

# SCARP – A MORE EFFICIENT RESCUE PROCESS FOR SMEs

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# Background – Reason for Introduction of Legislation

- > Restructuring and Insolvency regime in Ireland
  - Examinership
  - Formal and Informal schemes of arrangement
- > If unsuccessful
  - Liquidation or Receivership
- > Examinership process, successful process for larger companies
- > Out of the reach of smaller entities due to costs due to costs

# Background – Reason for Introduction of Legislation

- > In 2020, CLRG examine and make recommendations for the formulation of a Rescue Process for small and micro companies
  - To assist companies restarting post-pandemic
  - To deal with unsustainable debt
  - A quicker/more cost effective alternative to Examinership
  - With reduced Court involvement
- > Public consultation process which concluded in March 2021
- > Bill initially published in May 2021
- > Passed by both houses of the Oireachtas and signed into law on 21 July 2021
- > Companies (Rescue Process For Small and Micro Companies) Act 2021 (the Act)
- > Commencement date of the Act?

# KEY COMPARISONS

Examinership	SCARP
Examinership process includes certain mandatory court applications and continuous court oversight.	SCARP is designed to be an administrative and out of court process.
Various Court Applications throughout the process.	Potential for 0 court applications. Choice of applications include: <ul style="list-style-type: none"> <li>• Application by the Process Advisor for an automatic stay on creditor claims</li> <li>• Application to repudiate an onerous contract</li> </ul>
Period of examinership = maximum of 100 ordinarily or 150 days.	Period of SCARP = maximum of 70 days.
No Revenue exception/opt-out (all debt including Revenue debt to be included).	Revenue may opt-out if statutory basis exists for an opt-out (Excludable Debt).
Court application to confirm Scheme.	Rescue Plan can come into effect after approval at creditors' meeting. A 'cooling-off' period of 21 days will apply prior to the scheme taking effect to permit creditors to raise any objections.
Automatic Entry into Liquidation if examinership fails.	Liquidation not automatic on failure of Rescue Process. Process Advisor is obliged to provide a report to the Company which should include a recommendation as to whether the company should be wound up or not.

# Steps to Commence Process

## > Eligibility criteria (2 of 3 to be satisfied)

- Turnover < €12 M
- Balance Sheet < €6 M
- Employees < 50

## > 5 Conditions

- Likely to be or are is unable to pay its debts as they fall due
- No resolutions pending for winding up
- No resolutions for winding up has been made
- Cannot have appointed a Process Advisor (PA) in past 5 years
- No examiner can have been appointed in previous 5 years

# Steps to Commence Process

## > To initiate the process, the directors shall

- Make full enquiry into affairs of company
- Prepare a statement
  - ✓ Assets, debts and liabilities
  - ✓ Names and addresses of creditors
  - ✓ Details of security
- Statutory declaration re. full enquiry made
- Submit same to PA who will determine whether company has reasonable prospect of survival (**S 558C of the Act**)

# Steps to Commence Process

- > PA reviews information, issues a **report** to the directors to determine the “reasonable prospect of survival” criteria and reasons for his or her **determination** (S 558D)
- > PA’s report will have regard to various matters
- > Directors consider PA’s report and pass resolution to commence the Rescue Process (RP) and to appoint the PA
- > No requirement to make an application to Court to commence the RP

# Role of Processor Advisor

## Eligibility

- > Same qualifications as Liquidator or Receiver (**S 633 of the Companies Act, 2014**)
- > Officer of the Court (**S 558ZX**)

## Powers

- > To take whatever steps are necessary, subject to the right of parties acquiring an interest in good faith and for value in such income, assets or liabilities, to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract (**S 558ZS(6)**)
- > Repudiation of contracts (**S 558P**)
- > Power to obtain documents and evidence of the company
- > Power to deal in secured assets of the company (*with court approval*)
- > Personally liable on any contract unless contract provides otherwise



# Role of Processor Advisor

## Obligations

### > Upon appointment

- With 2 days (**S 558J**)
  - ✓ File with CRO
    - Notice of appointment
  - ✓ File with Court
    - Resolution
    - Determination and report
    - Reason for selection of Jurisdiction High Court v Circuit Court
  - ✓ Advertise in Iris Oifigiúil

# Role of Processor Advisor

## Obligations

- **Within 5 days (\$ 558K)**
  - ✓ **Give notice to Employees, Creditors, Revenue containing**
    - Fact of appointment and date resolution
    - Pre-appointment payments
    - Process payments
    - Jurisdiction High Court v Circuit Court
    - Request information from creditors re. nature, security, credit terms etc.
- **As soon as is practicable**
  - ✓ Deal with excludable debts
  - ✓ Objection to inclusion within 14 days

# Role of Processor Advisor

## Obligations

- > Where unable to prepare a RP (S 588S)
  - Reasons why RP is not feasible and
  - Next steps (which may include a recommendation to wind up)
  
- > Preparing a RP (S 558Q)
  - Class
  - Impairment
  - Management/Direction
  - Constitution
  - Implementation

# Role of Processor Advisor

## Obligations

- > Convene meetings of members and creditors (S 558T)
  - To consider RP
  - Timeline within 49 days of appointment
  - Give 7 days Notice (on or before Day 42) providing
    - ✓ RP
    - ✓ Statement of affairs
    - ✓ Likely outcome of a Liquidation or Receivership
    - ✓ Any other relevant information
    - ✓ Proxies
    - ✓ Statement re. costs and remuneration incurred to date
    - ✓ Estimate of additional costs and remuneration, if approved
    - ✓ Estimate of additional costs and remuneration, if not approved

# Role of Processor Advisor

## Obligations

### > If approved, issue Notification of approval

- Within 48 hours to
  - ✓ Interested parties
    - RP
    - Statement
    - Objection form
  - ✓ CRO
  - ✓ Court

# Role of Processor Advisor

## Costs & Liabilities

- > PA's fees and costs are treated similarly to an Examinership
- > PA's to use staff of the company to minimise own costs
- > Likely that Courts will consider PA rates to be benchmarked to levels approved by the High Court in other insolvency cases
- > Where the RP is approved, members or creditors may apply to the relevant court for the review of the PA's remuneration, costs and expenses within 21 days after notice of approval is filed (**S 558ZZ**)
- > The court will have regard to
  - Whether PA used company staff to minimise his or her costs
  - Time properly required
  - Complexity of the case
  - Effectiveness with which PA carried out his or her duties
  - Value and nature of property dealt with by PA

## REPUDIATION OF LEASES

The Process Advisor possesses **a choice** of whether to repudiate a contract via:

1. Court application; or
2. The administrative process

### The Administrative Process

Step 1: notification to contract holder of intention to repudiate the contract

Step 2: consideration of any proposals or modifications put forward by the contract holder regarding the contract

Entitlement of contract holder to object to any repudiation by commencing court application

## State Debt (inc. Revenue) (S 558L)

- > “Excludable Debt” means
  - Any tax, duty, levy or any other charge payable to the State
  - Any debt or liability under the Redundancy Payments Acts 1967 to 2014 i.e. Redundancy Payments Scheme
  - Any debt or liability under the Employees (Employer’s Insolvency) Acts 1984 to 2020 i.e. Insolvency Payments Scheme
  - Any debt or liability under Social Welfare Consolidation Act 2005 or
  - Any debt or liability arising under such other enactment as may be prescribed
- > Creditors must execute their right to ‘opt out’ of the RP being formulated by the PA within 14 days of being given notice



# State Debt (inc. Revenue)

**> Grounds for objection are;**

- The eligible company has failed at any time relating to tax imposed by or under the Act or any other enactment
- Revenue are conducting an audit or intervention
- The company is a party to an appeal in relation to a requirement relating to tax imposed by the Act or any other enactment
- Such other enactment as may be prescribed

## **ACHIEVING COMPLIANCE IN THE ABSENCE OF COURT OVERSIGHT**

- Director must set out a true and accurate reflection of the state of the Company's affairs. It is a criminal offence for a director to provide false or misleading information
- Court Applications by the Process Advisor against director(s) on the basis of improper transfer of assets and fraud against the Company
- The Process Advisor is obliged to report any offences committed against the Company by a director to the ODCE and/or the DPP

## THE RESCUE PLAN: FORMALITIES

- **Prescribed contents of the Rescue Plan** : to include class of creditors whose interests will be impaired, any changes that should be made in relation to the management of the company; provide for the implementation of the rescue plan
- **Notice to creditors** in advance of creditors meeting
- **Threshold for approval of the Rescue Plan**: 60% in number representing the majority in value of the claims represented at that meeting in that creditor class
- **Objections**: The objecting creditor is obliged to state the grounds upon which an objection is being made
- **Court hearing** in respect of the objection

## **GENERAL ANALYSIS/COMMENTS**



# ANY QUESTIONS?

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