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Corporate insolvencies remain at historically low levels. It is suggested that government support, Revenue warehousing and creditor forbearance are among the reasons. The true impact of Covid-19 on Irish companies is unknown until restrictions are lifted and economic supports withdrawn.

When that happens, we will have a new Debtor-in-Possession tool available in this jurisdiction. It is aimed at 'small and micro' companies which make up 98% of the companies registered in Ireland which have been severely impacted by Covid-19 and for which the costs of examinership (our 30 Year old Chapter 11 equivalent) may be out of reach.

<u>What is SCARP?</u>

On 7 December 2021, the Companies (Rescue Process for Small and Micro Companies) Act 2021 (SCARP) came into operation.

SCARP amends the Companies Act 2014 (the **2014 Act**) to establish a new rescue process for small and micro companies that are, or are likely to be, unable to pay their debts. The new rescue process is modelled on the existing debtor in possession process but has been tailored for small and micro companies. Due to the reduced role of the court in the process, SCARP should be a more accessible and cost-efficient process

<u>Who can avail of SCARP?</u>

The requirements for an eligible company to meet if it wishes to avail of a rescue plan include that:

1. The company is, or is likely to be, unable to pay its debts; and
2. The directors of the company have not utilised this or similar process in the previous 5 years.

A company is a ***small company*** if any two of the following conditions are satisfied:

(a) The turnover of the company does not exceed €12 million;
(b) The balance sheet of the company does not exceed €6 million;
(c) The average number of employees does not exceed 50 people.

A company is regarded as a ***micro company*** if two or more of the following numerical conditions [1] are satisfied:

(i) The turnover of the company does not exceed €700,000;
(ii) The balance sheet of the company does not exceed €350,000; and
(iii) The average number of employees does not exceed 10 people.

<u>How will SCARP operate?</u>

- The directors must prepare a statement of affairs setting out the financial situation of the company and confirm by statutory declaration that they have made a full inquiry into the affairs of the company;

- This statement and statutory declaration are provided to the intended process adviser ("PA") (expected to be an insolvency practitioner) who then determines whether there is a reasonable prospect of survival of the company as a going concern;

[1] Plus another statutory small company measure/test

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- The company must then pass a resolution to appoint the PA within 7 days of receipt of the PA's report, without any need for a court application;

- The PA must immediately begin preparing a rescue plan for the company;

- The creditors of the company will receive notice of the appointment of the PA and the process and should consider whether they object to inclusion of their debt in the process;

- If at any point the PA deems that there is no longer a reasonable prospect of survival of the company, the PA must notify the directors and resign;

- The PA must call meetings of the creditors as soon as possible to consider the rescue plan and not later than 49 days after the date of the passing of the directors' resolution;

- The rescue plan will be deemed to be accepted once 60% in number representing the majority in value of the claims represented at that creditor class meeting have voted in favour of the rescue plan;

- Where the rescue plan is approved the PA must notify the employees, the Revenue Commissioners and any impaired creditor or member within 48 hours;

- The rescue plan is then binding on the company, members, creditors and directors once 21 days have passed from a Court filing of the notice of approval and where no objection has been filed.

Key Features

- The directors of the company remain in control of and responsible for the running of the business;

- Subject to court approval (or an alternative out-of-court procedure), the PA may repudiate contracts that are burdensome if it is necessary for the survival of the company;

- The PA may seek court permission to sell or dispose of charged property but the priority of the charge holder is protected;

- Tax liabilities may be excluded from the rescue plan;

- There is no automatic protection from creditors during the SCARP process, however upon application to the relevant court, a stay on creditor enforcement actions will be available. This may be important where there is a threat of creditor action that could jeopardise the ongoing trade of the business.

Conclusion

Although many features of SCARP are familiar, this is a new and entirely untested process, but it is hoped that companies are pro-active about their restructuring as the option are limited when quality advice is sought too late.

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Barry heads the market-leading insolvency and corporate recovery team at Beauchamps in Dublin, where he advises a wide range of clients on contentious and non-contentious restructuring, insolvency and corporate recovery issues. Barry is a Fellow of INSOL International and Deputy President of INSOL Europe.

Barry previously chaired the insolvency law committee of the statutory Company Law Review Group (CLRG), where he represented the Irish Society of Insolvency Practitioners. He chaired the report recommending the adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

Barry is a past chairman of the Irish Society of Insolvency Practitioners and an active member of the UK Insolvency Lawyers' Association.