filing of Revenue returns to delay discharging debt - overdraft facilities consistently being maximised/exceeded with associated high interest commitments - banks and/or other providers of finance unwilling to advance additional funding/offering less favourable terms - fixed term borrowings approaching maturity without realistic prospect of renewal or repayment - reliance/over-reliance on credit cards to make payments / credit card balances not being cleared regularly - directors funding the business with personal funds - overreliance on group companies to meet day to day funding needs - reliable cashflow forecasts indicating a deficit that cannot be met - poor liquidity ratios
Other	- breaches of the terms of loan agreements - legal proceedings threatened or issued, or judgments obtained against company for outstanding debts - directors/management spending disproportionate amount of time dealing with problems as opposed to growing the business - failure to meet obligations to the Revenue Commissioners, e.g., non-payment of obligations as they fall due, or failure to maintain instalment payments or direct debits as they fall due
Financial reporting/accounting records/management accounts/management information	- management accounts indicating declining profit margins/ ongoing losses/cash deficits - management unwillingness to acknowledge/confront issues - management reluctance to produce timely management information, i.e., problem avoidance - management reluctance to bring issues to the attention of the auditor/efforts to conceal information from the auditor - unrealistic assumptions/data being used to support going concern basis of preparation of statutory financial statements - irregularities in accounting records - significant delays in being able to finalise statutory financial statements
Force Majeure events	- unforeseen events impacting upon a supplier and/or customer and/or on a company supply chain

***Important note**: the list of early warning signs set out above is not exhaustive and is provided for the purpose of assisting companies and their directors. This document is for information purposes only. The CEA accepts no responsibility or liability howsoever arising from the contents of this document. The CEA is not an advisory body, and companies and company directors should seek the advice of a professional advisor on all company related issues, including financial, and restructuring mechanisms available.*

APPENDIX 2

CONTENT OF RESTRUCTURING PLANS - ARTICLE 8 OF THE DIRECTIVE AND ARTICLE 15 OF THE REGULATION AMENDING SECTION 539 OF THE COMPANIES ACT 2014

Restructuring plans must contain the following information:

- the identity of the debtor (i.e., the company),
- the assets and liabilities of the company when the restructuring plan is submitted, including a valuation of the assets and a description of the economic situation of the company and the position of employees, and a description of the causes and the extent of the difficulties of the company,
- the identity of parties affected by the restructuring plan, describing their claims or interests covered by the restructuring plan,
- where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class,
- where applicable, the parties, whether named individually or described by categories of debt, which are not affected by the restructuring plan, describing the reasons why it is proposed not to affect them,
- where applicable, the identity of the practitioner in the field of restructuring (i.e., the examiner or process advisor),
- the terms of the restructuring plan, including, in particular:
    i. any proposed restructuring measures aimed at restructuring the company's business that include changing the composition, conditions or structure of a company's assets and liabilities or any other part of the company's capital structure, such as sales of assets or parts of the business, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements,
    ii. where applicable, the proposed duration of any proposed restructuring measures,
    iii. the arrangements with regard to informing and consulting the employees' representatives in accordance with union and national law,
    iv. where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar,
    v. any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan,
- the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan.