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**Bille na gCuideachtaí (Leasú), 2014**  
**Companies (Amendment) Bill 2014**

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*Mar a tionscnaíodh*

*As initiated*

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**BILLE NA gCUIDEACHTAÍ (LEASÚ), 2014  
COMPANIES (AMENDMENT) BILL 2014**

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# Bill

*entitled*

An Act to provide for a system of examinership that will reduce the costs and time involved for companies falling below certain threshold sizes, by amending the Companies (Amendment) Act 1990. 5

**Be it enacted by the Oireachtas as follows:**

## **Interpretation**

1. In this Act— 10

“Act of 1990” means the Companies (Amendment) Act 1990.

“appropriate court” means the Circuit Court, and the exercise of the powers and jurisdiction conferred by this Act shall be within the jurisdiction of the circuit of the Circuit Court in which the company has its registered office in the State.

**Amendment of Act of 1990** 15

2. The Act of 1990 is amended by inserting the following sections after section 36—

**“Criteria to be applied when determining whether restructure is applicable**

36A. Where—

- (a) the liabilities of the company do not exceed €5,000,000, or
- (b) the company employs fewer than 50 people, or 20
- (c) the company has turnover of less than €8.8 million,

the provisions of sections 36B to 36M shall apply in any application by the company for protection.

**Power to apply for a protective certificate**

36B. (1) On receipt of a report, made in the prescribed form, prepared and endorsed by an independent accountant, an examiner, if he or she is of the opinion that the company to which the report applies has a reasonable prospect of survival as a going concern shall: 25

- (a) issue a certificate to that effect;

- (b) furnish the certificate together with a copy of an application for a protective certificate and supporting documentation to the appropriate court.
- (2) Where the examiner is not so satisfied, he shall notify the directors of the company to that effect. 5
- (3) Where the appropriate court receives the application for a protective certificate and accompanying documentation pursuant to section 2 it shall consider the application and documentation and, subject to section 2(4)—
  - (a) if satisfied that the eligibility criteria specified in section 36A have been satisfied, and other relevant requirements relating to an application for the issue of a protective certificate have been met, shall issue a protective certificate, and 10
  - (b) if not so satisfied, shall refuse to issue a protective certificate.
- (4) Where the court issues a protective certificate under this section it shall have the same effect as the court appointing an examiner to a company in accordance with section 2. 15
- (5) The examiner shall notify the Companies Office of the issuance of any protective certificate, and will cause notices thereof in a manner set out at Schedule 1 to appear in two national daily newspapers within 72 hours of the issuance of the protective certificate. 20
- (6) The examiner shall notify all creditors named in the schedule to the independent accountant's report of—
  - (a) the issuing of the protective certificate, and
  - (b) the effect of the protective certificate issuing, 25
 and their right to appeal the making of the protective certificate to the appropriate court including the time limits in which such appeal can be made, and the grounds upon which such appeal can be made.

**Preparation of report in pursuance of section 56 of the Company Law Enforcement Act 2001** 30

- 36C. (1) Within 21 days of the date of issuing a protective certificate the examiner shall prepare and submit to the Office of the Director of Corporate Enforcement a report prepared in accordance with section 56 of the Company Law Enforcement Act 2001.
- (2) Within 21 days of his receipt of the report compiled in accordance with section 56 of the Company Law Enforcement Act 2001, the Director of Corporate Enforcement shall notify the examiner as to whether he is relieved of his duty to bring proceedings against the directors of the company to restrict them from acting as directors in accordance with section 150 of the Companies Act 1990 or disqualify them in accordance with section 160 of the Companies Act 1990. 35 40

### **Right of appeal against the issuing of a protective certificate**

- 36D. (1) Where any creditor is aggrieved by the issue of a protective certificate, that creditor may, within 7 days of serving the notice of the issue of the protective certificate, apply to the appropriate court for an order striking out the protective certificate. 5
- (2) A creditor who brings an application under this section shall give notice to the Companies Office, the company and the examiner, and the application shall be made in such form as is provided for in the rules of court.
- (3) In determining an application under this section the court shall not strike out the protective certificate unless it is satisfied that— 10
- (a) the company has by its conduct within the 2 years prior to the issue of the protective certificate arranged its financial affairs primarily with a view to being or becoming eligible to apply for a protective certificate, or 15
- (b) failing to give such direction would cause irreparable loss to the creditor which would not otherwise occur, or
- (c) matters of a material nature are not disclosed in the independent accountants report, which if disclosed would impact on the examiner’s decision to grant a protective certificate, or 20
- (d) the dominant purpose of the application for a protective certificate is to defraud any of its creditors.
- (4) In determining the costs of the application the court shall have regard to the objective that all the parties to such an application should bear their own costs, save where there are no grounds disclosed in the application to strike out the protective certificate which impact on the examiner’s decision to grant the protective certificate. 25
- (5) A hearing under this section shall be heard with all due expedition and in any event within 14 days of the lodging of the appeal.
- (6) An appeal under this section shall not act as a bar to the examiner preparing proposals for a scheme of arrangement (‘the proposals’). 30

### **Power of examiner to assume executive functions**

- 36E. Where an examiner is of the opinion that the directors are behaving in a manner which is calculated to undermine the examinership or which is calculated to abuse the protection afforded to the company the examiner may assume the executive functions or powers of the directors in accordance with section 9. 35

### **Power to challenge use by examiner of his powers**

- 36F. (1) Where a director or creditor is aggrieved by the examiner exercising his powers under this Act, which shall include the incurring of any expenses, that director or creditor shall, within 7 days of being notified of the power being exercised by the examiner, apply to the Circuit Court for an order restricting the examiner from exercising his powers 40

or incurring such expenses.

- (2) A director or creditor who brings an application for an order restricting the examiner from exercising his powers shall give notice to the company and the examiner, and the application shall be made in such form as is provided for in the rules of court. 5
- (3) In determining an application under this section the court shall not prohibit the examiner from exercising his power unless it is satisfied that the examiner has acted in bad faith in the execution of his or her duties.

**Repudiation of contracts** 10

- 36G. (1) The examiner as part of any scheme may repudiate any contract or the terms of any contract in accordance with section 20.
- (2) Where repayment obligations to secured creditors materially impacts on the solvency of the company the examiner may amend the term over which any loan remaining by the company may be paid so as to ensure the solvency of the company providing the amendment includes a review provision in a period not exceeding 5 years. 15
  - (3) This review will include the right of the creditor to revert the terms of the loan to the original agreement.

**Non-application of certain provisions of the Act** 20

- 36H. Where protection afforded to a company arises from the examiner issuing a scheme of arrangement, the examiner is not obliged to comply with the following provisions, which would otherwise apply:
- (a) section 18(2);
  - (b) section 21; 25
  - (c) section 25B.

**Obligation to obtain court approval**

- 36I. (1) Where a protective certificate has been granted to a company under this Act the examiner shall, within 70 days of the issuing of the certificate, convene a creditors meeting to consider the examiner's proposals for a scheme of arrangement in accordance with section 24(1). 30
- (2) The scheme shall be approved unless a creditor or creditors whose interests are materially impaired in the proposals vote against the proposals at the meeting convened for the purpose of their consideration on the basis that they have been unfairly prejudiced by the proposals. 35
  - (3) Where a creditor or creditors vote against the scheme the examiner shall, within 7 days of the meeting, cause an application to be made to the Circuit Court, at the hearing of which, the court shall determine whether or not the scheme should be approved, such hearing to take place within 14 days of the application to the court by the examiner. 40
  - (4) In considering whether or not to approve the scheme the court shall

have regard to whether or not an objecting creditor has been unfairly prejudiced by the scheme. The court shall have particular regard to any opinion expressed by the examiner as to the prejudice, if any, caused to the objecting creditor.

- (5) In determining the costs of the application the court shall have regard to the objective that all the parties to such an application should bear their own costs. 5

#### **Valuation of security and rent**

- 36J. (1) The value of security in respect of secured debt or the valuation of the market value of the rental income of the property the subject to a lease agreement for the purposes of this Act shall be determined by agreement between the examiner and the secured creditor or lessor. 10
- (2) Where the examiner does not accept a secured creditor's or lessor's estimate of the value, if any, of the security claimed by the secured creditor or the rent claimed by the lessor, the company, the examiner and the secured creditor or lessor shall in good faith endeavour to agree the market value for the security or rental income having regard to any matter relevant to the valuation of security or leasehold, including the matters specified in subsection (5). 15
- (3) In the absence of agreement as to the value of the security or rent, the examiner and the secured creditor or lessor shall appoint an appropriate independent expert to determine the market value for the security or rent having regard to any matter relevant to the valuation of security or rent, including the matters specified in subsection (5). 20
- (4) Where the examiner and the secured creditor or lessor are unable to agree the independent expert to be appointed under subsection (5) the issue may be referred by either of them to the President for the time being of the Law Society who shall appoint such independent person as it considers appropriate to determine the market value of the property or rent concerned having regard to any matter relevant to the valuation of security or leasehold, including the matters specified in subsection (5), and the valuation carried out by such person shall be binding on the company and the secured creditor or lessor concerned. 25 30
- (5) The matters referred to in subsections (1) to (4) as the matters specified in this subsection are: 35
- (a) the type of property the subject of the security;
  - (b) the priority of the security;
  - (c) the costs of disposing of the property the subject of the security;
  - (d) the price at which similar property to that which is the subject of the security has been sold or rented within the 12 months prior to the issue of the protective certificate; 40
  - (e) the date of the most recent valuation or transaction with respect to the property the subject of the security or leasehold and the value

- attributed to the property in respect of that valuation or transaction;
- (f) whether the market for the type of property the subject of the security or leasehold is or has been subject to significant changes in conditions;
  - (g) data made available to the public by the Property Services Regulatory Authority pursuant to Part 12 of the Property Services (Regulation) Act 2011 and which relate to property similar to the property the subject of the security; and 5
  - (h) any relevant statistical index relating to the valuation of the same or similar types of property or rent as the property the subject of the security. 10
- (6) In this section ‘market value’ as respects property means the price that property might reasonably be expected to fetch on a sale in the open market at the date of the issue of the protective certificate and market value as respects rent means the rent that property might reasonably be expected to fetch on the open market at the date of the issue of the protective certificate. 15
- (7) The creditor or lessor and the company shall each pay 50 per cent of the costs of carrying out the valuation by the independent person pursuant to subsection (3) or (4). 20

#### **Secured Debt**

- 36K. (1) The examiner may deal with secured debt in accordance with section 11.
- (2) Where a secured creditor of the company has been notified by the examiner that a protective certificate has been issued in respect of the company the secured creditor concerned shall furnish to the examiner an estimate, made in good faith, of the market value of security. 25
  - (3) The terms of a scheme of arrangement may provide for the manner in which secured debt is to be treated which may include the alteration of the terms of the loan, including an alteration as to the term or the calculation of any interest payment, to a repayment constituting a repayment based on not less than the market value of the security plus 7 per cent. 30

#### **Lease agreements**

- 36L. (1) Where the owner of a property leased to the company has been notified by the examiner that a protective certificate has been issued in respect of the company the owner concerned shall furnish to the examiner an estimate, made in good faith, of the market value of the rental income of the property the subject to the lease agreement. 35
- (2) The terms of a scheme of arrangement may provide for the manner in which the leasehold is to be treated which may include: 40
    - (a) the repudiation of the agreement;
    - (b) the alteration of the terms of the lease to a rent constituting not less

than the market value of the lease plus 7 per cent.

**Steps to be taken by the examiner following acceptance of the scheme of arrangement**

36M. Where a scheme of arrangement is approved in accordance with this section, the examiner shall, as soon as practicable, notify the Companies Office and each creditor concerned and enclose with that notification a certified copy of the scheme of arrangement.” 5

**Short title**

3. This Act may be cited as the Companies (Amendment) Act 2014.

Bille na gCuideachtaí (Leasú), 2014

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# BILLE

*(mar a tionscnaíodh)*

*dá ngairtear*

Acht do dhéanamh socrú maidir le córas scrúdaitheoireachta lena laghdófar na costais agus an t-am atá i gceist do chuideachtaí a thiteann faoi bhun méideanna tairsí áirithe, trí Acht na gCuideachtaí (Leasú), 1990 a leasú

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*An Teachta Stephen S. Donnelly a thug isteach,  
30 Eanáir, 2014*

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Companies (Amendment) Bill 2014

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# BILL

*(as initiated)*

*entitled*

An Act to provide for a system of examinership that will reduce the costs and time involved for companies falling below certain threshold sizes, by amending the Companies (Amendment) Act 1990

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*Introduced by Deputy Stephen S. Donnelly,  
30th January, 2014*

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