

# The Examinership of Norwegian Air Group

Ruairi Rynn and Rebecca Martyn report on the first case where an Irish examinership was used to restructure the obligations of a non-EU company



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**O**n 26 May 2021 Norwegian Air Shuttle ASA (NAS), together with four Irish companies (Norwegian Air), successfully exited the Irish examinership process which was used for the first time to restructure the obligations of a non-EU company and which had many key and innovative features in terms of cross-border issues linked to the aviation sector.

Through the restructuring the Norwegian Air group notably succeeded to:

- raise NOK 6 billion (€590 million) in new capital through share and hybrid debt offerings;
- reduce its total debt since the end of 2019 by approximately NOK 63-65 billion (€6 billion-€6.2billion) to approximately NOK 16-18 billion (€1.57 to €1.77 billion);
- discontinue its long haul operations;
- reduce its fleet from 156 aircraft to 51 aircraft and secured competitive leasing arrangements on its retained fleet, including “Power by the Hour” agreements through Q1 2022.
- terminate aircraft purchased orders representing CAPEX commitments of approximately NOK 85 billion (€8.19 billion) in aggregated value; and
- pivot to a short-haul network primarily operating in Norway and the Nordics or from Norway/the Nordics to Continental Europe.

## Jurisdiction

A central aspect of the restructuring was dealing with NAS, the Norwegian incorporated parent of the group, the main operating company, whose shares were listed on the Oslo Stock Exchange.

Mr Justice Michael Quinn in the Irish High Court (the **Court**), who delivered four written judgments over the course of the examinership, held that it was possible for the Court to appoint an examiner to a non-Irish incorporated company that did not have its centre of main interests (**COMI**) in Ireland, or any other EU country, but which was related to another company (e.g. a parent, subsidiary or sister company) that

- had its COMI in Ireland,
- was in examinership and
- where the debtor had a “sufficient connection” to Ireland.

In considering whether the Court should exercise that jurisdiction, Mr Justice Quinn was satisfied that the restructuring implemented through the examinership would be effective in other key jurisdictions including Norway, England and Wales. Mr Justice Quinn appointed Kieran Wallace of KPMG Ireland as Examiner of the companies.

## Parallel Norwegian reconstruction

The Irish examinership was the main restructuring process for NAS and the only possible process for the Irish incorporated companies. It was supplemented in Norway through a Norwegian law reconstruction (restructuring)

process for NAS. Mr Havard Wiker of Ro Sommeres law firm was appointed as the reconstructor and he proposed a reconstruction plan for NAS that replicated and implemented in full the terms of the Examiner’s scheme (**Norwegian Plan**).

The scheme adopted certain necessary elements of Norwegian law in order to ensure that the Norwegian Plan could work. A novel element of the NAS scheme was that it authorised the Examiner to vote on behalf of all the creditors of NAS in favour of the Norwegian Restructuring Plan (even on behalf of those who voted against the Irish scheme) to be sure of the approval and implementation of the examinership scheme through the Norwegian Plan.

The examinership scheme and the Norwegian Plan were ultimately subject to recognition under Chapter 15 of the US Bankruptcy Code.

## Fleet reduction - repudiation of aircraft leasing arrangements and the Cape Town Convention

A significant feature of the restructuring was the reduction of the group’s aircraft fleet and the restructuring of NAS’s guarantee obligations on the leasing arrangements. The companies sought to repudiate the leasing arrangements related to practically the group’s entire fleet and secured a reduction in the fleet size and the leasing terms through a combination of the court applications and negotiations.

Mr Justice Quinn was satisfied that the Irish Court had jurisdiction to repudiate foreign law contracts, including the English law on leasing arrangements, for any company that was subject to the examinership process.

The Judge was also satisfied that the Cape Town Convention did not prohibit the Court from approving the repudiation of the aircraft leasing arrangements and associated guarantees and also held that the companies' liabilities linked to terminations could be written down by the examinership scheme on the basis that they were not "modifications" that required creditor consent.

### Conditional investment

A unique feature of the examinership was the structure and timing of the proposed investment (which had a minimum target amount of NOK 4.5 billion (€433.6 million). There were three components to the proposed investment:

- Rights offering to existing shareholders of up to NOK 395 million (€38.06 million) – this was ultimately oversubscribed and raised the full amount.
- Private placement of new shares with key investors - this ultimately raised gross proceeds of NOK 3.73 billion (€359.4 million).
- A hybrid debt instrument paying cash and payment in kind interest with an equity conversion right: this was only available to creditors and raised NOK 1.875 billion (€180.7 million).

The nature and scale of the investment required meant that it was impractical to undertake the type of public offerings necessary to secure the investment until the restructuring was approved. Consequently, and in a significant departure from established practice, the Examiner presented the examinership scheme for approval to the creditors and to the Court *before* binding

investment commitments were in place. In order to protect creditors, the examinership scheme and the Norwegian Plan were structured so that the terms of the restructuring, in particular the write-downs of the obligations to creditors, would not take effect *unless and until* the minimum capital investment of NOK 4.5 billion (€433.6 million) was raised.

The Court approved the examinership schemes on 26 March 2021 and fixed the effective date under the schemes as 26 May 2021 in order to facilitate the completion of the capital raising process by NAS. The capital raise was completed on 21 May 2021 and the restructuring became effective on 26 May 2021. In approving this aspect of the examinership, the Court demonstrated a willingness to deviate from established practice and provide the necessary flexibility to facilitate the complex capital raise required to secure the airline's survival.

### Blended dividend

In addition to the novel approach to securing the investment, the examinership scheme for NAS provided for a "blended dividend" to go to unsecured creditors, representing 5% of their claims, comprising a proportionate share of a cash pot of NOK 500 million with the balance of the 5% blended dividend being converted into a debt instrument, titled a Dividend Claim.

The Dividend Claims could be held as debt instruments by the creditors or converted into equity in NAS that could be held or sold pursuant to a structured sale in the Autumn of 2021.

### Treatment of existing equity

Before the examinership, NAS had undergone a previous debt to equity conversion which led to many leasing creditors taking significant equity positions in the company. The examinership required further dilution of NAS's existing equity, but not the complete extinguishment of the

position. Rather, and excluding any new investment, existing shareholders were diluted to 4.6% (subject to certain assumptions).

The Court was satisfied that the significant, but not complete, dilution of existing equity holders was appropriate where the retention of a small portion of the equity preserved value and liquidity in the shares which, through the Dividend Claims, were a key part of the dividend to creditors of NAS.

### Concluding remarks

The said examinership schemes were some of the most complex and innovative such schemes of arrangement approved by the Irish courts since the introduction of the process in 1990.

Through the examinership Norwegian Air has been able to transform its business into a flexible, Nordic-focused airline with a strong balance sheet. In doing so, it has shed significant legacy obligations under aircraft purchase contracts and leasing arrangements, its entire long-haul fleet and associated service arrangements.

The complexities and success of the restructuring underline the effectiveness of the examinership process (in addition to the separate Irish law schemes of arrangement) to implement complex international restructurings in Ireland. The innovative and novel features in the schemes formulated by the Examiner and ultimately approved by the Court's judgments demonstrate the fundamental strengths of the examinership process that also provide companies with automatic and effective protection against creditor actions, the ability to achieve cross-class cram-downs and to terminate legacy contracts.

William Fry LLP advised Kieran Wallace of KPMG Ireland, the Examiner, on the formulation and ultimate approval of the schemes of arrangement to implement the restructuring. ■



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