



An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Summary Rescue Process

Public consultation on a restructuring process suitable for the rescue of small companies

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Background

The Department of Enterprise, Trade and Employment is seeking views on a potential new restructuring process suitable for the rescue of small companies.

The Department is committed to the continuous improvement of legislation, aiming to simplify the regulatory environment and to support business while also maintaining the appropriate safeguards for all stakeholders such as creditors and employees. It is important that the legislative framework is periodically reviewed to ensure that its original objectives are still valid and being achieved, and to ensure clarity and accessibility for individuals, business and civil society groups alike. In this regard, the impact of Covid-19 on business has necessitated a review of the existing restructuring processes provided for by the Companies Act 2014, to determine whether they meet the needs of business as it responds to the economic impact of the pandemic.

It has been acknowledged that small companies have particular challenges in availing of the State's most common rescue framework, examinership. The associated costs pose a significant barrier to access. Covid-19 continues to disrupt economic activity and may eventually give rise to increased numbers of companies in difficulty. While there will be companies amongst that cohort which should be properly wound up and cease trading, there will also be companies with viable business models capable of being rescued. Small companies employ in the region of 788,000 across the country and contribute significantly to our economy. It is in our economic interest that those companies which are fundamentally viable have an opportunity to restructure and access an appropriate rescue process.

Proposed new restructuring process for the rescue of small companies

As part of the Government's medium-term stabilisation response to the economic challenges of the pandemic, and in keeping with commitments contained in the Programme for Government, it is proposed to provide for a stand-alone process outside existing frameworks for the rescue of small companies. In this regard, the Tánaiste wrote to the Company Law Review Group (CLRG) requesting it to examine the issue of rescue for small companies and make recommendations as to how such a process might be designed.

The CLRG submitted its report in October 2020 and recommended a "Summary Rescue Process", a standalone process separate from the examinership process, but which would mirror key elements of the examinership legislation. Such a process would:

- be designed for "small" companies (as defined by the Companies Act 2014) which represent 98% of companies in Ireland,

- be commenced by resolution of directors rather than by application to Court,
- be concluded within a shorter period than examinership,
- be overseen and assisted by insolvency practitioners,
- provide that the rescue plan be passed by a simple majority in value of creditors,
- provide for format of cross class cram down of debts designed to reduce costs,
- not require application to Court for approval of rescue plan (provided no creditor objects), and
- have safeguards against irresponsible and dishonest director behaviour.

It is envisaged that this process will reduce the associated costs and regulatory burden for ease of access for small companies while also maintaining appropriate safeguards for creditors.

A full copy of the terms of reference referred and CLRG's report can be accessed at the following link: <http://www.clrg.org/clrg/publications/the-company-law-review-group-s-special-report-on-the-rescue-of-small-business.pdf>

The existing restructuring processes provided for under the Companies Act 2014

Currently in Ireland, the examinership process presents the most commonly used framework in which corporate rescue and restructuring takes place. In addition, Part 9 of the Companies Act 2014 provides a process which can be used to restructure companies in certain situations.

Examinership

Examinership is a process which sees the appointment of an independent person (the "Examiner") by the Court to companies which are experiencing financial difficulties. The aim of the process is to allow a structured settlement with all creditors so as to prevent job losses and to allow companies with a potentially viable business (but which has become burdened with an unsustainable level of debt) to continue to trade rather than having to go into liquidation thus preserving employment and supporting a more advantageous return for creditors. The appointment of an Examiner automatically puts the company under the protection of the Court. Such court protection will prevent any creditor from acting to wind up or appoint a receiver to the company in question for the duration of the examinership.

The stages in examinership can be summarised and characterised as follows:

- A petition is presented to the Court by the company, directors of the company, a creditor or by certain shareholders.
- An independent expert's (usually an accountant) report is prepared outlining the current financial position of the company and its prospect of survival.
- On the basis of this report the Court determines whether the company has a reasonable prospect of survival and is therefore eligible to the Court's protection while it restructures.

- The initial period of protection provided by the Court is 70 days. However, this can be increased to 150 days¹ on the basis of exceptional circumstances.
- The Examiner uses this period of protection to devise a plan for the company's survival and puts this to a vote of the company's creditors.
- Once the company's creditors have approved the plan in line with the requirements of the Companies Act 2014, it is then put to the Court for final confirmation.

While this long-standing preventive restructuring framework is internationally recognised and has proven to be a successful tool in its own right, the cost associated with examinership may be prohibitive for smaller businesses.

Part 9 Scheme

A Part 9 scheme of arrangement is a proposal originated by the directors of a company to restructure the ownership and or debts of a company, whether public or private. It can be used as a debt and financing restructuring tool. In non-insolvency situations, it can also be used to migrate an Irish-incorporated company to another jurisdiction, to make an offer for its shares or to effect a complete takeover.

The stages in a Part 9 scheme can be summarised as follows:

- A scheme must be devised and a circular to affected shareholders and/or creditors prepared.
- The meetings of shareholders and/or creditors must be convened.
- The meetings of shareholders and/or creditors must pass the resolutions approving the scheme.
- The company must apply to the High Court for the scheme to be sanctioned.
- The Court Order must be delivered to the Registrar of Companies.

Part 9 schemes are frequently used by holding companies and are not considered appropriate for the restructuring of small companies.

¹ The maximum period of protection provided for by examinership was increased from 100 to 150 days temporarily by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 in response to the pandemic. The temporary provisions of the Act remain in place until 9th June 2021 and may be extended further by Government order.

Submissions or comments are invited in respect of the questions listed below:

1. Key elements of the process

Robust restructuring processes typically contain some or all of the following elements:

- the granting of a stay or moratorium;
- support for new and interim financing;
- support for negotiation with creditors and, where necessary, equity holders, through the introduction of cram down provisions which might include cross class cram down provisions;
- a final approval of a restructuring agreement through an official body - in Ireland, the High Court or in some cases, the Circuit Court.

These elements are present in the examinership process and are regularly cited as being central to its success.

The Summary Rescue Process proposed by the CLRG allows a company to apply for a stay on proceedings and focuses on creditor negotiation and the introduction of cross class cram down provisions.

Question 1

Which of the above elements do you consider most important in a simplified process for small companies? Please give reasons for your answer and, if appropriate, set out your views on any other elements you consider important for inclusion.

2. Excludability

The Personal Insolvency Act 2012 provides for administrative mechanisms for the restructuring of personal debt; one such mechanism is a Personal Insolvency Arrangement (PIA). Under a PIA, certain debts are explicitly excluded from being dealt with as part of the process. These are called excluded debts.

The types of debt that are excluded and cannot be covered by a PIA are:

- Debts under family law orders, such as maintenance orders for spouses and children;
- Debts due under court awards for personal injury or death;
- Debts arising from a loan (or forbearance of a loan) obtained through fraud or similar wrongdoing;
- Debts arising under court orders made under the Proceeds of Crime Acts or fines imposed by the courts for criminal offences.

The Act specifies certain other types of debt to be excludable from a PIA. This means that they can be covered by the PIA only if the creditor is asked and agrees to let them be included. If the creditor is asked and does not respond, the creditor is also deemed to have consented to the debts being included. Most types of excludable debts are those owed to the State.

The types of debt that are excludable and may be covered if the creditor agrees are:

- Taxes, duties, charges or levies owed to the State, such as income tax, the Local Property Tax, VAT, capital taxes;
- Service charges owed to local authorities;
- Rates.

Examinership does not provide for any debts to be excluded and all will be considered as part of the plan devised by the Examiner.

Question 2

Are there any debts which you believe should be excludable from the proposed Summary Rescue Process? Please provide detail for your answer.

3. Disqualification from entry

In examinership, entry to the process is at the discretion of the Courts². The Court will appoint an Examiner where it appears to the Court that:

- The company is or is unlikely to be able to pay its debts;
- No resolution subsists for the winding up of the company; and
- No order has been made for the winding up of the company.

The Court will not appoint an Examiner until it has afforded every creditor who has indicated their desire to be heard on the matter an opportunity to do so³.

As entry to the process is subject to Court approval, there are no criteria set out in the Companies Act which automatically preclude a company from presenting a petition to appoint an Examiner to the Court. However, this can be contrasted with the administrative process for the restructuring of personal debt as provided for by the Personal Insolvency Act 2012.

The Personal Insolvency Act 2012 provides a mechanism through which individuals may propose a Personal Insolvency Arrangement for the resolution of debt with the help of a Personal Insolvency Practitioner. Entry to the process is not subject to Court approval. An individual may not avail of this process for several reasons, including if they:

- are an undischarged bankrupt;
- are a discharged bankrupt subject to a bankruptcy order;
- have already availed of a Personal Insolvency Arrangement; or
- are availing of any other debt resolution mechanism provided for the Personal Insolvency Act⁴.

Question 3

Do you consider there are any automatic reasons why a company should be disqualified from entering into the Summary Rescue Process? Please give reasons for your answer.

² Section 509, Companies Act 2014

³ Section 515, Companies Act 2014

⁴ This list is non exhaustive, other criteria can be found in section 91 of the Personal Insolvency Act 2012. For further information in relation to personal insolvency, please see Insolvency Services of Ireland website at <https://www.isi.gov.ie/>

4. Standard forms

A creditor's right to be heard is of fundamental importance in any restructuring process. In examinership, the Court will not appoint an Examiner until it has heard from any creditor who has indicated their desire to be heard on the matter.

The Department is considering how the Summary Rescue Process will give creditors a forum within which to voice their concerns. To make the process as accessible, flexible and simple as possible for all involved, it is proposed that the Insolvency Practitioner will send all creditors a prescribed form so they can inform him or her of any details they consider relevant to the process. This will be done immediately on appointment of the Insolvency Practitioner, before a scheme is devised.

Question 4

Please set out the information you think should be sought from creditors via prescribed form by the Insolvency Practitioner upon appointment?

5. Potential users

Examinership is currently available to all companies. However, the commercial reality of the associated costs means it is typically utilised by medium and large companies.

The Department proposes to make the Summary Rescue Process available to micro and small companies as defined in the Companies Act 2014. Roughly 98% of companies fall into these categories and therefore may be eligible to avail of the process.

Micro company⁵ means a company that, in its most recent financial year fulfils 2 or more of the following requirements:

- turnover of the company does not exceed €700,000;
- balance sheet total of the company does not exceed €350,000;
- average number of employees does not exceed 10.

Small company⁶ means a company that, in its most recent financial year, fulfils 2 or more of the following requirements:

- turnover of the company does not exceed €12 million;
- balance sheet total of the company does not exceed €6 million;
- average number of employees does not exceed 50.

Question 5

Please set out your views in relation to the potential scope of the Summary Rescue Process.

⁵ Section 280D, Companies Act 2014

⁶ Section 280A, Companies Act 2014

6. Additional comments

The Department is committed to meaningful engagement with stakeholders and would ask respondents to this consultation to highlight any issues which may not have been already captured.

Question 6

Please provide any additional comments you wish to inform the development and direction of policy on a new restructuring process for small companies.

This may include comments on the safeguarding of creditors, processes provided for in other jurisdictions etc.

Deadline for Submissions

The deadline for submissions or comments on this review is 5th March 2021.

Submissions should be sent to:

tara.keane@enterprise.gov.ie

When making your submission please provide the name of the individual, firm or organisation making the submission; contact details and briefly describe your interest in this subject matter.

Freedom of Information Act 2014 and Publication of Submissions

The Department will make public on its website all submissions received under this consultation. Your attention is also drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Act 2014. Therefore, should you consider that any information you provide is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Department will consult with you regarding information identified by you as sensitive before publishing or otherwise disclosing it.

General Data Protection Regulation

Respondents should note that the General Data Protection Regulation ('GDPR') entered into force in Ireland on 25th May 2018 and it is intended to give individuals more control over their personal data. The key principles under the Regulation are as follows:

- Lawfulness, fairness and transparency;
- Purpose limitation;
- Data minimisation;
- Accuracy;
- Storage limitation;
- Integrity and confidentiality;
- Accountability.

The Department of Enterprise, Trade and Employment is subject to the provisions of the Regulation in relation to personal data collected by it from 25 May 2018. Any personal information which you volunteer to this Department, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Acts 1988 to 2018.

8 February 2021