

Small Firms Require New Rescue Mechanism

Examinership can be an effective path to survival out of insolvency but the process is too costly for micro firms, writes **John Kinsella**

As the Covid-19 lockdown continues to batter businesses, many will struggle to recover their losses and remain viable. Formal restructuring of some sort may be unavoidable, including the prospect of examinership. However, this court-supervised process of corporate recovery doesn't suit small firms, which has led to calls for the process to be repurposed.

When a trading company in financial difficulty enters examinership, a court can confirm a binding agreement with all creditors to pay back a percentage of their debt over an agreed timeline. Examinership provides protection from creditors, as well as breathing room to put a survival plan in place.

The process commences with the filing

of the petition, accompanied by an independent expert's report on the survival prospects for the business. If the court is satisfied to appoint the examiner, the company is protected from creditor claims for 100 days while the examiner works out the rescue plan.

The examiner's solution is then put to creditors. If it is accepted by a majority of one class of creditor, it can go back before the court. The judge can then rule that the proposed solution can go ahead, and creditors just have to lump it, even if they don't like it.

Examinership is available through the High Court and the Circuit Court. Law firm Dillon Eustace notes that the fundamentals in both courts are the same, so the Circuit Court route doesn't

provide significant cost savings over the higher court route.

Examinership is not a guaranteed route to business survival. Analysis by Vision-net.ie found that of the 420 companies in examinership between 2007 and 2016, just over half continued to trade successfully afterwards.

The wider issue is that small retail, hospitality and tourism enterprises floored by the Covid-19 lockdown are unlikely to have the resources to avail of the examinership process.

ISME, the small firms lobby group, argues that the current unprecedented situation calls for fresh thinking. Anticipating significant numbers of insolvencies post Covid, ISME wants a simplified, fixed-cost examinership regime, to be administered outside the courts in the first instance.

Solicitor **Barry Lyons**, who drew up ISME's submission to government, says that given the small size of most Irish firms, and their unattractiveness to potential investors, the cost of going through examinership in its current guise would be disproportionate to the benefit arising.

"A typical examinership will cost €80,000 and will take 100 days to complete," says Lyons. "The cost, the number of steps, and resulting time involved means that examinerships are rarely conducted for companies which qualify for Circuit Court examinership. In such cases, otherwise viable businesses are broken up in liquidation."

ISME has proposed an administrative examinership conducted by an accountancy practitioner. This would cost c.€15,000 and could take less than 70 days to complete. The examiner, rather than a court, would issue the protective certificate, prepare a scheme of arrangement and convene a creditors' meeting to vote on the proposals.

ISME's plan is aimed at cutting down the number of solicitors, barristers and accountants involved, and giving the examiner more autonomy. The Irish



**Irish
Society of
Insolvency
Practitioners**

The Irish Society of Insolvency Practitioners, an organisation comprising of accountants and solicitors working in the insolvency profession in Ireland, was established in 2004. From a small beginning, membership has grown to several hundreds today.

ISIP has a number of objectives, including:

- Providing a forum for consideration and discussion of Insolvency matters.
- Promoting best practice in the area of Insolvency.
- Liaising with Government agencies and making recommendations on legislative reform governing Insolvency.
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For more information about what we do, please go to our website www.isip.ie

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Society of Insolvency Practitioners (ISIP) concurs that the existing examinership process is too costly for micro SMEs.

To reduce costs, the society has proposed combining the role of the independent accountant with that of the examiner. ISIP also wants a temporary relaxation of the rule on liquidity requirements for companies entering examinership, as well as an extension of the protection period.

“We also propose that the initial admission of companies to examinership

he explains. “The downside from a director’s viewpoint is that they do not have the benefit of a moratorium against winding-up petitions. An additional hurdle is that you need 75% approval by each class of creditor, while examinerships only need 50%.”

Brendan O’Donoghue, restructuring and insolvency partner in RBK, says that Ireland’s examinership legislation is respected internationally. “There may be some reluctance about changing it dramatically because it compares well



would be done through the Insolvency Service of Ireland, in a similar way to how the ISI admits private individuals to Personal Insolvency Arrangements and Debt Settlement Arrangements,” says **Jim Stafford** of Friel Stafford, who chairs ISIP’s representation committee.

Luke Charleton insolvency specialist in EY, expects many distressed firms to explore a scheme of arrangement, as provided for in Finance Act 2014. Under this process a company can canvass its suppliers and creditors and agree debt write-downs with very little need for recourse to the law.

“Schemes of arrangement are a practical way of resolving the restructuring the company’s balance sheet,”

with, for example, Chapter 11 in the United States.”

O’Donoghue also wonders why more use is not being made of consensual schemes of arrangement. “They are a lot cheaper and only require going to court once. While these schemes do not give the same protection from creditors as an examinership, the company doesn’t have to be technically insolvent for the process to commence.”

O’Donoghue adds that schemes of arrangement are happening below the radar. “Typically, you’re dealing with creditors of the company, whereas with the examinership court process notices have to be published in newspapers.”

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“The pandemic is very different from the financial crisis in 2008,” says Cormac Mohan.

“Not all firms are losing out, with the value of some companies increasing. However, it is an unfortunate reality that businesses in certain sectors will not survive in the changed environment.

“A key challenge for many businesses centres on whether they have enough cash in the short term to continue as a going concern. Cashflow modelling will be critical. A second big challenge in this market involves changing business valuations - business owners need to have realistic expectations.

“Valuations are down significantly, so getting funds into the business will be increasingly difficult for both short-term working capital or the survival of the business, and for long-term growth and innovation.”

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Cormac heads the firm’s Insolvency and Corporate recovery team. He is a qualified accountant who holds a Diploma in Insolvency & Corporate Restructuring from the Law Society of Ireland. He is a member of the Consultative Committee of Accountancy Bodies of Ireland (CCABI) and a former President of CPA Ireland.

Cormac has represented a number of clients and has a track record over the last 15 years in preparing independent expert reports for the courts in the examinership process across a range of sectors.

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