COMPANY LAW REVIEW GROUP

REPORT ADVISING ON A LEGAL STRUCTURE FOR THE RESCUE OF SMALL COMPANIES

22 OCTOBER 2020

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Chairperson’s Letter to the Minister for Business, Enterprise and Innovation

Mr Leo Varadkar T.D.
Tánaiste and Minister for Business, Enterprise and Innovation
23 Kildare Street
Dublin 2
D02 TD30

22 October 2020

Dear Tánaiste,

I refer to your letter of 8 July 2020 and am pleased to present to you a Special Report of the Company Law Review Group (**CLRG**) on potential company law amendments to insolvency structures supporting the rescue of the SME sector.

The Review Group affirms the analysis in your letter that the examinership process, 30 years old as of August this year, is internationally recognised and has proven a successful tool for restructuring in its current form. However, for a number of reasons, this process has not proved as useful for the SME sector and, in particular, for small companies.

In parallel with this, the Review Group is also aware that the impact of any amendments to corporate rescue extends far beyond a company seeking rescue, its directors and shareholders, and has implications for creditors, often other (creditor) companies, the Revenue Commissioners, employees and competitors, who may be unfairly disadvantaged by a statutory corporate rescue process. Thirty years of experience with the examinership legislation has led to considerable expertise on balancing these issues.

The issues arising in constructing a process are complex. The examinership legislation is itself set out in 50 sections taking up 35 pages of the Companies Act 2014, supplemented by detailed Rules of Court. In the interests of a timely delivery of this Report, the Review Group’s recommendations highlight issues that will require further examination, or which will benefit from further consideration.

I would like to acknowledge and thank the members of the CLRG’s Corporate Insolvency Committee who attended 8 intensive meetings and made numerous submissions and drafting recommendations. Professor Irene Lynch Fannon, Chair of the Committee, chaired the discussions and, working with me as Chair of the CLRG, led the analysis giving rise to the Committee’s recommendations which in turn have been adopted and approved by the Review Group.

I would also like to thank the Department of Business, Enterprise and Innovation for their support, in particular, Secretary to the Group, Ms. Tara Keane.

Yours sincerely,

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Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

The Company Law Review Group ("**CLRG**") is a statutory advisory body charged with advising the Minister for Business, Enterprise and Innovation ("**the Minister**") on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Business, Enterprise and Innovation ("**the Department**" or "**DBEI**") and the Revenue Commissioners. The Secretariat to the CLRG is provided by the Company Law Development and EU Unit of the Department.

1.2 The Role of the CLRG

The CLRG was established to "monitor, review and advise the Minister on matters concerning company law." In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" (section 959 of the Companies Act 2014).

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation of Lobbying Act 2015 and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

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2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at the date of this Report is provided below.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking & Payments Federation Ireland CLG
Ciara O'Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Dr David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank of Ireland
Emma Doherty	Ministerial Nominee (Matheson)
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Gillian O'Shaughnessy	Ministerial Nominee (Byrne Wallace)
Ian Drennan	Director of Corporate Enforcement
Prof. Irene Lynch Fannon	Ministerial Nominee (School of Law, University College Cork)
James Finn	The Courts Service
John Loughlin	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) (PricewaterhouseCoopers)
John Maher	Ministerial Nominee (DBEI)
Kathryn Maybury	Small Firms Association Ltd (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	IBEC (Irish Business and Employers' Confederation)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Maura Quinn	The Institute of Directors in Ireland
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Richard Curran	Ministerial Nominee (LK Shields Solicitors LLP)
Rosemary Hickey	Office of the Attorney General

Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DBEI)
Vincent Madigan	Ministerial Nominee

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The most recent work programme began in June 2020 and will run until the end of May 2022. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency. The statutory mandate of the CLRG to monitor, report and advise the Minister on matters concerning company law remains current at all times.

3.2 Company Law Review Group Work Programme 2020-2022

The Review Group's current Work Programme is as follows:

1	Consider the Companies Act in the context of creditors' rights under the following headings: • Review whether the legal provisions surrounding the liquidation of companies effectively protect the rights of workers. • Review the Companies Act with a view to addressing the practice of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business. • Examine the legal provision that pertains to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection.
2	Provide ongoing advice to the Department of Business, Enterprise and Innovation on potential amendments to company law in light of the Covid-19 pandemic and the consequent effects on companies' administration, solvency and compliance with the Companies Act 2014.
3	Provide ongoing advice to the Department of Business, Enterprise and Innovation on the migration of participating securities in light of Brexit, and any consequential company law amendments arising.
4	Examine the possible impacts of the increased use of Artificial Intelligence in the context of the Companies Act 2014, with particular regard to corporate governance matters.
5	Provide ongoing advice to the Department of Business, Enterprise and Innovation on request in relation to EU and international proposals on company law.
6	Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.

7	Review the enforcement of company law and, if appropriate, make recommendations for change.
8	Review the CLRG's recommendation from its 2017 Report on the Protection of Employees and Unsecured Creditors' in relation to "self-administered liquidation" and make further recommendation as to how this might be implemented.
9	Review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance.

3.3 Additional item to the Work Programme, addressed in this Report

On 8 July 2020, the Minister wrote to the Chairperson requesting that the CLRG examine the issue of rescue for the SME sector under the following headings:

1	Examine and make recommendations as to how the statutory scheme of arrangement provisions of the Companies Act 2014 might be adapted to provide a rescue framework for SMEs.
2	Examine and make recommendation as to ways in which key elements of the examinership process, including a stay on enforcement proceedings and a cross class cram down, might be incorporated into a rescue framework for SMEs.
3	Other EU Member States provide for voluntary restructuring processes, with a strong emphasis on creditor agreement. Examine and make recommendation as to whether such a process is desirable in an Irish context with particular emphasis on the French framework (mandate ad hoc procedure).
4	Any other recommendations the CLRG consider appropriate.

This Report is concerned with this subject matter

3.4 Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

3.5 Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at E.U. level. This Report is the product of work by the Corporate Insolvency Committee chaired by Professor Irene Lynch Fannon. The Committee's members are set out in Appendix 1 on page 38.

4. A Rescue Plan for SMEs

4.1 Introduction

4.1.1 Defined terms

In this Report the following defined terms and expressions are used:

"**2014 Act**" or "**Companies Act**" means the Companies Act 2014 (as amended);

"**CLRG 2012 Report**" means the Report of the Company Law Review Group on proposals to reduce the cost of rescuing viable small private companies;

"**CLRG Covid-19 Report**" means the Report of the Company Law Review Group to the Minister dated 25 June 2020 on measures to address company law issues arising by reason of the Covid-19 pandemic;

"**COMI**" means the centre of main interests of a company, which is defined by reference to Article 3(1) of the EU Insolvency Regulation as the place where the company conducts the administration of its interests on a regular basis and which is ascertainable by third parties. This is presumed to be the registered office of the company in the absence of proof to the contrary;[1]

"**EU Insolvency Regulation**" means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (EIR recast);[2]

"**EU Preventive Restructuring Directive"** means Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132;[3]

"**examinership**" means the corporate insolvency rescue process introduced by the Companies (Amendment) Act 1990, now regulated by Part 10 of the 2014 Act;

"**micro company**" means a company that, in its most recent financial year fulfils 2 or more of the following requirements:

(i) the amount of turnover of the company does not exceed €700,000;

(ii) the balance sheet total of the company does not exceed €350,000;

(iii) the average number of employees does not exceed 10; [4]

"**ODCE**" means the Office of the Director of Corporate Enforcement;

"**Part 9 scheme**" means a compromise or settlement, referred to as a scheme of arrangement made under Chapter 1 of Part 9 of the 2014 Act;

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[1] Article 3(1) of the EU Insolvency Regulation.

[2] OJ L 141, 5.6.2015, p. 19.

[3] OJ L 172, 26.6.2019, p. 18.

[4] Definition taken from Companies Act 2014, section 280D.

"**Part 10 scheme**" means proposals for a compromise or scheme of arrangement made in an examinership pursuant to Part 10 of the 2014 Act;

"**small company**" means a company that, in its most recent financial year, fulfils 2 or more of the following requirements:

(i) the amount of turnover of the company does not exceed €12 million;

(ii) the balance sheet total of the company does not exceed €6 million;

(iii) the average number of employees does not exceed 50;[5]

"**SME**" or "**small or medium-sized enterprise**" means a company or group of companies, having:

(i) fewer than 250 employees; and

(ii) an annual turnover of not more than €50 million *and/or* a balance sheet total of no more than €43 million.[6]

4.1.2 Framework of analysis

In its concluding remarks in the CLRG Covid-19 Report, the Review Group noted that that there is a need to examine corporate rescue structures suitable for smaller companies and to consider the development of a simplified process for such companies. It was agreed by the Review Group that this issue would be examined as part of a second phase of work to deal with medium-term stabilisation measures required to aid economic recovery.

4.1.3 Key Elements to a rescue framework

In its deliberations on a potential legal framework for a rescue process for the SME sector the Review Group considered current rescue processes available under Irish law, namely examinerships under Part 10 of the Companies Act 2014 and Part 9 Schemes of Arrangement. Based on consideration of these processes and the experience of practitioners and stakeholders, in its Covid-19 Report the Review Group highlighted four elements which are typically found in a successful and robust rescue process:

- the granting of a stay or moratorium;
- support for new and interim financing.
- support for negotiation with creditors and, where necessary, equity holders, through the introduction of cram down provisions which might include cross class cram down provisions;
- a final approval of a restructuring agreement through an official body - in Ireland, the High Court or in some cases, the Circuit Court.

These elements are present in the examinership process and are regularly cited as being central to its success. They are also recognised and included as options available to Member States in the EU Preventive Restructuring Directive.

[5] Definition taken from Companies Act 2014, section 280A.

[6] This definition is consistent with that adopted by the European Commission in its Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. O.J. L124 20 May 2003 p 36.

In addition, the CLRG Covid-19 Report made the following observations:

1. The suitability of examinership for the SME sector has been the subject of previous CLRG consideration leading to the CLRG's 2012 Report. One of that Report's recommendations, subsequently enacted[7], providing for examinership for small companies to be operated under the jurisdiction of the Circuit Court, has not led to a significant uptake in small companies availing of examinership. It has been suggested that moving examinership to a Circuit Court outside Dublin has in some cases tended to increase rather than reduce costs. The issue of Court jurisdiction is considered in paragraph 4.5.22 of this Report.

2. It is generally considered that examinership, as a process for restructurings for larger companies and groups, has been relatively successful. However, the uptake is relatively low compared with the incidence of insolvencies, and the consequent pursuit of alternative insolvency processes, in particular voluntary liquidations. A second point on which there has been little analysis concerns the failure and success rate of the process.[8] To date there has been little analysis of the relatively high failure rate of examinerships – about one third of all examinerships fail and there is little data on the continued success of rescued companies. It was suggested that there has been an increased international interest on the part of lawyers and policy makers in examinerships in light of the requirement imposed on other EU Member States to adopt rescue processes under the EU Preventive Restructuring Directive where in some cases the Member State does not have any process of this kind. However, from a practical perspective, because examinership is listed in Annex A to the EU Insolvency Regulation, it is not normally possible for international companies to avail of this process because of the rules on COMI (Centre of Main Interests) in the Regulation which determine questions of jurisdiction. The Review Group took the view that adjustment of examinership for SMEs would not be appropriate in that context.

3. Consequently, the view of the CLRG is that a rescue framework more suited to the SME or small enterprise sector should be a standalone process separate from and independent of the examinership process, although mirroring key elements of the examinership legislation which, as described above is informed by 30 years of practical experience since its first enactment.

4. In England and Wales, the scheme of arrangement provisions in Part 26 of the UK Companies Act 2006, which are broadly similar to the Irish scheme of arrangement provisions in Chapter 1 of Part 9 of the 2014 Act, have led to considerable restructuring and turnaround success in England and Wales.[9] In contrast to examinership, these provisions are not subject to the EU Insolvency Regulation and in fact cannot be listed in Annex A of that

[7] Companies (Miscellaneous Provisions Act 2013), section 2 amending section 2 of the Companies (Amendment) Act 1990, now Companies Act 2014, section 509(7).

[8] Deloitte monitors the use of the various insolvency processes. In recent years the number of examinerships is around 3% of all insolvencies as compared with figures for creditors' voluntary liquidations being over around 70% each year between 2017 and 2019. www2.deloitte.com.

[9] See further McCann L, and Lynch Fannon I, in Courtney (Ed.) *Bloomsbury's Professional Guide to the Companies Act 2014* Chapters 6, 7 and 8. See also Payne J: Schemes of Arrangement: Theory, Structure and Operation (CUP, 2014) for a treatment of the English legislation and its success in recent years. See also Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (Bloomsbury Professional 2012) Chapter 14 for a consideration of Irish case law on these provisions.

Regulation. Therefore, these provisions are not subject to the jurisdiction rules determined by the COMI provisions in the EU Regulation. For this reason, London became a forum of choice for corporate restructurings during the last recession[10].[11]

4.2 Existing Law on Corporate Rescue in Ireland.

4.2.1 Introduction

Currently in Ireland, the examinership process presents the most commonly used framework in which corporate rescue and restructuring takes place. In addition, Part 9 of the Companies Act 2014 (which re-enacts provisions from the 1963 Companies Act) provides a process which can be used to restructure companies in certain situations. After deliberation**,** the Review Group determined that its efforts should be focussed on modelling the new process on the examinership framework rather than focussing on Part 9 Schemes. This section provides a summary of its observations in this regard.

4.2.2 What is a Part 9 scheme?

As the Tánaiste's mandate to the Review Group is to consider the appropriateness of a Part 9 Scheme as a possible rescue process, this section 4.2 and Appendices 2 and 3 contain information on the law and procedure involved in such Schemes, which has informed the Review Group's analysis of the corporate rescue and restructuring processes currently available under Irish law.

A Part 9 scheme of arrangement is a proposal originated by the directors of a company to restructure the ownership and/debts of a company, whether public or private. In non-insolvency situations, it can also be used to migrate an Irish-incorporated company to another jurisdiction, to make an offer for its shares or to effect a complete takeover. In insolvent situations its equivalent provisions have been used as a debt and financing restructuring tool in England and Wales. A number of Irish registered corporates have availed of the Irish provisions in the same manner.

The stages in a Part 9 scheme can be summarised as follows:

- A scheme must be devised and a circular to affected shareholders and/or creditors prepared.
- The meetings of shareholders and/or creditors must be convened.
- The meetings of shareholders and/or creditors must pass the resolutions approving the scheme.
- The company must apply to the High Court for the scheme to be sanctioned.
- The Court Order must be delivered to the Registrar of Companies.

[10] In light the judgment in European Court of Justice Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* and the possibility of a comparable application of the legal principles to the transfer of data outside the EU to the UK as a third country, it is possible that London may have difficulties in repeating this in the recovery from the Covid-19 pandemic.

[11] See further Payne *ibid.* There is some evidence that Ireland has become of interest as a possible jurisdiction for this kind of restructuring work post Brexit. See recent Irish cases such as *Re Ballantyne Re plc* [2019] IEHC 407 and *Re Nordic Aviation Capital DAC* [2020] IEHC 445 where amongst other issues the question of jurisdiction was considered.

4.2.3 Shortcomings of Part 9 schemes for companies

The potential difficulties arising from the use of a Part 9 scheme as a means of SME rescue include the following:

- The absence of an automatic stay on proceedings.
- The requirement for significant majorities across all classes of creditors in order for it to work. If English case law were followed this might not be necessary, where it is arranged (for a variety of commercial reasons) that there is usually only one class of creditors.[12]
- The vulnerability of the company's constitution of classes of creditors to being reopened by the Court when the scheme comes to be approved.
- It is generally not used for trading companies and in practice is used for holding or 'TopCo' companies.

4.2.4 Deliberations of the Corporate Insolvency Committee and the Review Group on Part 9 Schemes.

The Committee initially considered the Part 9 Scheme procedure and concluded, based on the observations of practitioners involved with Part 9 Schemes, that it did not provide a suitable model for a restructuring or rescue process for smaller trading companies. The Review Group was informed by practitioners on the Corporate Insolvency Committee that the process was most appropriately used to restructure 'TopCos'. Nevertheless, it was agreed that some aspects of the procedure warranted further consideration including:

- the manner of commencement of a process and the absence of an automatic stay on proceedings during the currency of the process; (See paragraph 4.5.9.)
- the consideration of constitution of classes of creditors under Part 9 Schemes which has also influenced the consideration of the same issue in some examinership cases and is similarly relevant to the design of any new rescue process. (See paragraph 4.5.12.)

A more detailed outline of the Part 9 Scheme process is set out in Appendix 2.

4.3. Rescue processes in other jurisdictions

The Review Group was provided with an outline of comparable procedures in France, the Netherlands and the United Kingdom, set out in Appendix 4. While it was instructive to consider these processes, the Review Group is of the opinion that its design of the rescue process outlined in the succeeding sections of this Report is more suitable for Irish circumstances and the Irish legal landscape.

4.4 Key questions in designing a rescue process

Following the framing of its analysis as described above, the approach of the Committee and the Review Group, was to consider a number of key questions, which would lead to the design of a potential procedure:

[12] See "The rise and rise of the English scheme of arrangement", Allen & Overy, 21 December 2015. https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-rise-and-rise-of-the-english-scheme-of-arrangement

1. Should any new process be designed as a short-term measure to deal with the consequences of the Covid-19 pandemic only or should it be a long-term solution to ongoing problems regarding the suitability of existing processes to the SME sector.
2. What should be the scope of a new process? Should it be available to all SMEs?
3. What is the purpose of the new process? Should it be focused on a rescue of the company or only the salvageable enterprise of the company?
4. Should there be limits on the availability of such a process? For example, should companies be able to avail of the process once only, once every few years or as frequently as they see fit if the particular company meets the criteria for use of the process?
5. How would this process interact with other insolvency or rescue processes such as examinership in terms of availability to the debtor company?
6. What tests should the debtor company satisfy in terms of future viability? [13]
7. What might a new process be called?
8. Should there be a role for a qualified insolvency practitioner, as required in examinerships and liquidations? Or should the process proceed without one as in a Part 9 Scheme?
9. How might a process be commenced – unilaterally by the company or by leave of some authority or Court?
10. Should there be a statutory stay on proceedings, execution and enforcement of security?
11. What might be the timeframe for the process – the 70 – 100 days of an examinership that is somewhat mirrored in a Part 9 scheme – or some alternative timeframe?
12. Should the process recognise different classes of creditors? If so, how should classes of affected creditors be constituted?
13. What voting majority and quorum should be required in any creditor vote?
14. Should there be any limitations on participation in votes, etc., by particular classes of creditors, e.g. connected creditors?
15. How should onerous contracts be addressed?
16. Should there be cross class cram down included in the framework?
17. If cross class cram down is to be allowed, do particular classes of creditors require special consideration, e.g. employees, the Revenue Commissioners or connected creditors? What is the treatment of new and interim financing?
18. Will the tests of 'unfair prejudice' as applied in examinerships apply? Should the legislative framework articulate the 'best interests of creditors' test as described in the EU Preventive Restructuring Directive?
19. How should a scheme become binding – by the fact of creditor approval or by order of the Court?

[13] Questions 2- 6 are important 'threshold' questions regarding the availability of the process. The threshold questions also include viability tests.

20. What protections could be engineered into such a process, for example, to deal with miscreant directors and officers?

21. What protections should there be for guarantors and the holders of guarantees?

22. Which Court should have jurisdiction over the process?

23. What role, if any, should there be for a statutory regulatory body? Which body should discharge any such role?

The deliberations and Review Group's conclusions on these questions are outlined in the next section.

4.5 Design of a potential process

Having regard to the time available to complete this review, it was decided to limit consideration of the issues to the design of a rescue process that was largely modelled on examinership but structured in a manner which would be simplified and considerably less expensive to implement. This builds on a previous report of the CLRG in 2012 and responds to the current context of financial and economic difficulties caused by Covid-19 and the anticipated continued economic difficulties.[14]

4.5.1 Duration of a new process [Question 1]

Members considered whether the Group should confine itself to the Covid-19 period or more generally and beyond that period. While there were differing opinions as to the merits of each, it was generally acknowledged that there is a de facto gap in available procedures for the rescue of small companies as highlighted in the CLRG's 2012 Report; Covid-19 has merely exacerbated the pre-existing issue and brought it the fore. It was agreed that the rescue of SMEs was to be considered generally and not to confine any recommendations to the Covid-19 period. However, in taking this approach and given the timeframe for completion of deliberations, the Review Group recognises that there will inevitably be issues and points of detail which require further consideration by the Department.

It was also agreed by the majority, that any process recommended was not by reason of specific defects in examinership legislation (although there were some points of procedure that might be reformed) but rather that the cost associated with examinership causes a consequential barrier to access for smaller companies.

4.5.2 Scope of a new process. [Question 2]

Detailed consideration was given to the scope of any new process and, in particular, to whether any new process recommended should be available to small and medium enterprises or just to small enterprises. Definitions of small and medium[15] enterprises are established in EU law[16] and reflected

[14] This is an important policy imperative in its own right. Evolving economic figures suggest a 35% increase in insolvencies as a result of Covid-19.

[15] The qualifying conditions for a medium sized company are satisfied by a company in relation to a financial year in which it fulfils two or more of the following requirements: (a) the amount of the turnover of the company does not exceed €20million; (b) the balance sheet total of the company does not exceed €10million; and (c) the average number of employees of the company does not exceed 250. Section 350 (6) Companies Act 2014.

[16] European Commission in its Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. O.J. L124 20 May 2003 p 36.

in the Companies Act (as amended). The CLRG 2012 Report formed the view that medium sized companies were of sufficient scale that they could avail of examinership. Accordingly, it confined the scope of its recommendations to apply only to small companies – companies which under this definition would satisfy two of the then three criteria – turnover of €8.8 million or less, a balance sheet of €4.4 million or less and 50 or fewer employees. For the purposes of application of the preparation and filing of financial statements, the Companies Act, now defines a small company as:

> "a company if, in relation to a financial year, it fulfils 2 or more of the following 3 requirements:
>
> (a) the amount of turnover of the company does not exceed €12 million;
>
> (b) the balance sheet total of the company does not exceed €6 million;
>
> (c) the average number of employees does not exceed 50.[17]

Consideration was given as to whether the requirement for any new or streamlined process existed primarily at small company level. The CLRG 2012 Report had considered that "examinership, in the form currently available to small private companies (SPCs), is inadequate by reason of the costs involved which are prohibitive"[18]. Companies with turnover, balance sheet total or employees above two of these thresholds would be companies of significant size, even if they qualify as "medium sized". Accordingly, the Review Group concludes that any new process ought to be available only to small companies as defined in the Companies Act (to include micro companies).

It should be noted that some members of the Review Group expressed concern that the proposal in the CLRG 2012 Report, which was subsequently enacted allowing for examinerships to be operated in the Circuit Court for small companies, has not supported the medium sized enterprise sector. The examinership process is still run through the High Court for these companies. It was observed in fact that the majority of companies availing of the examinership process are medium sized companies, yet the numbers remain low. One reason for this is the cost of the process. Accordingly, ISME were of the view that not including medium sized companies could leave a gap of support which should be available to such companies. ISME highlighted that medium sized companies are often operating on narrow margins despite their turnover or number of employees and are ill-placed to bear the costs of examinership.

One way of addressing this would be to extend Circuit Court jurisdiction to this sector. However, the current difficulties with the exercise of this jurisdiction by the Circuit Court are further considered in paragraph 4.5.22 below.

As an alternative, and whilst acknowledging that there were mixed views amongst the Review Group on this question, there may be merit in the Department considering the extension of this new simplified process to medium enterprises following an assessment of its success or otherwise with small companies should it be implemented.

4.5.3 **What is the purpose of the new process? Should it be focused on a rescue of the company or only the salvageable enterprise of the company? [Question 3]**

The Review Group is of the view that the purpose of any new process should be to save the enterprise and any jobs provided by it. This should be the primary objective rather than to help

[17] Companies Act 2014 section 280A(1), inserted by Companies (Accounting) Act section 15.

[18] Report, page 1 para 1.

shareholders whose investment has proved to be unsuccessful. In principle, the rationale behind any process ought to be similar to that of examinership and focus on saving the enterprise and jobs. However, given that the process is targeted at small businesses and accordingly, the objective is also to simplify the process to the extent possible, it is considered that in most cases, saving the company will mean saving the enterprise.

The Review Group is also of the view that seeking to differentiate between the company and the undertaking carried out by the company added a level of complexity that was not proportionate given that the new process would only be available to small companies. Accordingly, the Review Group recommends that the process should be one that rescues the company and the jobs it provides (which is predicated on the assumption that the survival of the company would also facilitate the survival of the undertaking).

4.5.4 Availability of process [Question 4]

The potential for the successive availability of various insolvency processes must be considered. This can be divided into two issues: first, whether a new process itself should be in any way delimited in terms of multiple use and secondly, whether there should be any limitation either on its use after an examinership or on an examinership after its use. The second of these issues is dealt with at paragraph 4.5.5.

- While there is not a limit on the number of attempts to enter examinership, it is believed that of those companies that have availed of examinership more than once, the directors have changed or the Part 10 Scheme (namely the rescue scheme) addressed this issue with the addition/removal of directors. With smaller companies/family run businesses, it is unlikely that this would be a realistic option.
- The personal insolvency process under the Personal Insolvency Act 2012 is limited to once only for an individual debtor.

There are two distinct positions of members of the Review Group. The legal and accounting practitioners on the Review Group largely prefer there to be no limitations on use. Between the experience of the small number of companies that had undergone more than one examinership and their observations of market practice, they anticipate that the understandable caution of any insolvency practitioner putting his or her reputation on the line in a second use of the process was sufficient protection. In addition to this, it is unlikely that creditors would support the repeated use of the process. The position of the ODCE, the Revenue Commissioners, ICTU and some other members is that there ought to be a limitation on its use, at the very least that it should not be used more than once in any five-year period.[19]

The Review Group has not come to a consensus view on this point and considers it a matter of policy for the Minister to determine. However, should the Minister consider it appropriate to allow companies avail of the procedure repeatedly, all Review Group members agree that there must be sufficient anti-abuse measures to ensure that the assets and funds of the company are not depleted to the detriment of creditors. The issue of safeguarding is considered at 4.5.11.2.

[19] Section 288 of the Companies Act has the effect of restricting companies from changing their financial year within a 5-year period.

4.5.5 Interaction of a new process with other insolvency or rescue processes [Question 5]

There is the possibility that access, particularly if not carefully delimited, to a variety of processes might create a risk of inappropriate "forum shopping" and confer a tactical advantage to the applicant and disadvantage the company's creditors to a greater or lesser degree. For example, a company availing of a proposed new process might subsequently avail of an examinership. Any new process would have the potential for use in addition to an examinership or scheme of arrangement or indeed for serial use. At present there is no restriction on a company using a Part 9 Scheme and then proceeding to examinership or indeed availing of an informal debt write down and then proceeding to examinership as in *Re Kitty Hall Holdings Ltd and others*[20].

In the case of the proposed new process being followed by an examinership, the Review Group does not propose that there be any express limitation, in particular because the commencement of an examinership requires an order of the Court. The Court acts as gate keeper and will ensure that successive attempts at rescue through use of the examinership process does not amount to an abuse of process.

In the case of an examinership followed by the proposed new process, the positions of Review Group members are as outlined in 4.5.4. Accordingly, there was a divergence of opinion as to whether companies who have availed of examinership should be afforded the opportunity to avail of this process

In favour of allowing access, some practitioners on the Review Group articulated that the administrative safeguards discussed at 4.5.11.2, and the fact that creditors have the right to object to the scheme and go to Court act as a sufficient barrier to abuse. It was highlighted that once in Court, the insolvency practitioner would be required to outline to the Court all previous rescue attempts made by the company and the Court would factor this into its decision. Additionally, practitioners highlighted that the practical commercial difficulty of attracting new investment following a failed examinership so as to be in a position to avail of a subsequent attempt at rescue via the new process would act as a natural deterrent to those seeking to abuse the process.

Those opposed to allowing access primarily highlighted concerns in respect of the impact on creditors, in particular whether availing of the new process following a failed examinership simply delayed the inevitable and would ultimately cause the position of creditors to deteriorate.

4.5.6 Should there be a test of viability for the debtor undergoing the process?

As described in paragraph 4.5.9 below, a number of criteria relevant to the commencement of the process will be replicated from the examinership legislation. These include the requirement that the debtor company must have a reasonable prospect of survival[21]. The establishment of the future viability of the enterprise will occur in accordance with the process described below in paragraph 4.5.9 on the commencement of the process and paragraph 4.5.11.2 on safeguarding measures.

[20] [2017] IECA 247.

[21] An opportunity could be taken at drafting stage of any measures to implement this Report's recommendations to outline the details of what it means for a company to have 'a reasonable prospect of survival' and for such criteria to be considered for application in examinerships also. It should be noted that in examinership, this test is actually considered on two occasions. The Examiner will need to give an initial view as to the company's prospect of survival and case law outlines that when a company exits the process the Court will again need to consider whether there is a reasonable prospect of survival.

4.5.7 Name for a new process [Question 7]

The Review Group is unanimous in rejecting the use of "examinership" in any form. A number of suggestions were tabled: "mediated process", "supervised process", statutory rescue and transition process" ("START process") or "Preventive Restructuring Framework for Small Companies".

The Review Group concludes that a suitable name would be a "Summary Rescue Process". This would echo the expression "summary approval procedure", introduced as a definition by the Companies Act and, as in that case, denoting an abridgement of what might otherwise be a more protracted procedure.

4.5.8 Qualified insolvency practitioner [Question 8]

Whilst a Part 9 scheme is commenced without the legal requirement for an insolvency practitioner in a formal role, it is not unusual for a report from such a person to be presented at the Court hearing to sanction the scheme. Examinerships in contrast commence with the appointment of the Examiner by the Court. The Review Group envisages a requirement for significant input from a qualified insolvency practitioner into any new procedure.

Section 633(1) of the Companies Act sets out the classes of persons eligible to be appointed a liquidator of a company, which can be summarised as follows:

1. accountants who are members of a prescribed accountancy body;
2. practising solicitors;
3. members of other professional bodies recognised by IAASA;
4. individuals entitled, under the laws of another EEA state, to act as liquidator in insolvency proceedings; and
5. individuals authorised by IAASA under grandfathering provisions for liquidators without formal qualifications.

The Review Group concludes that an insolvency practitioner – for the purpose of this Report, referred to as a "Process Adviser" [22] – falling within any of the above classes should be involved in the Summary Rescue Process. The role of the Insolvency Practitioner ["Process Adviser"] is further described in the relevant sections below.

4.5.9 Commencement of process [Question 9]

There was a view, expressed in particular by practitioners present at the Corporate Insolvency Committee's deliberations, that one of the barriers to access to examinership for small companies is the cost of the process generally, including costs relating to the commencement of the process. In Committee discussions, a minimum figure of €18,000 was cited as necessary to commence the examinership process to cover the costs of the independent expert, solicitors' fees, counsel's fees, advertising costs and stamp duty, and so forth. It was suggested that costs can be much higher in some cases.

[22] This is similar to the restructuring expert or observer required under the new Dutch WHOA procedure. The descriptive term for such insolvency practitioner is not finalised.

In that context the consideration of how an alternative rescue process could be commenced was driven by the need to reduce costs. This is the first of a number of design proposals which are driven by this consideration.

It was agreed that any new process should be commenced by the debtor company through a resolution of the directors of the company rather than by an application to the Court.

Prior to the formal commencement of the process, the directors would seek advice from an insolvency practitioner, the Process Adviser-designate, who would:

- be furnished with a full statement of affairs of the company, prepared under a duty of utmost good faith and sworn by affidavit, by the directors of the company. Considerable emphasis on the duty of utmost good faith being imposed on directors in this context is stressed by the Review Group; and
- form a view on this basis and other information available to him or her and advise the directors of the company, in writing, that the company appears to have a reasonable prospect of survival in accordance with interpretation of that phrase under section 509 of the Companies Act 2014 as it relates to the examinership procedure.

Additional conditions outlined in section 509(1) Companies Act 2014 should be repeated, and stated in this commencement process, namely that the company is unable or likely to be unable to pay its debts, that no resolution subsists for the winding up of a company and no order for the winding up of the company has been made.

The statement of affairs[23] would be in a format to be prescribed, avoiding the format in the Rules of the Superior Courts, which was considered to be unfit for this purpose.

Once the above-mentioned steps are followed the company would then proceed as follows:

- The directors of the company would pass resolutions:
  - to appoint the Process Adviser;
  - to publicly issue a notice of suspension of payments other than debts incurred during the process (which includes *inter alia* continued payment of employee remuneration including PAYE and levies in respect of that remuneration);
  - to commence and / or continue discussions with creditors with a view to convening creditors' meetings;
  - to commence and / or continue discussions with potential investors and financiers with a view to obtaining more capital;
- The company would give immediate notice of:
  - the suspension of payment of debts; and
  - payments necessary to the continued operation of the business (such as payment to crucial suppliers) including the payment of employees will not be suspended. [24]

[23] ICTU suggested that the statement of affairs be supplemented by a due diligence report on the terms and conditions of employment of employees which is consistent with the statutory statement under the Terms of Employment Information Act 1994.

- appointment of the Process Adviser:

This notice would be given in the prescribed form to the following:

- the CRO;
- the Revenue Commissioners;
- employees;
- creditors;

and by notice in Iris Oifigiúil and on the company's website.

In light of the disproportionate costs of newspaper advertising in a process for a small company, it is not proposed that there be a requirement to publish notice in a newspaper.

The notice would also be filed in the office of the relevant Court (High Court or Circuit Court in accordance with considerations in paragraph 4.5.22 below) to provide for the filing of various matters which might arise, and which are summarised in the safeguarding measures which are considered in paragraph 4.5.11.2 below.

This notice would be accompanied by the statement of affairs as described above.

In addition, a report in relation to the company as described under section 511 of the Companies Act 2014 with modifications would be furnished with the notice.

4.5.10 Stay on proceedings, execution and enforcement of security [Question10]

There was considerable debate around whether there should be an automatic stay on proceedings and enforcement as in an examinership or simply an ability on the part of the company to apply for a stay as in the case of a Part 9 Scheme.

Arguments in favour of a stay included these:

- it draws a line in the sand which distinguishes pre-process debts from post-process liabilities;
- without a stay, the process may be rendered futile if a number of creditors act precipitously including creditors who may exercise the right to appoint a receiver, creditors with reservation-of-title clauses or creditors with particular enforcement rights such as sequestration of assets (for example the Revenue) enforce their entitlement to resume possession of their inventories;
- it prevents fixed charge holders enforcing their security to avoid costs (e.g. as in the case of Examiner's costs) reducing the net amount recoverable under their security.

The principal argument against such an automatic stay is that it would clearly require the involvement of the Court at the commencement of the process, thereby adding significantly to the costs of the process. Whilst a winding up, with accompanying discontinuance of payment of debts and a stay on proceedings and enforcement, is commenced unilaterally, that will be in the context of the trade of the company being terminated.

[24] Section 521 of the Companies Act 2014 deals with the payment of pre-petition liabilities in examinership and the process outlined is guided by the principles contained in this section.

Following extensive discussion, the prevailing view of the Review Group is that there should not be an automatic stay but that there should instead be an ability, as in a Part 9 scheme scenario, for the company to apply to Court for such a stay, if required, as a defensive measure against any move by a particular creditor. It was also reiterated that as negotiations would have begun then pragmatically creditors would not move within a particular stated time frame below.[25]

4.5.11 Timeframes for the process and deadlines [Question 11]

Initially, consideration was given as to whether the process should mirror the 70-day time frame applicable to examinership, which in turn is not hugely different from a typical Part 9 Scheme timetable, both of which are illustrated in Appendix 3.

The following suggested timetable is modelled on that timeline, although it aims to arrive at a conclusion earlier than in either of those processes.

Before Day 1	Company prepares Statement of Affairs Proposed Process Adviser delivers advice to company Resolution to commence process is passed and Proposed Process Adviser is appointed.
Day 1	Notification of commencement of process and the suspension of payments is sent in the prescribed formats to the following: - the CRO; - the Revenue Commissioners; - employees; and - creditors. - the Court office (see below under additional safeguards) This notice is accompanied by the statement of affairs and the report based on a section 511 structure as described above.
	Company and Process Adviser work to prepare a draft rescue plan along the lines of section 539 of Companies Act 2014 as above.
No later than day 42:	Notices are issued convening creditors' meeting(s) on 7 days' notice, including the report modelled on sections 511 and the report of the scheme proposals modelled on ss. 534 and 539 of the Companies Act 2014 together with up to date statement of affairs.
7 days after notice of meeting(s)	Creditors' meeting(s)

[25] ICTU's position on this particular point is that there should be no stay at all on proceedings and enforcement of employee claims and point to the precedent of section 678 of the Companies Act 2014, the EU Preventive Restructuring Directive, in particular Article 6.5, the comparatively short limitation periods for referral of complaints to the Workplace Relations Commission (WRC), the benefits of WRC dispute resolution as well as the general vulnerability of workers.

Business day following meeting(s)	Notice of approval of scheme is communicated in the prescribed form to: - the CRO; - the Revenue Commissioners; - employees; and - creditors. - the Court (see below additional safeguards)
14 days waiting period	In the absence of a notice of objection to the Process Adviser, by any creditor or the Revenue Commissioners, copied to the Court, the Scheme becomes binding on all parties, subject to a filing procedure in the Court. See below at paragraph 4.5.19
	OR
Alternatively, within 7 days following meeting(s)	Company applies to Court for approval of the scheme See further below para. 4.5.17

4.5.11.1 Proposals for Compromise or Scheme of Arrangement.

Once the process commences, the Process Adviser would:

- set about exploring options for the rescue of the company and negotiating with any parties critical to the design of a rescue plan for the company;
- prepare the rescue plan for approval by the creditors in keeping with the steps provided for in section 534(1), (5) and (6) of the Companies Act as it relates to the proposals of the Examiner in examinership;
- prepare proposals, the contents of which will be governed by section 539 of the Companies Act as it pertains to an Examiner's proposals;
- following this and in keeping with the provisions of section 534(5)(a) of the Companies Act, supply a copy of his or her report to the company.

This Process Adviser's report would be filed with the Court, consistent with the proposed commencement papers being filed in the Court office, as discussed in the next section.

Prior to the issue of notices for the meetings of classes of creditors in accordance with the provisions of section 534(2) of the Companies Act 2014 (constituted in accordance with developed principles) and called to approve the scheme, the Process Adviser would deliver an updated report to the company with a copy to the creditors along the lines of the Report described in section 539 of the Companies Act 2014 in addition to a statement to the following effect:

- the proposed scheme satisfies a 'best interest of creditors' test, namely that the creditors would get at least as good as what they would get in an alternative scenario; (see section 511(3)(g))
- no creditor is being unfairly prejudiced;
- [the continuance (if such be the case) of equity ownership by some or all shareholders is justified by new equity introduced by them and/or the circumstances of the company.]

4.5.11.2 Additional administrative safeguards.

Initial meeting of creditors.

It was debated as to whether the commencement of the process should be accompanied by particular administrative steps.

It was suggested that there should be a facility in place, possibly by convening an initial creditors' meeting to allow creditors object or raise concerns with the commencement of the process. This would mean that the directors might convene a creditors' meeting immediately following the commencement of the process, so as to enable more information as to the reasons for the insolvency to be made known. The Revenue Commissioners noted that the dialogue and exchanges at creditors' meetings are valuable in enabling the Revenue to formulate their position in relation to a company in an insolvency process. The ODCE, based on its experience of creditors' meetings in liquidations, was strongly of the opinion that creditors' meetings provide valuable context to the issues facing a company and often result in the disclosure of facts of which the insolvency practitioner may not be aware.

However, practitioners on the Corporate Insolvency Committee highlighted that holding a meeting at this stage in the process added little value as there is nothing for the creditors to consider at this point.

As a middle ground, it was suggested that on serving notice of the commencement of the process (as described in the above timeline), the Process Adviser would also have an obligation to write to all creditors and provide them with an opportunity to disclose any pertinent or additional information. In the context of reducing costs and simplifying the process for creditors, this could be done via the circulation to all creditors of a standard response form. Any material facts disclosed would then be required to be addressed in the insolvency practitioner's report.

The Review Group tentatively concludes that there is merit in providing a facility for creditors to highlight concerns and any material facts which might impact the progression of the process, though there was a difference in opinion as to the vehicle that might be used for this process.

Pre-notification to Court

It was proposed that the commencement notice of the process described above would also be filed in the relevant Court office (High Court or Circuit Court- see above, paragraph 4.5.9). This means that a record number will be attached to the process from the outset which will support the filing of further applications, objections from creditors and so forth.

It is envisaged that the Court will have several potential roles in this process:

- to hear applications regarding the assumption of executive powers by the Insolvency Practitioner
- to hear applications for a stay, for example on the part of the debtor, where creditors or others objected to the notice of cessation of payments and commencement of the process.
- to hear other general applications from creditors, *inter alios*;
- to hear applications relating to other matters for example:

- to facilitate applications for repudiation of contracts, if these are to be accommodated in the proposed process;[26]
- to approve the rescue plan;
- to hear any general applications, including objections from creditors generally or moving from the process to an examinership or winding up.

The Review Group tentatively concludes that this is a good idea and would have the effect of having a relatively more frictionless ability for applications to Court to be made.

Mirroring personal insolvency process

There was consideration as to whether there was merit in disallowing the process as in a personal insolvency process[27], where 25 per cent or more of his or her debts (other than excluded debts) were incurred during the period of 6 months ending on the date on which the process starts. Advocates of this proposal noted that there have been examinership cases where is appears that the company may have deliberately ceased paying taxes (and other debts) in the months prior to applying for examinership and using these funds as the new "investment" required for the scheme If this were to be applied as a condition, then it would appear that Covid-19-related debts would require to be excluded. The Review Group ultimately concludes that, with appropriate safeguards in place, this proposal is not required.

Directors' duty to creditors

It is also important to note in terms of preventing abuse that the statement that a company is unable or likely to be unable to pay its debts is a triggering point for directors' duties to be owed to creditors in accordance with the principles outlined by the Supreme Court in *Re Frederick Inns Ltd*[28]. These duties are also the subject matter of discussion in the CLRG Report on the Rights of Employees and Unsecured Creditors 2017 which recommends the codifying of these duties under a proposed section 224A of the Companies Act 2014.

The Review Group endorses this previous CLRG recommendation and notes that it was signalled for inclusion in the General Scheme of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 although not included in the Bill as initiated or the Act as enacted.

Additional safeguards included in the design of the process include the provisions addressed in paragraphs 4.5.20 and 4.5.23.

Duty to act in utmost good faith

Review Group members place particular emphasis on the directors' duty to act in utmost good faith throughout the process in particular when preparing the statement of affairs, which must be sworn by affidavit The entire process, as described in paragraph 4.5.9 above would be subject to a 'good faith' test in line with section 518 of the Companies Act in respect of examinership.

[26] See section 4.5.15.

[27] Personal Insolvency Act 2012 section 91(5).

[28] [1994] 1 ILRM 387.

4.5.12 Constitution of classes of creditors [Question 12]

The Review Group noted that in the UK, it had been possible for schemes of arrangement under Part 26 of their Companies Act 2006 to be facilitated by votes of creditors within a single class. This was in the context of negotiations being concluded with creditors which in certain instances would be preferential to those available to the general body of creditors.[29]

There was discussion as to whether classes of creditor might be codified in the law, even on a non-exhaustive basis. As described in Appendix 2, case law around the constitution of classes of creditors has been developed in English and Irish law and in that context, codification might not provide the required flexibility on this question. In that context it is crucial to differentiate between creditors with a common ranking and rights of recovery on the one hand and, on the other, creditors with a particular distinct interest: a proprietary director and a supplier might rank pari passu as to rights, but their respective interests are quite different.

Currently this is a matter for the Court in in both Ireland and in England and Wales. [30]

4.5.13 Quorum and voting majorities [Question 13]

Part 9 Schemes require that resolutions be passed by a special majority – 75% in value being a majority in number of those voting at the scheme meeting. Part 10 schemes require a simple majority. European models such as the Dutch WHOA procedure require a 66⅔% (although it was noted that this was a very new procedure and has largely been untested to date). After considerable debate, it was agreed that a simple majority-in-value vote was most appropriate, with the issues of constitution of class being more relevant.

The issue of quorum was also considered. There are precedents for there being a requirement for a quorum for significant corporate events. Most recently under the Migration of Participating Securities Act 2019, the migration of a company to the new intermediated system of shareholding requires a quorum of one third of the share capital involved. That in turn reflects the Companies Act default of a one-third-of-capital quorum for variation of rights attaching to shares[31], which is analogous to a creditor varying its rights. Quora are not required in existing rescue processes considered in accordance with the principles guiding the discussion. Accordingly, it was decided not to recommend any quorum for the meetings at which a scheme would be approved.

4.5.14 Limitation on connected creditors in participation in votes [Question 14]

The exercise of voting rights by connected parties is probably the most contentious issue that arises in creditors meetings to wind up a company.

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[29] The ICTU position on this point is that employees should be constituted in a class of their own because of their commonality of interest (EU Preventive Restructuring Directive, Article 9.4), their rights are not dissimilar, the nature of their contractual relationship with the employer, the underpinning of their rights by both contract and statute, their continuing and almost total financial dependent relation with the employment, the particular vulnerability of non-union employees and the fact that they do not have the benefit of limited liability.

[30] The case law on constitution of classes is discussed in Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (Bloomsbury Professional, 2012). Chapter 14 pp. 627-635. See however, the decision of Barniville J in *Re Ballantyne Re: plc* [2019] IEHC 407 and *Nordic Aviation Capital DAC* [2020] IEHC 445

[31] See section 88 of the 2014 Act.

This issue is considered further in relation to particular classes of creditors in paragraph 4.5.17 below.

In addition, in Appendix 5 is an exploration of a possible description of a connected creditor which may be of use in formulating a statutory definition for this purpose.

4.5.15 Onerous contracts [Question 15]

Under section 537 of the Companies Act it is possible for application to be made to the Court for the repudiation of onerous contracts.

There were two different views expressed by the Review Group members on this point.

Firstly, some members considered the repudiation of contracts too complex an issue to be dealt with in a simplified process aimed at smaller companies. It was highlighted that any company in the position to cover the cost of repudiation should use the existing examinership framework.

Others felt that repudiation should be available where it is necessary to ensure the survival of the company. It was highlighted that in most cases this issue is settled without Court involvement and suggested that where Court involvement was required, this process could aim to limit costs.

The Review Group did not reach a consensus on the issue and consider it to be a matter of policy for the Minister to determine.

4.5.16 Cross class cram down [Question 16]

The Tánaiste's brief to the Review Group requested, inter alia, that there should be an examination and recommendations on how a cross class cram down of creditors might be incorporated into a recue process. In submissions received and in Review Group deliberations it was acknowledged that a key element of any robust rescue process was the ability for there to be cross class cram down as in an examinership. In an examinership process this means that if one class of impaired creditors votes in favour of the scheme, then the scheme can be presented for approval to the Court and can be imposed on other classes of creditors as long as the tests outlined in section 541 of the Companies Act are complied with, inter alia, that the scheme is not unfairly prejudicial to the rights of any interested party (which includes creditors) and that the scheme is otherwise fair and equitable in relation to any class of members or creditors.

4.5.17 Consideration of exclusion of particular classes of creditor [Question 17]

In the context of approval of any compromise or scheme and the proposed operation of cross class cram down, particular classes of creditors were discussed:

- *Employees*[32]*:*

  It was noted that Article 13 of the EU Preventive Restructuring Directive specifically protects workers and that the WHOA procedure introduced in the Netherlands excludes workers. Article 13 does however defer to national legislation. In addition, Recitals 13 and 16 and Article 4(5) state that Member States may maintain or introduce other restructuring processes in addition to processes introduced in compliance with the Directive.[33]

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[32] ICTU's position is that employees should be excluded from a cross class cram down.

[33] Prior to the Covid-19 crisis, the Corporate Insolvency Committee had been considering the implementation of the Preventive Restructuring Directive 1023/2019 at the request of the Department as part of the Review Group's Work Programme. The examinership legislation was being considered in the context of suitable

- *Revenue Commissioners:*

  The potential for Revenue to be in an excludable class in relation to the process on the basis of both the model provided for under the Personal Insolvency Act 2012 and to accommodate current debt warehousing/stimulus arrangements during Covid-19, was discussed. Revenue explained that as a creditor Revenue could 'opt-in' to the Personal Insolvency Arrangement or remain outside it (and thereby be "excluded"). The decision to remain outside such an Arrangement could only be made in certain circumstances, such as where there was an ongoing failure to make returns, the debtor was under audit or there were other matters such as fraud to be addressed.

  With regard to debt warehousing/stimulus arrangements relating to Covid-19, it was noted that, as what was being considered was the design of a process for long term implementation, any such potential exclusion on this basis would have to be included in the legislation on a temporary basis. It was agreed that the most appropriate way to deal with this was to provide an option to the debtor to either accept a debt warehousing/stimulus arrangement or consider negotiating with Revenue.

  The question of including an 'excludability option' needs to be considered further.

- *Connected creditors*

  The exercise of voting rights by connected parties is probably the most contentious issue that arises in creditors meetings to wind up a company. The ODCE reported that it regularly receives complaints to the effect that connected creditors have used non-verified debts and even spurious debts as a basis to outvote other creditors, particularly on the votes for the appointment of a liquidator (presumably on the basis that they expect their choice to give them more favourable treatment than a liquidator supported by the other creditors). Given that it is being proposed that the connected creditors will be the people appointing and paying the Process Adviser in this process, other creditors are likely to have concerns that any proposals emerging could be unduly favourable to the connected creditors. Clearly such creditors have a massive conflict of interest in the process and stand to gain most out of the rescue of their company. It is not unreasonable that they should have to convince the majority of other creditors of the merits of their scheme. If they cannot, then the scheme should fail.

It was noted that in examinership proceedings no particular creditor or class of creditor is automatically excluded. This is also the case under the Part 9 Scheme of Arrangement process. The underlying aim of reducing costs of the process is important in this context.

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implementation of the Directive. It is not the case that the Directive requires that all rescue processes comply with the Directive. Rather, Member States are required to introduce a rescue process following the proposals of the Directive and is particularly relevant to Member States including Germany and Austria as important economies, which currently have no preventive restructuring processes. Article 4.5 of the Directive states "The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of Court, without prejudice to any other restructuring frameworks under national law. Member States shall ensure that such restructuring frameworks affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner". (It should be noted that ICTU has expressed strong reservations on the interpretation of this Article, particularly in the context of the CLRG designing a process for the majority (98%) of businesses which employ 69% of all employees) and especially the protections afforded to employees including information and consultation contained in the EU Preventive Restructuring Directive.

The majority view of the Review Group is that the exclusion of creditors as a class (as distinct from the recognition of particular creditors as being part of a particular class) would not be acceptable.

New and Interim Financing.

At the outset of this Report the importance of addressing new and interim financing supporting a rescue process is mentioned in paragraph 4.1.3. This is also addressed in Articles 17 and 18 of the EU Preventive Restructuring Directive. In Ireland the examinership legislation addresses the certification of Examiner's expenses, costs and remuneration in section 554 of the 2014 Act and therefore provides that remuneration, costs and expenses of the Examiner (and liabilities incurred by the company in accordance with section 529 of the 2014 Act) will be paid in full and before all other claims in any scheme or compromise or subsequent receivership or winding up. The priority of these claims depends on sanction by order of the Court. It is proposed that the same provision should be mirrored in relation to the sanction by the Court of a scheme under this process following the proposed structure in paragraph 4.4.19 below. It is anticipated that most schemes under this process would involve cross class cram down and therefore an approval by a Court.

Similarly, section 529 of the 2014 Act provides that liabilities deemed to be incurred by the Examiner in the course of the protection period and certified under that section as being necessary to the survival of the company as a going concern during the protection period will be treated as expenses under section 554 of the 2014 Act. This addresses the issue of interim financing. It is proposed that these provisions are mirrored in this new process.

As regards new financing, in a successful rescue or restructuring the position of the new financier will be the subject matter of the compromise and is a matter of agreement between the debtor and creditors.]

4.5.18 Will the tests of 'unfair prejudice' as applied in examinerships apply? Should the legislative framework articulate the 'best interests of creditors' test as described in the Preventive Restructuring Directive? [Question 18]

The key criteria against which a scheme is considered by the Court under the examinership legislation are:

- whether the scheme has been accepted by at least one class of creditors whose rights are impaired;
- whether the proposed scheme is fair and equitable in relation to any class of creditors or members that has not accepted the proposal and whose interests are being impaired by the proposals;
- whether the proposals are unfairly prejudicial to the interests of any interested party; and
- whether the sole or primary purpose of them is to avoid the payment of tax[34].

It is envisaged that these tests would be applied in this context under the approval process described above. In relation to the issue of the best interests of creditors' test as described in the Preventive Restructuring Directive 1023/2019 this test relies on a comparative consideration of the position of a creditor or class of creditors in alternative scenarios such as winding up and the comparative

[34] Section 541(4) of the Companies Act provides that "the Court shall not confirm any proposals …… if the sole or primary purpose of them is the avoidance of payment of tax due" and it is recommended that this be replicated for this new process.

consideration of a creditor or class of creditors in relation to other creditors and how they would fare in alternative scenarios, balanced against the question of rescue. This test has been articulated by the Courts in Ireland under the examinership process.[35]

4.5.19 How a scheme should become binding [Question 19]

Both a Part 9 Scheme and a Part 10 Scheme in an examinership become binding only when approved by order of the Court. As described above the inclusion of the possibility of a cross class cram down which is available in examinerships was considered to be important to preserve in this process. A number of options present themselves in these circumstances which vary in accordance with whether a cross class cram down is operated or not:

1. Court approved rescue plan with cross class cram down:
    - the Scheme becomes binding when approved by 50% + 1 of a required class of impaired creditors and approved by the Court if a cross class cram down is being proposed;
2. Creditor-approved rescue plan with cross class cram down:
    - the Scheme becomes binding when approved by 50% +1 of a required class of impaired creditors and a cross class cram down is notified to all parties following which a cooling off period expires without a creditor serving a notice of objection on the Process Adviser, with a copy to the Court. Where a creditor serves such a notice of objection an automatic obligation on the debtor company is triggered requiring the company to go to Court and demonstrate that the scheme satisfies the normal criteria outlined in paragraph 4.5.18. i.e. that it is not unfairly prejudicial and complies with other considerations as set out etc.;
3. All-class creditor-approved rescue plan
    - the Scheme becomes binding when approved by all classes of creditors where a majority rule applies, as with above a 50%+1, (sometimes called an intra class cram down) and a cooling off period expires without a creditor serving a notice of objection on the Process Adviser with a copy to the Court. Where a creditor serves a notice of objection an automatic obligation on the debtor company is triggered requiring the company to go to Court and demonstrate that the scheme satisfies the normal criteria outlined in paragraph 4.5.18. i.e. that it is not unfairly prejudicial and complies with other considerations as set out etc.

In both the second and third cases a period of 14 days from notification of the scheme in accordance with the provisions described above would require to pass without a notice of objection being filed

[35] See for example the following paragraph 30 from the Supreme Court decision in *Re McInerney Homes Ltd*:

"In this case, the trial judge's approach to the question was to view the scheme against the likely return to affected creditors under the likely alternative in the event that there was no examinership, and no successful scheme. I agree that that is a vital test. Furthermore, as the trial judge recognised, there may well be circumstances where a creditor may be required to accept less than would be obtained in such circumstances on liquidation or a receivership, but those circumstances would normally require weighty justification. However, as this case illustrates, there may remain considerable difficulty in determining the value which a creditor, and in particular a secured creditor, might otherwise obtain, by reference to which the proposal can be judged." *McInerney Homes Limited & ors and the Companies (Amendment) Act 1990* [2011] IESC 31.

with the Court by an objecting creditor. It is envisaged that where there is no notice of objection, the rescue plan would be recorded by a Court Office procedure similar to that in the case of a judgment in default of appearance or defence.

In light of current legislative frameworks, it is the view of the Review Group that the approval of the Court may be required where a cross class cram down of any kind is part of the proposal. This is not only because the obvious moral hazard but for potential constitutional law reasons; where the unilateral adjustment of property rights may be repugnant to Article 40.3.2 of Bunreacht na hÉireann. The Review Group notes that the Department will be required to further consider potential constitutional issues arising with the Office of the Attorney General when examining these proposals.

All 3 options allow for the inclusion of a Court hearing, albeit through different procedural means.

There is a statutory precedent for a scheme or compromise with creditors to become binding in a similar manner to the model proposed above, where creditors approve the scheme unless the Court approval process is triggered (initiated) in the manner described. Under section 676 of the Companies Act a scheme which is proposed after the company has gone into liquidation, but which is not approved by the Court may nonetheless become binding on creditors. The statutory provision is as follows:

> "s. 676 (1) Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by a special resolution and on the creditors if acceded to by three-fourths in number and value of the creditors.
>
> (2) Any creditor or contributory may, within 21 days after the date of completion of the arrangement, appeal to the Court against it, and the Court, on the hearing of the appeal, may, as it thinks just, amend, vary or confirm the arrangement.
>
> (3) This section is in addition to the circumstances in which a compromise or arrangement in relation to a company may become binding under Chapter 1 of Part 9."

What is interesting about this provision is that it does not differentiate between classes of creditors – it simply needs a special resolution and for 75% in value and 75% in number of all creditors to accede to it – and the passing of a 21-day cooling off period during which time an aggrieved creditor can apply to Court for redress.

4.5.20 Dealing with miscreant directors and officers [Question 20]

As described in paragraph 4.5.9 above on the commencement of the process, the entire process would be subject to a "good faith" test similar to section 518 in relation to examinerships.

The Summary Rescue Process has the potential to be a very significant insolvency process and could have a profound impact on struggling small businesses and how they interact with the rest of the economy.

It seems reasonable to assume that a significant number of companies that would otherwise go into liquidation will seek to avail of this process. As well as companies in financial difficulty going into liquidation, there is also a cohort of companies who manage to struggle through their financial difficulties, generally by injecting personal funds into the company, cutting costs and reaching informal forbearance or write-off arrangements with individual creditors. As this category of companies does not currently engage with any official insolvency process, the extent of this situation is not known. Depending on their perception of the process, the attendant costs and the consequences involved, such companies may also seek to avail of this process. To the extent that the latter category chooses to avail of the process, this will represent an additional negative impact on their creditors.

Currently, the actions taken, or not taken, by directors of a company that goes into liquidation are subject to review; initially by the liquidator, with the liquidator's report being reviewed by the ODCE. The directors can face restriction or, in more serious cases, disqualification and/or criminal prosecution. The ODCE file reviews have found that some 90% of company directors are considered to have acted honestly and responsibly and no further action arises in their cases leaving them free to engage in new enterprises. This system is in place for about 17 years and is generally considered to be a fair, reasonable and proportionate response to business failure and is well regarded internationally.

Where a company does not go into liquidation but manages to work its way through its financial difficulties, the question of director behaviour does not usually come to be reviewed. In a small number of cases, allegations of improprieties by such directors may be made to the ODCE by creditors or other interested parties, which can lead to an investigation by the ODCE of the circumstances of the case.

The circumstances leading up to a decision to enter the Summary Rescue Process will be identical for a company that would otherwise go into liquidation. Accordingly, there is a real danger that, if the directors do not face the same level of scrutiny, they may be tempted to enter the process in order to avoid or delay the level of scrutiny that would otherwise occur. Given that 90% of directors do not face any sanction, this should not pose any threat to the process for honest and responsible directors while, conversely, the other 10% should not be facilitated in avoiding scrutiny and, where appropriate, sanction.

Similarly, it is important that the process does not result in company directors - who might otherwise work to ensure the survival of the company - perceiving the Summary Rescue Process as an 'easy' option with no downsides for them. It would be most unwelcome if companies that are capable of surviving without going through a formal insolvency process were incentivised into Summary Rescue Process because it was seen as being so favourable to companies that can demonstrate that they meet the "entry" criteria.

Against this background, it is recommended that the Process Adviser overseeing the process should be required to submit a report to the ODCE along the lines of the current section 682 report[36] and that the current requirements in respect of restriction applications should also apply. This has the significant advantage of building on a tried and tested system that is familiar to all the relevant stakeholders and is backed up with substantial jurisprudence so that people can have a reasonable expectation of how the system will treat their particular set of circumstances.

4.5.21 Guarantors [Question 21]

The position of guarantors was discussed. As a general principle the Review Group has taken the view that matters of this kind should be treated in a manner which is similar to the approach taken in examinerships under Part 10 of the Companies Act. Section 547(a) describes how subsequent provisions of the particular chapter of the Act have effect in relation to the liability of "(a) any person (the 'third person") whether under a guarantee or otherwise;"

[36] The CLRG's 2017 Report on the Protection of Employees and Unsecured Creditors recommended that the provisions regarding the liquidator's report ought to be amended to include a specific question on the treatment of employees. While the CLRG notes that this recommendation has not yet been progressed, it would like to further endorse it in the context of this Report.

Section 548 describes a general rule that the liability of the 'third person', in this case the guarantor, is not affected by a compromise or scheme of arrangement. However, the enforcement by a creditor of this kind of liability which includes guarantees is dependent on the serving of notice in a time period determined by receipt of the notice of the creditors' meetings. The notice provisions are described in section 549(1) of the 2014 as follows:

> "(a) if 14 days or more notice is given of such meeting, at least 14 days before the day on which the meeting is convened under section 540[5] to consider the proposals is held, or
>
> (b) if less than 14 days' notice is given of such meeting, not more than 48 hours after he or she has received notice of such meeting…."

Further details are provided in the section.

It is proposed that as a general principle regarding matters of specific contracts provisions of the examinership legislation are mirrored in any proposed legislation unless otherwise addressed.

4.5.22 Which Court should have jurisdiction for the process? [Question 22]

There was discussion as to the appropriate Court to have jurisdiction over the process. A view was expressed that current experience would indicate that the provisions of section 509(7)(b) of the Companies Act providing for the Circuit Court to have jurisdiction over examinerships involving companies of a smaller size determined by turnover and employees has not been successful as a general policy strategy.

A number of reasons were canvassed for this situation. In that light the Review Group's deliberations tended to support continuing jurisdiction for the High Court. However, the ODCE expressed the view that the Circuit Court should have jurisdiction to deal with all aspects of the process. This process is intended to be used by small companies and to be a relatively low cost and simple process.   It was generally acknowledged that a structured move to Circuit Court jurisdiction could address the objective of reducing costs in contrast to the continued situation of the process being dealt with through the High Court using specialist professionals (who are mainly based in Dublin) with the costs that would be associated with such an outcome. Some consideration to the creation of a specialist Circuit Court permanently sitting in Cork and Dublin was mooted.

4.5.23 Role for a Supervisory Authority [Question 23]

Consideration was given as to what role, if any, there should be for a statutory regulatory body and if so, which body should discharge any such role.

4.5.23.1

In the first instance, consideration was given to the Insolvency Service of Ireland that has certain supervisory functions in relation to personal insolvency.

In the CLRG 2012 Report a possible extended role for the Insolvency Service of Ireland was contemplated but the Review Group noted this consideration was prior to the establishment of the Insolvency Service of Ireland. The Irish Society of Insolvency Practitioners suggested a role for the Insolvency Service of Ireland on the basis that this agency was accustomed to a rehabilitative role and also had a series of appropriate forms which could be adapted to an efficient process. On reflection, the Review Group concludes that it does not at this stage envisage a role for the Insolvency Service of Ireland and that it is preferable for personal and corporate insolvency to remain distinct from one another. It is important to note both in relation to this observation and the following observation regarding the ODCE that the final role of the supervisory authority would be decided on completion of the full design of the legislative framework.

4.5.23.2

The ODCE has a crucial role in dealing with insolvency matters. The task of the ODCE's Insolvency Unit is to enforce the responsibilities of the Director of Corporate Enforcement under company law in relation to insolvent companies by:

- supervising liquidators in the proper discharge of their duties;
- assessing directors' conduct in insolvent liquidation situations; and
- sanctioning fraudulent or abusive behaviour.

Liquidators of insolvent companies must report to the ODCE and must also apply to the High Court for the restriction of each of the directors of those companies unless they are relieved of that obligation by the ODCE. However, the ODCE noted that about 90% of directors of insolvent companies do not face restriction and are, therefore, free to restart in business following liquidation. The liquidation framework is designed to ensure that honest and responsible company directors are not penalised for genuine business failure. This aligns with the EU's policy on "second chance".

The ODCE would not have any role to examine the merits of any rescue plan: that should be a matter for the directors, the Process Adviser and the creditors, and ultimately the Court in the circumstances outlined above in paragraph 4.5.19. However, it would have a role in relation to following up on miscreant directors as in a winding up as described in paragraph 4.5.20.

5. Conclusion

5.1 Summary of recommendations

The Review Group recommends the introduction of a new corporate rescue process.

- The process should be distinct from examinership and have a separate name, which the Review Group recommends be the "Summary Rescue Process".
- The procedure should be available to "small companies" as defined in the Companies Act, meaning companies that satisfy two of these three criteria:
  - annual turnover of up to €12 million;
  - a balance sheet total of up to €6 million;
  - up to 50 employees.
- The procedure should commence by a resolution of the company's directors rather than by an application to Court as in examinership.
- Instead of running for 70 to 100 days (or longer under the Companies (Miscellaneous Provisions) (Covid-19) Act 2020, which enables up to 150 days) as in examinership, the procedure should aim to conclude within a shorter period.
- The company's directors should commence the process following advice from a qualified insolvency practitioner as to the company's viability, subject to a compromise with creditors and/or introduction of new capital.
- The insolvency practitioner should oversee the procedure and assist the company's directors in preparing a rescue plan for approval by creditors.
- A vote of the creditors to support a rescue plan should be required, by a 50% +1 majority in value as in examinership, rather than the 75% vote required in a scheme of arrangement under Part 9 of the Companies Act.
- Cross class cram down of debts should be available as part of the procedure.
- Court approval of any cross class cram down should be required in the formats proposed, designed with a view to reducing costs.
- The possibility of approval of a rescue plan without an application to Court should be examined, provided there is no objection from any creditor involved.
- The safeguards against irresponsible and dishonest behaviour of directors that apply in liquidation should apply to this process.

The Review Group notes that these proposals will require further consultation with the Office of the Attorney General should they be progressed.

5.2 Comparisons with Part 9 Schemes and examinership

5.2.1 Part 9 Schemes

A Summary Rescue Process would differ from a Part 9 scheme by:

- having a qualified insolvency practitioner negotiate and develop the rescue plan;
- having a more detailed commencement process;

- having specific filing obligations as described above;
- adjusting the majority required to approve the scheme from the "special majority" of majority in number and 75% by value to 50%+1 in value only;
- having different approval criteria mirrored on the examinership process
- having different possibilities in relation to Court approval processes.
- having a more prescribed engagement with a supervisory authority, with the CRO and with the Revenue Commissioners.

5.2.2 Examinership

A Summary Rescue Process would differ from an examinership by:

- not requiring commencement by order of the Court;
- having particular commencement stages as described above;
- not having an automatic stay – but note the proposal for a requirement for Court consent to issue or progress proceedings;
- having different filing requirements with CRO and Revenue;
- having different approval processes;
- potentially not including the repudiation of onerous contracts, which is possible in an examinership.

Appendix 1

Corporate Insolvency Committee of the Review Group

Membership as at October 2020

Prof. Irene Lynch Fannon	Chairperson
Jill Callanan	Alternate of CLRG member Richard Curran (L K Shields Solicitors LLP)
Marie Daly	CLRG member, IBEC CLG (Irish Business and Employers' Confederation)
Matthew Day	Department of Business, Enterprise and Innovation (DBEI)
Michael Halpenny	CLRG member, Irish Congress of Trade Unions (ICTU)
David Hegarty	Nominee of CLRG member, Director of Corporate Enforcement (ODCE)
Rosemary Hickey	CLRG member, Office of the Attorney General
Tanya Holly	CLRG member, Department of Business, Enterprise and Innovation (DBEI)
Barry Lyons	Nominee of CLRG member Neil McDonnell, Irish Small and Medium Enterprises Association CLG (ISME)
Vincent Madigan	CLRG member
Neil McDonnell	CLRG member, Irish Small and Medium Enterprises Association CLG (ISME)
Tony O'Grady	Alternate of CLRG member Emma Doherty (Matheson)
Conor O'Mahony	Alternate of CLRG member the Director of Corporate Enforcement (ODCE)
Paddy Purtill	Alternate of CLRG member, Revenue Commissioners
Amy Reville	Alternate of CLRG member, Revenue Commissioners
Eamonn Richardson;	Invitee of Committee Chairperson (KPMG)
Ruairi Rynn	Alternate of CLRG member Barry Conway (William Fry)
Doug Smith	CLRG member (Eugene F Collins)
Declan Taite	Nominee of CLRG member Kathryn Maybury (Duff & Phelps)
Kieran Wallace	Invitee of Committee Chairperson (KPMG)

Appendix 2

Outline of the law and procedure of a Part 9 Scheme

A2.1 Stages of a Part 9 Scheme

There are five stages in putting forward a Part 9 scheme:

- A scheme must be devised and a circular to affected shareholders and/or creditors prepared.
- The meetings of shareholders and/or creditors must be convened.
- The meetings of shareholders and/or creditors must pass the resolutions approving the scheme.
- The company must apply to the High Court for the scheme to be sanctioned.
- The Court Order must be delivered to the Registrar of Companies.

A2.2 Devising of scheme and preparation of scheme circular

In order for there to be a scheme of arrangement, there must be clarity in what is proposed. As a matter of law there must be a "compromise or arrangement" between the company and its shareholders or a class of them or its creditors or a class of them.[37]

Care must be taken when composing the classes of shareholder and creditor. The case law makes it clear that the Courts will look through literal classifications where there are genuinely differing and competing interests in ostensibly the one class. In the case of shareholders, the principle was stated thus:

> "Normally the classes that will have to be considered in the case of a proposal affecting members are the ordinary and preference shareholders; … but there may be further categories to be considered and the criteria to be applied in considering whether a particular category of members or creditors constitutes a "class" within the meaning of the section"[38]

Mr Justice Keane in his *Company Law in Ireland* states:

> "It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."[39]

In considering the constitution of classes this broad principled-based approach has been followed in Irish case law including by Laffoy J in *Re Millstream Recycling Ltd*,[40] where the

[37] Companies Act 2014, section 450(1).

[38] Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2QV 573 at p 583.

[39] *Keane on Company Law,* 5th Edition 2016, Brian Hutchinson. 32.13

[40] *Re Millstream Recycling Ltd* [2009] IEHC 571.

Court placed a great deal of emphasis on the judgment of Costello J in the High Court in *Re Pye (Ireland),* and in *Ballantyne Re plc*[41] where a number of different issues were at stake.

Following some discussion of the particular issue of Revenue debts in *Re Pye (Ireland) Ltd*, section 23(5) of the Companies (Amendment) Act 1990 explicitly gave the Revenue Commissioners the power to compromise and agree to a scheme in an examinership. This has been re-enacted to apply to Part 9 schemes in section 453(4) of the Companies Act and applies to examinerships under section 540(6) of the Companies Act. This is relevant to the design of the process proposed in this document.

Whilst the (full) board of the company moves a Part 9 Scheme forward, a committee of independent directors (distinct from continuing directors) is generally needed for the purposes of considering the interests of shareholders whose shares are to be acquired.

The scheme is put to shareholders in the form of a circular[42], usually put together by financial and legal advisers to the company appointed for the purpose of the scheme with heavy input from the company's independent board directors.

A2.3 Convening of the meetings of shareholders and/or creditors

A company has a choice in either proceeding to convene the meeting or meetings or to apply to Court to do so. Prior to the commencement of the 2014 Act on 1 June 2015 it was necessary to apply to Court for the meetings to be convened. Even though a Court application is no longer required, it is not unusual for application to be made to the High Court, with a view to seeking to fireproof the appropriate classification of shareholders and/or creditors; notwithstanding that the substance of any issue as to composition of classes will only be dealt with at the hearing where sanction of the scheme is sought.[43]

Where an Order is sought, it is routinely given, on the basis of the following documents:

- a Notice of Motion, a technical document specifying the details of when and where the meeting should be held;
- a Grounding Affidavit, which states the reasons why the scheme is being proposed, and is typically made by the Chairman, the Chief Executive or the Company Secretary
- an advanced and an as-near-as-possible final draft of the scheme circular.

The Court hearing to hear this application is normally routinely heard 7 to 14 days after the papers are filed in Court. The Court hears no evidence other than the affidavit. The Order which is usually given is for the meeting to be held between 4 to 5 weeks following the date of the Court hearing.

Where the company itself convenes the meeting it will give at least the same notice as it would for a meeting at which a special resolution is proposed, namely 21 clear days.

[41] *Re Ballantyne RE plc and the Companies Act 2014 [*2019] IEHC 407.

[42] Companies Act 2014 section 452(1).

[43] Companies Act 2014, section 450(5).

There is no automatic stay on proceedings when a Part 9 scheme is proposed but application can be made to the High Court for such a stay by the company, its directors, a member, a creditor and where the company is in liquidation, by the liquidator.[44]

A2.4 Meetings of shareholders and/or creditors

The meeting or meetings will be chaired by a Director, usually the Chairperson of the Board of directors.

In order for a resolution to approve a Part 9 scheme to be passed, it must be approved by a "special majority" which is defined as:

> "a majority in number representing at least 75 per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the scheme meeting"[45]

This means that a group of creditors or shareholders constituting a majority in number can in effect veto a scheme resolution. In this context it is worth noting that the Review Group, in its June 2020 Report on certain company law issues arising under the EU Central Securities Depositories Regulation 909/2014 has recommended an amendment to this provision in relation to Part 9 schemes used for takeovers of publicly traded companies. In those cases the Review Group has recommended as an alternative to the majority-in-number requirement, a company would satisfy the special majority where the resolution is passed at a meeting at which at least one third of the shares in issue are represented.[46] This alternative to the majority-in-number requirement is separately being considered by the Review Group's Corporate Governance Committee in relation to Part 9 schemes for all companies.

It is noteworthy in this context that section 47 of the Company Law Enforcement Act 2001[47] removed the requirement for a vote by majority in number (as well as in value) to pass a resolution to remove a company-appointed liquidator. However, the Committee is of the opinion that any adjustment of the quorum or majorities required for an SME rescue procedure should be analysed distinctly (as set out in section 4.4).

A2.5 Application to Court for approval of a Part 9 scheme

Once the Scheme resolution or resolutions are passed, an application is made to Court. The documents required are:

- a petition to approve the scheme – a formal request to the High Court for the Part 9 scheme to be approved or, as it is termed in the 2014 Act "sanctioned";
- copies of newspaper advertisements of the petition;

[44] Companies Act 2014, section 451.

[45] Companies Act 2014, section 449(1).

[46] Consistent with the requirement to pass a migration special resolution under section 8 of the Migration of Participating Securities Act 2019.

[47] This inserted a new section 267(3) into the Companies Act 1963, now section 588(6) of the Companies Act 2014.

- a (further, detailed) Grounding Affidavit;
- supporting affidavits from the a financial adviser (in the case of a takeover scheme) or an accountant (in the case of a scheme compromising creditors' claims) to the company;
- the actual scheme circular as sent; and
- minutes of meeting of shareholders

There are at this stage, two outings to Court. The first is concerned merely with fixing the date of the hearing, which usually takes place within 7 to 14 days following filing of papers. The Court will, if requested, (although there is no requirement for it) direct as to how the shareholders, and creditors, are to be notified of the proposed application to approve the scheme.

The second and final hearing will take place between 3 to 5 weeks later and usually takes between 1 and 2 hours (in the absence of objections). At this hearing the fairness and justification for the scheme must be proven, and evidence is again heard on affidavit, rather than viva voce.

The tests that the Court applies when considering whether to approve a scheme are these:[48]

1. sufficient steps have been taken to identify and notify all interested parties;
2. the statutory requirements and all directions of the Court have been complied with;
3. the classes of members or creditors, as the case may be, have been properly constituted;
4. there is no improper coercion of any of the members concerned; and
5. the scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it.

Subject to the Court being happy to give the order, it will give an order approving the resolution to approve the scheme and any ancillary orders – e.g. a reduction of capital where there is a company takeover.

A2.6 Register Order

Once the Order issues, the technical term used being when it is "perfected", it must be delivered to the Registrar of Companies within 21 days, whereupon it becomes binding on all persons concerned.

A2.7 Part 9 schemes and Part 10 schemes contrasted

The following table sets out the areas of difference and similarity between a Part 9 scheme outlined above and a Part 10 scheme where a company emerges successfully out of examinership.

[48] In Re Ballantyne plc [2019] IEHC 407 (Barniville J.)

Appendix 2 – Outline of the law and procedure of a Part 9 Scheme

	Part 9 scheme	**Part 10 scheme**
Who originates it?	Originated by (full) Board of Directors of the company using existing advisers. Scheme proposals sent to company shareholders or creditors for approval.	Examinership is usually initiated on the application of the directors of the company. [49] The Examiner, having been appointed by the High Court (or Circuit Court as described above) originates the scheme.
Is there an insolvency practitioner to supervise the process	No.	Yes, the Examiner.
Is an independent expert's report required	No, but it is usual when the Court is finally considering whether to approve the scheme, where there are continuing directors.	Yes, as part of the application to commence the examinership.[50]
Who are the "independent directors"?	Directors unconnected with the continuing shareholders (the acquirer or investor in a restructuring) constitute themselves as a committee of independent directors, taking advice as to the fairness of the scheme from an independent financial adviser or accountant.	Unusual for there to be such a Committee.

[49] A petition to commence an examinership may be made by: "(a) the company; (b) the directors of the company; (c) a creditor, or a contingent or prospective creditor (including an employee), of the company; (d) a member or members of the company holding at the date of the presentation of the petition not less than one tenth of such of the paid-up share capital of the company as carries at that date the right of voting at general meetings of the company." Companies Act 2014, section 510.

[50] Some legal practitioners have expressed the opinion that there is no legal reason preventing the Examiner-designate from being the independent expert and that the practice of having a separate person is the result of a misinterpretation of the law. This adds to the cost of an examinership and arguably removes an incentive for the Examiner to use best endeavours to ensure a successful exit from examinership; the independent expert takes no responsibility for the outcome of the examinership and the Examiner takes no responsibility for the analysis of the independent person in his or her report.

Appendix 2 – Outline of the law and procedure of a Part 9 Scheme

	Part 9 scheme	**Part 10 scheme**
What majorities are required for the proposal to succeed?	(i) A majority in number of the voting shareholders or creditors, as the case may be (ii) which majority must hold at least 75% of the shares of the voting shareholders or 75% of the debt of the voting creditors.	A simple majority in value of one class of creditor whose rights have been impaired under the proposed scheme
Can the vote of one class affect the rights of another class	No. However in English schemes there is only usually one class of creditors given the flexibility of the schemes which enables (i) the payment of crucial creditors and (ii) the disregard of 'out-of-the-money' creditors. [51]	Yes.
What Court approvals are necessary?	Court approval is required: (i) to obtain approval of the scheme; (ii) if a stay on proceedings is sought.	Court approval is required (i) to commence an examinership (ii) to continue the period of protection beyond 70 days; (iii) to approve the scheme.
Is there a stay of proceedings against the company	No, save as may be ordered by the Court upon special application by the company, its directors, a member, a creditor and where the company is in liquidation, by the liquidator.[52]	Yes, automatically upon the company going into examinership.

[51] See for example *Sea Assets v PT Garuda Indonesia* [2001] EWCA Civ 1696 and *Re Bluebrook Ltd* [2010] 1 BCLC 338

[52] The latter is not relevant to the use of a Scheme in a restructuring, where it is used to avoid the stigma of insolvency.

Appendix 2 – Outline of the law and procedure of a Part 9 Scheme

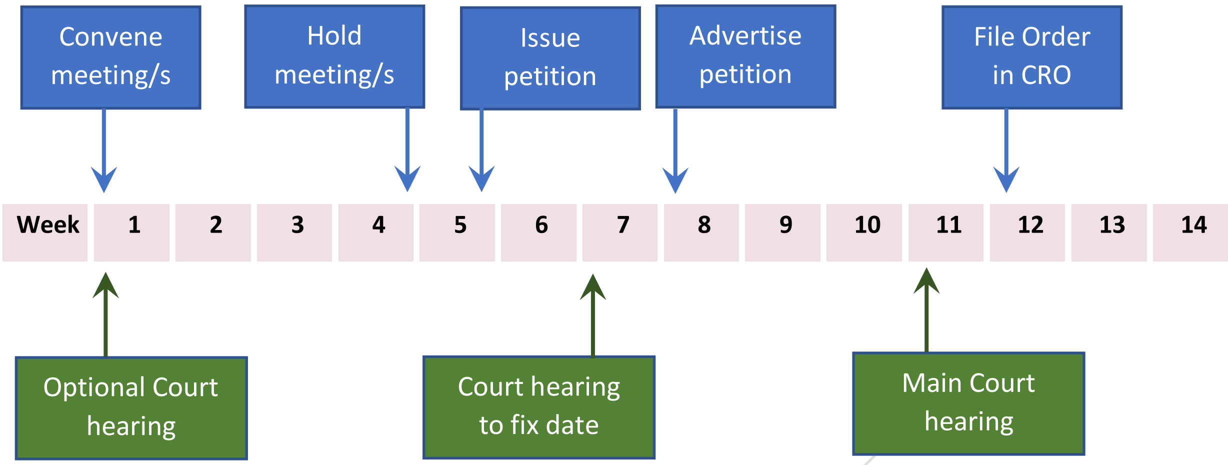
	Part 9 scheme	Part 10 scheme
What is the effect of there being separate classes of or distinctions between shares and types of creditor?	The company is responsible for constituting proper classes of shareholders or creditors, as the case may be. This may be approved by the Court but does not have to be post 2014. Proprietary directors always constitute a separate class.[53]	The Examiner will constitute the classes of shareholders and creditors. The class of shareholders is usually irrelevant as they will have their interest nullified economically. Each class of creditor will receive a dividend from the scheme, as proof that it is a better outcome than a winding up.
What is the Court's approach to the fairness or otherwise of a proposal?	A Court will approve the scheme where it is satisfied that the scheme is fair to shareholders or creditors, as the case may be. A similar unfair prejudice test can be used as with examinerships.	A Court will approve the scheme where it is satisfied that the scheme provides a better outcome for creditors than a winding up and that the company has a reasonable chance of survival.
Who pays the fees?	The company.	The company
What dictates the timetable?	Timetable affected by Court dates.	Timetable laid down by statute.

[53] But see English case law on 'out of the money' classes. Similarly as in an examinership, an English scheme of arrangement used as an insolvent restructuring process will not necessarily include shareholders who have no economic interest; and again as in an examinership, out of the money creditors will not be paid.

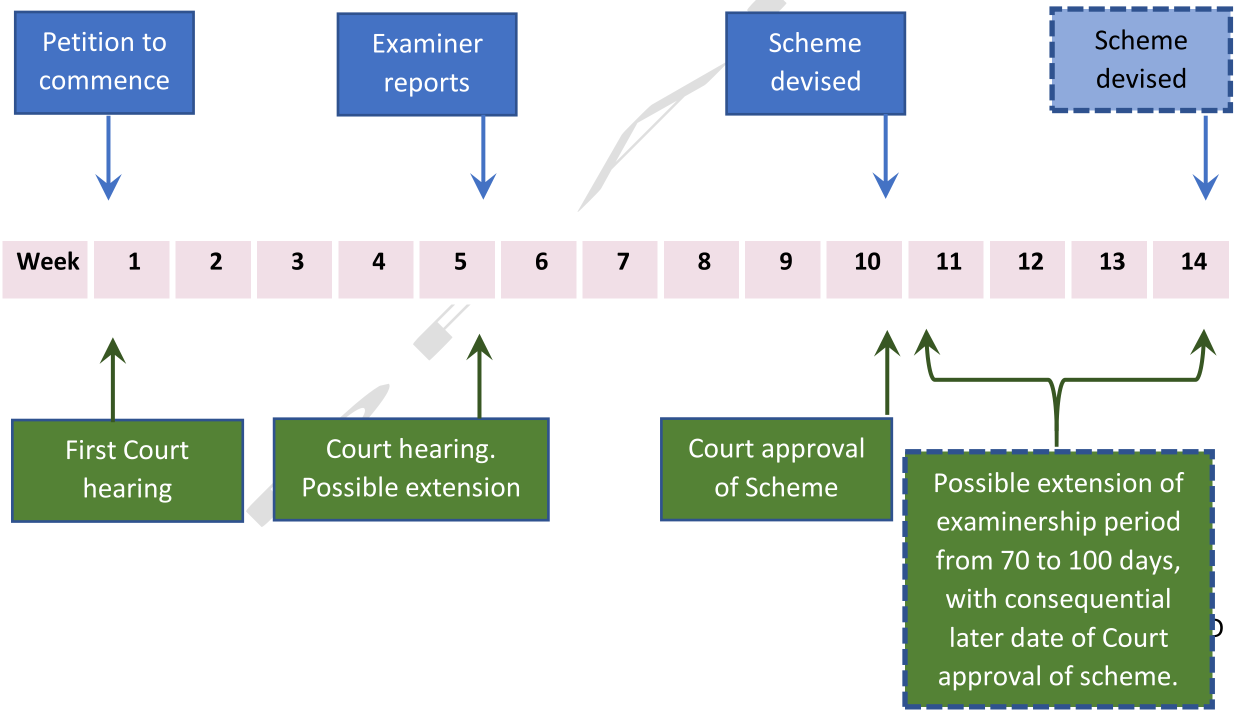
Appendix 3

Illustration of Part 9 scheme and examinership timeframes

Part 9 scheme timetable



Examinership timetable



Appendix 4

Some comparable EU Member State and other voluntary restructuring processes

A4.1 Preliminary

Other EU Member States provide for voluntary restructuring processes, with a strong emphasis on creditor agreement. The recommendations contained in the Report are informed by a consideration of the processes available in these two jurisdictions which are less formal than an examinership process and therefore less costly. The recommendations of the group are also informed by the standards incorporated in the EU Preventive Restructuring Directive (PRD) Directive 1023/2019.

A4.2 Overview of the French procedure

The French law for protection of companies ("loi de sauvegarde des entreprises") gives companies that are facing economic, legal or financial difficulties and that are not yet in a situation of insolvency ("cessation de paiements") (where the company is not able to pay its debts) the means to deal with these difficulties in a preventive way.

Three preventive restructuring procedures are now available to companies facing financial difficulties but not yet insolvent (companies which are described as being "en cessation de paiements"):[54]

(1) the ad hoc mandate (mandat ad hoc);

(2) the conciliation (conciliation); and

(3) the safeguard (sauvegarde), with its two variants, the accelerated financial safeguard and the accelerated safeguard.

Of these the first two preventive procedures can be used: the "ad hoc mandate" and the "conciliation", as out-of-court settlement proceedings ("règlement amiable").

In each procedure, the company's management seeks to negotiate the company's debts with the company's creditors, under the aegis of a third party intermediary, who, depending on the procedure, will be either:

- the ad hoc agent – "mandataire ad hoc"; or
- the mediator – "conciliateur" and will be appointed by the President of the Court.

The company's manager can only apply to the Court if the company has not made a declaration of cessation of payments ("déclaration de cessation de paiements") and if the company has not been able to pay its debts for less than 45 days.

The company's management stays in place and their powers and responsibilities are not displaced by the appointment of either the ad hoc agent or the mediator. There is no stay on proceedings under either procedure. The main difference between the ad hoc mandate and the conciliation is that a conciliation agreement will either be approved by the Court

[54] Ordinance No 2014-326 of 12 March 2014 and Law No 2016-1547 of 18 November 2016

(constatation), which means that confidentiality is retained, or will be sanctioned by the Court (homologation), which renders the judgement public. The adverse effect of publicity, which is attached to the sanctioning of the agreement, is mitigated by the fact that such sanctioning confers more legal advantages than a mere approval in the event of subsequent insolvency proceedings being opened (e.g. protection for new money).[55]

A4.3 Differences between the ad hoc mandate and the conciliation

These two procedures are carried out in different ways even though they have the same objective, which is to provide a confidential and out-of-court negotiation of the company's debts. An ad hoc agent or a mediator, appointed by the President of the Court, assists the debtor.

The mediator's appointment is for a maximum period of four months, renewable for one additional month, similar to the duration of the Irish examinership. This procedure can be useful for companies that already have started negotiations with creditors. It can end on the approval by the Court of a draft agreement between the company and its creditors.

The ad hoc agent's appointment can be longer than that of the mediator. He or she is usually appointed for three months, renewable several times if necessary. The agent's mission ends with the drafting of an agreement negotiated between creditors and partners. The Court does not need to approve this agreement.

A4.4 Dutch WHOA procedure

The WHOA[56] is modelled on the English scheme of arrangement and has been enacted in light of the EU Preventive Restructuring Directive. Whether the process is covered by the Insolvency Regulation seems to be a matter of choice of the debtor. Interestingly, comparative elements include the cessation of payments process, the idea of shareholders and creditors being divided into classes and a majority vote. However, in the Dutch process if shareholders representing at least two-thirds of the value of the issued capital in the debtor vote in favour the vote is carried and similarly a creditor's class is deemed to have voted in favour of the debt restructuring agreement if creditors representing at least two-thirds of the value of the outstanding claims vote in favour of the plan. It is envisaged that only those affected by the restructuring will vote. There is also a cross cram down possibility, but the Court must approve this plan.

A4.5 Adaptability of a French or Dutch Procedure for Ireland?

In both the French and Dutch jurisdictions there has been a move to increase the availability of rescue processes in anticipation of the implementation of the preventive restructuring Directive 2019/1023. In both jurisdictions less formal processes begin with a cessation of payments process initiated by the company itself and which is treated as a stay of sorts. The

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[55] See www.ucc.ie/en/JCOERE for further details on France in the French Report https://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/France_FINAL_PDF_.pdf

[56] Wet Homologatie Onderhands Akkoord (Homologation of Private Agreement Act) or "WHOA", which became law in the Netherlands in June 2020. See further https://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/TheNetherlands_FINAL_PDF.pdf

process then goes on to involve an informal renegotiation of liabilities which is conducted in a manner which is transparent to existing creditors. However, even in these informal processes Court approval is necessary for the plan to become binding beyond an informal debt write down agreement.

A4.6 United Kingdom

In March 2020 the Corporate Insolvency and Governance Act was passed in the UK, which provides for some interim measures to address the difficulties of businesses and companies arising from Covid-19 effects. It also introduces an examinership-like statutory rescue process in a new Part 26A of their Companies Act 2006. (Part 26 deals with the scheme of arrangement provisions which are similar to Part 9 of the Irish Companies Act 2014). The key characteristics of this new process which is simply described as an arrangement or reconstruction, are these:

- a commencement process that is out of court
- a court order for the calling of classes of creditors and members
- voting by creditors, with approval by a 75% majority,
- sanction by the Court of the compromise, and a cross class cram down.

There is a moratorium (stay) available which is linked to the moratorium available under Part 1A of the Insolvency Act 1986 but it is not automatic, and does not seem to be envisaged as being automatic. The Review Group did not consider that this model would provide any useful rescue process for small companies.

Appendix 5

A possible definition of connected creditor

In relation to a company, a connected creditor is:

(a) a person who within 12 months of the commencement of the process is or was a director of the company, its holding company, its subsidiary company or fellow subsidiary of its holding company;

(b) a person who within 12 months of the commencement of the process is or was a secretary of the company, its holding company, its subsidiary company or fellow subsidiary of its holding company;

(c) the trustees of any employees' share scheme or pension fund established for the benefit of any directors and employees of the applicant and its subsidiary undertakings; or

(d) any person who under any agreement has a right to nominate a person to the board of directors of the applicant; or

(e) a person who alone, or acting in concert with any person with a present or contingent disclosable interest (as defined in section 257 of the Companies Act) in:

   a. 5% or more of the issued share capital; or

   b. 5% or more of the issued share capital of any class;

   of the company or of any class of shares, its holding company, its subsidiary company or fellow subsidiary of its holding company;

(f) a person connected (within the meaning of section 220 of the Companies Act) with any of the foregoing

Explanatory note: Paragraphs (c), (d) and (e) adopt similar concepts in an unrelated area of law. Under the UK and Irish listing rules[57], shares are not considered to be in the hands of the public if they are held directly or indirectly by:

(a) a director of the applicant or of any of its subsidiary undertakings; or

(b) a person connected with a director of the applicant or of any of its subsidiary undertakings; or

(c) the trustees of any employees' share scheme or pension fund established for the benefit of any directors and employees of the applicant and its subsidiary undertakings; or

[57] UK Listing Rule 6.14.3; Irish Listing Rule 2.2.27.

(d) any person who under any agreement has a right to nominate a person to the board of directors of the applicant; or

(e) any person or persons in the same group or persons acting in concert who have an interest in 5% or more of the shares of the relevant class;

Appendix 6

Examinership statistics provided by the Revenue Commissioners

Revenue Records - Examinerships		
	2019	**2018**
Petitions	25	32
- Successful	*18*	*26*
- Failed	*7*	*6*
Revenue Division		
- LCD	2	0
- MED	13	11
- Other^	10	21
Debt/Dividend		
Total Debt €m	2.7	2
Paid	61%	85%
- Super Pref. €m	*0.1*	*0.2*
Paid	*100%*	*100%*
- Pref. €m	*1.3*	*1.6*
Paid	*77%*	*87%*
- Unsecured €m	*0.9*	*0.1*
Paid	*23%*	*16%*
- Other €m	*0.4*	*0.1*
Paid	*86%*	*100%*

^ While Revenue sizes differ from normal definitions, all cases in other have turnover < €2m

Appendix 6 – Examinership statistics provided by the Revenue Commissioners

Revenue Records - Examinerships								
	2019	**Trading***	**2018**	**Trading***	**2017**	**Trading***	**2016**	**Trading***
Petitions	25	19	32	26	15	6	27	13
- Successful	*18*	*18*	*26*	*25*	*7*	*6*	*12*	*11*
- Failed	*7*	*1*	*6*	*1*	*8*	*-*	*13*	*-*
- Withdrawn	*-*	*-*	*-*	*-*	*-*	*-*	*2*	*2*
Practitioners								
- Hughes Blake	*10*		*8*		*11*		*11*	
- Moore Stephens	*-*		*-*		*-*		*1*	
- KPMG	*2*		*-*		*-*		*5*	
- Whiteside Cullinan	*-*		*-*		*-*		*1*	
- McStay Luby	*-*		*-*		*-*		*2*	
- Friel Stafford	*1*		*-*		*-*		*1*	
- Grant Thornton	*3*		*3*		*2*		*5*	
- Deloitte	*-*		*-*		*-*		*1*	
- Joseph Walsh	*5*		*3*		*2*		*-*	
- PwC	*1*		*17*		*-*		*-*	
- Crowes	*-*		*1*		*-*		*-*	
- Kirby Healy	*2*		*-*		*-*		*-*	
- Collins Garcia	*1*		*-*		*-*		*-*	

* Trading as at March 2020