

Chartered Accountants Ireland or CCAB-I material

Technical Alerts

TA 02/2022 - Small Companies Administrative Rescue Process

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May 2022

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A. Introduction

1.This Technical Alert highlights the features of the Companies (Rescue Process for Small and Micro Companies) Act 2021.

2.The legislation has created a rescue process for small and micro companies known as Small Company Administrative Rescue Process (SCARP). The purpose of SCARP is to provide an alternative to examinership, for the benefit of small and micro companies, which is more accessible and cost efficient than the existing examinership process and capable of conclusion within a shorter period of time and to assist viable small and micro companies to remain in business while trading through periods of temporary difficulty.

3.The directors in a small or micro company can now avail of a simplified and relatively inexpensive company law procedure that allows them to rescue a business that may otherwise face liquidation.

4.The SCARP procedure allows the company, with the guidance of an Insolvency Practitioner, to arrange with creditors to compromise debts.

5.It is only suitable for a company where the directors can show that the company will be financially viable in the future and that creditors are better off financially under a SCARP than in a liquidation.

B. Eligibility

6.The requirements where an eligible company wishes to avail of a rescue plan are set out in Section 558B as follows:

- a. Be a small company as defined by the Companies (Accounting) Act 2017 section 280A or a micro company as defined by the Companies (Accounting) Act 2017 section 280D.
- b. Be unable, or likely to be unable, to pay its debts.
- c. No resolution nor order has been made for the winding up of the company.
- d. Not having used the process in the previous five years.
- e. Not have an Examiner appointed in the previous five years.

7.For a company which is eligible, the small company qualifying conditions are satisfied if, in relation to a financial year, it fulfils two or more of the following requirements:

- a. the amount of turnover of the company does not exceed €12 million;
- b. the balance sheet total (total assets) of the company does not exceed €6 million;
- c. the average number of employees does not exceed 50.

8.The qualifying conditions for a micro company are satisfied by a company if, in relation to a financial year, it qualifies for the small companies regime, and fulfils two or more of the following requirements:

- a. the amount of turnover of the company does not exceed €700,000;
- b. the balance sheet total (total assets) of the company does not exceed €350,000;
- c. the average number of employees does not exceed 10.

9.A company will meet the criteria if it was a small or micro company in the financial year immediately preceding the current year.

C. The Process

Step 1: Engage a Process Advisor

10.The company should engage a Process Advisor to determine whether an eligible company has a reasonable prospect of survival.

11.The Process Advisor must have the same qualifications for appointment as a Liquidator as set out in Companies Act 2014 section 633. As set out in Companies Act 2014 section 635, the company's auditor cannot act as Process Advisor.

12.The Process Advisor has no executive function in the company. They have similar rights and powers as an Examiner. For further information on the powers of the Process Advisor please refer to Section 558ZS.

13. The fees and costs of the Process Advisor are treated similarly to those of an Examiner, in that they are paid from the assets of the company. The Process Advisors shall be paid in full and shall be paid before any other claim, secured or unsecured, under any rescue plan or in any receivership or winding up of the eligible company to which he or she has been appointed.

Step 2: Preparation of a Statement of Affairs

14. A statement of affairs in the prescribed form should be prepared by the directors, having made a full inquiry into the affairs of the company, and include the following:

- a. Particulars of the company's assets, debts and liabilities (including contingent and prospective liabilities) at the latest practicable date.
- b. The names and addresses of the eligible company's creditors.
- c. The securities held by each of them.

A copy of the prescribed form of the Statement of Affairs, along with other template documents, is available in Statutory Instrument [S.I. No. 675 of 2021](#).

15. The directors are required to submit a statutory declaration to the Process Advisor to confirm the accuracy of the statement of affairs. If false or misleading information has been included in the statement of affairs, the directors may be guilty of a category 2 offence.

16. The Process Advisor will determine whether there is a reasonable prospect of survival of the eligible company, and the whole or any part of its undertaking, as a going concern.

Step 3: The Process Advisor's Report

17. If the Process Advisor determines that there is a reasonable prospect of survival of the eligible company, and the whole or any part of its undertaking, as a going concern a report is prepared under Section 558C.

18. In making this determination, the Process Advisor will have regard to the statement of affairs and the following:

- a. The nature of, and prospects for, the business of the eligible company.
- b. The availability of funding for, and investment in, the eligible company in the future, including expressions of interest by any external funders.
- c. The cost structure of the eligible company, including any cost reductions already achieved or that may be achieved.
- d. Whether projections and business plans are based on objectives and independent evidence.
- e. Whether the eligible company can generate a sufficient return to remunerate investment and repay funding.
- f. The wider economic situation.
- g. The circumstances of the market in which the eligible company is operating, including the likely future prospects of the market.
- h. The expertise, brand and historic success of the eligible company.
- i. Where the eligible company is part of a group of companies, the place of the company in the structure of the group and its prospects in that context.
- j. Whether a secured creditor has expressed an interest in (or attempted to initiate) a trading receivership.
- k. Such other matters as the Process Advisor considers relevant in the circumstances.

19. The Process Advisor will consider other matters including:

- a. Whether any deficiency between the assets and liabilities of the eligible company has been satisfactorily accounted for.
- b. A statement of the conditions or other matters which the Process Adviser considers are essential to ensure that the company would have a reasonable prospect of survival as a going concern, whether as regards the internal management and controls of the company or otherwise.
- c. Opinion as to whether the preparation, approval and taking effect of a rescue plan would offer the company a reasonable prospect of survival.
- d. Opinion as to whether an attempt to continue the whole or part of its undertaking would likely be more advantageous to the members as a whole or the creditors as a whole than the winding up of the eligible company.
- e. Recommendations as to the course the company should take.
- f. Details of the extent of the funding required to enable the eligible company to continue trading during the course of the rescue period and the sources of that funding.

- g. Recommendation as to which liabilities incurred before the appointment of the Process Advisor should be paid.
- h. Information on the appointment process and potential costs and fees of the Process Advisor.

20. The formal process begins after the Process Advisor's report is submitted to the directors of the eligible company.

Step 4: The Rescue Process

21. The directors of the eligible company may call a meeting of its board of directors at which a resolution to appoint a Process Advisor shall be proposed and considered. This meeting shall be held within 7 days of receipt of the Process Advisor's report.

22. When the director's resolution is passed, the Process Advisor must do the following within two working days of appointment:

- a. Deliver a notice of his or her appointment to the Companies Registration Office.
- b. File with the office of the relevant court a copy of:
 - i. The resolution;
 - ii. The Process Advisor's determination that the eligible company has a reasonable prospect of survival and their report.
 - iii. Where the Process Advisor has determined under Section 558H(2) that proceedings in relation to the eligible company should be brought in the High Court, the reasons for this determination.
- c. Make arrangements for a notice of their appointment and the date of that appointment to be published in Iris Oifigiúil.

23. The Process Adviser shall, as soon as practicable and in any event no later than 5 days after the passing of the resolution, give to creditors (including employees) and other stakeholders a notice setting out:

- a. The fact of his or her appointment as Process Advisor and the date of the passing of the resolution in respect of same.
- b. Any payments that the Process Adviser considers are required to be made for the eligible company to continue trading.
- c. The fact that any liabilities arising after the appointment of the Process Advisor that are properly incurred by the Process Advisor shall be paid in full.
- d. The determination made under section 558H(2) as to whether any proceedings shall be brought in the Circuit Court or the High Court, as the case may be.

24. The directors of the eligible company shall ensure that, within 48 hours after the passing of the resolution, a notice in the prescribed form stating that the Process Adviser has been appointed and the date of the appointment is placed on any website of the company in a prominent and easily accessible place. The directors of the company shall ensure that the notice remains on the website during the rescue period.

25. The Process Advisor shall keep under review during the rescue period the determination made in relation to the eligible company's prospect of survival.

Step 5: The Process Advisor's engagement with creditors and stakeholders

26. Following the issue of the notice to inform creditors of the Process Advisor's appointment, each creditor and other stakeholder should submit evidence of their claim for monies owed to the Process Advisor.

27. Where a creditor fails to submit evidence of their claim for monies owed, the Process Advisor shall issue a reminder notice. If no information is received, the Process Advisor shall estimate the value of the creditor's claim and give notice to the creditor specifying the estimated value and to inform that unless the creditor supplies the information required within 72 hours the estimated value may be used for the purpose of preparing a rescue plan.

28. Creditors and other stakeholders are afforded an opportunity to provide information and explanations to the Process Advisor and to disclose any facts they consider material to the process.

Step 6: The Process Advisors Rescue Plan

29. As soon as is practicable after the passing of the resolution, the Process Advisor shall prepare a rescue plan for the eligible company.

30. In advance of preparing the rescue plan, the Process Advisor will review the company's financial circumstances and consult with stakeholders including directors, creditors, employees and shareholders.

31. The rescue plan shall:

- a. Specify each class of members and creditors of the eligible company.
- b. Specify any class of members and creditors whose interests or claims will not be impaired by the rescue plan.
- c. Specify any class of members and creditors whose interests or claims will be impaired by the rescue plan.
- d. Provide equal treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favourable treatment.
- e. Specify any changes that should be made in relation to the management or direction of the company.
- f. Provide for its implementation.
- g. Include such other matters as the process adviser deems appropriate.

32. The Act provides for a repudiation process for onerous contracts, including leases, or an application to Court and sets out detailed requirements in each case for notice, objection and calculation of the relevant claim. A rescue plan shall not provide for a reduction in rent reserved under a lease of land / or extinguishment of the right of the lessor to any such payments without the landlord's consent.

33. The Process Advisor shall give notice to creditors with excludable debt requiring them to inform the Process Advisor within 14 days if they object to inclusion in the rescue plan. Excludable debt, in relation to an eligible company, means:

- a. any liability of the eligible company arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State.
- b. any debt or liability of the eligible company arising under the Redundancy Payments Acts 1967 to 2014, the Protection of Employees (Employers' Insolvency) Acts 1984 to 2020, the Social Welfare Consolidation Act 2005, or such other enactment as may be prescribed.

Step 7: Rescue Plan Approval

34. As soon as practicable after preparing the rescue plan, the Process Advisor shall call the appropriate meetings of members and each class of creditor for the purpose of considering the rescue plan.

35. Meetings should be held no later than 49 days after the date of appointment of the Process Advisor.

36. The Process Advisor shall provide at least 7 days' notice in writing to every person entitled to attend the meeting.

37. The notice shall be accompanied by the rescue plan, a statement of assets and liabilities of the eligible company at the date on which the rescue plan was prepared and a description of the likely financial outcome of a winding up of the eligible company or the application of a receivership to that company for each class of members and creditors.

38. The Process Advisor should also provide a statement explaining the effect of the rescue plan, the reasons why it is fair and equitable and not unfairly prejudicial, the likely consequences of a failure to approve the rescue plan and, where appropriate, the Process Advisor's view on the likely outcome for creditors if the eligible company was wound up.

39. The Process Advisor should also provide information on of fees, costs and expenses incurred.

40. A rescue plan shall be deemed to have been accepted by a meeting of members or creditors or of a class of members or creditors when 60% in number representing a majority in value of the claims represented at that meeting have voted, either in person or by proxy, in favour of the resolution for the rescue plan.

41. A rescue plan shall be binding on all members or creditors (or class of members or creditors) affected by the rescue plan, the eligible company and the directors of the eligible company, where it is accepted by at least one class of creditors whose interests or claims would be impaired by implementation of the rescue plan and 21 days pass from the date of filing of the notice of approval with the office of the relevant court.

42. The Process Advisor shall, within 48 hours after the approval of the rescue plan, give notice of the approval to employees of the eligible company, the Revenue Commissioners and any member or creditor whose claim or interest would be impaired if the rescue plan were implemented. The notice should identify the relevant court office in which an objection may be filed within 21 days.

43. The Process Advisor shall also provide notice of approval of the rescue plan to the Companies Registration Office and relevant court within 48 hours after the approval of the rescue plan.

D. Objection to the rescue plan

44. A creditor or member may file an objection to a rescue plan. This should be sent to the Process Advisor and the office of the relevant court.

45. An objection may be made on any of the following grounds:

- a. That the rescue plan unfairly prejudices the interests of the objector.
- b. That the rescue plan is unfair and inequitable in relation to the objector.
- c. That there was some material irregularity at or in relation to a meeting where the rescue plan was approved.
- d. That a member or creditor has been materially prejudiced by not receiving notice of the meeting or any other notice required to be sent under the Act.
- e. That acceptance of the rescue plan by the meeting was obtained by improper means.
- f. That the rescue plan was put forward for an improper purpose.
- g. That it is not necessary for the survival of the eligible company, and the whole or any part of its undertaking, as a going concern that the contract specified in the objection be repudiated or affirmed.
- h. That the amount of loss or damage determined in respect of the repudiation of the contract specified in the objection is inadequate or excessive.
- i. That the sole or primary purpose of the rescue plan is the avoidance of payment of tax due.
- j. That the rescue plan contains an unlawful provision.
- k. Such other grounds as may be prescribed.

46. Where the relevant court dismisses an objection or approves a modified rescue plan, the rescue plan shall be binding on all the members / creditors or classes of members / creditors affected by the rescue plan, and on the eligible company.

E. The role of the Court

47. The SCARP process does not provide the eligible company automatic protection from creditors. The relevant court may, on receipt of an application stay all proceedings or restrain further proceedings for the relevant period.

Such an application can be made by the eligible company, the directors of the eligible company or the Process Advisor.

48. The relevant court may also make other orders including the following:

- a. No proceedings for the winding up of the eligible company may be commenced or resolution for the winding up passed.
- b. No receiver over any part of the property or undertaking of the eligible company shall be appointed.
- c. No attachment, sequestration, distress or execution shall be put into force against the property or effects of the eligible company, except with the consent of the Process Adviser.
- d. Where any claim against the eligible company is secured by a mortgage, charge, lien or other encumbrance or a pledge of, on or affecting the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of that security, except with the consent of the Process Adviser.

e. No steps may be taken to repossess goods in the eligible company's possession under any hire-purchase agreement (which includes retention of title claims), except with the consent of the Process Adviser.

F. Failure of the Process

49. The Process Advisor shall keep under review during the rescue period the determination made in relation to the eligible company's prospect of survival.

50. If, at any time during the rescue process, the Process Advisor determines that there is no longer a reasonable prospect of survival of the eligible company, and the whole or part of its undertaking, as a going concern, the Process Advisor shall immediately:

- a. Give notice of the determination to the directors of the eligible company.
- b. Prepare a report setting out reasons why a rescue plan could not be prepared and recommendations as to the next steps to be taken by the directors of the eligible company (including the winding up of the company).
- c. Resign as Process Advisor in respect of the eligible company.

51. The Process Advisor may make this determination because of any changes in the circumstances of the eligible company or the discovery of inaccuracy in the information provided to the Process Advisor that was relied upon for the determination of the eligible company's prospect of survival.