SCARP: The new rescue process for Small and Micro Businesses in Ireland

As countries across Europe face the implications of the COVID-19 pandemic, Mark Woodcock, Chairman of Restructuring and Insolvency Ireland (RII), considers innovative new Irish legislation, which will allow small companies to restructure their debt.

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Examinership is an internationally recognised rescue process for Irish companies. The process was most recently in the international news when the Norwegian Air Group restructured its affairs through the Irish Courts in June 2021. This was a super advertisement for the process as the Group had business interests in many European countries.

However, there has been a concern for some time that the Examinership process is out of reach for smaller businesses due to the associated costs. As part of the Irish government's response to the economic challenges of the pandemic, a law was passed in July allowing for a similar rescue process for small businesses.

New rescue process

The Small Company Administrative Rescue Process (**SCARP**) provides for a stand-alone rescue framework for small companies. The primary focus of the proposal is to reduce complexity and costs and the means of achieving this goal is by making it an out-of-court process.

SCARP will be available to companies that have a turnover not exceeding €12 million, a balance sheet total not exceeding €6 million, and whose average number of employees does not exceed 50. This means it will effectively be available to about 98% of companies in Ireland.

Key features

The process will be commenced by company resolution and will be overseen by an insolvency practitioner. This will provide safeguards to stakeholders against irresponsible and dishonest director behaviour. The insolvency practitioner will prepare a rescue plan within 42 days of appointment, which may be passed by 60% in number, representing a majority in value of at least one class of impaired creditors, and will allow for cross-class cram-down of debts. The rescue plan will not require Court approval, provided there are no formal creditor objections filed in Court. The process is to be concluded within a period of 50 days, which is considerably shorter than the time allowed in an Examinership.

Effect on creditors

Unlike Examinership, there will be no automatic Court protection for the company. This could be controversial, as it seems that creditors may still be a threat during the process. Although creditors will not be impaired by virtue of entry to the process, they may be impaired by the cross-class cram-down of debts.

In recognition of the property rights of creditors and the need to balance the respective rights, where an objection to the rescue plan is raised, there will be an automatic obligation on the company to seek Court approval for the plan. This will act as a safeguard for creditors. The rescue plan must satisfy the 'unfair prejudice' test, providing each creditor with a better outcome than in a liquidation.

In order for the rescue plan to be successful, creditors should engage with the process. However, State creditors will operate on an "opt-out basis" on prescribed grounds, such as if the company has a poor history of tax compliance. Although it is suggested that the State would not remove itself from the process for arbitrary reasons, where Revenue is often the largest creditor for struggling businesses, a poor tax compliance history will likely preclude that business from availing of SCARP. This could also prove controversial.

Conclusion

SCARP seeks to mirror key elements of Examinership but with increased efficiencies and lower costs making it more accessible to smaller businesses. This is welcome news for companies which have come under additional strain during the pandemic, but which have a viable business that should survive with the appropriate assistance.

We, in Ireland, believe it will be a real game changer and go a long way towards assisting struggling businesses. ■

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