

Technical Factsheet

Small Companies Administrative Rescue Process

Overview

The legislation provides an alternative to Examinership for viable small and micro companies which is more accessible and cost efficient and capable of conclusion within a shorter time period.

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ACCA LEGAL NOTICE

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1. Executive summary

The Government has enacted the [Companies \(Rescue Process for Small and Micro Companies\) Act 2021](#). The legislation has created a new company rescue procedure called the Small Company Administrative Rescue Process (“SCARP”). The SCARP will assist many small businesses who are facing insolvency, restructure their debts and become sustainably viable.

The Directors in a small or micro company can now avail of a simplified and relatively inexpensive company law procedure that allows them to rescue a business that may otherwise face liquidation. The procedure allows the company to arrange with their creditor to “cram down” (i.e. only repay a portion of) their debt or to reschedule debt repayment. It is only suitable for a company where the directors can show that the company will be financially viable in the future and that creditors are better off financially under a SCARP than in a liquidation. A SCARP is like the Examinership process used to rescue large companies but less formal and a lot less expensive.

A majority by value of creditors in one class of creditors is needed to approve a SCARP scheme. If an individual creditor applies to Court to reject the plan, the company will need to go to Court to get their approval for the scheme. Onerous leases can also be repudiated under the scheme, but if the landlord/lessor objects the Courts will need to approve any repudiation. A Court application is not necessary if no creditor objects. A SCARP is managed by an independent Process Advisor (insolvency practitioner). The rescue plan must satisfy the best interest of creditors test and provide each creditor with a better outcome than a liquidation. Finally, no creditor may be unfairly prejudiced or treated unfairly by the plan.

The SCARP adds to the already existing company rescue procedures:

- Examinership under [part 10 of the Companies Act 2014](#): a procedure generally only used by large companies as it is a very legalistic process and is expensive
- Schemes of arrangements under [Section 449 to 454](#): these need 75% agreement of creditors and offer less protection for the company during the process.

Court involvement is not mandatory in the SCARP process. In this regard, it is a much more cost effective and nimbler process in assisting SME's in financial difficulty.

In summary, the new process is a simplified corporate rescue mechanism specifically geared towards small and micro companies with the primary objective being to save a company and any jobs provided by it.

2. ELIGIBILITY

For a company to avail of the new process they must meet the following eligibility criteria

- Be a small or micro company as defined by the Companies Act
 - [S280A Qualification of company as small company: general](#)
 - [S280D Qualification of company as micro company](#)
- Be unable or likely to be unable to pay its debts
- Not be in liquidation nor has an order been made for the winding up of the company
- Not having used the process in the previous 5 years
- No examiner has been appointed in the past 5 years

The company size conditions are that the company must meet two of the following three criteria:

- (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; and
- (c) the average number of employees does not exceed 50.

A company will still meet the criteria if it was under the size limits in the previous years and only exceeded the limit in the current year. A company will not meet the criteria if it was medium or large in the previous years and only met the small company limit in the current year. The balance sheet total is the total of all assets without deduction for liabilities. The average number of employees is based on a formula which counts an employee based on the number of persons employed under contracts of service by the company in a month (whether throughout the month or not) and each month of the year is then added together. In the extreme this means that an employee who works just one hour in a month is counted as 1/12th of an annual employee. Businesses regulated by the Central Bank of Ireland are not allowed to use the procedure.

A company that does not meet the size criteria to use a SCARP will still have other options for financial rescue including: schemes of arrangements under [Sections 449 to 454](#) of the Companies Act; and an examinership under [part 10](#) of the Companies Act.

3. THE PROCESS

Step 1: Engage a Process Advisor

To enter the process, the company will engage an independent insolvency practitioner to act as a “Process Advisor”.

The Process Advisor must have the same qualifications for appointment as a liquidator as under the [Companies Act 2014](#) including meeting specific consanguinity and independence requirements in [Section 634](#). As with other insolvency procedures, the company’s existing Auditor/Accountant cannot act as Process Advisor for reasons of independence etc. However, the companies existing accountant may assist with the preparation of a statement of affairs and creditors list.

Whilst the Process Advisor has no executive function in the company, they have similar rights and powers as an examiner in that:

- they can attend board meetings
- third party advisors such as accountants/solicitors must make the company's books and records available to the Process Advisor even where there are unpaid fees outstanding to those advisors
- they can "certify" certain liabilities to be treated as expenses of the SCARP

With regard, to the Process Advisors fee - the fees and costs of SCARP are treated similarly to Examinership, in that they are paid from the assets of the company. In order to minimise professional fees, the Process Advisor is expected to use the services of the staff of the company as far as possible although they may also use the company's existing external accountant where there are limited inhouse accounting skills available.

Step 2: Prepare a Statement of Affairs

Having identified the need to enter the process and having engaged a suitable Process Advisor, the directors of the company will, having made full enquiry into the affairs of the company, prepare a Statement of Affairs in a prescribed form.

The Statement of Affairs will specify

- particulars of the company's assets, debts and liabilities
- the names and addresses of the company's creditors
- particulars of each security given by the company, including the name of the secured creditor and the date on which it was given, and
- other information may be required depending on circumstances

The directors are required to confirm the truth and fairness of the statement of affairs by making a statutory declaration that they have made full enquiry into the affairs of the company. Where any false or misleading information has been included in the statement of affairs, the directors may be guilty of a category 2 offence.

The Statement of Affairs is submitted to the Process Advisor who will then gather information on the company's specific situation to enable them to form an opinion on the company's prospects for survival.

Step 3: The Process Advisors Report

The Process Advisor will then issue a report on whether the company in their opinion has a reasonable prospect of survival. In making this determination the Process Advisor will review the statement of affairs, and the following:

- the company's business plan in the future;
- the availability of additional funding or investment for the company;
- the cost structure of the company, including any cost reductions already achieved or that may be achieved;

- whether projections and business plans for the company are based on objective and independent evidence;
- whether the company can generate a sufficient return to remunerate investment and repay funding;
- the wider economic situation;
- the circumstances of the market in which the company is operating, including the likely future prospects of the market;
- the expertise, brand and historic success of the company;
- where the company is part of a group of companies, the place of the company in the structure of the group and its prospects in that context;
- whether a secured creditor has expressed an interest in (or attempted to initiate) a receivership; and
- such other matters as the process adviser considers relevant in the circumstances.

The Process Advisors report will consider matters similar to an Independent Accountant's Report in an Examinership including:

- has any deficiency been satisfactorily accounted for;
- a statement of the conditions or other matters which the Process Adviser considers are essential to ensure that the company would have a reasonable prospect of survival as a going concern, whether as regards the internal management and controls of the company or otherwise;
- opinion as to whether the preparation, approval and taking effect of a rescue plan would offer the company a reasonable prospect of survival;
- recommendations as to the course the company should take;
- details of any funding required;
- recommendation as to what process liabilities should be paid; and
- information on proposed fees

On foot of the Process Advisor's report, the formal process will commence.

Step 4: The Rescue Process

In order to commence the rescue process, the directors of the company will call a board meeting within 7 days of receiving the Process Advisors report. At that meeting they will propose and consider a resolution to commence the process.

When the directors' resolution is passed, the Process Advisor must within 2 working days

- deliver to Companies Registration Office, a notice of their appointment;
- file a copy of the following to the Circuit Court for the area for which the registered office is situated (or in certain circumstances Dublin Circuit or the High Court):
 - (i) the resolution,
 - (ii) the Process Adviser's determination that the company has a reasonable prospect of survival and their report, and
 - (iii) where a Process Adviser has determined under [section 558H\(2\)](#) that proceedings in relation to the company should be brought in the High Court, the reasons for the determination

- make arrangements for a notice of their appointment and the date of that appointment to be published in [Iris Oifigiúil](#).

The Process Adviser shall, as soon as practicable and in any event no later than 5 days after the passing of the resolution, give to creditors, including employees a notice setting out:

- the fact of their appointment as Process adviser and the date of the passing of the resolution in respect of same
- any payments that the Process Adviser considers are required to be made in order for the company to continue trading
- the fact that any liabilities arising after the appointment of the Process Adviser that are properly incurred by the process adviser shall be paid in full, and
- the determination made under section 558H(2) as to whether any proceedings shall be brought in the Circuit Court or the High Court, as the case may be,

The directors of the company shall ensure that, within 48 hours after the passing of the resolution, a notice in the prescribed form stating that the Process Adviser has been appointed and the date of the appointment is placed on any website of the company in a prominent and easily accessible place. The directors of the company shall ensure that the notice remains on the website during the rescue period.

Crucially, from a time and cost perspective, there is no requirement at this stage to apply to a Court. Applying to the Court at this stage of the process is a requirement in an Examinership but not a SCARP.

Step 5: The Process Advisors initial engagement with creditors and stakeholders

Creditors are informed of the process and are sent the Statement of Affairs and the Process Advisor's report.

Creditors will also be sent a Proof of Debt form. This is for creditors to complete and attach proof that they are owed money. The form and the proof needs to be returned by the creditors within 14 days. During this period, creditors are afforded an opportunity to provide information and explanations to the Process Adviser and to disclose any facts they consider material to the process.

Step 6: The Process Advisors Rescue Plan

The Process Advisor having reviewed the company's financial circumstances and consulted with stakeholders including directors, creditors, employees and shareholders, will prepare a draft rescue plan.

In terms of this plan, which is in simple terms, an agreement between a company and its creditors to settle company debts. There are:

- no prescribed components or exclusions; and
- no creditor may be unfairly prejudiced.

Critically the plan must satisfy 'best interest of creditors' test (i.e. provide each creditor with a better outcome than a liquidation).

In terms of the approach the Process Advisor's rescue plan can take, there is no express limitations. In this regard:

- debts can be written down; and
- different classes of creditors receive different treatment.

For example, whilst in Examinerships, creditors are normally settled with a "lump sum", in a SCARP companies could pay off amounts owed to creditors over a period of, say, three years.

The plan may also involve:

- new investment from current or new shareholders and it may also involve dilution of existing shareholders;
- the reduction of rents (but only with landlords' consent); and
- the repudiation of property leases if necessary for survival.

It is important to note that a lease repudiation involves the landlord calculating their claim i.e. lost rental for the remaining term of the lease less mitigating rent received and any repudiation will require a court application, which would make the process more expensive.

Dealing with State Creditors including Revenue

One of the big issues for SMEs can be legacy Revenue or State Debt. In this process, State Debt (Revenue / Social Welfare Act Debt) is classified as "Excludable Debt".

An Excludable Debt shall be included in a proposal for a rescue plan unless the creditor (Revenue) objects on one of the following grounds:

- tax returns outstanding;
- where there is an ongoing tax audit or intervention;
- where taxes are under appeal;
- where there is a history of non-compliance with tax obligations; and
- such other grounds as may be prescribed.

The Process Advisor must provide the state creditor (usually Revenue but it could also be, for example, a local county council in respect of rates) with a period of 14 days to "opt in". If the state does not respond within the 14 days, the result is that they are automatically included, and the state debts are written down along with other creditors.

Step 7: Rescue Plan Approval

Having formulated a rescue plan, the Process Advisor summons a meeting of members and each class of creditor. The meetings must be held within 42 days of the Processor's Advisor's appointment. To facilitate the short time scale, meeting notices may be sent by email. Creditors are invited to vote (having been provided with 7 days-notice) on the plan by day 49.

For the Rescue Plan to be approved by creditors there must be a 60% majority in number and a simple 51% majority of value in respect of at least one class of creditors. Such approval of one class of creditor voting in favour of the rescue plan will result in it being binding on all creditors.

If there is no objection to the plan and it is approved by creditors there is no requirement to obtain Court approval and the plan becomes binding. A formal objection to the plan can be lodged in the appropriate Circuit Court and with the Process Advisor within 21 days.

4. CREDITOR OBJECTION

There will be SCARP's where creditors wish to object. In order to object to a rescue plan, creditors must file a Notice of Objection with the Process Advisor and the Court.

Grounds for objecting could possibly include:

- the rescue plan unfairly prejudices the interests of the objector;
- the rescue plan is unfair and inequitable in relation to the objector;
- there was some material irregularity at or in relation to a meeting where the plan was approved;
- a member or creditor has been materially prejudiced by not receiving notice of the meeting or any other notice required to be sent under the Act;
- acceptance of the rescue plan by the meeting was obtained by improper means;
- the rescue plan was put forward for an improper purpose; and
- the sole or primary purpose of the rescue plan is the avoidance of payment of tax due.

The Court will sanction a plan unless it is unfair and inequitable or unfairly prejudicial to objecting member/creditor, remembering that the Process Advisor in drafting the plan must ensure that:

- no creditor may be unfairly prejudiced; and
- must satisfy 'best interest of creditors' test (i.e. provide each creditor with a better outcome than a liquidation).

5. THE ROLE OF COURT

Whilst Examinerships provides automatic protection from creditors, SCARP does not. The Process Advisor must make an application to Court for protection from any specific creditor.

Court would also have additional involvement if required to:

- determine questions posed by the process advisor, creditors, ODCE etc.
- can stand down a receiver or provisional liquidator,
- deal with repudiation of onerous contracts including leases, and
- hears objections made by creditors/members to the rescue plan.

6. FAILURE OF PROCESS

Not every SCARP will succeed. If the vote does not pass, the Process Advisor must report to the Board as to why it was not successful, and set out recommendations as to the next steps such as Liquidation etc.

Appendix 1

Meeting of directors to decide to avail of Small Company Administrative Rescue Process

MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF ABC LIMITED (“the Company”)

HELD ON: DATE at TIME

AT: LOCATION

PRESENT: NAME (Chairman & Director)
NAME (Director)

Quorum

- 1 **IT WAS RESOLVED** that NAME be appointed Chairman for the purposes of the meeting. The Chairman took the chair and called the meeting to order. The Chairman noted that notice of the meeting and of the nature of the business to be conducted had been given to all directors entitled to attend the meeting, that a majority of the directors were present and that a quorum was present throughout the meeting in accordance with the Company’s articles of association/constitution. The meeting then proceeded to business.

Minutes

- 2 The reading of the minutes of the immediately preceding meeting was deferred.

Directors’ Interests

- 3 In accordance with the provisions of Section 231 of the Companies Act 2014 (the “Act”), those directors present each declared that he/she had no interest in the business to be transacted at the meeting which would preclude them from participating in the meeting and forming part of the necessary quorum.
- 4 It was noted that, pursuant to Section 137 of the Act at least one of the directors of the Company is resident in the EEA and that each director present did not individually hold more than 25 reckonable directorships, for the purposes of Section 142 of the Act and was therefore eligible to vote on all board resolutions brought before the meeting.

Disqualification and Restriction Orders

- 5 Those directors present each declared that they were not the subject of a declaration made under Section 819 of the Act, or disqualified from acting as a director under Section 839 of the Act or deemed disqualified from acting as a director under Section 840 or Section 841 or subject to a disqualification order under Section 842 of the Act. Those directors present each declared that they had not received any notice under Section 850 or Section 852 of the Act

relating to a restriction or disqualification undertaking and had not received notice of any application made under Section 820 of the Act.

Purpose

- 6 The Chairman advised that the meeting had been convened in order to comply with the provisions of Section 558E. The Chairman explained to the meeting that ABC LIMITED was experiencing financial difficulty and that the purpose of the meeting was to consider the financial position of the Company and to consider whether the company would have / will have a reasonable prospect of survival if the company's debts can be dealt with by using the Small Company Administrative Rescue Process

The Directors then reviewed the independent report of NAME OF PROCESS ADVISOR and resolved, having considered the books and records of the company and the Process Advisors report' that the company appoint Mr/Ms X as the Company's Process Advisor and commence the Small Company Administrative Rescue Process

Filings

- 7 **IT WAS RESOLVED** that the company secretary be and is hereby instructed to attend to the necessary entries in the statutory registers of the Company and on the company's website and to prepare all necessary forms and to attend to all necessary filings in the Companies Registration Office in connection with the aforementioned matters within the requisite timeframes.

Closing of Meeting

- 8 There being no further business, the meeting then ended and **IT WAS RESOLVED** that the Chairman sign the minutes forthwith as a record of the proceedings at the meeting.

NAME
(CHAIRMAN)

Appendix 2

Checklist of matters to prepare prior to engaging an insolvency practitioner / Process Advisor

If you are a director of a Company or an advisor of a Company which may need to avail of a SCARP, you should identify and contact a suitably experienced Process Advisor (insolvency practitioner) and consider the following steps:

1. Commence preparing a pack of information for the Process Advisor such as:
 - a. a brief history of the company,
 - b. an organisation chart,
 - c. summaries of property leases and finance leases,
 - d. summary of employees' salaries and employment history,
 - e. an excel spreadsheet of all creditors to include postal and email addresses,
 - f. cash flow forecasts and trading forecasts,The company's existing external accountant can assist with preparing this information
2. Statement of Affairs (all assets and liabilities of the company at market value)
3. Bring management accounts up to date
4. Submit all tax returns. In particular, ensure that you have adjusted your VAT returns if you have not paid a supplier within the required 6 months
5. Review if trade creditors have valid Retention of Title clauses
6. Obtain valuations of buildings, plant & machinery
7. Consider impact on any ongoing insurance claim for business interruption
8. Consider implementing a "pay freeze" in respect of certain creditors
9. Consider implementing a redundancy programme
10. Surrendering leases to landlords (and thereby quantify their claims now)
11. Open up a new bank account with another bank to avoid set off of accounts