



## Examinership, the process, practical issues & outlook

Examinership is Ireland's corporate rescue process which gives an insolvent Company (or group of Companies) protection from its creditors for a period of up to 100 days. The protection afforded under examinership legislation is to facilitate a Company (through a Court appointed Examiner) secure investment and put a legally binding scheme of arrangement in place for the settlement of debts with its creditors.

Once a Company has been placed in examinership by the Court, this prevents any enforcement through either the appointment of a liquidator or a non-statutory receiver. A Company can utilise the examinership legislation to overturn the appointment of a Receiver but there is a very narrow window of time to do so.

When a Company successfully exits the examinership process, the Company continues trading with the business and assets intact, jobs saved but without the

majority (or in some cases any) of the liabilities accumulated prior to entering the examinership.

The opportunity which examinership affords for Companies to restructure is invaluable. Getting early advice prior to and guidance throughout the process is critical to a successful outcome.

### Examinership Process

Obtaining a practical understanding and clear direction on each of the three distinct **stages of the process; entry, during and exit** is paramount to a successful outcome;

#### Entry

- Company **must be insolvent**
- Company must be **suitable for the process** meaning that it should have a reasonably prospect of survival, sufficient cash flow for the 100 day protection period and ideally have the support of stakeholders

- Company (or a Creditor of the Company) must prepare an **ex parte application** to the Court which includes an **Independent Experts Report (IER)**
- IER can now be **prepared by the Company's auditor** which was not always the case
- **Contents of IER clearly set out** in the Companies Act 2014
- **Critical components of the IER** include the projected cash flow for the protection period, any funding requirements, historic or pre-petition liabilities that may require payment and the conditions deemed essential for survival
- IER ultimately **must opine that the Company has a reasonably prospect of survival** if investment is secured and the conditions deemed essential for survival are met
- After the ex parte application is heard, the Court (if satisfied) will likely place the



Company in interim examinership if the Company expresses a concern that the goodwill may be impacted if not placed under Court protection. The Court will list a return date for a hearing to confirm the examiners appointment

- The confirmation hearing will afford the opportunity to stakeholders and creditors attend Court to support, oppose or remain neutral on the examiners appointment

#### During

- During the examinership process, the **Company's directors retain their executive powers** and are ultimately responsible of the day to day running of the Company
- Examiners **main focus is to secure investment** and then **prepare a scheme of arrangement** for the settlement of the debts of the Company
- Examiner will generally **seek investment by publically advertising** for expressions of interest
- Given the time constraints of the process, a **strict timeline** will be outlined to potential investors
- Investors identified will be provided with an **Information Memorandum** and access to a **data room** but only after they have executed a non-disclosure agreement
- After potential investors have been afforded time to review the information provided and potentially meet the

management of the Company, the Examiner will issue a **deadline for submission of offers**

- The offers will be required to clearly outline any **conditionality attaching and clear proof on funding**
- Examiner will then choose the investment that gives the **optimal return** to the Company and creditors
- Examiner will enter into an **Investment Agreement** that will only be conditional upon approval of the scheme of arrangement by the Court

#### Exit

- Once the Investment Agreement is executed and the **investment funds are received**, the examiner will prepare a proposal for a scheme of arrangement for the Company which will identify the classes of creditors and the proposed dividend to each class of creditor
- The Examiner will then **call and chair the creditor and member meetings** which will allow the members and each class of creditor vote on the proposals put forward
- For the proposals to be accepted **at least one class of creditor is required to vote in favour of proposals** and **no class of creditor can be unfairly prejudiced** by the proposals meaning they must receive a dividend at least equal (ideally greater) to what they would receive in a liquidation or receivership scenario

- After the creditors and members meetings are held, the examiner prepares a report to the Court which outlines the scheme of arrangement for the creditors and the outcome of the respective creditors meetings
- The report should identify that at least one class of creditors voted in favour of the scheme and that no class of creditor is unfairly prejudiced by the proposals
- After the report is presented to the Court, the **Court** will consider and **if satisfied** issue an order **approving the scheme of arrangement**
- The Company **successfully exit the process** and the dividends to each class of creditors are discharged

#### Practical Issues

Whilst the legislative framework and timeframe of the protection period afforded under examinership is clear, the practical issues that may arise at each stage of the process and which need to be considered are less obvious. Having an awareness, guidance and direction on these issues is pivotal. Some of these issues are considered below:

- If a company is seeking examinership protection but the Court feels that the **process is being abused** or the **Company is not suitable**, the Court may reject the application meaning the Company will either be placed in liquidation or Receivership.
- The **support of key creditors and employees** during the process will be

required. The Company and its directors must continue trading with minimal disruption so keeping supply lines running with key creditors and financiers whilst also maintaining the support of employees throughout is critical.

- Although the IER should identify the **pre-petition liabilities** that may be required to be discharged to enable the Company to continue trading during the protection period, the Company is **not required to discharge these in full immediately** and an application can be made to the Court if further pre-petition liabilities are identified after the examiners' appointment.
- There are a number of once off opportunities which examinership affords to a Company to include **disclaiming onerous contracts** including property leases, **dealing with secured creditor debts** and **changing work practises** to name but a few. These should all be considered and explored by a Company when considering a potential examination.
- When a Company enters examinership it must be prepared for the possibility of **external investment and new owners** at the end of the process. Although our recent experience has seen 83% of examinerships resulting in the existing owners sourcing the required investment there are no guarantees that the ownership structure will remain intact.
- If the Examiner **does not succeed in obtaining investment**, the protection afforded will be lifted by the Court and the Company will be placed in liquidation or receivership.
- It is also worth noting **that not all claims are impaired** in examinership. Due to the ranking of creditors, certain classes of creditors may be required to be paid in full on the basis that they would receive full payment in a liquidation or receivership scenario. Where the continued support of a creditor is essential to the success of the protection period, this may necessitate the respective claim(s) not being impaired.
- **Connected party debts or monies owed to an officer** of the Company are

not likely to receive a dividend under the scheme of arrangement.

- Although examinership can deal with a Company's secured debts, it **cannot extinguish personal guarantees** which may have been provided as security for corporate debt.
- Offers for investment received by an Examiner which have **onerous conditionality attaching** or do not have **clear proof of funds** are less likely to be considered by the Examiner.
- To allow a Company successfully exit examinership, the **investment pledged must be received** by the Company. Sufficient investment monies will be required to facilitate the payment of the dividends outlined in the scheme of arrangement, any immediate working capital required and the examinership costs.
- The examinership period **does not have to go the distance** to allow a Company a successful exit. If the Examiner has identified the preferred investor and held the meetings of creditors, the Examiner can seek the approval of the Court long before the initial 70 day period expires.

### Outlook

Whilst there are other legislative options for Companies to reach a binding settlement with creditors, these require a higher voting majority than examinerships and do not have a defined timeframe for agreement to be concluded which can lead to procrastination.

The decision to seek the protection of the Court through examinership should not be taken lightly by a Company and its directors, however Irish corporates still seem somewhat reluctant to consider or utilise the process when experiencing financial difficulties. This remains somewhat disappointing given that examinership applications can now also be made in the Circuit Courts, the opportunity that the process affords to reach a binding agreement with creditors and the current success rate of circa 75%.

In an effort to understand the rationale as to why companies do not consider

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or embrace the examinership process earlier, we researched why. SME awareness of the examinership legislation and the personality traits of successful entrepreneurs such as self-confidence, independence and the ability to deal with uncertainty featured prominently.

In the 9 months to the end of September 2017, the number of examinership applications in Ireland increased to 27 which accounted for 4% of total insolvencies in the period. In 2016 the UK had 1,349 Administrations (UK equivalent to examinerships) which represented circa 8.2% of total insolvencies. Although the UK is a much larger market and the administration process is more established, Irish Companies and directors could benefit significantly from considering and embracing the examinership process if they are experiencing financial difficulties.

Examinership affords an opportunity to a Company and its directors to recalibrate an established business with a significantly stronger balance sheet. Getting early advice, guidance and direction throughout the process will safeguard for a successful outcome.

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