



EXECUTIVE SUMMARY

The social and commercial restrictions enforced because of the Covid-19 pandemic has resulted in a severe and rapid contraction in both demand and supply. These restrictions are unlikely to be raised for some time, and when they are, significant levels of corporate insolvencies are expected to follow. If even 5% of Ireland's 271,000 companies were to cease trading as a result of Covid-19, over 13,000 insolvencies could result, with all the consequential job losses.

For reasons set out below, examinership is not the most logical route for these businesses to follow. We propose the adoption of a simplified, fixed cost examinership regime, which is administered outside the courts in the first instance.

Administrative Insolvency would be conducted by a single practitioner, would cost approximately €15,000 and (depending on how far advanced funding negotiations are) could take less than 70 days to complete.

CONTEXT AND BACKGROUND

Ireland has a well-developed and respected second-chance regime in its examinership system. This system is however expensive, administratively cumbersome, and unsuitable for most of the businesses which are about to fall into insolvency. A typical examinership will cost €80,000 and will take 100 days to complete. The cost, the number of pro forma 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.

TWO SUBMISSIONS

ISME has two submissions to make in relation to the demand and supply contractions arising from the C19 closures, one straightforward, the other less so;

1. Companies have incurred rent, rates, revenue and other overhead costs ("the Overhead Costs") while shut down, and unable to generate any (or very limited) income. Reduction in overhead is at least in excess of 16% (1/6th) of annual income. This has enormous implications for the survival of companies affected. ISME recommends a blanket apportionment of Overhead Costs incurred from 1st March 2020 for payment over 36 months from the date on which the Government declares the C19 pandemic over.
2. Failing this, ISME recommends reform of the rules on examinership as set out below, to make this corporate recovery process more user friendly, less cumbersome, more efficient, and far less expensive

3% of insolvent companies seek to restructure in Ireland. In the US, where their Chapter 11 process is mirrored here, the percentage is 11%. The rate of equity and job destruction unnecessarily arising is significant.

The principles behind examinership are few, and simple:

1. The company (only companies can currently avail of the process) must be insolvent, and have a reasonable prospect of survival in whole or in part as a going concern, and
2. The company and the examiner must act with the utmost good faith, and
3. In any scheme of arrangement agreed between the company, its investor, the creditors and other stakeholders, the creditors cannot be unfairly prejudiced. Unfair prejudice arises where a creditor's position would be better in a distribution from its assets if the company went into liquidation.

Summary of the proposed amendment to the processes:

- A. The Examiner is authorised to act by one of the eight accountancy bodies governed by the Irish Auditing and Accounting Supervisory Authority (IAASA) and is subject to its certification and regulatory regime. The Examiner is also subject to oversight by the Office of the Director of Corporate Enforcement in the conduct of his duties as examiner. Otherwise, save in cases set out below oversight of the process by the Court is not required,
- B. Subject to the conclusions in a report they prepare, the Examiner issues the protective certificate to the Company,
- C. The Examiner manages the investment or other funding (loan, asset sale, invoice discounting, etc.) process
- D. The Examiner prepares proposals for a scheme of arrangement ("Proposals") for the consideration of the members and creditors of the Company
- E. The Examiner convenes meetings of the creditors at which they vote on the Proposals
- F. If the statutory tests regarding the meetings and their outcome are satisfied, 14 days later the Examiner files the Proposals in the CRO, when they become binding on the members, creditors and contributories of the Company
- G. A members, creditor or contributory has the 14 days to appeal against the Proposals being binding, on risk of an order for costs being made against them in the event of a vexatious application

Particulars of the amendments**1. At the start of the process:**

	Current situation	Proposed revision	Statutory provision
a	Three firms of solicitors, two barristers and two accountants are needed for application for court protection with the appointment of an examiner.	The examiner is already authorised to act by their governing body subject to oversight of the Irish Auditing and Accounting Supervisory Authority (IAASA) and the ODCCE, and is subject to their certification and regulatory regimes. This level of proofs and confirmations are unnecessary	(s) 633, (s) 634, (s) 635 Companies Act 2014
b	One solicitor acts for the company preparing the proofs set out in the Companies Act 2014 required for the petition papers.	Required proofs are set out in the Companies Act and their preparation should be within the professional competence of the proposed examiner	
c	One solicitor swears an affidavit as to the examiner's suitability.	The examiner is authorised to act by the Irish Auditing and Accounting Supervisory Authority (IAASA) and is subject to its certification and regulatory regime. This level of proofs and confirmations are unnecessary	Rules of the Superior Courts
d	The examiner (an accountant) swears as to their experience and qualifications to act.	The examiner is already authorised to act by their governing body subject to oversight of the Irish Auditing and Accounting Supervisory Authority (IAASA) and the ODCCE, and is subject to their certification and regulatory regimes. This level of proofs and confirmations are unnecessary	
e	A different accountant prepares a report on the history of the company's trade and sets out the measures needed to ensure the company's survival. Three elements are common to almost all petitions: <ul style="list-style-type: none"> ○ An investment by way of loan or equity is required ○ The creditors need to accept some kind of a write down or reschedule of their debt 	It is unclear why a separate accountant's view on the provenance of the issues faced by the Company, and the steps required for its saving are required. Failings with the report are disclaimed with reference to the haste with which the report is prepared. There is no reason why the examiner cannot prepare this report and then follow through on his analysis and recommendation	(s) 511(3) (a) (s) 511(3) (b) (s) 511(3) (c) (s) 511(3) (d) (s) 511(3) (e) (s) 511(3) (f) (s) 511(3) (g)

Administrative Insolvency Proposal

- The Court needs to approve any proposals put by the examiner

- f Counsel for the company drafts papers for court based on the proofs and the content of the expert's report The examiner's report contains all the required information and should form the basis of his appointment without the requirement for a Court Order for the examiner's appointment and court protection pursuant to (s) 509

- g The submission is put to the Court for the examiner's appointment. The examiner is already authorised to act by their governing body subject to oversight of the Irish Auditing and Accounting Supervisory Authority (IAASA) and the ODCCE, and is subject to their certification and regulatory regimes. In the event of an improper application, leave to the Court should be available to a member, creditor or contributory of the Company

- h The examiner will have solicitor and counsel at the confirmation hearing, This should not be required

- i There will be at least six affidavits, the expert's report, advertisements and notices to creditors This should not be required

- J Including advertisements, stamp duty, VAT and professional fees, even for the smallest companies the costs of getting into examinership are at least €17,000. There will be no Stamp Duties, very limited professional fees, no advertising costs, very limited solicitors costs, no Court applications and therefore no counsel's fees. Professional costs should be limited to €3,000

- k It is extremely unusual for a judge to reject an application for protection. Examiner certificate should suffice for protection from its creditors, with a right of appeal by dissatisfied creditors believing there is an abuse of process

(s) 511(3) (h)
 (s) 511(3) (i)
 (s) 511(3) (j)
 (s) 511(3) (k)
 (s) 511(3) (l)
 (s) 511(3) (m)
 Companies Act
 2014

(s) 509

(s) 509 CA 2014

2. Once the examiner is appointed:

	Current situation	Proposed revision	Statutory provision
a	They have to report to the court as to the outcome of the process within 35 days of the presentation of the petition. Inevitably this term is extended to 70 days. This can be further extended by 30 days. This further extension is not unusual.	Requirement to report in 35 days is; <ol style="list-style-type: none"> a) unnecessary, b) always extended, c) adds to the costs applicable to the process 	(s) 531 (2) (b)
b	The examiner rarely takes an executive position in the Company (although they can if the Directors are not assisting with the process)	Assumption of executive position in the Company is made by application of the Examiner to the Court. If the examiner thinks they require executive powers, that view will be agreed by the Court. Unwarranted assumption of executive functions should be challenged by appeal to the Court	(s) 528 <i>et seq</i>
c	The examiner makes details of the potential investment available to interested parties, and manages the investment process	These obligations are core to the examiner's function, and should remain as they are. There is no court input to this aspect of examinership process	
d	The examiner's power to repudiate onerous contracts, including lease terms and provisions	Needs to remain so as to ensure the survival of the Company as a going concern. There is no court input to this aspect of examinership process	(s) 537 (s) 525 (s) 544
e	The examiner steers the investment to ensure a number of things; <ul style="list-style-type: none"> o The investor and the company have similar expectations and their values are aligned, o The terms of the investment (e.g. the Director's employment status including salary, equity participation, terms of a shareholder's agreement, treatment of creditors) can be agreed, o The terms of any proposals for a scheme of Arrangement ("Proposals") will not fall foul of the unfair prejudice rules 	These obligations are core to the examiner's function, and should remain as they are. There is no court input to this aspect of examinership process	

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| f | Once investment terms are agreed then the investment agreements are drafted between the investor's and the Company's solicitors, with the examiner's solicitors overseeing the process. | These obligations are core to the examiner's function, and should remain as they are. There is no court input to this aspect of examinership process |
| g | When agreements are reached the investment funds are put in escrow, subject only to the Court approving the Proposals | These obligations are core to the examiner's function, and should remain as they are. There is no court input to this aspect of examinership process |
| h | The examiner prepares Proposals and circulates them to the members and creditors of the Company and convenes meetings for them to vote on the Proposals. | These obligations are core to the examiner's function, and should remain as they are. There is no court input to this aspect of examinership process |
| i | It is unusual for a company's creditors to support Proposals where its Directors have acted in a dishonest or underhand manner. Otherwise they almost always will. | |
| j | Only one class of creditors must approve the Proposals for them to be submitted to the Court | |

The end of the process:

Current situation	Proposed revision	Statutory provision
a The Examiner prepares a report on the outcome of the meetings and files it in court, for the approval of the Court.	On the basis it is correctly convened and properly carried out, the outcome of the unsecured class of creditors' meeting (those most impacted on by any scheme of arrangement) acts as a litmus test on the behaviour of the company, its Directors, and the examiner and how the examination has been carried out. If unsecured creditors oppose the Proposals, or if a creditor can claim they are unfairly prejudiced in any Proposals, or if there is an issue in relation to the behaviour of the examiner, they should have	(s) 534 (s) 543

Administrative Insolvency Proposal

- a right of appeal to Court, but on risk of an order for costs in the event their argument is unsuccessful or deemed to be vexatious
- b It is very unusual that following the process, the Court would refuse to approve the Proposals A significant cost of the process is the preparation and application for Court approval of the Proposals. This would be unnecessary if the Examiner's certificate was deemed to stand for a period of (say) 14 days pending the appeal by a creditor or contributory
- c Once approved the Proposals are binding on the members and creditors of the Company as an Order of the Court. Subject to the 14 day terms set out above
- D It is unusual for the costs of an examinership to be less than €80,000 plus VAT (inclusive of petition costs) A very significant element of the costs of examinership are those steps that are set out in the Companies Act, but are typically unnecessary, pro-forma, but extremely time consuming and as a result expensive. It renders this process too cumbersome and as a result expensive, and unsuitable for the huge numbers in financial difficulty arising from liabilities incurred in the Covid 19 commercial shutdown.
- The costs of an administrative examinership should be a fraction of the typical examinership costs, probably less than 25% of these costs

3. Why is this process unsuitable at this time:

Many Irish companies are noteworthy for-

- their very small size (employing <15 people), and
- how unattractive they are to potential investors because of the size of their balance sheet, and/or dominant family or principal members, and
- even if they can get investment, the examinership process is cumbersome, and the costs completely disproportionate to the benefit arising, and
- the relief is inapplicable to sole traders and partnerships

Thus, the current examinership process will not protect these companies, with a catastrophic impact on this sector of the economy.

4. What are commercial features arising from companies emerging from Covid 19 shut down

Common issues for companies emerging from the C19 shutdown are:

- Companies have incurred rent, rates, revenue and other overhead costs (“the Overhead Costs”) while shut down, and unable to generate any (or very limited) income, probably in excess of 16% (1/6th) of annual income. This has enormous implications for the very survival of companies affected
- While many companies will have investment available to them to pay for the cash flow required to emerge from C19 enforced hibernation, in the absence of certainty regarding these liabilities, those investors (including state agencies such as SBCI) will be reluctant to make funding available where there is uncertainty regarding treatment of *inter alia* these Overhead Costs,
- If provision is made for a blanket extension of payment terms of the Overhead Costs for (say) 36 months, this will act as a backstop for negotiations between these creditors and companies affected by the shut-down. Failing this, an administrative examinership as set out above is a more efficient, practical and workmanlike option that is prepared with the benefit of eighteen years’ hands on experience in the two examinership regimes in place since 1999.

Barry Lyons specialises in the area of Corporate Recovery including Examinerships, Receiverships and Liquidations. He has advised on some of the largest corporate restructuring cases in the state spanning business sectors such as real-estate development companies, construction, hotel and leisure and retail.

He also has extensive experience in commercial litigation and advises companies on matters relating to commercial and corporate transactions.

Barry is a regular contributor on corporate recovery topics to national and local print and broadcast media. His articles have featured in publications such as The Irish Times, The Irish Independent, The Sunday Business Post and The Law Society Gazette.