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Key workings of the SCARP progress for Irish businesses

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The Small Company Administrative Rescue Process (**SCARP**) was first introduced on 7 December 2021, to provide a quicker and more affordable formal restructuring process to businesses in Ireland. SCARP allows businesses to restructure their debts by agreeing to a rescue plan with their creditors.

Its primary objective is to allow small and micro enterprises to avail of a legislative corporate rescue process where the alternative examinership process can be too costly for those enterprises. The SCARP process is structured to require minimal court intervention and can be contrasted therefore with the examinership process which mandates multiple court applications.

Who can avail of this process?

To avail of the process, a company must meet the following criteria:

1. The company must be a small or micro company as defined by the Companies Act 2014. A small or micro company is one which meets two of the following three conditions:

- - Fewer than 50 employees
  - Turnover less than €12 million, and
  - Balance sheet less than €6 million

2. The company is, or is likely to be, unable to pay its debts
3. The company must not be in liquidation
4. The company must not have appointed an examiner or Process Adviser(a ' **PA**') in the previous 5 years and
5. If a receiver has been appointed to the company, the company is eligible only if that receiver

has been appointed for a period of less than 3 working days

How does the SCARP process work?

The directors must make a full inquiry into the company's finances and prepare a statement of affairs in the prescribed form. A PA (usually a qualified accountant) is required to determine whether the company has a reasonable prospect of survival and, having made that determination, prepared a Rescue Plan for the company. The Rescue Plan will usually require fresh investment and will provide for a write down of the company's debt.

The first step in the process requires a prospective PA to draft a S558D Report explaining the company's prospects for survival. The Section 558D Report contains:

- A statement of the conditions which the PA considers essential to the prospect of survival of the company
- Recommendations that the PA believes should be taken into account and
- Details of the extent of funding required to enable the eligible company to continue trading during the rescue period and the source/sources of that funding.

On receipt of this report, the directors may, within 7 days, call a meeting to decide whether or not to appoint a PA.

Under SCARP, a PA must notify various parties, including employees, creditors and the Revenue of his/her appointment.

The primary function of the PA is to prepare a Rescue Plan which is defined as *"a plan for an eligible company…that is intended to secure the survival of the company, and the whole or any part of its undertaking, as a going concern."*

Once the Rescue Plan is approved, the PA must file a notice of its approval in court within 48 hours. The plan will become binding on the company and all creditors and members of the company within 21-days of the filing of the notice of approval, unless an objection is lodged with the relevant court within that 21-day period.

The process has a 70-day timeline from commencement: 49 days for creditors to receive and vote on the Rescue Plan and a further 21-day cooling off period where creditors' objections can be raised.

The Rescue Plan must be approved by 60% of the creditors representing a majority in value of at least one class of impaired creditors.

The approved Rescue Plan can provide for the write-down of liabilities across all classes of creditors. However creditors will face a better outcome to that faced in a liquidation. The Rescue Plan will allow for the survival of the company and crucially for the retention of jobs.

Court applications

Unlike Examinership, there is no immediate or automatic protection from creditor action or enforcement. As noted at the outset, the SCARP process was designed to avoid the level of court involvement required in the examinership process. Indeed, it should be possible to complete the process without any court applications.

However, court protection can be sought by the PA after her appointment under the provisions of Section 558N of the Companies Act 2014. The following are the most common applications made by a PA in the SCARP process:

- Seeking a stay on court proceedings extant when the process begins
- Seeking a stay on any provisional liquidator or receivership appointments
- When a creditor objects to the Rescue Plan as being unfairly prejudicial
- Ratifying the repudiation of a lease where a landlord objects to the repudiation

Where a creditor objects this can result in a dramatic increase in the costs of the process. Care needs to be taken here as the process can be open to abuse by creditors not acting in good faith.

Success rate for SCARP

Anecdotal evidence to date suggests that there has been a high success rate. Further, a Deloitte report dated 24 January 2024 indicated that SCARP has a success rate of almost 80%. It follows that a considerable number of small companies have been rescued and jobs saved which was the primary objective of the legislature.

However there remain some issues which may impact the success of SCARP:

- It is still relatively new process so it remains underutilised
- Revenue has a key influence on the success of SCARP as it can opt out of the process
- The tax liabilities outstanding under the debt warehousing scheme, brought in to assist companies during the pandemic, fell due on 1 May 2024. Companies must engage with Revenue to deal with their warehoused tax liabilities. Revenue will usually support a company’s SCARP once it has met the requirements and has actively engaged. However, on 9 May 2024 the Irish Times reported that Revenue had issued demands to more than 11,700 businesses

Conclusion

We have significant experience advising Process Advisors, companies and creditors in respect of the SCARP process. We were engaged by the Process Advisor in the first contested SCARP application in Ireland and secured the withdrawal by a contingent creditor of its objection to the Rescue Plan which was subsequently ratified by the Court.

If you have any questions about the SCARP process please contact a member of our Dispute Resolution team via their contact details below.

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