

Companies (Rescue Process for Small and Micro Companies) Bill 2021

by Tom Murray

New Restructuring and Recovery Procedure for SMEs

The Government has recently enacted the new Companies (Rescue Process for Small and Micro Companies) Bill 2021, the aim of which is to provide a quicker and more cost effective restructuring option for SME and micro businesses, similar to the existing Examinership process.

It is a well known fact that the existing Examinership process, whilst a very worthwhile piece of legislation, has not been suitable for micro or SME businesses due to the significant cost of it being a court driven process. This is reflected by the relatively low number of companies that avail of Examinership compared with the numbers that enter liquidation. As a result, a much more cost effective and simplified process to assist SMEs has long been called for.

The Covid-19 pandemic has directly expediated the drafting and implementation of this new rescue process which is specifically designed in terms of reducing costs and simplifying the process to suit SME and micro businesses.

In short, the new process is a simplified corporate rescue mechanism specifically geared towards small and micro companies with the primary objective being to save the company and any jobs provided by it.

For a company to avail of the new process they must meet the following eligibility criteria:

- Small or Micro Company
- Unable or likely to be able to pay debts
- Not in liquidation
- Not having used the process in the previous 5 years

The last requirement demonstrates that this is not seen as a short term procedure but something that is

envisaged will be long term central tenet of a "fit for purpose" corporate recovery system in Ireland.

In order to enter the process, the company will engage an Independent Insolvency Practitioner to act as a "Process Advisor". The Process Advisor must have the same qualifications for appointment as a liquidator. As with other insolvency procedures, the company's Auditor/Accountant cannot act as Process Advisor for reasons of independence etc.

Whilst the Process Advisor has no executive function in the company, they have similar rights and powers as an examiner in that:

- a. they can attend board meetings etc.
- b. third party advisors such as accountants/solicitors may not exercise a lien over the company's books and records in respect of unpaid fees against the Process Advisor.
- c. they "certify" certain liabilities to be treated as expenses of the SCARP.

Having identified the need to enter the process and having engaged a suitable Process Advisor, the director of the company will prepare a Statement of Affairs by statutory declaration.

This is submitted to the Process Advisor who will then gather information on the company's specific situation to enable them to form an opinion on the company's

prospects for survival.

The Process Advisor will then then issue a report on whether the company in their opinion has a reasonable prospect of survival.

The Process Advisors report will consider matters similar to an Independent Accountant's Report in an examinership including:

- Has any deficiency been satisfactorily accounted for.
- Opinion as to whether the Company has a reasonable prospect of survival.
- Recommendations as to the course the Company should take.
- Details of funding required.
- Recommendation as to what pre-petition liabilities should be paid.
- Information on proposed fees.

On foot of the Process Advisor's report, the formal process will commence. In order to commence the process, the

- Directors then pass a resolution to commence the process.
- Directors will also pass a resolution to cease ALL payments to creditors for the duration of the process.

The directors' resolutions are filed with the relevant court, notified to creditors, delivered to CRO and be publicly advertised on the company's website (if any) and Iris Oifigiuil.

Crucially, from a time and cost perspective there is no requirement

to apply to a Court which is required in an Examinership.

Creditors are then informed of the process and are sent the Statement of Affairs and the Process Advisor's Report. Creditors will also receive a Proof of Debt form which needs to be sent back within 14 days. During this period, creditors are afforded an opportunity to provide input to the process advisor and to disclose any facts they consider material to the process.

The Process Advisor will consult with stakeholders including directors, creditors and shareholders and drafts a rescue plan. In terms of this plan, which is in simple terms, an agreement between a company and its creditors to settle company debts. There are:

- No prescribed components or exclusions.
- No creditor may be unfairly prejudiced.

Critically the plan must satisfy 'best interest of creditors' test (i.e. provide each creditor with a better outcome than a liquidation).

In terms of the approach the Process Advisor's rescue plan can take, there is no express limitations.

In this regard,

- Debts can be written down.
- Different classes of creditors receive different treatment.
- Whilst in Examinerships, creditors are normally settled with a "lump sum", Companies could pay creditors over a period in a SCARP, of say, three years. (Such proposals are popular in the UK).

The plan may also involve:

- New investment from current or new shareholders and it may also involve dilution of existing shareholders.
- The reduction of rents (but only with landlords consent).
- The repudiate property leases IF necessary for survival.

It is important to note that a lease repudiation involves the landlord calculating their claim i.e lost rental for the remaining term of the lease less mitigating rent received and

any repudiation will require a court application, which would make the process more expensive.

One of the big issues for SMEs will be legacy Revenue or State Debt. In this process, similar to Personal Insolvency, State Debt (Revenue / Social Welfare Act Debt) is classified as "**Excludable Debt**".

An Excludable Debt shall be included in a proposal for a rescue plan unless the creditor objects on one of the following grounds:

- Tax returns outstanding.
- Where there is an ongoing tax audit or intervention.
- Where taxes are under appeal.
- Where there is a history of non-compliance with tax obligations.
- Such other grounds as may be prescribed.

The Process Advisor provides the State Creditor with a period of 14 days to "opt in". Failure to respond on behalf of the State Creditor within 14 days will result in them automatically being included.

Creditor Approval

Having formulated the rescue plan, the Process Advisor summons meetings of members and each class of creditor within 42 days of their appointment. Facilitating a timely process, notices may be sent by email.

Creditors are invited to vote (having been provided with 7 days notice) on the plan by day 49 and to be approved by Creditors there must be a 60% majority in number and a SIMPLE majority of value in respect of at least one class of creditors.

Such approval of one class of creditor voting in favour of the rescue plan will result in it been binding on all creditors.

If there is no objection to the plan and it is approved by creditors there is no requirement to obtain Court approval and the plan becomes binding 7 days after Statutory notices are filed unless objected to within 21 days.



Creditor Objection

There will be SCARP's where creditors object. Grounds for objecting would include:

- The rescue plan unfairly prejudices the interests of the objector.
- The rescue plan is unfair and inequitable in relation to the objector.
- There was some material irregularity at or in relation to a meeting to which section 558Y applies.
- 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.
- Acceptance of the rescue plan by the meeting was obtained by improper means.
- The rescue plan was put forward for an improper purpose.
- The sole or primary purpose of the rescue plan is the avoidance of payment of tax due.

In order to object a rescue plan, creditors must file a notice of Objection with the Process Advisor and the Court.

That being said the **Court will sanction a plan unless it is unfair and inequitable or unfairly prejudicial to objecting member/creditor remembering that the Process Advisor in drafting the plan must ensure that:**

- No creditor may be unfairly prejudiced.
- Must satisfy 'best interest of creditors' test (i.e. provide each creditor with a better outcome than a liquidation).

The Role Of Court

Whilst Examinerships provides automatic protection from creditors, SCARP does not.

The Process Advisor must make an application to Court for protection from any specific creditor. Court would also have additional

involvement if required to:

- Determine questions posed by the process advisor, creditors, ODCE etc.
- Can stand down Receiver or provisional liquidator.
- Deal with repudiation of onerous contracts including leases.
- Hears objections made by creditors/members to the rescue plan.

Failure Of Scarp

Not every SCARP will succeed. If the vote does not pass, the Process Advisor must report to the Board as to why it was not successful, and set out recommendations as to the next steps such as Liquidation etc.

If the SCARP was not successful because the State creditors did not "opt in" then Examinership might be considered (An Examinership could deal with State creditors who did not opt into the SCARP) – however as already noted cost may be prohibitive.

Payment Of The Process Advisor

The fees and costs of SCARP are treated similarly to Examinership, in that they are paid from the assets of the company. In order to minimise professional fees, the Process Advisor is expected to use the services of the staff of the company as far as possible.

So what to do now?

If you are a Director of a Company or an advisor of a Company which may need to avail of a SCARP, you should identify and contact a suitably experienced Process Advisor and consider the following steps and then:

- a. Commence preparing a pack of information for the Process Advisor such as:
 - a brief history of the company,
 - an organisation chart,
 - summaries of property leases and finance leases,

- summary of employees' salaries and employment history,
- an excel spreadsheet of all creditors to include postal and email addresses,
- cash flow forecasts and trading forecasts,
- Statement of Affairs.

b. Bring management accounts up to date.

c. **Submit all tax returns.** In particular, ensure that you have adjusted your VAT returns if you have not paid a supplier within the required 6 months.

d. Avoid directors putting monies into company now. Ideally, wait for the SCARP process, as "new monies" can be very persuasive to creditors.

e. Review if trade creditors have valid Retention of Title clauses.

f. Obtain valuations of buildings, plant & machinery.

g. Consider impact on any ongoing insurance claim for business interruption.

h. Consider implementing a "pay freeze" in respect of certain creditors.

i. Consider implementing a redundancy programme.

j. Surrendering leases to landlords (and thereby quantify their claims now).

k. Open up a new bank account with another bank to avoid set off of accounts.



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