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The Insolvency & Corporate Governance Act 2020

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The Corporate Insolvency and Governance Act 2020 came into force at lightning speed on 26 June 2020 and represents the most significant reform to the insolvency framework since the introduction of administration under the Enterprise Act in 2002.

It put into effect new procedures and measures to seek to rescue companies in financial distress due to the COVID-19 outbreak and the resulting economic crisis.

The Act introduced three major permanent reforms to insolvency law, which are not time-limited by reference to COVID-19 and seek to create a more debtor-friendly, rescue environment for companies in difficulties so as to reduce the number of companies entering into restructuring or insolvency procedures.

The Act also introduced several temporary insolvency and corporate governance changes, which will remain in place until September 2020, unless extended. These temporary measures seek to tackle the pressures resulting from the COVID-19 pandemic and to mitigate the effect of the insolvency regime on the responsibilities of directors whose businesses are struggling due to the COVID-19 crisis.

The legislation is both complex and long. This note is only intended to summarise its key points as opposed to being a full and detailed analysis.

Permanent Changes

Moratorium

The Act introduces a new standalone moratorium procedure, which can be used to afford distressed but viable businesses some breathing space from creditor action to pursue a plan to rescue the company as a going concern. The initial period for the moratorium is 20 business days, but this can be extended for a further 20 business days without consent. Further extensions of up to one year or more are available with the permission of the court or the consent of creditors.

In that moratorium period, the directors remain in control, but a licensed insolvency practitioner is appointed as a "monitor", whose consent is required before the directors can undertake certain transactions.

For as long as the moratorium applies, it prevents the commencement of insolvency proceedings or other legal proceedings against the company (including the enforcement of security) and the forfeiture of a lease. However, the company must pay debts falling due during the moratorium, although with certain exceptions it does not have to pay debts falling due prior to the moratorium.

Restructuring plan

This new reorganisation measure is a court supervised restructuring process similar to a scheme of arrangement, but with the addition of a "cross-class cram down", which enables the court to sanction the approval of a compromise or arrangement where dissenting classes of creditors are bound on certain conditions. The restructuring plan is available to companies which have encountered, or are likely to encounter, financial difficulties that affect their ability to carry on the business as a going concern and that propose a compromise or arrangement between the company and its creditors, or any class of them (or the members, or any class of them).

As with a scheme of arrangement, creditors are divided into classes according to the similarity of their rights prior to and as a result of the plan. Each affected creditor has the opportunity to vote on the plan and, provided that one class of creditors who would receive a payment or have a

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genuine economic interest approves the plan, and the plan delivers a better outcome than liquidation or administration, it becomes binding on creditors of all classes if sanctioned by the court. The court's role is to assess whether the classes have been properly formulated, whether the plan is fair and equitable and whether each creditor receives more than they would under liquidation or administration.

Ban on termination (known as ipso facto) clauses

The third permanent measure places a restriction on suppliers of goods and services from terminating, varying or exercising any right under a contract, because the counterparty has entered an insolvency or restructuring process. Suppliers are also banned from requiring payment of sums falling due prior to the insolvency as a condition of ongoing supply. As a result, suppliers shall continue to supply the debtor on the same terms without a guaranteed payment of arrears. There are significant carve-outs (including by contract and entity type) to the operation of these provisions, including a temporary exclusion for small company suppliers, which expires on 30 September 2020.

Temporary Changes

Suspension of wrongful trading

The Act includes a temporary suspension of the wrongful trading regime, such that the court, in considering whether a director should make a contribution to the assets of the company, is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors between 1 March 2020 and 30 September 2020. It removes, therefore, one potential threat of personal liability on directors trading through the COVID-19 pandemic.

Winding-up petitions and statutory demands

The Act temporarily removes the threat of statutory demands and winding-up petitions in circumstances where the unpaid debt is due to COVID-19. As such, from 27 April to 30 September 2020, a creditor cannot present a winding up petition, unless it has reasonable grounds to believe that the debtor was not financially affected by COIVD-19 or was unable to pay its debts regardless of the pandemic. If the court dissents with the creditor, no winding-up order will be made.

Similarly, the measure places a ban on statutory demands served between 1 March 2020 and 30 September 2020 being used for presenting a winding-up petition on or after 27 April 2020.

Filing requirements and members' meetings

The Act grants a temporary extension to deadlines for filing accounts and other Companies House filing deadlines and provides temporary flexibilities relating to how and when members' meetings of private and public companies may be held.

Call corporate lawyer, Evangelos Kyveris, today.

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