

Ireland Update: New Statutory Directors' Duty to Have Regard to the Interests of Creditors

The European Union (Preventive Restructuring) Regulations 2022 (the "2022 Regulations") have amended the Companies Act 2014 (the "Companies Act") in a number of respects, including by introducing a new statutory duty requiring directors of a company that is (or is likely to be) insolvent to have regard to the interests of creditors.

The 2022 Regulations transpose the EU Preventive Restructuring Directive (2019/1023) (the "Directive") into Irish law. The Directive has the principal objective of ensuring that Member States have minimum rules in place so that viable enterprises that are in financial difficulties have access to effective national preventive restructuring frameworks that can enable them to continue to operate.

Directors' Duties to Creditors

Prior to the 2022 Regulations, a director's duty to creditors in the period approaching insolvency, often referred to as 'the twilight zone', was a common law duty only and was not provided for in the Companies Act or in any statute. Irish court judgments never clarified whether the duty was owed to the company, which is the usual position in regards to directors' duties, or to the creditors.

The 2022 Regulations have amended the Companies Act to provide that directors now have a statutory duty to have regard to the interests of creditors where there is a likelihood of insolvency, as opposed to only after the company has become insolvent. It inserts the following new section into the Companies Act as follows:

"A director of a company who believes, or who 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 negligence conduct that threatens the viability of the business of the company".

This duty to creditors has also been included in the list of fiduciary duties owed by a director to the company in the Companies Act.

The 2022 Regulations clarify that the duty to have regard to creditors is owed by the directors to the company only and will be enforceable in the same way as any other fiduciary duty owed to a company by its director. This means that creditors will have no direct right of action against a director where there is a breach. In practice, a breach will most likely be enforced by a company acting through its liquidator.

Test for Assessing When a Company is Unable to Pay its Debts

In this context, a company is deemed to be unable to pay its debts if:

- It is unable to pay its debts as they fall due;

- The value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities;
- A statutory demand for payment of an amount exceeding €10,000 (or an amount of more than €20,000 that is owed to two or more creditors) is not paid within 21 days period¹; or
- Where execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part.

Meaning of "have regard to"

The meaning of the expression "have regard to" was recently considered in the High Court in *Cork County Council v Minister for Local Government, Planning and others*². In this case, Mr Justice Humphreys set out a helpful summary of the relevant principles when considering the meaning of the phrase. These include:

- Expressions like "consider", "take into account" and "have regard to" all mean the same thing;
- Having regard implies looking at the matter concerned and factoring in its relevance, if any, and weight, if any, as those matters appear to the decision-maker;
- If the decision-maker fails to even look at the documents or matters to which it is to have regard, or if the evidence doesn't demonstrate that it has done so, then a ground for judicial review arises;
- If it is stated that regard was had to something, then the onus is on the party challenging that to prove otherwise by evidence;

¹ During an "interim period" as defined which expires on 31 December 2022, this amount is increased to €50,000

- The process of having regard has to be carried out bona fide and in accordance with the statutory purpose; and
- There is no necessary obligation for the consideration to be lengthy or ponderous.

The scope of the obligation to "have regard to" was originally set out in *McEvoy v Meath County Council*³. In this case, the High Court found that the phrase created an obligation to consider something rather than to slavishly adhere to it.

It is unclear how a court interpreting this new directors' duty would treat these decisions, given they arose in a different context, but they would undoubtedly carry some weight in the court's determination.

Early Warning System

The amendments brought about by the 2022 Regulations provide that a company director may have regard to "early warning tools". The term "early warning tool" is not defined in the Directive, but it is defined in the amended Companies Act as a mechanism to alert company directors to circumstances that could give rise to the company being likely to be unable to pay its debts, and which can identify restructuring frameworks available to the company under Irish law.

On 14 October 2022, the Corporate Enforcement Authority published a draft "Information Note" on its website, which is intended to assist directors in understanding the impact of the 2022 Regulations on directors' duties. The draft Information Note provides guidance as to:

- Steps that can be taken to ensure the directors are aware, on an ongoing basis, of the company's financial position; and

² [2021] IEHC 683

³ [2002] IEHC 31

- 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.

The "indicators" are a list of factors that are contained in Appendix 1 to the draft Information Note.

Responses to the draft Information Note are to be submitted to the Corporate Enforcement Authority by 1 November 2022⁴.

Conclusion

The amendments introduced by the 2022 Regulations, including in particular the clarification that the duty to have regard to the interests of creditors is owed to the company only, are welcome.

Directors should be mindful of their obligation to have regard to the interests of creditors when the company is (or is likely to be) unable to pay its debts. Any director of a company that is in financial difficulty should consider taking legal and other professional advice.

How the Maples Group Can Help

For further information or assistance in undertaking any of the actions advised above, please reach out to your usual Maples Group contact or any of the persons listed below.

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October 2022

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⁴ <https://cea.gov.ie/en-ie/Media/Latest-News/cea-seeking-interested-parties-views-on-a-draft-information-note-concerning-aspects-of-the-preventive-restructuring-regulations>