

**Department of Enterprise, Trade and Employment's Public Consultation
on Summary Rescue Procedures for Small Companies – 4 March 2021**

Introduction

Banking & Payments Federation Ireland (BPFI) represents over 100 domestic and international member institutions. We mobilise industry's collective resources to represent a collective position in relation to matters and proposals which may impact on members, consumers and the economy.

BPFI welcomes the opportunity to contribute members' views on DETE's Public Consultation on the proposed Summary Rescue Procedure for Small Companies (SRP). We note that the Consultation is to inform the General Scheme of the Bill which DETE is developing.

1. Key elements of the process

Robust restructuring processes typically contain some or all of the following elements:

- 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.

The Summary Rescue Process (SRP) proposed by the CLRG allows a company to apply for a stay on proceedings and focuses on creditor negotiation and the introduction of cross class cram down provisions.

Question 1

Which of the above elements do you consider most important in a simplified process for small companies? Please give reasons for your answer and, if appropriate, set out your views on any other elements you consider important for inclusion.

Members recognise that each element outlined above is important.

The proposed SRP should seek to balance support for businesses while also maintaining the appropriate safeguards for all stakeholders, including creditors.

In particular, members regard the following elements outlined above as most relevant in the SRP:-

- (i) The granting of a stay or moratorium: this would allow a company the time and opportunity to devise a strategy/avail of the SRP without the pressure of meeting their debt obligations for that period.
- (ii) A final approval of a restructuring agreement through an "official body" - in Ireland, the High Court or in some cases, the Circuit Court: to safeguard creditor interests and ensure terms of the SRP are complied with.

The CLRG's Report has raised the possibility of the approval of a rescue plan, without an application to Court, provided that there is no objection from any creditor involved. Members would be supportive of looking at this possibility in the context that there is no objection from any other creditor. In addition, members regard the following additional elements are important factors to be included in the SRP:

- (i) The right of secured creditors to raise an objection to/opt out of the SRP at the initial stages of the process, as a further means to safeguard secured creditors' interests.
- (ii) Reduced complexity and cost to initiate the SRP, ensuring barriers to access are removed.
- (iii) The application of the debtor viability test to companies in advance of them availing of the SRP, akin to the assessment used in the examinership process.
- (iv) The notification of all creditors that the company is seeking to avail of the SRP. All creditors could be identified through ICB/CCR credit checks as an additional safeguard which should be part of a broader due diligence exercise carried out at the initial stage of the SRP.
- (v) Ensuring that the distinction between secured and unsecured creditors is catered for in the SRP, together with a delineation of associated voting rights.

Separately, members also note that consideration could be given to the appointment of specialist Corporate Insolvency judges to the Circuit Court, with the expertise to deal with SRP applications for final approval to ensure an effective and efficient process. Members note that this point would have to be raised with the Courts Service.

2. Excludability

Question 2

Are there any debts which you believe should be excludable from the proposed Summary Rescue Process? Please provide detail for your answer.

Members consider that the following debts could be excludable from the proposed SRP:-

- (i) Employee entitlements in a redundancy scenario. The SRP should preclude employee entitlements being reduced in order to protect employees.
- (ii) Secured debt, in the event that the SRP proceeds despite a secured creditor raising an objection.

In the event that the SRP does not provide for any debts to be excludable then members consider that steps need to be taken under the SRP to ensure that 'connected creditors' do not seek to utilise non-verified debts to out-vote other creditors. Also, consideration needs to be given to how the SRP costs will rank ahead of secured creditors if the SRP is not approved.

3. Disqualification from Entry

Question 3

Do you consider there are any automatic reasons why a company should be disqualified from entering into the Summary Rescue Process?

Members consider that the following are automatic reasons for which a company should be disqualified from entry into the SRP, for a prescribed period of time:-

- Companies which have already availed of the SRP/examinership/scheme of arrangement.
- Companies that have recently had a scheme of arrangement approved by the High Court but have not yet complied with payment terms and/or are having difficulty with such compliance.
- Companies which have debts ratified by a court and where a judgment/court order is held.
- Companies which have not undergone or failed a debtor viability test.

4. Standard forms

Question 4

What information should be sought from creditors via prescribed form by the Insolvency Practitioner upon appointment?

In the first instance, members note that the SRP process should ensure that all creditors are notified that a company is seeking to enter into the SRP. Building in such a provision allowing creditors to be on notice of a proposed SRP is imperative where a swift summary process is envisaged. This could be done by way of an ICB/CCR credit check, detailing all potential creditors, perhaps alongside the debtor viability test as part of a broader due diligence exercise carried out at the initial stage of the SRP.

Members consider that a prescribed form, similar to proof of debt in insolvency proceedings, should be provided to creditors to allow them outline what debt is owed to them, the security (if any) held by them etc.

In an examinership process the creditors are afforded the opportunity to object to the appointment/scheme, and the court would determine if the reasoning for same is valid. A standard form allowing creditors to voice concerns may not be suitable, particularly in the absence of a draft scheme. As a result, members consider that providing details of a proposed draft scheme at the initial stages, including confirmation of the company passing the debtor viability test, would allow for creditors to give their approval in principle or detail any grounds for rejection. In the proposed SRP, where ultimately creditor approval by simple majority in value is a requirement, there should be a mechanism for determining if rejection is justified.

In addition to the prescribed form of information sought, members consider that a reasonable timeframe for the return of these completed forms should be prescribed, to give creditors sufficient time to check and verify their records thoroughly before completing the prescribed forms and returning them.

5. Potential Users

Question 5

Please set out your views in relation to the potential scope of the Summary Rescue Process.

Members consider that the SRP is more suitable to 'micro companies'. Small companies, by definition, could still avail of examinership process. Where a small company has a significant level of debt, or where there is potential for international debt, the examinership process is more appropriate rather than the SRP.

6. Additional Comments

Question 6

Please provide any additional comments you wish to inform the development and direction of policy on a new restructuring process for small companies. This may include comments on the safeguarding of creditors, processes provided for in other jurisdictions etc.

Members have the following additional comments, to inform the development and direction of policy on the SRP:-

Commencement of SRP: Members note that the SRP will commence by way of resolution of the directors of the company (rather than Court application), following a consultation with an insolvency practitioner.

Cross cram down: Members note that the CLRG Report states that the approval of the Court may be required where a cross cram down of any kind forms part of the proposal and this is an important point for Members.

Guarantees: It is important that the SRP does not affect the enforceability of third party guarantees and that the obligations of guarantors are unaffected. The right to pursue a guarantor should be retained in respect of any losses arising. If there is to be a requirement for creditors to serve a notice (similar to Section 549 of Companies Act 2014) on third party guarantors, consideration should be given to a reasonable timeframe for creditors to do so following notification of the creditors meeting in the SRP process.

Disputed Claims: A prescribed process for dealing with disputed claims is critical to ensuring the timely implementation of the SRP. This also ensures both the company and the creditors access to the fair adjudication of debt.

SRP Failure/Termination: The SRP should also provide for events where the scheme under the SRP is not accepted, fails or terminates. All parties should revert to their original positions before the SRP was entered into. In the event that the company is wound up following the SRP, the SRP should outline any applicable prescribed period of time within which a creditor could proceed with a winding up application.

Stay on Proceedings: As an automatic stay on proceedings is not currently proposed as part of the SRP, creditors may need in certain circumstances (such as where a receiver appointed over an asset of the company undergoing SRP has contracted to complete the sale or where there is an urgency due to the statute of limitations to issue court proceedings) to obtain directions/consent from the applicable court as to how to proceed. The SRP should detail the procedure for such applications.

Set-Off: Clarification in the SRP would be welcome as to creditors' contractual rights of set-off without having to obtain the consent of the Insolvency Practitioner/court as is the case in examinership.

Valuation Disputes: These have arisen in examinerships so the SRP should cater for this scenario.

Powers of Insolvency Practitioner: An Insolvency Practitioner should have powers to investigate the property and affairs of the company and to require the assistance of the directors in exercising those powers. This is to ensure sufficient funding for the SRP agreement/prospect for survival after its implementation. The Insolvency Practitioner should also monitor the plan until such time as the scheme is deemed successful.

Duties of Insolvency Practitioner: As a safeguarding mechanism, the SRP should detail the professional obligations and duties the insolvency practitioner owes to the company and creditors, and also any prescribed qualifications to become an insolvency practitioner.

International Recognition: Although unlikely companies availing of the SRP will have significant international trade/debt, the SRP should provide for the scenario where an international creditor may challenge the SRP and how the SRP plan will withstand any legal challenge in the absence of a court approval.