Mapping Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Country Report

IRELAND

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The Irish Perspective on Restructuring

For the past 30 years, Ireland has had one of Europe's most robust restructuring frameworks, namely the examinership process. Borrowing quite heavily from Chapter 11 of Title XI of the United States Code, it is thought that examinership was introduced, at least in part, to attract and retain foreign direct investment from the US. In addition, Ireland also has a Scheme of Arrangement framework, which is almost identical to the Scheme of Arrangement in the United Kingdom. During the last recession, examinership was by far the favoured process for reasons relating to lower threshold of approvals required within classes and expressly described cross class cram down procedures. The examinership process is included in Annex A of the EIR Recast 848/2015. Its goal is to enable the company to successfully restructure and return to viability. The protection of employment was a stated policy goal of the process, although not the only goal. The legislative framework allows for the courts to engage in a balancing exercise to ensure fairness and avoid unfair prejudice. The effect that Brexit will have is uncertain, but it may result in Ireland becoming a *home* for restructuring, in view of its framework for the Scheme of Arrangement, which is not covered by the EIR Recast and the examinership procedure, which is.

PART 1: The General Context of Preventive Restructuring

Function and Aims of Insolvency and Rescue

The early cases on examinership often referred to three significant features of the legislation; the first characterised in judicial pronouncements as providing a 'breathing space' for ailing companies to find new investment and to reach the possibility of agreeing a compromise with their creditors. This is a description of the stay or moratorium, whereby the court orders the appointment of an examiner to the company and the company is put under the protection of the court for a period of time.[3] Prior to the amendment of the Companies Act in 1999, the duration of court protection was 90 days with the

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[3] Companies Act 2014, s. 520.

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possibility of extension. Following the advice of the Company Law Review Group, the 1990 Act was subsequently amended and this duration was reduced to 70 days with the possibility of an extension.[4]

The second purpose, which seemed to motivate the courts in appointing an examiner and supporting the operation of the legislation, was the idea that the rescue of the company and its undertaking would preserve jobs.[5]

Thirdly, there was a perception expressed at that time that the aggressive securitisation practises of banks at that time were precipitating business failure. Usually banks would take security over the entirety of the assets of the company and with the right to appoint receiver and manager, failure to repay would lead to receiverships (often a piecemeal sale of parts of the business) with a final liquidation.[6] Even in modern times post the introduction of the examinership process, receiverships are vastly more significant as an insolvency process. Examinership was presented as an alternative to the appointment of a receiver and manager and subsequent liquidation. Accordingly, the legislation provided for the examiner to have court approved access to assets subject to security and enabled the examiner to exercise borrowing powers of the company. Such borrowing was then sanctioned by the courts and certified as 'expenses' of the examiner; in so doing, the borrowing and its costs then gained priority over existing secured lenders.[7]

Existing Legislative Frameworks

Irish company law always contained provisions which are broadly the same as the provisions in English company law regarding a Scheme of Arrangement. These were originally provided in modern legislation in the 1963 Companies Act under sections 201-204.[8] In addition to the Scheme of Arrangement, the Examinership procedure was introduced in 1990 as a modern preventive restructuring process. It was introduced under the Companies (Amendment) Act 1990, which was subsequently amended in 1999 following a report of the Company Law Review Group , in which some of the most radical aspects of the legislation were criticised.[9] This legislation has now been consolidated in Part 10 of the Companies Act 2014. Since its introduction in 1990, the examinership process has been considered in numerous cases decided by the Irish High Court, the Court of Appeal and the Supreme Court and has been the subject of extensive academic commentary.[10] Interestingly, whilst both Schemes of Arrangement and the Examinership process are equally available to companies in Ireland, the latter is by far the favoured mechanism for preventive restructuring, as is evidenced by figures arising during and after the recent financial crisis and ensuing recession.[11]

[4] Company Law Review Group (1994) 'First Report', para 2.22 available at <http://www.clrg.org/publications/clrg-report-1994.pdf>.
[5] *"It is clear that the principle focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs." Re Traffic Group Ltd* [2008] 3 I.R. 253, 260.
[6] For example the statements from the Irish Supreme Court in *In re Atlantic Magnetics Ltd. (in receivership) [1993] 2 I.R. 561*.
[7] ibid.
[8] They are repeated with some slight modern amendments in ss 449- 455 of the Companies Act 2014.
[9] Company Law Review Group (1994) 'First Report' available at <http://www.clrg.org/publications/clrg-report-1994.pdf>.
[10] Irene Lynch, Jane Marshall and Rory O'Ferrall *Corporate Insolvency and Rescue* (Butterworths, 1996); Irene Lynch Fannon and Gerard Murphy *Corporate Insolvency and Rescue* (Bloomsbury Professional, 2012); Thomas Courtney (ed) *Bloomsbury Professional's Guide to the Companies Act 2014*; John O'Donnell and Jack Nicholas: *Examinerships* (Roundhall, 2016). For an early discussion of this legislation see Irene Lynch 'Goodman International and the 1990 Companies (Amendment) Act.' (1992) DLI Spring 2. See also Irene Lynch 'Saving Jobs - At What Cost? Consideration of the Companies (Amendment) Act 1990' (1994) Irish Law Times 208 and Irene Lynch 'Reform in Haste, Repent at Leisure. A Consideration of the Company Law Reform Group, 1993' (1994) Irish Law Times 189.
[11] In 2014 there were 18 reported and completed examinerships, in 2015, 19 and 2016, 15. In considering the viability of a rescue process generally the comparative figures for liquidations are 68, 50 and 32 to the 3rd Quarter of 2016 and 299, 251 and 346 receiverships. http://www.insolvencyjournal.ie/stats (2017). In this period there was one completed scheme of arrangement *Re Millstream Recycling Ltd* [2009] IEHC 571. Note during the recession the rescue of companies became even more important. The Irish Times notes that 'Of the 420 companies that had an examiner appointed between 2007 and 2016, some 56 per cent of them are now back on their feet.' Irish Times, 13 July 2017.

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Stay of Individual Enforcement Actions

Once the court receives the petition to for examinership, the company is placed under court protection for a period of 70 days from the date of the petition.[12] Court protection equates to a stay of individual enforcement actions and will cease earlier than 70 days should the petition be withdrawn by the petitioner or refused by the court.[13] An extension to the 70 days is available under s.543(3) of the Companies Act; upon on application of the examiner, the court may extend the stay if it is satisfied that extra time is needed for the completion of the report (proposal). In situations where the examiner has submitted the report but the court has not yet adjudicated on it, the stay may be extended under s. 534(4). The legislation does not currently specify a maximum duration for this extension.

Once the examiner is appointed, the stay will end in certain circumstances, namely;

(i) if the court is satisfied that the examiner would be unable to present the report containing the restructuring proposals, thereby implying that no agreement can be reached with creditors or,
(ii) if the court rejects the proposal.

Section 535 provides for the examiner to apply for direction from the court if (s)he cannot enter into an agreement with the relevant parties or cannot formulate the relevant proposals. The court is empowered to make any order it sees fit, which would logically extend to ending the stay, if it appears that the examiner will be unable to restructure. It is possible for proceedings to be commenced against the company with leave from the court under the combined provisions of s.520(4) and 520(5). There is no facility for a creditor to make a case that they will be unfairly prejudiced by or become insolvent as a result of the continuance of the stay.

The Adoption of Restructuring Plans

Similar to the framework in England & Wales, creditors are also afforded voting rights in the Irish Scheme of Arrangement and the common law rules on class formation are the applicable law.[14] There is no provision which specifically mandates the examination of voting rights and class formation by the court, however, there is court sanction of the compromise agreement, similar to the framework in England & Wales.[15] This is a change from legislation which was in place prior to 2014 and which replicated the UK legislation entirely. The proposal in the Scheme of Arrangement becomes binding on a class of creditors once a 'special majority' of 75% by value.

In examinership, the examiner must secure the agreement, expressed by vote, of at least one class of impaired creditors in order for a proposal to be eligible for court confirmation.[16] To be considered a vote in favour, a majority in number representing a majority in value of the claims represented at that meeting must vote in favour.[17] The legislation does not exclude particular creditors from voting. With that said, s.540(1) specifically refers to "members or creditors summoned" to consider the proposals. When read in conjunction with s.541(4) – proposal must be approved by at least one class of creditors impaired by the proposal – it would seem implicit that this excludes creditors unimpaired by the restructuring plan, particularly as only impaired parties have a right to be heard at the court hearing to confirm the

[12] Companies Act 2014, s. 520. Under Irish law, technically, the stay is granted upon petition to the court for the examiner's appointment, however, the petitioner may apply *ex parte* to the court for directions as to proceedings on the same day. If the court sees fit, this *ex parte* application can also to be treated as the hearing of the petition (Ord 75A the Rules of the Superior Courts s.4(4) and s.5(2)), however, in practice this is rare. Accordingly, the court is free to confirm the appointment of the examiner or reject the petition within a short time frame.
[13] Companies Act 2014, s. 520(2).
[14] Companies Act 2014 s 450-453.
[15] Companies Act 2014, s 453(2)(c).
[16] Companies Act 2014, s.541(4).
[17] Companies Act 2014, s.540(4).

proposal.[18] Other individuals may be permitted to make submissions, but their right to be heard is not guaranteed. Parties may also be excluded where they are not considered to be creditors by the court.[19]

The separation of creditors into classes is done according to the priority accorded under sections 621 and 622 i.e. liquidation. The examiner's report must contain a list of the creditors of the company, their priority and the nature and value of any security held by them.[20] In line with the usual rules of ranking (for liquidation), creditors can be divided into preferential, secured and unsecured creditors and may be further subdivided into categories at the discretion of the examiner. There is a clear distinction between super-preferential, preferential, secured and unsecured claims.

In accordance with ordinary priorities applicable in insolvency, employees' claims may:

(i) be accorded preferential status, applicable to claims for payments arising within the previous 4 months of a liquidation event.[21]
(ii) be accorded super preferential status if the claim is for PRSI
(iii) be treated as unsecured.[9]

Given that the voting process and creditor classification forms part of the examiner's report, the court, as part of the approval process, considers and approves them.[22] The court will only approve the examiner's proposals if it is satisfied that they are fair to any affected parties that has rejected them and that they are not unfairly prejudicial to any interested party.[23] The court can also review the classification of an individual creditor if appealed by that creditor under s.543(a) of the Companies Act 2014, which pertains to material irregularity at the meeting.[24]

The Confirmation of Restructuring Plans

All proposals are subject to court approval in order to become binding, both in examinership and the Scheme of Arrangement.[25] Other than the conditions regarding approval in s. 453 there are no conditions specified in the legislation that must be considered by the court in approving the Scheme of Arrangement. However, the Court still retains discretion to reject a scheme on grounds, which have been developed in case law. The Irish courts have also cited English authorities in developing these criteria. [26] An example of a judicially developed criteria is that the court will consider whether the approving majority has been acting *bona fide*. Examinership, on the other hand, is a little more complex. In order to confirm a proposal in examinership, the court must be satisfied that;

[18] Companies Act 2014, s.543(1).
[19] For example in *Re Siac Ltd. [2014] ILRM 357* the Polish Roads Authority, was excluded by the examiner on the basis that outstanding litigation generated uncertainty regarding whether the party was, in fact, a creditor. The court nevertheless agreed to hear submissions from the party.
[20] Companies Act 2014, s.536(f).
[21] This is under rules applicable to preferential creditors generally under s. 621 of the Companies Act 2014. Section 621(b)-(d) apply particularly to issues concerning employees. Super preferential creditor status relates to some social insurance payments which have been deducted by an employer debtor but not returned to the Revenue.
[22] In applying Irish case law, MacCann and Courtney state that the court will only confirm a scheme if it is satisfied that the classes were properly constituted, amongst other criteria. Lyndon MacCann and Thomas Courtney, *The Companies Acts 1963 – 2006* (Bloomsbury 2008) 396 in relation to *Re Colonia Insurance (Ireland) Ltd.* [2005] 1 IR 497 and *Re John Power and Sons Ltd* [1934] 412.
[23] Companies Act 2014, s.541(4)(b).
[24] See John O'Donnell and Jack Nicholas, *Examinerships* (2nd edn, Lonsdale 2016) 136: they argue that such an error or misclassification would have to be determinative i.e. the proposal would not have been accepted by the particular class of creditors, had the particular creditor(s) been correctly classified. The other grounds for objection are laid out in s 543(1)(b)-(d).
[25] Companies Act 2014, 453 (2)(c) and s.541.
[26] See for example the judgment of Barniville J in *Re Ballantyne RE Plc & Companies Act 2014* [2019] IEHC 407: "In conclusion, before sanctioning the Scheme I must be satisfied that the preconditions in Section 453, subsection 2(a) and (b) have been satisfied...I am required in accordance with the principles set out in the case law identified earlier, including the cases of *Colonia* and *Depfa*, to be satisfied that there was no coercion of the minority at the relevant Scheme meeting…I am also required to be satisfied that an honest and intelligent person acting reasonably in his or her own interests could support the Scheme. The starting point is that the Scheme creditors have voted overwhelmingly in favour of the Scheme in the numbers and percentages referred to earlier. As sophisticated investors, it must be assumed that they have carefully considered all aspects of the Scheme and the financial return to them." [para 141-2] See also *Re Pye (Ireland) Ltd* [1985] IEHC 62; *Re Millstream Recycling Ltd* [2009] IEHC 571; *Re Hellenic and General Trust Ltd* [1976] 1 WLR 123.

(i) it has been approved by at least one class of impaired creditors;
(ii) the proposals are fair and equitable to any affected class of members or creditors that has rejected them; and,
(iii) they are not unfairly prejudicial to any interested party.[27]

Otherwise, the courts are empowered to reject a proposal.[28] Irish law mandates that the appointment of an examiner be adequately publicised to maximise the chance for interested parties to be notified that the process has commenced.[29]

The proposal "must provide equal treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favourable treatment".[30] While the Companies Act 2014 does not specifically provide for the rejection of a proposal by the court on the grounds that it would not have a reasonable prospect of success, the courts have viewed it as a key criterion, given the very purpose of the examinership process.[31] It appears that the Irish courts utilise the "next-best-alternative scenario" in confirmation hearings, rather than requiring that creditors must be better off in examinership than they would be in a liquidation. For example, in *Re McInerney Homes* the court refused to confirm the plan from the examiner because the dissenting creditors demonstrated that they would do better under long-term receivership.[32]

Cross-Class Cram-Down

Once the proposal is confirmed by the relevant court, it will be binding on all affected creditors or classes of creditors, included creditors or classes of creditors that dissent. [33] In other words, Ireland operates a cross-class cram-down. The three criteria for court confirmation are outlined above.[34] Arguably, the requirement that the examiner's proposal be "fair and equitable" to dissenting classes of creditors and not be not "unfairly prejudicial to the interests of any interested party" amounts to an unfair prejudice standard.[35]

It is the responsibility of the examiner to defend the proposal and to prove it is not unfairly prejudicial to the court. In assessing this criterion, the court will consider the effect of the proposal on that class, in addition to the predicted effects of alternatives to the proposal. The court balances the outcome of the process for these classes against the overall goal of the rescue and the long-term benefits of the continuation of trade of the debtor. As such, there may be circumstances where a dissenting creditor could have done better under liquidation, but the proposal will still be considered "fair and equitable". This concept has been well-developed through the Irish courts, which have used this 'test' to prevent large and secured creditors from acting solely in their own best interests to the detriment of the collective of creditors and other stakeholders.[36]

Protection of New and Interim Financing

The Irish Scheme of Arrangement mirrors the Scheme in England and Wales in that no statutory provisions grant preferential treatment to new finance. Within examinership on the other hand, interim

[27] Companies Act 2014, s.541(4).
[28] Companies Act 2014, s.541(3).
[29] Companies Act 2014, s.531(2)(3). The examiner is required to supply a copy of the proposal to any interested party upon written application per s.534(5)(c).
[30] Companies Act 2014, s.539(1)(d).
[31] See *Re Tivway Ltd* [2009] IEHC 494; [2010] 3 IR 49 and *Re Clare Textiles Ltd* [1993] 2 IR 213.
[32] *McInerney Homes Ltd v Cos Acts 1990* [2011] IESC 31 (22 July 2011).
[33] Companies Act 2014, s.541(7). Section 541(6) provides similarly for members and classes of members.
[34] Companies Act 2014, s.541(4)(b); The proposal has been approved by at least one class of impaired creditors; the proposals are fair and equitable to any affected class of members or creditors that has rejected them; the proposals are not unfairly prejudicial to any interested party.
[35] Companies Act 2014, s 541(4)(b).
[36] *Re McInerney Homes Ltd and Ors* [2011] IESC 31 and *Re Mount Wolseley Hotel Golf & Country Club & Ors & Companies Acts* [2014] IEHC 24.

and new financing appears to be protected by the legislation and by the courts respectively, through a series of decisions. The degree to which the legislation has been used to achieve protection for new financing has been afforded in more recent times is questionable, however. Normally, new financing is part of the debt-equity swap incorporated in the compromise or restructuring arrangement.[37] As regards interim financing, prior to 1999, the borrowing of the examiner had priority; post 1999, the borrowing of the examiner was ranked after a fixed charge. However, his or her fees, costs reasonably incurred and remuneration ranked before a fixed charge. According to s.554(3), costs "which have been sanctioned by … the court shall be paid in full and … before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company". The legislation makes no specific distinction between new and interim finance, instead any court sanctioned costs of the examiner have priority ranking in subsequent liquidation. This section is considered to have been "specifically designed to encourage loans" to be made to a company, giving "a formal statutory assurance to anyone who lends money to a company during the protection period that he will be repaid in full".[38] In *Re Atlantic Magnetics* the Supreme Court took the view that the court sanctioned costs of the examiner, in this case the repayment of money borrowed "would clearly rank in priority to any claim of any form or secured creditor".[39] The legislation was subsequently amended to rank such expenses "after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company".[40] In practise this provision is used to secure protection for interim financing. It is not used for borrowing of new financing supporting the implementation of a restructuring plan.

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Threshold of Insolvency

Both the Scheme of Arrangement and examinership can be used in circumstances of solvency or insolvency, the former because there is no threshold for entry and the latter because the threshold is that the company is, or is likely to become, unable to pay its debts.[41]

Debtor in Possession

The rescue process cannot proceed under the legislation without the appointment of an examiner. The examiner is regulated in the same manner as other insolvency practitioners. Under s.519 of the Companies Act 2014, a person "shall not be qualified to be appointed or act as an examiner of a company unless he or she would be qualified to act as its liquidator".[42] As examinership includes a mandatory stay and the use of cross-class cram-down, the procedure must be overseen by an insolvency practitioner. By contrast, the Scheme of Arrangement process can be carried out without the aid of an insolvency practitioner. The court may, however, elect to appoint one to the SoA.

Rights *in Rem* under the EIR Recast and the PRD

[37] *Re Goodman International* (28 January 1991), HC, Hamilton P, (1963–1993) Irish Company Law Reports 623. For commentary see Irene Lynch Fannon, 'Saving Jobs-At What Cost? Consideration of the Companies (Amendment) Act 1990' (Irish Law Times 1994) 208.
[38] See the comments of Blayney J in *Re Don Bluth Entertainment* [1994] 3 IR 141, [1994] 2 ILRM 436, 440.
[39] [1993] 2 IR 561, 577. This meant that money, which was alleged to be secured by a fixed charge, could be used by an examiner to obtain a loan.
[40] Companies Act 2014, s.554(4). See also *Re Don Bluth Entertainment Ltd* [1994] 3 IR 141 where the Supreme Court, overturning a High Court decision, ruled that a loan had to be repaid in full in the currency in which it was given i.e. American Dollars, as distinct from repaying the Irish Punt equivalent when examinership ended, the difference between the two figures being approximately £200,000. According to the Court, to repay anything other than the full amount in dollars as of the date of payment would not fulfil the requirements of what was then s 29(3) 3 of the Irish Companies Act 1990.
41 For the Scheme of Arrangement, see the Companies Act 2014, chapter 1, part 9. See also Irene Lynch Fannon and Gerard Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury 2012) chapter 8; and Lyndon McCann and Thomas B Courtney (eds), *Bloomsbury Professional's Guide to the Companies Act 2014* (Bloomsbury 2015) chapter 9 on Mergers and Acquisitions. For examinership, see Companies Act 2014, s 509(1).
[42] Furthermore, "[a] person who acts as examiner of a company when he or she is not qualified to do so under subsection (1) shall be guilty of a category 2 offence" per s. 519(2) of the Companies Act 2014.

The most common exercise of a right *in rem* in Irish law is the right of a secured creditor to appoint a receiver over the asset(s) of a debtor. A receiver can either be court-appointed or appointed by a debenture holder, the latter being by far the most common; where it is the latter, the terms of the debenture (contract) will dictate the circumstances which give rise to the appointment of the receiver. It is common to have a receiver appointed as a receiver-manager, a right that has been severely curtailed under English law by contrast. A receiver-manager takes control of the business, effectively suspending the powers of the directors, and realises the assets in order to repay the creditor or manages the business in order to salvage some or all of it. The debenture holder has a contractual right to appoint the receiver. Irish law, however, permits the displacement of the receiver by the appointment of an examiner as long as the receiver is not in situ for more than 3 continuous days.[43] In this regard, the ability of a secured lender to exercise its rights over a secured asset is compromised by a rescue procedure. Whilst this might give rise to a conflict between the examinership procedure, the EIR Recast article 8 and the fact that examinership is registered in Annex A, this conflict will only arise in relation to assets situated outside the jurisdiction.

[43] It has been the case that the company as debtor in possession applies to have an examiner appointed as a defensive mechanism to the appointment of a receiver. Per Irish Companies Act, s 512(4) "The court shall not give a hearing to a petition if a receiver stands appointed … for a continuous period of at least 3 days prior to the date of the presentation of the petition." This short "window of opportunity" has occasionally given rise to last minute petitions by companies for the appointment of an examiner; in *Re Belohn & Merrow Ltd* [2013] IEHC 157 for example, the Receiver was appointed to Merrow Ltd – the sole registered shareholder of Belohn Ltd – on a Friday and when they became aware of this on the following Sunday, the directors of Merrow Ltd petitioned the court *ex parte* for the appointment of an examiner.