DÁIL ÉIREANN

AN COMHCHOISTE UM FHIONTAR, TRÁDÁIL AGUS FOSTAÍOCHT

JOINT COMMITTEE ON ENTERPRISE, TRADE AND EMPLOYMENT

Dé Máirt, 15 Meitheamh 2021

Tuesday, 15 June 2021

Tháinig an Comhchoiste le chéile ag 9.45 a.m.

The Joint Committee met at 9.45 a.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Richard Bruton,	Ollie Crowe.
Paul Murphy,	
Louise O'Reilly,	
Matt Shanahan.	

Teachta / Deputy Maurice Quinlivan sa Chathaoir / in the Chair.

General Scheme of the Companies (Small Company Administrative Rescue Process) Bill 2021: Department of Enterprise, Trade and Employment

Chairman: I thank members and witnesses for participating in today's committee meeting in line with the exceptional circumstances we have to deal with during the Covid-19 pandemic. I remind the committee that, apart from me and members of the committee secretariat, all members and witnesses are required to participate remotely and all members are required to participate from within the precincts of the Leinster House complex only. Apologies have been received from Deputy Stanton and Senators Gavan and Ahearn.

Today we will give consideration to the general scheme of the companies (small company administrative rescue process) Bill 2021. Recently, the Minister of State at the Department of Enterprise, Trade and Employment, Deputy Robert Troy, wrote to the Business Committee seeking an exemption from the normal pre-legislative scrutiny requirements in light of the urgency of getting this Bill enacted. This is the third time the Department has requested an exemption from normal pre-legislative scrutiny requirements from us, and these are not requests to which I agree or ask the committee to agree lightly. Pre-legislative scrutiny is an essential part of our role as legislators. Since the beginning of the year our committee has been very busy and has agreed to pre-legislative scrutiny on the corporate enforcement authority Bill and the sale of tickets Bill, since enacted, and we are to complete pre-legislative scrutiny of the competition Bill.

The general scheme we will be discussing today provides for a rescue mechanism for small and microbusinesses facing financial and trading difficulties exacerbated by the Covid-19 pandemic, with the aim of preventing the closure of otherwise viable companies and providing them with the necessary breathing room to continue in operation and trade their way out of present difficulties. The Minister of State's request to the Business Committee for a waiver of pre-legislative consideration has been passed on to this committee for our observations. Following today's meeting we are required to communicate these decisions to the Business Committee for it to decide on the application for a waiver. As the committee will know, we had been scheduled to commence today's meeting at 9.30 a.m. with the Minister of State at the Department of Enterprise, Trade and Employment, Deputy Troy. Subsequently, however, the Minister of State was unable to attend. A letter to this effect has been circulated to members explaining his reasons. In his place, we are delighted to welcome the Minister of State, Deputy English, who indicated that he would be available from 9.45 a.m., hence the later start time for today's meeting. I am pleased to welcome the Minister of State to brief the committee on the general scheme and on the case for a waiver of pre-legislative scrutiny.

Before we start, I wish to explain some limitations to parliamentary privilege and the practice of the Houses regarding references witnesses make to other persons in their evidence. The evidence of witnesses physically present or who give evidence from within the parliamentary precincts is protected pursuant to both the Constitution and statute by absolute privilege. However, today's witnesses, as I said, will give their evidence remotely from a place outside of the parliamentary precincts and, as such, may not benefit from the same level of immunity from legal proceedings as a witness physically present does. Witnesses are reminded of the long-standing parliamentary practice that they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable or otherwise engage in speech that might be regarded as damaging to the good name of the person or entity. Therefore, if their statements are potentially defamatory in respect of an identifiable person or

entity, they will be directed to discontinue their remarks. It is imperative that they comply with any such direction.

The opening statement of the Minister of State, Deputy English, has been circulated to members, as has a letter to the Business Committee from the Minister of State, Deputy Robert Troy. To commence our consideration of this matter, I now invite the Minister of State, Deputy Damien English, to make his opening statement.

Minister of State at the Department of Enterprise, Trade and Employment (Deputy Damien English): I thank the Chair for the introduction and for facilitating the time change to allow me to participate in the place of the Minister of State, Deputy Troy. I thank the committee for the invitation to discuss the forthcoming Bill to amend the Companies Act 2014 and to provide for a small company administrative rescue process. I am joined online by two officials from my Department, Ms Fiona O'Dea and Ms Tara Keane. They are happy to take any questions if I am unable to answer them. After today's discussion, we will be happy to engage with the committee over the coming weeks. We hope to finalise work on the Bill and bring it to Cabinet on 22 June or the following week. We will then bring the legislation through the Houses and discuss it with the select committee.

The companies (small company administrative rescue process and miscellaneous provisions) Bill is included as a legislative priority on the Government's legislation programme for the summer session. It delivers on a programme for Government commitment to review the Companies Act to simplify and improve examinership laws in response to the Covid-19 crisis and follows on foot of proposals by the Company Law Review Group, CLRG, in response to the Tánaiste's request that it examine the issue of corporate rescue specifically for small companies and advise as to how such a process might be put in place. I know this is an issue the committee has discussed several times and members have sought to find a simplified and less costly process to address the matter.

On 8 July 2020, the Tánaiste requested that the CLRG examine the issue of rescue for the sector. Membership of the CLRG, which is a statutory body, is wide and representative of a broad range of stakeholder experts, making it uniquely well-positioned to advise on company law. It has served us well in this space before. The CLRG submitted its report in October 2020 and recommended a rescue process for small companies, which would be stand-alone and separate from the examinership process, but which would mirror key elements of the examinership legislation. Since receipt of that report, the Department has worked closely with the Office of the Attorney General in developing the CLRG's advice from both an operational and policy perspective. Throughout this process, we have also had strong engagement with the Revenue Commissioners, the Departments of Social Protection and Justice and other relevant stakeholders. In addition, my Department launched a public consultation earlier this year to inform development of the general scheme. The Minister of State, Deputy Troy, notified this committee of the consultation and invited it to make submissions. An overview of all submissions made, the responses to them and the reasoning underpinning those responses is available in a report on the Department's website.

In overall terms, the Department has engaged in a process which has been transparent and accessible and has involved substantial submissions from representative bodies for employers and employees across all sectors and industry professionals in the field of company law and insolvency. As a consequence, I am pleased to note that the general scheme of the Bill has met with a generally positive response from industry and professionals in the field. I ask the joint committee, in considering our request for a waiver of pre-legislative scrutiny, to bear in mind

the role of the CLRG in developing the Bill and the level of engagement with stakeholders in the public consultation.

As members will know, the primary purpose of the Bill is to provide for a small company administrative rescue process, one that can assist viable small and micro-size companies to remain in business, as the economy recovers and supports are phased out, and to try to protect as many jobs as possible.

We know from years of experience that examinership works. It saves both companies and employment. It is internationally recognised and is a successful tool for restructuring, in its own right. However, examinership is overseen by the court from beginning to end. For this reason, it can be an expensive undertaking and, thus, potentially out of reach for the average small company, whether that be a local restaurant, hairdresser or other similar businesses. The small company administrative rescue process is designed to reduce those costs insofar as possible and provide access to an affordable and much-needed avenue of rescue and recovery for small companies in difficulty. It has limited court involvement where creditors are engaged in the process and positively disposed to a rescue plan. However, the option for court involvement remains, if there is no agreement by the creditors. This is an important part of the process.

The Bill replicates key provisions of the examinership model in an administrative context. While it provides for certain novel concepts, it does so by building on a tried and tested framework, with the benefit of years of experience and jurisprudence. The proposals are founded on an existing bedrock of well-understood and well-respected law and they deliver an accessible, fair and balanced process for the broad range of stakeholders impacted by corporate rescue.

The introduction of this legislation, or any new legislation, is not without risk. For this reason, officials in my Department have engaged extensively with the Office of the Attorney General to ensure the process is constitutionally robust and meets the required standards of procedural fairness. Therefore, the process incorporates robust safeguards, including court oversight, where appropriate. It strikes a fair balance between the needs of the company and its creditors.

The main provisions of the Bill can be broadly summarised as follows. The Bill is designed to help small and micro companies, as defined by the Companies Act 2014, which constitute approximately 98% of companies in Ireland. The rescue process is commenced by resolution of directors, rather than by application to the court. It is concluded within a shorter period than examinership. It is overseen and implemented by a qualified insolvency practitioner, to whom we refer in the context of the Bill as "process advisor". The rescue plan can be passed by a majority of creditors. The Bill provides for the format of cross-class cram-down of debts, designed to reduce costs. The process does not require an application to court in circumstances where no creditor objects to the plan. Where creditors do object to the rescue plan, the courts will then have a role in adjudicating the matter, as is currently the case in examinership. The Bill also incorporates safeguards against, and penalties for, irresponsible or dishonest director behaviour.

On foot of recommendations made by the CLRG in its first phase of work in the area of employees' rights as creditors during a liquidation and taking into consideration the Irish Congress of Trade Unions's, ICTU, minority report to the CLRG report, the Bill also enables the Companies Act 2014 to provide for a number of actions that can be addressed in the short term to improve the quality and circulation of information to employees as creditors. In that regard, I am also happy to engage with the committee on the overall plan of action that we discussed previously, as it is not fully dealt with in this legislation. I will also be happy to engage with the committee on its report on this area.

These amendments feature in the plan of action the Minister of State, Deputy Troy, and I published last week. It contains a range of commitments, including amendments to employment law and company law, to enhance protections and ensure transparency for employees in insolvencies.

As we emerge from a sustained period of lockdown, and as Government supports for businesses are gradually phased out, this is a Bill of the utmost importance and urgency. We are all aware of the enormous pressure business owners currently face in terms of not only their immediate liquidity, but also the sustainability of their businesses into the future. This is particularly true of small and micro companies, which employ almost 800,000 workers. Some 78% of small and micro companies operate in sectors that have been particularly challenged by the pandemic, such as retail, hospitality and the service industry. The contributions these companies make to our economy cannot be understated. They will be key to our country's economic recovery, which we want to be jobs led. It is for this reason that the Government is so committed to providing a genuine, alternative rescue framework for these companies.

This Bill is an integral part of Government's response to the economic impact of the pandemic. It provides for a rescue framework for small and micro companies, many of which have been significantly challenged by Covid-19. Our response to the crisis has proven successful in mitigating the immediate impact of the pandemic on these companies, so far. However, as the economy reopens, we must have an appropriate regulatory response, not simply planned but actually in place and available to small businesses. It should support fundamentally viable companies to continue to trade and get themselves back on their feet, and to preserve employment. It is our responsibility to ensure that this essential rescue process is implemented in time to make a difference to these companies. To that end, I ask the joint committee to approve a waiver of pre-legislative scrutiny, so that we may achieve enactment of this important legislation before the summer recess.

As I said, my officials and I are happy to answer members' questions and provide greater detail on the provisions of the Bill. We are also available after the meeting to go through any finer points if members want or need more time on this. We would like to have the support of the committee on the journey of this necessary legislation. As I said, we hope to bring it through Cabinet next week or the week after in order that we can begin the formal process in the Houses of the Oireachtas.

Chairman: I thank the Minister of State. I invite members who wish to speak to raise a hand using the raise hand function on Teams. It is important, when they finish their contribution, that they cancel the raised hand. The first speaker will be Deputy Louise O'Reilly.

Deputy Louise O'Reilly: I thank the Minister of State for attending and facilitating this discussion. I was not expecting him this morning so while he is here, I remind him that we are still waiting on the heads of the Bill for the Workplace Relations Commission, WRC. If he could get that to us as soon as possible, it would be much appreciated. I do not like to be in the position of waiving pre-legislative scrutiny as we all get a lot from it. However, I do understand and accept the urgency in this situation. I welcome the Bill. I am not the only person in that position. At some point we have all referenced the need for examinership "lite", or some version of that, so this is good. However, I do have a couple of questions if that is okay. I may take the opportunity to follow up if that is in order as well.

Regarding speeding up the process, what is the estimated time saving involved? How much quicker is it anticipated that it will be in comparison to the current process? This leads to an-

other question and if it is all right, I will take the two of them together. It is about the cost of it. Does the Minister of State have an estimated cost of the process at this point in the proceedings?

Head 52 relates to the costs and remuneration of process advisers. It indicates that they will use the resources of the company, but they might not exist. We are talking about small businesses, so we are not talking about places that would be massively overstaffed with administration and backroom staff. In the event that it is not there or that it is not forthcoming for whatever reason, could that lead to a situation whereby costs will escalate in a way that would not be desirable? Perhaps the Minister of State will respond to those questions first. I have a couple of other questions.

Deputy Damien English: I thank Deputy O'Reilly for her support in principle for the legislation. I totally accept the concerns about not having pre-legislative scrutiny. I accept that is a process she would not like to see continue. I know we will avoid it as much as we possibly can.

Regarding the other legislation, I hope to have something for the Deputy in the coming week or two. As per my commitment, as soon as I have it, I will share it with everybody, and we will tease it out. I know there has been some engagement with our officials on that piece as well and it can continue because we want to have everybody on board with it is as much as we possibly can.

The rough timeline we expect is that once a process adviser is appointed, he or she has up to 49 days to produce a rescue plan. That is the target. In terms of how long the process will take thereafter, it depends on the rescue plan and what is put in place in that regard. My understanding is that there is no official end time on the process, but the aim is to save companies that are viable and can be protected and to put in place a plan, by agreement, within 49 days.

It is hard to clarify the exact costs that will be involved. At the moment we think the costs of examinership are an issue and a barrier to the process. They are in the region of €80,000 to €120,000 for the normal examinership process. What we expect for this process is somewhere between €20,000 and €50,000. Naturally, if there is full agreement and everyone is on board, there is a quick resolution and a plan is put in place quickly, it could be a lot less. That is roughly what we expect if creditors are in agreement and there is no need to involve the courts in the process. That is based on experience and getting feedback, but I cannot give any guarantees on that. What we hope to do is to put in place a cheaper model if everybody plays his or her part to reduce the costs.

Deputy Louise O'Reilly: That would involve both the co-operation and the staff being available at that point. Clearly, it will cost more then if they are not available. I am trying to get an understanding of what is involved. I expect that the figure of €20,000 to €50,000 would involve the staff being available and additional staff not having to be hired? I suppose the hope is that is what would happen.

I did not see it, but if it is there the Minister of State can point it out to me. Is there any legal mechanism to make sure that wages or moneys owed to the workers – it is not just about the business owners; it must also be about the people working there – are protected as part of the rescue process? I apologise if it is there and I missed it, but perhaps the Minister of State could point it out to me. That would be fantastic.

Deputy Damien English There are two pieces in that regard. As Deputy O'Reilly is aware, statutory entitlements are protected in any of these processes if they are not paid out by

the company. That is clear in law. I accept there is an ongoing debate about strengthening that provision and we are happy to continue the discussion in that regard.

Employees are among the creditors who must agree to the rescue plan. They are very much involved in this process, which they should be in all cases, because they are a major creditor as well. Unless I have missed it – my officials might want to clarify this – there is no enhancement of the statutory rights of employees yet. We are engaged in a conversation on that process. Part of the plan of action is to strengthen the information around employees as creditors and that was part of the process of engagement with the committee and the discussion on the Duffy Cahill report and other reforms as well. The entitlements have not changed in this Bill.

Ms Tara Keane: I might come in to respond to Deputy O'Reilly's question. The ongoing expenses of employees will continue to be paid, as they are critical to the continuation of the business and the normal suite of employment protections will apply. Employees will continue to receive their wages and other statutory entitlements for the duration of the process.

Deputy Louise O'Reilly: I thank Ms Keane very much for the clarification. I also thank the Minister of State. I would like to see something a bit stronger in the Bill in terms of the protections for workers because I sometimes think the focus can go off the people who will be impacted. It is not just the people who own and run the business. We will have an opportunity to discuss that further.

Will there be a register of process advisers so that people can find them quickly? There is a concern that vital time could be lost while one is looking for those supports. A centralised register guarantees minimum qualification and while the qualifications are essential, more importantly, that people looking to access the service would have a one-stop shop where they would be able to access a register and easily find a person to help them through the process. Has the Minister of State given consideration to compiling a register like that?

Deputy Damien English I know that one must be qualified as a liquidator in order to become a process adviser. I will bring Ms Keane in to respond to the question of a register.

Ms Tara Keane: No, we had not given consideration to a register, the reason being that in order to be a process adviser, one must be qualified under section 633 of the Companies Act to be a liquidator. That sets out the various people who can act in that capacity. It would be the typical insolvency practitioners who run examinerships and liquidations, and solicitors. We did not feel there was necessarily a need for a central register, given that it was already established practitioners that companies are used to dealing with in the course of their business.

Deputy Louise O'Reilly: I still think a centrally accessible register might streamline the process a little and make it easier, given the purpose of the Bill. I ask the Minister of State to have a look at that.

Under head 34, could I assume that reference will be made to virtual meetings given that they are becoming a feature of life that will be with us post pandemic?

Ms Tara Keane: There will be. If Deputy O'Reilly looks further on in the Bill, there is an amendment to the Companies Act to include any meetings held under this process in the Companies (Miscellaneous Provisions) (Covid-19) Act. They will come into scope that way.

Deputy Louise O'Reilly: I thank Ms Keane. I missed that.

Ms Tara Keane: That is no problem at all.

Deputy Louise O'Reilly: Could Ms Keane explain to me about head 42, subsections (4) and (5), which concern consideration by members and creditors of proposals? What is the difference in how proposals are accepted under this process and the normal process? Will this perhaps lead to a deluge of objections or does she reckon it will go smoothly enough?

Under the same head, in subsection (7) there is an indication that the State will not object to any plans where a majority vote in favour. Obviously, if the majority back a proposal the State will back off, but that might still lead to some people being disenfranchised.

Ms Tara Keane: There is a possibility that there will be objections. That is just an unfortunate reality. We must provide people with an opportunity to object in order for the process to be compatible with the Constitution. We cannot mandate a write-down of property rights. However, what does happen here is that one only needs one class of impaired creditor to approve the rescue plan, so that means if over 50% in one class approve it then this can be imposed on the other classes. There will then be a cooling off period within which the objections can come in. The extent to which people approve the plan is really dependent on the quality of the process adviser's report and how much he or she has convinced them that this is the best way to go. What process advisers have to do is to prove to creditors that they will be better off in this scenario than they would be if the company were wound up and that they will receive more money this way than that.

Deputy Louise O'Reilly: It will depend more or less entirely on the powers of persuasion of the process advisers.

Deputy Damien English: It is the power of the rescue plan which is key. People have to believe the rescue plan can rescue the company and give it the best chance of getting its debts paid and saving the jobs as well. The Deputy asked about the protection of employees and that is the key here. The real aim is to keep the company viable and operating, and that generally works as well.

It is fair to say Revenue has taken a very responsible approach to the examinership process in general and, in 90% of cases, it does agree with the plans and it does buy in. However, it has to protect the State as well. If there are any issues for Revenue, it is generally based on historical evidence in regard to the company's performance or track record.

Deputy Louise O'Reilly: I thank the Minister of State. I have one more question which relates to head 48, the provision with respect to leases. Most of the businesses I have spoken to in the last 18 months will say that what is driving them into debt is a lack of forbearance by commercial landlords, and "forbearance" is a word I hope we will consign to the dustbin of history post-Covid because, generally, it will be shown that the people talking about forbearance cannot demonstrate when that forbearance is shown. I know there are constitutional issues that the Minister of State has referenced in regard to property rights, and they are difficult to circumvent. There are situations where the debts are effectively strangling a company that might otherwise have a very sound business model and be a very sound business but, due to the commercial rents and the lack of forbearance on the part of commercial landlords, they are being driven into debt and driven towards this process. Has any consideration been given to how that might be supported within the legislation?

Deputy Damien English: Under the rescue plan, the process adviser has the right to re-

pudiate a contract as well, and this also references contracts that are a drain and need to be changed. Ms Keane might want to come in on the specifics because there is an ongoing requirement in regard to the rent thereafter as well.

Ms Tara Keane: As the Minister of State correctly stated, there is a provision in the Bill which allows for the repudiation of contracts. What happens is that, subject to court approval, they can formally accept or reject certain uncompleted contracts to which the company is party. Any party which suffers a loss as a result of that is awarded compensation, and this ranks as an unsecured debt as part of the rescue plan. Where this comes in with regard to leases is that, in examinership, the repudiation clauses are frequently used to renegotiate rents and other onerous contracts. It is actually very unusual for it to end up in court because it provides the stick with which one can encourage those negotiations and mutual reorganisation of the contract. I should also state that this is a particular provision we are looking at quite closely with the Attorney General to refine it and streamline it further.

Deputy Louise O'Reilly: It might be helpful if, following the discussion with the Office of the Attorney General, the Department would provide us with more detailed information. Just to use belt, braces and baler twine, when Ms Keane refers to contracts, she is referring to service contracts with outside agencies, not from within the company.

Ms Tara Keane: Yes, absolutely.

Deputy Louise O'Reilly: I thank Ms Keane.

Deputy Damien English: In general, there are a couple of issues we are happy to come back on when we have the full legislation through Cabinet. The suggestion in regard to the list of potential process advisers is a useful one and is something we can work on as well. I cannot promise it will be ready in time for this but it is something that can follow the legislation.

Chairman: I call Senator Ollie Crowe.

Senator Ollie Crowe: I thank the Minister of State, Deputy English, and his officials for a detailed briefing. As we are all aware, for anyone involved in business or enterprise, the facts are that during the examinership process, the majority of costs are usually of a legal nature. That this legislation is removing the requirement to go to court will certainly help businesses and will reduce costs significantly.

Where a creditor triggers an objection, there is a requirement to have the scheme confirmed by court. Will the Minister of State advise whether he is concerned about disingenuous or frivolous objections, where creditors might use the threat of such objections to attempt to secure enhanced payment for themselves over other creditors? Is this a concern? Was consideration given to imposing penalties for such objections, such as the creditor having to pay any legal costs and so on? I will leave it at that.

Deputy Damien English: I thank the Senator. In regard to the second question, while I was engaged in the preparation of this Bill, I will let Ms Keane comment on whether it was considered, although I am sure it was. The benefit here is to try to encourage everybody to get involved in this process to save the company and protect its ongoing debts in general, so there is a chance of paying them. We hope a majority would buy into this process, as opposed to objecting to it or going into the courts process. I understand the point the Senator is making, that is, that one individual, large creditor could have an impact on the overall process. If it is returned to the courts for an opinion, the reasons for that objection would naturally be first judged by the

courts and they are the best place to do that. Our Constitution contains protection of property rights so, at all times, there has to be access to the courts, if needs be. Naturally, the aim here is that we can avoid that but there has to be full support in general. Ms Keane might want to come in on whether it had been considered previously.

Ms Tara Keane: It was considered previously. We thought it was an unfair balance because when we are talking about creditors, we are often talking about other small companies and perhaps unsophisticated creditors who would not be used to a court process. We felt that to impose a significant penalty on them for raising what could be a valid objection just did not fit in with the overall procedural fairness and robustness of the process, and that it would be disproportionate for them to bear the burden of cost. Also, in examinership, it is for the company and the examiner to prove to the court that the rescue plan is fair, that it is not unfairly prejudicial to any creditor and that the same burden of proof should apply in the SCARP, the small company administrative rescue process.

Senator Ollie Crowe: That is okay. I thank the Minister of State and Ms Keane. I might come back in later but I will leave it at that for now.

Deputy Richard Bruton: I welcome the Minister of State and his team. I warmly welcome this and believe it is timely and much-needed. I have no doubt there are many companies which are carrying burdens and that need restructuring but, underlying that, they are viable companies.

It goes back to the cost of access. The reason we have only about one fifth of the access to examinership that there is in the UK is the very high cost in Ireland associated with going to court. I know the role of the court has been reduced but, on the choice of a requirement for qualification as a liquidator, I would be interested to know why that was required and whether it creates a very high entry barrier for small companies looking to use this procedure.

We get the impression that liquidators are a small group of people and they can almost name their price and, as I understand it, their bill is the first that has to be paid from any resolution. On that element, I would be interested to know why there cannot be a little bit more relaxation in regard to the type of person. Undoubtedly, they need to be capable of assessing and ensuring that no creditor is unfairly prejudiced, and all the rest of it.

Second, I want to understand the threshold for moving ahead with the proposal. Is it that it includes over half of the creditors by value? I know that, obviously, one has to have the power, and I think the term used is to "cram down", although in a fair way, but we cannot let one hold up the overall. How is the threshold decided as to when there are enough creditors on board for the process to proceed, albeit that an objection can still be raised? The speed issue, which Deputy O'Reilly raised, will continue to be a concern. If this runs on for a long time, it will be more difficult and onerous. Will the Minister of State indicate where he thinks the quicker process has been achieved?

Many companies, having come through this process, will be short of capital. There is a risk that viable businesses will become zombie companies in that they cannot get access to new capital. One of the problems with examinership has traditionally been the lack of finance providers willing to take on companies that have been established as financially viable following restructuring. How does the Government intend to approach that? Certain categories of investor get support from the Exchequer in one form or another. For companies coming through this process, will there be a need to establish access to capital? Some of the vehicles the Government has put in place may be suited, but in some cases there may be a need for new equity. Will

that be part of this process? Could the process involve a requirement to have new equity come in and to identify its sources? I am trying to better understand how one would get a company that is temporarily struggling to return to a viable growth path.

Deputy Damien English: I will deal with a couple of the issues the Deputy raised Ms Keane will address the issue of the register. To respond in reverse order, the main aim of these structured resettlements is to assist companies with a sound business model and a viable future, as the Deputy identified. It is generally their legacy debts that are the difficulty. The process of putting the rescue plan in place should deal with ongoing financial costs and highlight where they are part of the plan or access to finance is key to making the plan. Often, companies in this position have a bright future from a trading point of view if they have time to deal with legacy debts. That was the planning process which the Deputy will be familiar with. What we could do----

(Interruptions).

Deputy Damien English: The Bill does not deal with access to finance but it is a major issue which we are tracking in the Department. We would be willing to review the credit guarantee and proposals brought through the system with the approval of the House of the Oireachtas. They are working extremely well and de-risk financial providers of those loans, be they credit unions, mainstream banks or others. They are encouraged to back sustainable businesses because the State and the EU take on some of the risk.

The credit guarantees in place for this and next year, which we have extended, should be sufficient but we can track that and monitor any judgments. The Credit Review Office will deal with refusals of credit. We can track that as well. They are measures in place now that were not in place after the last financial crisis and which would have been of great benefit back then. Structures are in place but we will have an ongoing review of that and track that.

The Deputy referred to equity as opposed to borrowing finance. The SME task force highlighted this as an issue we need to look at to encourage equity stakes in SME communities and microbusinesses. The budget will look at that but there are no proposed changes linked to this legislation. The point is well made and I will track that.

In this case, the threshold for proceeding with a proposal is a majority of creditors by value. That is different to an examinership, which is a majority by value and number. That should result in greater acceptance of the plans.

On the necessity to qualify as a liquidator, it is important that the person who will become process adviser has the qualifications to do the job. The Deputy made the point that it should not be cost prohibitive. A number of people are qualified to do it and it is linked in the legislation. Ms Keane may wish to speak on the specific qualifications but my understanding is that the bar is not especially high but not everybody concentrates on this business. Once this process is in place, we may see a number of companies use it that have not been able to use examinership processes in the past. More people might make themselves available as process advisers.

The question the Deputy will probably ask next is what are the likely numbers. We do not know. The Deputy and many others have made the case strongly that this legislation needs to be put in place and we share that view. We have no idea what the numbers will be like because Government supports, with the backing of the full Houses of the Oireachtas, have kept those

businesses alive to this stage. Only in the recovery stage will we find out what businesses are in a position to continue. Hopefully the majority will, but we have to recognise that some companies will need to avail of a scheme like this. Even at that, this process will not save all companies. Does Ms Keane wish to respond on the issue of qualifications?

Ms Tara Keane: Yes. One has to be qualified as a liquidator, which means it is open to members of an accountancy body, qualified solicitors, members of one of the other professional bodies regulated by the Irish Auditing and Accounting Supervisory Authority, IASSA, suitably qualified people from other member states and people with significant experience of insolvency proceedings under a grandfathering provision. There is a good pool of people from which to choose. However, I take the Deputy's point that there will be a cost involved. We felt it was important for the overall robustness of the process that a specialist person be in place to advise the company. Notwithstanding that this applies to micro and small companies, they may have tricky affairs which need to be considered. It speaks to the overall robustness and protection of creditors if we ensure someone suitably qualified does that, particularly in circumstances where we have removed court supervision.

The Deputy mentioned the point about overall time saving. Currently, examinerships can run for up to 150 days, on the basis of temporary amendments being made under the Companies (Miscellaneous Provisions) (Covid-19) Act. However, they typically last 100 days. This process is expected to conclude in 70 days, which is subject to getting a rescue plan by day 49 and having a 21-day cooling-off period. There will be circumstances in which it can be done more quickly and there is flexibility in the Bill to allow this to happen.

Deputy Richard Bruton: Would it be good for the Department to work with groups like chambers of commerce? People intimidated by the cost of engaging one of these process advisers could then have access to a pre-entry clinic, to use the political word, where there would be people available to give them a *pro bono* steer.

Deputy Damien English: We can certainly look into that. It makes logical sense. Part of the directors and creditors agreeing a plan will be around costs and viability. If the costs are excessive, it will not be possible to use this system and save the company, so it is in everyone's interest that the costs are manageable. The Deputy is right that it can be expensive, which we want to avoid. We will track and monitor that.

We have engagement from all stakeholders on this and we can continue that to see how to use the process to its best ability, once we get it through the Houses with Members' support in the weeks and months ahead.

Deputy Matt Shanahan: I thank the Minister of State and his team. I think everybody agrees this is very important legislation. We need to get it over the line as quickly as possible. Will the Minister of State highlight where Revenue debt and, in particular, leases will be considered in terms of prioritising outstanding debt in this process? We will have companies that have already warehoused Revenue debt. In this proposed process, how will this be dealt with? Is Revenue a preferential creditor which would see no write-down while the burden would be placed on private companies? Maybe the burden will have to be placed on private companies. Could the Minister of State give us an idea about that? The same applies to leases. What is the Minister of State's attitude to leases? Where there is an onerous lease, we are asking the business to get involved in an examinership process, yet the landlord might be saying he cannot take any hit on the lease. There may also be upward-only rent clauses on foot of which payments must be made.

Deputy Damien English: I thank Deputy Shanahan. There are two issues. Leasing, I believe, is dealt with under head 48 in relation to contracts. There is a process to have a conversation with the landlord. There are two issues. Separate from this legislation, we have had an ongoing conversation with the business community on potential legacy debts from rent and arrears. Since the start of the pandemic, the Government, through the Minister for Finance, Deputy Paschal Donohoe, and the Minister for Public Expenditure and Reform, Deputy Michael McGrath, and many others have requested that all landlords and others involved in leasing, be they institutional landlords or private landlords, engage with their tenants to try to find a way through this. We have put in place a voluntary code of conduct to try to enable this process. It has been of assistance in many cases. My Department is doing work on this in conjunction with the Department of Finance to determine whether we need to assist more. An arbitration model that has worked well in other countries is being suggested by some but, in the majority of leasing contracts here, an arbitration process is already identified. Therefore, we are not convinced about what the State could add to the process.

Under the process in the proposed legislation, there is an opportunity for the process adviser to work with all creditors, engage and put in place a rescue plan, which would involve dealing with rents, leases and ongoing costs. There is an opportunity to repudiate contracts and to try to deal with this issue. What the Deputy is talking about is a rescue plan in this regard. As he knows, various supports have been provided by the State on behalf of the taxpayer to the businesses in question. We did not stipulate which costs or bills businesses would pay. That is a decision every business has to make for itself. In most cases of which we are aware, people have sat down with all their providers of services, including in respect of properties, and worked out a payment plan. That is what we would encourage in this regard. Those conversations have gone on. Admittedly, there are still some cases that are not dealt with. Naturally, we do not want legacy debts to drag a business down. We will continue to engage and work on this.

The supports announced under the economic recovery plan will assist businesses with their ongoing costs, certainly their wage costs. The Covid restrictions support scheme, CRSS, is continuing. The new business resumption support scheme, BRSS, payment, to be introduced in September, will assist companies that have still not reached a turnover allowing them to pay their bills. The small business assistance scheme for Covid, SBASC, is in operation and there are various other arrangements. I accept they are not all sufficient to replace lost turnover and profits but they are certainly of assistance in paying some of the bills.

With regard to Revenue, warehousing was mentioned specifically. As the Deputy knows, the option to warehouse debts in this regard was extended beyond August of this year until the end of this year. For all of 2022, there will be no interest charged on the warehouse debt but the charge will kick in thereafter, in 2023. Therefore, one has a full 12 months, after which Revenue will engage on plans for repayment over a suitable period. Revenue has been asked to engage in a pro-business manner. It is engaging in this way and has responded quite well over the past year.

With regard to this legislation, both the Revenue Commissioners and the Department of Social Protection are excludable in respect of the start of this process. In most cases, the Revenue Commissioners have engaged in the examinership process and have been supportive of plans but in some cases, based on historical dealings with a company or some of its directors, they may opt not to do so to protect the State. That is their job. In general, however, the Revenue Commissioners have been quite supportive of the process. Our indications are that they and the Department of Social Protection will continue to be supportive under the legislation under

discussion.

Ms Tara Keane: The Revenue Commissioners, by default, are included in the rescue plan but they have the option to remove themselves based on confined statutory grounds. These all relate to issues where tax returns are outstanding or where the company has a poor history of compliance. The reason we have included this is that when an examiner is appointed, the court will invite the Revenue Commissioners to make a submission on the tax history of the company and confirm the outstanding debts to the State. That does not happen here; they do not have that opportunity so we have included the measure as a safeguard to protect moneys owed to the Irish people. We have drawn the section from the Personal Insolvency Act 2012, which also provides for the Revenue Commissioners to be excludable. The difference, however, is that we have said they can have the option to exclude themselves only on statutory grounds, as opposed to having a carte blanche to exclude themselves. The Revenue Commissioners have indicated to us that, on the personal insolvency side, in circumstances where they are in a position to quantify the debt, they have opted in to over 90% of cases and they have no reason they would not engage in the same manner under this process.

Deputy Matt Shanahan: I thank the Minister of State and Ms Keane. Deputy Bruton raised the issue of approved liquidators. The Minister of State has highlighted the position on solicitors and accountancy firms. What is the position on a small business? We are going to see people entering this process over €10,000. For a large business, this would not be an issue but it is the type of debt that would bring down a micro-company. If businesses are to be referred to large-scale practitioners, the debts that will accrue by the end of the process will probably be in the order of a few thousand euro. Could any arrangement be arrived at under the legislation whereby, with the agreement of the creditors, a de facto accountant could be appointed to engage in the process? This to improve the scheme to try to reduce the cost to micro-businesses.

Ms Tara Keane: There is not such an arrangement under the legislation but it is important to point out that there is nothing excluding micro-companies from entering voluntary agreements with their creditors outside the legislation and reaching mutually agreed positions on write-downs or renegotiated contracts. I accept that the cost of appointing a liquidator may be prohibitive to some companies but it is important to point out also that, at the early stage, before the company decides to appoint someone, the person engaged to give the professional advice is obliged to give the client information on fees and the ongoing costs of the process. It is then up to the directors of the company to determine whether they wish to make a formal appointment. They have the option to shop around. Since solicitors are qualified, it means one's local solicitor is also qualified. It could be somebody who has already given professional advice to the company in another capacity. Therefore, I do not necessarily envisage companies being boxed into using some of the larger firms — in Dublin, perhaps — that are used to running the large-scale examinerships.

Deputy Matt Shanahan: I have another question, on the scheme of creditors. The Minister of State said the decision is made based on the quantum of money. If 51% of the money is to support examinership, that decides the position on the remaining creditors. Has the Minister of State given any cognisance to where a large company that can afford to take the hit might take the debt write-down on the basis of wanting the scheme to go one way, which might impact very negatively on the other creditors?

Deputy Damien English: Again, it is by agreement. If no agreement is reached, an application may be made to the courts to judge on the matter. Any objector to it-----

Deputy Matt Shanahan: Not if the 49% are not in agreement. We have already said that this legislation will provide that the greater quantum, the 51%, will determine whether a scheme of arrangement is put in place.

Deputy Damien English: Everybody, even those who are not part of the simple majority in value, would still have the option to object to the courts. The courts would judge on it. One would have to have specific reasons for objecting. The first phase would involve the making of a judgment.

Ms Tara Keane: The Minister of State has covered most of the points I was going to raise. In addition to doing what he said, we are determining how to refine the provision to make sure smaller creditors are not boxed out of making sure they can protect their interests.

Deputy Matt Shanahan: I thank the Minister of State and Ms Keane.

Deputy Louise O'Reilly: I have a question about the process advisers. I was just sitting here thinking about them and the circumstances that would arise if they were to say they need a certain number of staff. They come from a firm. I am aware that they could be from a local solicitor's office or small firm but, equally, they could be from a firm with a considerable team of background staff. I am sure they will all be lovely people but is there anything to prevent them from saying they need two accountants, that they happen to have two such accountants in their firm and that the company with which they are dealing does not have qualified accountants? All of that is going to add to the cost. I am conscious of what Deputy Shanahan was saying in that we are talking about small companies. I understand completely the purpose of the measure but we need to guard against the possibility that the process advisers might insist on bringing in staff, which would add to a bill. In a large examinership, this is not so onerous but when we are talking about amounts of €10,000 and €15,000 for additional requirements for staff for potentially up to 49 days, that would be burdensome. If I missed it, I will put my hand up but is there anything to prevent this from happening? I do not know if this might be by way of a code of practice. I stress that I do not know these process advisers. I am sure they are all lovely, fine upstanding people but we could have a situation whereby someone will insist that he or she needs a team of accountants and has them back in his or her own company because at the end of the day, the process advisers work for their company. If it is not there, consideration should be given to ensuring that this cannot happen unnecessarily. I understand it is tricky because we must balance that with the fact that the process advisers probably will need some additional help. However, if they are looking at the person who does a bit of part-time book keeping for the company and saying this person is not good enough and he or she needs a qualified accountant or two or five qualified accountants, we could end up with extra costs when this is trying to avoid that. The Minister of State's thoughts on that would be very welcome.

Deputy Damien English: Does Ms Keane want to answer that question?

Ms Tara Keane: First, it is up to the company at the beginning to decide whether to appoint the particular process adviser. The process adviser has an obligation to inform the company of the likely costs of his or her appointment and the ongoing costs throughout the process. That gives the company the information at the start to make an informed decision as to whether this is suitable for it.

In addition, in circumstances where the court has to approve the process adviser's costs, it will have regard to the additional expenses of the process adviser and the extent to which he or she makes use of the facilities available to him or her via the company and his or her own

facilities and whether this incurred an additional cost throughout the process. In conversations with the insolvency practitioners on the Company Law Review Group, the majority of them indicated that in most cases for small and micro companies, anyone who is qualified to act as a liquidator will generally be well equipped to deal with the accounts of these companies.

Deputy Louise O'Reilly: That is very welcome but strengthening it might be helpful. With the greatest will in the world, extra costs could end up being stacked on. I understand an indication will be given but if one has ever had building work done, one always gets an indication but in the final shake up, it is not always exactly what they say. I want to avoid that if possible.

Deputy Damien English: I am not sure if there is any magic way we can deal with the concern but having come late into this process, I will discuss it with Ms Keane and Ms O'Dea to see if we can strengthen it. After the legislation, there may be other things we can do as well. I understand the Deputy's concern but I would also say to a lot of companies that it is important to have full professional advice when they are trying to produce a business rescue plan. Very often, some companies could benefit from that at an earlier stage, which is why we grant aid through the LEOs to encourage that. It is beneficial but the Deputy is right. It cannot be abused and there cannot be unnecessary costs. The Deputy wants to avoid an unnecessary burden caused by bringing in too many professional people at too high a cost. That is certainly something we can look at. I am not convinced it can all be dealt with in legislation but it is certainly something we can look at it. We will take a look at it with the team.

Chairman: Does anyone else want to come in? That concludes our briefing session on the matter today. I thank the Minister of State and his officials for attending and helping us with the briefing. Before the Minister of State goes, I remind him that we discussed the Duffy Cahill report in the past so we are open to an update on that. When he gets a chance, he might come back to the committee on that.

Deputy Damien English: I thank the Chairman for his co-operation and for facilitating my team and me. I am happy to address any further individual queries that might come up and will certainly take back the suggestions made today to see how we can enhance it. There will also be an opportunity to debate this informally in the Houses. In respect of the ongoing conversation around the Duffy Cahill report and the other recommendations and conversations, we have completed our work and produced the plan of action in this space. It is going through Cabinet this week so I can engage with the committee as I committed to do in January. I am not sure where the committee's ongoing discussions are with regard to this topic but I am happy to engage with it on our proposals and any suggestions the committee may have. We did engage briefly with our stakeholders, who we brought together prior to Christmas. There seemed to be general acceptance that we are moving in the right direction. Of course, we always want to add to that and there is some ongoing work from the Company Law Review Group but we will certainly move with any changes we can at this stage and, hopefully, by agreement with the committee. This is something we can always work on in the future so I am happy to engage with the committee. We will link in for a date to arrange that.

Chairman: I thank the Minister of State and his officials. The committee needs to make a decision as to whether we will go into private session or continue in public session to decide whether we will waive pre-legislative scrutiny. Can those who think we should go into private session raise their thumbs? I think it is two and two. We will stay in public session. We can do this quickly anyway.

Having heard the evidence from the Minister of State, the committee is now required to

adopt its observations for the business committee on whether the normal requirement to carry out pre-legislative scrutiny of the Bill can be waived. I invite members to make any comments they may wish to make.

Deputy Louise O'Reilly: I appreciate fully how necessary this legislation is. While we have been very good in facilitating the waiving of pre-legislative scrutiny, I do not want it to unrecorded that this is not best practice and is not ideal. It cannot become a habit. I understand entirely the unprecedented nature of the times through which we are living and the need to expedite legislation. I do not in any propose to delay this legislation but I do not want it to go unremarked either that the waiving of pre-legislative scrutiny is not good practice. It is not something I support as a general rule. Pre-legislative scrutiny is an essential part of the democratic process. In waiving it, I am conscious that we are facilitating necessary legislation but we must also be cognisant that pre-legislative scrutiny is necessary. We need to be cognisant of the frequency with which this is happening and the danger that it might become a habit because none of us want it to become one. Notwithstanding my misgivings, I am happy to waive pre-legislative scrutiny in this instance because I understand that we are all at one on the need for this specific legislation. However, everything can be an emergency if it is left until the last minute and I am anxious that we do not drift into the space where the waiving of pre-legislative scrutiny becomes the norm. Everything becomes an emergency if one leaves it long enough.

Deputy Matt Shanahan: I would be largely in agreement with what Deputy O'Reilly said. We all understand the need for pre-legislative scrutiny but in this instance, it is an emergency regardless of whether it has been deliberately slowed down and I do not think it has. It is a difficult subject to get over the line anyway but we must do so. There are so many businesses that need to look at restructuring. This is an avenue for them to consider and we need to support it as much as we can.

Chairman: I reiterate comments made earlier. We do not want to waive pre-legislative scrutiny but we understand the circumstances surrounding this Bill and how important it is that this legislation goes through the Houses. As we are in the middle of a pandemic and many companies are waiting for this Bill to be enacted, I support the waiving of pre-legislative scrutiny of this Bill. The committee agrees with me as nobody else has objected so we can agree that we have agreed that. We will now request the clerk to write to the Business Committee to convey the position of the committee on this matter.

The joint committee adjourned at 10.50 a.m. until 9.30 a.m. on Wednesday, 16 June 2021.