



A Lifeline for Struggling Small Companies in Ireland – An Evaluation of the Small Company Administrative Rescue Procedure

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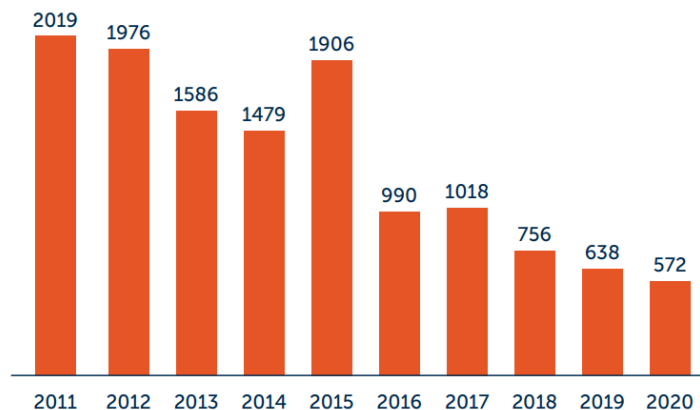
Introduction:

The annualised number of insolvent liquidations as a percentage of all active companies in Ireland, was roughly 0.25% per annum between January 2001 and September 2020¹. According to the Central Bank of Ireland:

“Government supports to firms, loan payment breaks from banks, and forbearance from other creditors are likely applying downward pressure on the insolvent liquidation rate.”²

The following graph demonstrates (with the exception of 2015) the continuing decline in corporate insolvencies, up to 2020³.

Corporate Insolvencies: 10 Year Trend



This decline continued in 2021 with 401 insolvent liquidations, but there was a significant increase in 2022 with 530 recorded (a 24% increase), and again in 2023, with 663 recorded (a 25% increase on the previous year). In the context of all liquidations, corporate insolvencies account for approximately

¹ McGeever, N., Sarchi C. and Woods, M. (2020). *Central Bank of Ireland Economic Letter on Irish Company births and Insolvent Liquidations during the COVID-19 Shock*, Vol. 2020, No. 13, at p. 8.

² Ibid at p. 9.

³ Russell, D. (2021). *Insolvency Trends in Ireland*, CPA Accountancy Plus, September Issue – see: <https://www.cpaireland.ie/getattachment/Resources/CPA-Publications/Accountancy-Plus/accountingcpd-net-courses-%282%29/PCA-Profiles-Personal-Development-%282%29/Insolvency-Trends-in-Ireland-by-David-Russell.pdf?lang=en-IE>

70% of all liquidations in Ireland⁴, and with only six examinerships in 2020, four in 2021, ten in 2022, and 18 in 2023, it is obvious that the majority of companies are not in a position to avail of this corporate recovery mechanism.⁵ According to Neil McDonnell⁶, the Chief Executive of Small Business Group ISME, restructuring smaller businesses was an uneconomic proposition, as only a tiny proportion of Ireland's businesses could afford the cost. The Revenue Commissioners have estimated that an examinership costs between €80,000 and €130,000, and with 98% of all companies in Ireland being classed as small companies⁷, the majority would not be in a position to bear this cost, as it is completely disproportionate to the benefit arising. According to PKF O'Connor, Leddy and Holmes, examinership rarely costs less than €100,000, putting it outside the reach of over 250,000 small companies in Ireland⁸. Consequently, this realisation created an impetus for the Irish Parliament to enact the Companies (Small Company Administrative Rescue Process and Miscellaneous Provisions) Act 2021, which became operative in December of that year⁹. This procedure (known as SCARP) is a process of administrative examinership, with limited Court intervention, intended to alleviate the cost of examinership and provide an alternative route to corporate recovery for companies in Ireland. In effect, the SCARP regime is designed to facilitate small companies struggling with excess debt to continue to trade, while negotiating debt write off and restructure with its creditors¹⁰. According to Chartered Accountants Ireland:

"The purpose of the SCARP is to provide an alternative to examinership, for the benefit of small and micro companies, which is more accessible and cost efficient than the existing examinership process and capable of conclusion within a shorter period of time and to assist viable small and micro companies to remain in business while trading through periods of temporary difficulty."

According to Mazars.ie:

*"The process provides a useful rescue tool for SME's who are facing temporary insolvency. It gives them an affordable option to restructure through a combination of a write-down of debt and new investment."*¹¹

Similarly, the Revenue Commissioners have commented that:

*"SCARP allows companies to restructure their debts, helps companies avoid liquidation, [and] ensures creditors get a better outcome than they would under liquidation."*¹²

⁴ See: <https://www.ifsc.ie/news/highest-corporate-insolvency-levels-since-2018-recorded-in-2023-deloitte-analysis>

⁵ Only 3% of insolvent companies seek to restructure in Ireland, whereas in contrast, in the US, where their Chapter 11 process mirrors Ireland examinership regime, the percentage is 11% - see: <https://isme.ie/wp-content/uploads/2020/04/Administrative-Examinership-Proposal.pdf>

⁶ See: <https://www.lawsociety.ie/gazette/top-stories2/examinership-too-costly-for-most-businesses>

⁷ The majority of small Irish companies employ less than 15 employees.

⁸ See: <https://www.pkf.ie/insights/its-unfair-to-deny-struggling>

⁹ This was achieved through the enactment of the Companies (Rescue Process for Small and Micro Companies) Act 2021 (Commencement) Order 2021, S.I. No. 673/2021.

¹⁰ See: <https://www.deloitte.com/ie/en/services/financial-advisory/research/29-percent-increase-in-insolvencies-year-on-year.html>

¹¹ See: <https://www.mazars.ie/Home/Insights/News-opinions/What-is-SCARP#:~:text=What%20is%20SCARP%3F,of%20debt%20and%20new%20investment>

¹² See: <https://www.revenue.ie/en/tax-professionals/scarp/index.aspx>

In effect, SCARP is a more cost-effective¹³, accessible and speedier alternative to examinership for SME's who are facing insolvency, unless they can restructure their debts. The purpose of this Article is to review the main terms of this legislation.

Eligibility:

In order to avail of this procedure, the company must be classed as either a small company¹⁴ or a micro company¹⁵. A small company is deemed to be one that complies with any two of the following eligibility 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;
- C. The average number of employees does not exceed 50.

In addition, the company cannot be a holding company or an ineligible company¹⁶.

In contrast, a micro company is defined as a company that complies with any two of the following eligibility criteria:

- A. The amount of turnover of the company does not exceed €700,000;
- B. The balance sheet total of the company does not exceed €350,000;
- C. The average number of employees does not exceed 10.

Furthermore, in order to avail of the rescue procedure, the company cannot be an investment undertaking, a financial holding undertaking, a holding company that prepares group financial statements, or a subsidiary that is included in the consolidated financial statements of a higher holding undertaking.

Where a company falls within the scope of this legislation the following conditions must also be met¹⁷:

- A. The eligible company is, or is likely to be, unable to pay its debts¹⁸,
- B. No resolution has been passed by the members or the creditors for the liquidation of the company,
- C. No Court Order has been made for the liquidation of the company,

¹³ The ISME have estimated that the cost of administrative examinership will be approximately €15,000 (depending on how far advanced funding negotiations are) – see: <https://isme.ie/wp-content/uploads/2020/04/Administrative-Examinership-Proposal.pdf>

¹⁴ As per Section 280A, Companies Act 2014.

¹⁵ Ibid at Section 280D.

¹⁶ In accordance with Section 12 of the Companies (Accounting) Act 2017, these include (1) companies that have transferable securities admitted to trading on a regulated market of any Member State, (2) credit institutions, or (3) insurance undertakings.

¹⁷ Section 558B(2).

¹⁸ Section 570 sets out three methods that can be used to prove a company is unable to pay its debts, namely if: (1) a creditor has served on the company a demand for a sum owed exceeding €10,000 and this demand has not been satisfied within three weeks, or two or more creditors has served on the company a demand for a sum owed exceeding €20,000 and this demand has not been satisfied within three weeks; or (2) a creditor has attempted to execute a decree, judgment or order of the court and this has been returned unsatisfied by the county sheriff; or (3) it is proved to the satisfaction of the court that the company is unable to pay its debts. In addition, Section 558B(3) also states that this is proven where the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

- D. The directors of the company have not passed a resolution for the appointment of a process advisor in respect of the company in the previous 5 years, and
- E. No examiner has been appointed to the company in the previous 5 years.

Procedural Requirements:

SCARP is undertaken by a process advisor, who in effect is acting as an independent insolvency practitioner. This is a person who possesses the same qualifications for appointment as a liquidator under Section 633 of the Companies Act 2014¹⁹.

Step 1: The Process Advisor is engaged to prepare a Process Advisory Report

To avail of the small company administrative rescue procedure a director of the company is required to make a full inquiry into the financial affairs of the company, and prepare a statement specifying the relevant financial information of the company, verifying its eligibility to utilise this procedure²⁰. The director is also required to complete a statutory declaration confirming compliance with this obligation²¹, and thereafter, he is required to submit the statement and the statutory declaration to a process advisor.

Upon receipt of this statement and declaration the process advisor is required to determine whether the company has a reasonable prospect of survival as a going concern, either in whole or in part²². This means that the process advisor must be confident that by effecting certain changes to the company, that it will be in a position that it can continue to trade. In making this determination the process advisor is required to take the following matters into consideration:

- A. The availability of company funding, both at present and in the future – for example, can calls be made on any unpaid portion of shares, can the company obtain funding from credit institutions or third party investors, are significant debts outstanding to the company? etc ... In 2013 *Xtravision* was placed into receivership arising from the withdrawal of credit insurance, the effect of this withdrawal meant that the company could not secure trade credit and would have had to pay cash on delivery for all of its stock, and ultimately this led to the liquidation of the company. In *Missford Ltd t/a Residence Members Club [2010]*²³, Justice Kelly made it clear that the use of money deducted by way of VAT and PAYE or Pay Related Social Insurance (PRSI) as working capital was a major factor in influencing the Court not to exercise its discretion in favour of appointing an examiner, as this funding should not be used for this purpose;
- B. Any expressions of interest by external funders, who may be interested in taking a stake-holding in the company – for example, Shamrock Rovers Football Club²⁴ was saved from liquidation in 2005, after the High Court approved a plan for a fan's consortium (known as the 400 Club), and an Australian-based businessman Ray Wilson, to effect a takeover of the club, with each taking a

¹⁹ This individual must be either (1) a member of a Prescribed Accountancy Body, holding a valid practising certificate, (2) a practising solicitor, (3) a member of professional body recognised by IAASA, (4) a person qualified under the laws of another European Economic Area member state (and recognised as equivalent) and/or (5) a person with practical experience of corporate insolvencies/rescues and knowledge of the relevant law.

²⁰ This includes details 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 any other relevant information (as per Section 558B(5)).

²¹ The inclusion of any false or misleading information is classed as a Category 2 breach of the legislation (Section 558B(6)).

²² Section 558C(4), Companies Act 2014.

²³ [2010] IEHC 11.

²⁴ Registered as Branvard Ltd.

50% share – as part of this plan the supporters invested €750,000 into the club by the end of 2005, ensuring that it had a reasonable chance for survival as a going concern;

- C. The business/trading expenses of the company, as well as any cost reductions that may be achieved through the rescue process, and whether these savings will be able to generate enough of a return for the company to enable it to remunerate investment and repay funding²⁵;
- D. The projections and business plans for the company and whether they are based on objective and independent evidence²⁶;
- E. The wider economic situation will also be relevant, as well as the current and future prospects of the market in which the company operates²⁷;
- F. The expertise, brand and historic success of the company;
- G. Whether the company is part of a group of companies (and the group's financial prospects); and
- H. Whether a secured creditor is considering placing the company into receivership, as well as any other factors that the process advisor considers relevant in the circumstances.

Step 2: Approval and Notifications

After determining whether the company has a reasonable prospect for survival, the process advisor must communicate this to the directors, and confirm it in writing. Where this determination relates to the potential viability of the company, a report must also be prepared by the process advisor and submitted to the directors.

This report will verify that the company has met the eligibility criteria, and include details of²⁸:

- A. Company officers (as well as details of any other companies in which they have an interest),
- B. The assets and liabilities of the company,
- C. The creditors and their respective securities,
- D. Whether any deficiencies in the value of assets and liabilities have been adequately dealt with,
- E. Any questionable substantial dissipation of company property prior to the date of the application,
- F. Any required changes to the internal management and controls of the company to ensure its survival,

²⁵ For example, can the company reduce its operational costs, disclaim onerous contracts, write off or restructure all or part of its debt.

²⁶ In *Re Vantive Holdings and Others [2009] IEHC 384*, a property development company applied for examinership, as a consequence of the financial crisis in Ireland, and the resulting collapse in the property market. The initial application for examinership was rejected by the High Court, as no valuations had been exhibited, there was no evaluation in any reasoned or analytical manner of projected future developments of the property market in Dublin, and there were manifest deficiencies in the report of the independent accountant. The independent accountant stated that he based his opinion that the companies had a reasonable prospect of survival on the companies' trading projections, but the Court challenged this as no view was expressed by the accountant as to the reasonableness of the projections or about the assumptions upon which they are based. According to Justice Kelly: *"I have the gravest reservations about the projections on which the independent accountant has relied in forming his opinion. They appear to me to be lacking in reality given the extraordinary collapse that has occurred and the lack of any indication of the revival of fortunes in the property market. The valuations in question are out of date and can hardly be described as truly independent."*

²⁷ According to Friel Stafford: *"... for some businesses, such as retail and hospitality, it will be challenging to assess future viability post-Covid. For example, in respect of pubs, the consensus view is that when pubs do ... re-open that sales in Year 1 will be 55% -60% of 2019 sales, Year 2 will be 75%, year 3 will be 85%. For some pubs, sales will not get back to full 2019 levels due to a change in consumer habits. In respect of fashion retail, Covid has propelled us 10 years into the future, and over 50% of such sales are now carried out online."* See: <https://www.frielstafford.ie/small-company-administrative-rescue-process-scarp/>

²⁸ Section 558D(3), Companies Act 2014.

- G. Their opinion as to whether the proposed rescue plan would offer a reasonable prospect of the survival to the company, and whether this is more advantageous than liquidating the company,
- H. The steps that may need to be undertaken to ensure survival, as well as a draft of the rescue plan, where available,
- I. The funding required to enable the eligible company to continue trading during the rescue period and the sources of that funding,
- J. Their recommendations as to which liabilities incurred prior to their appointment should be paid,
- K. Details of their potential fees and costs,
- L. The relevant court for the purpose of the application²⁹, and
- M. Any other matters the process advisor considers relevant.

Thereafter, the directors of the company must convene a meeting of the Board of Director, to consider passing a resolution to appoint the process advisor, in order to facilitate the potential rescue of the company³⁰. If this resolution is passed and a process advisor is appointed, this is determined to be Day 1 of the SCARP process. Upon appointment, the directors continue to retain control of the management of the company. The process advisor is required to provide the Companies Registration Office with notice of his appointment within two days of the passing of the resolution, and forward them a copy of the resolution to appoint him, and his report regarding the suitability of the company to enter this rescue process. Notice of appointment must also be placed on the company's own website in a prominent position, notified to the Courts and published in *Iris Oifigiúil*.

Step 3: Communication with Creditors

Following his appointment (and no later than Day 5) the process advisor is required to contact the company's employees, members and creditors (including the Revenue Commissioners), as well as any other parties with a financial interest in the company in order to obtain their contact details³¹ and details of their outstanding debt. Creditors are required to acknowledge receipt of this notification (within 7 days) and comply (within 14 days)³². At this stage notification should also be provided to landlords, particularly where there is a possibility of the repudiation of onerous contracts. By Day 12, any non-communicating creditors should be sent a reminder to provide their details.

All the debt of the company is eligible for inclusion in the rescue plan, except debt relating to any tax, duty, levy or other charge of a similar nature owed or payable to the State, any debt or liability arising under the Redundancy Payments Acts 1967 to 2014, the Protection of Employees (Employers' Insolvency) Acts 1984 to 2020, the Social Welfare Consolidation Act 2005, unless the creditors expressly consent to its conclusion³³. These excludable debts are to ensure that SCARP is not being used for tax avoidance purposes. Therefore, at this stage the process advisor should communicate with creditors who have excludable debt, and serve notice on them without delay that the process is

²⁹ Either the Circuit Court or the High Court.

³⁰ This meeting must be held within 7 days of the receipt of the process advisors report (Section 558E(3)). If a decision is made to appoint the process advisor then he required to keep the financial position of the company under review, and if at any point in the process he determines that the company no longer a reasonable prospect of the survival, he has a duty to notify the directors and resign his position. This change in position may arise as a consequence of any relevant matters, including a material change in the company's financial position, or the discovery of material inaccuracies in the financial statement provided to him. Should this situation arise the directors are required to take such steps as they consider appropriate in order to protect the interests of the employees of the company (Sections 558F&G).

³¹ Section 558I, Companies Act 2014.

³² Ibid at Section 558O.

³³ Ibid at Section 558L.

intending to compromise their debt, along with the debts of other creditors. Excludable creditors have 14 days from the initial communication to opt out of the rescue plan³⁴.

Step 4: Presentation of the Rescue Plan

Following his appointment, and the issuance of the relevant notifications, the process advisor must prepare a rescue plan for the survival of the company³⁵. This will include details of the members and creditors of the company, whether they will be impaired by the rescue plan, the nature of any changes required to be made to the management or direction of the company, and determine the time period for these changes to take effect³⁶. For example, regarding the creditors, an unsecured creditor may be asked to consider writing-off a portion of unpaid debt as a bad debt, a secured creditor may be asked to freeze interest payments, facilitate interest only payments for a prescribed period of time and/or place a moratorium on the repayment of the principal, to facilitate the restructure and survival of the company. Similarly, employees may be asked to take a pay freeze or reduction, and the company may be required to implement a redundancy programme. The plan may also require a total or partial replacement of the Board, to ensure expertise in relation to strategic decision making to facilitate long term survival.

Thereafter a meeting of the members and creditors must be convened to approve the plan³⁷, by Day 49 at the latest. Notice of this meeting must include³⁸:

- A. A copy of the proposed rescue plan
- B. A statement of the assets and liabilities of the company as at the date on which the rescue plan was prepared
- C. A description of the likely financial outcome of a liquidation of the company or of the application of a receivership to that company for each class of members and creditors
- D. A statement by the process advisor explaining the effect of the rescue plan, the reasons why it is considered fair and equitable and not unfairly prejudicial, as well as the likely consequences of a failure to approve the rescue plan (including liquidation or receivership)
- E. The process advisor's views on the likely outcome for creditors if the eligible company were to be liquidated – for example, the rescue plan may seek a 40% reduction in unsecured debt, in the hope that the company will be in a position to repay the 60% outstanding, as a consequence of the implementation of the plan. Therefore, if the process advisor determines that the liquidation is only likely to return €0.30 on every €1 owed to this creditor, this plan is more advantageous than liquidation, but in contrast if liquidation is likely to return €0.70 on every €1 owed to this creditor, this plan is less advantageous than liquidation
- F. Information regarding any changes in the management or direction of the company specified in the rescue plan
- G. Details of the remuneration and costs of the process advisor.

³⁴ This is generally permitted where the excludable creditor believes that SCARP is being used for tax avoidance purposes, including where the company has failed at any time to comply with a requirement in relation to the tax imposed, such as where there is a history of non-compliance, or where there is an ongoing revenue audit, intervention or appeal relating to the company's tax liability.

³⁵ Where the process advisor is unable to prepare the rescue plan (because of the financial position of the company), he must notify the directors, employees, members and creditors, and is likely to advise that the company is placed into liquidation.

³⁶ Section 558Q, Companies Act 2014 – in addition, any directors who fails to implement the rescue plan is guilty of a Category 3 breach (subsection (7)).

³⁷ Ibid at Section 558T.

³⁸ Ibid at Section 558U.

Step 5: Approval of the Rescue Plan

In order for the rescue plan to be approved 60% approval is required of those attending the meeting in person or by proxy, and representing a majority in value of the claims represented³⁹. Where approved, notice of approval must be provided to the company's employees, creditors (including the Revenue Commissioners) or members whose claims or interests would be impaired if the rescue plan is implemented, the Court and the Companies Registration Office, within 48 hours of that approval⁴⁰. The rescue plan becomes binding within the 21 days from the date of filing of the notice of approval with the Court, provided no objection has been filed by a creditor or a member within that time period⁴¹ (this is Day 70).

Objections

Where such an objection is filed, the Court will determine whether the objection should be dismissed or upheld⁴². If upheld, the Court is empowered, amongst other things, to modifying the rescue plan, approve any proposed modifications of the rescue plan, order that the decision of any meeting be set aside, or order that any meeting be reconvened. The Court can also order the liquidation of the company.

Where the Court upholds the rescue plans or its modifications, the plan becomes binding on the members, creditors and the company⁴³. Any dismissed objection results in the rescue plan becoming immediately effective. Any modified plan comes into effect on the date specified by the Court. A copy of the Court's Order must also be filed with the Companies Registration Office⁴⁴, and the approval must be notified to all interested parties.

The following graph illustrates the SCARP procedure and the relevant applicable dates⁴⁵:

³⁹ Ibid at Section 558Y.

⁴⁰ Ibid at Section 558Z.

⁴¹ Ibid at Section 558ZB.

⁴² In this situation, the burden of proof is on the process advisor to demonstrate that the rescue plan is not unfair prejudicial to certain creditors, inequitable or put forward for an improper purpose.

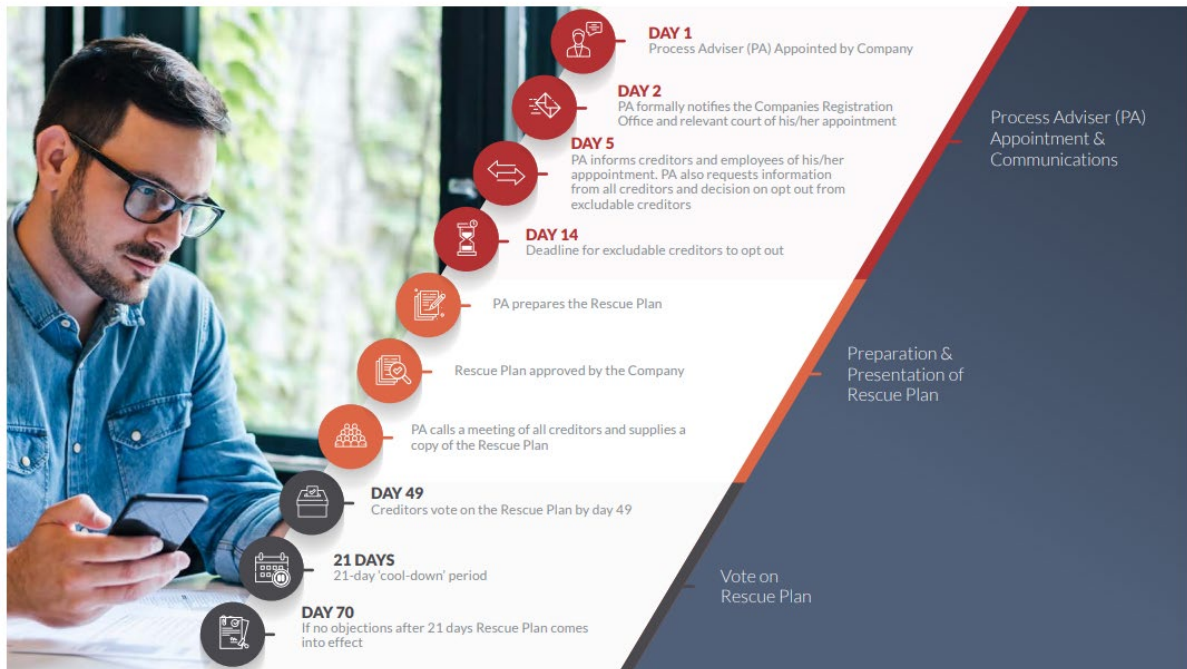
⁴³ Section 558ZD, Companies Act 2014.

⁴⁴ Ibid at Section 558ZE.

⁴⁵ Source: Department of Enterprise, Trade and Employment – see:

<https://enterprise.gov.ie/en/publications/publication-files/small-company-administrative-rescue-process.pdf>

Small Company Administrative Rescue Process



Rights and Powers of the Process Advisor:

The rights and powers of a process advisor are the same as those of a statutory auditor⁴⁶, in that they can access all relevant financial documentation of the company, ask questions/request explanations from company officers and employees, convene and attend general meetings of the company. The process advisor is also entitled to deal with any charged property of the company, where necessary in order to ensure the survival of the company⁴⁷. Furthermore, he is empowered to report to the Director of Public Prosecutions (DPP)/Corporate Enforcement Authority (CEA) if any offence relating to the Company is identified by him in the lawful performance of his functions. This could include offences such as unauthorised directors' loans, false accounting, dissipation of company assets, unfair preferences, fraudulent or reckless trading, insider trading, market manipulation, money laundering, bribery or corruption. He may also be required to apply for Restriction or Disqualification Orders, or request undertakings in this regard.

Resignation of the Process Advisor:

This is effected by the process advisor giving notice in writing to the company⁴⁸. Thereafter, he must notify the Companies Registration Office and the Court (within 7 days). Upon resignation the process advisor is required to state whether there are no circumstances connected with the resignation that he considers should be brought to the notice of the members or creditors of the eligible company, or that such circumstances do exist. Where they do exist, the company must convene a meeting of its members and creditors within 14 days to bring these circumstances to their attention.

⁴⁶ Ibid at Section 558ZS.

⁴⁷ Ibid at Section 558ZV.

⁴⁸ Ibid at Section 558ZW.

Effect of SCARP upon the Company:

- A. **Receivers:** Where a receiver has been appointed to the company for a period not exceeding three working days⁴⁹, or where a provisional liquidator has been appointed the company, then upon appointment the process advisor can make an application to the Court for the removal of the receiver or provisional liquidator, where he believes that the company has a reasonable prospect of survival as a going concern⁵⁰.
- B. **Legal Proceedings:** Upon an application of the company, the directors of the company or the process advisor, the Court can also order the cessation or restraint of all present and future proceedings against the company for the relevant rescue period of the company⁵¹. This is not automatic (such as happens in examinership) and requires the approval of the Court. For example, *Bio Marine Ingredients Ireland Ltd* made an application to the High Court in October 2023 to put a temporary halt on all legal actions by its creditors (owed over €400,000), as six of them had threatened the company with either legal or enforcement proceedings. After hearing affidavit evidence by the company and the process advisor, and the submissions of the relevant creditors, the Court was satisfied that the company had a reasonable prospect of survival as a going concern, and made an Order to restrain enforcement measures against the company.
- C. **Repudiation of company contracts:** The process advisor is entitled to repudiate existing company contracts, where he believes that repudiation would be more advantageous to the creditor than the company being placed into liquidation, where that contract is burdensome to the company, or its repudiation is necessary to ensure the survival of the company. Such repudiation must be notified to the creditor, agreed with the creditor and approved by the Court⁵². For example, where a company has signed a lease in the past, which in the current property market requires them to pay in excess of the marketable rental value of the property, if the company is placed into liquidation, any unpaid rent is likely to be classed as an unsecured debt, and if the liquidation takes three months, this debt is accumulating and preventing the landlord from reletting the property to another party. The accumulation of debt and the likelihood that a portion of this debt may need to be written off as a bad debt, is more disadvantageous than the process advisor repudiating the lease, before the company falls into arrears with rental payments.

⁴⁹ Ibid at Section 558M.

⁵⁰ Ibid.

⁵¹ Ibid at Section 558N.

⁵² Section 558P, Companies Act 2014. In this situation, the process advisor must notify the landlord of their intention to repudiate within 10 days, and consideration must be taken of any proposals/modifications put forward by the landlord to prevent the repudiation of the lease.

#Comparison Between SCARP and Examinership:

The following Table summarises the main differences between SCARP and Examinership in Ireland.

Factors	SCARP	Examinership
Eligible Companies	Small and Micro Companies only	All companies, irrespective of size
Appointment	Undertaken by a Process Advisor, who is appointed by a resolution of the Board	Undertaken by an Examiner, who is appointed by the Court, usually following an application by the company, or its directors
Timeframe for completion	7 weeks with a 3-week objection period (maximum 70 days)	100 days (149 days until 31 December 2022, under temporary COVID-related legislation)
Estimated Cost	€15,000 approximately (ISME)	€80,000-€130,000 approximately
Approval	Requires approval of the creditors – does not require Court approval, unless an objection is raised	Requires Court approval
Percentage Approval	By 60% in numbers of an impaired class of creditors of the company, representing a majority of value of the claims of the creditors within that class	By a simple majority of the voting classes of creditors whose interests or claims would be impaired by the process, provided that at least one of those creditor classes is a class of secured creditors or is senior to the class of ordinary unsecured creditors
Court Applications	Court applications are not required to effect the rescue plan – but there are a limited number of actions in respect of which the process advisor requires Court approval	Court applications are required to effect numerous aspects of the rescue plan
Exclusions	State creditors may be excludable from the process, but only on limited and specified grounds	No exclusions are permitted
Effect on Proceedings	No automatic effect	Automatically results in a stay on all on-going litigation

Repudiation of Onerous Contracts/Leases	Subject to creditor consent	Subject to Court approval, or by the examiner where they have been bestowed with the powers of an official liquidator (Section 9 Companies (Amendment) Act 1990)
Failure of the Rescue Plan	Likely to result in a recommendation for liquidation of the company, which if not effected, will be taken into consideration if the company is subsequently placed into liquidation	Does not automatically result in the liquidation of the company

Conclusion:

According to *Deloitte Ireland LLP*⁵³ by December 2022 (one year after the Act came into effect), the uptake of SCARP was 4.4%⁵⁴. This increased to 6.6% in 2023, and SCARPs operation to date can be summarised as follows:

2022	22 applications (8 successful, 3 unsuccessful – 290 jobs saved, 61 jobs lost) Success Rate: 73%
2023	33 applications (18 successful, 5 unsuccessful – 178 jobs saved, 70 jobs lost) ⁵⁵ Success Rate: 77.7%

This demand for SCARP is expected to continue to increase in 2024, and in particular given that over 60,000 Irish businesses are faced with having to pay back Revenue close to €2 billion in warehoused debt in May of this year (arising from cash-flow and trading difficulties experienced during the COVID-19 pandemic). Undoubtedly, an increasing number of small businesses may need to restructure and

⁵³ <https://www.deloitte.com/ie/en/services/financial-advisory/research/29-percent-increase-in-insolvencies-year-on-year.html>

⁵⁴ One of the first users of SCARP was a Kerry based hospitality business. In this case the rescue plan received the support of the company’s secured creditors, preferential creditors (who were mainly Revenue) and unsecured creditors (Revenue, overdraft facility, credit cards, key supplies etc), despite the fact that the write offs in the arrangement were substantial. Consequently, 20 jobs were saved and indirectly the approval also ensured the future viability of several local suppliers, who were creditors of the company. See: <https://www.quintas.ie/News/scarp-update---fail-to-prepare--prepare-to-fail/>

⁵⁵ According to Baker Tilly Ireland the retail, hospitality, construction and advertising sectors have accounted for half of all Scarp cases to date, including Linen Bundle Europe, Airmid Health Group and the restaurants China Sichuan in Sandford, Brasserie Sixty6 and Rustic Stone. See: <https://www.irishtimes.com/business/2023/11/30/scarp-business-rescue-process-saves-561-jobs-in-two-years/>

SCARP is now viewed as a vital tool in the armoury of small business owners, who may encounter financial difficulty in the months and years to come⁵⁶.

According to Baker Tilly Kirk:

“In a time period where costs are rising, uncertain economic climate and a spike in corporate failures forecast ... [it is] important for businesses to be aware of this process. SCARP is a lifeline that has proven to save small businesses in moments of financial difficulties, giving them a chance to restructure and build a sustainable business plan.”⁵⁷

⁵⁶ Ibid, as per Azets Ireland, Corporate Recovery Partner, Dessie Morrow.

⁵⁷ <https://www.bakertillykirk.ie/scarp-2023/>