Public Consultation on Proposals for Summary Process for Small Companies

ICTU Comments CLRG Special Report on Proposals for Rescue for Small Business

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Irish Congress of Trade Unions
31/32 Parnell Square
Dublin 1
www.ictu.ie

Introduction
In general, Congress supports consideration of the extension of pre-insolvency rescue for companies, provided only that such rescue processes preserve employment and that the rights and interests of workers are fully respected and protected.

What follows is essentially a reiteration of the ICTU proposals to the CLRG and our noted reservations in the above CLRG report, some of which are contained in the body of that or as footnotes.

Preliminary – EU Preventive Restructuring Directive (PRD)
In the CLRG report reference is made to the view that the PRD, at Recitals 13 and 16(part of) and Article 4.5, permits Members States to maintain or introduce other restructuring processes in addition to processes introduced in compliance with the Directive, and that, accordingly, this new summary process proposed is not required to be adjusted to comply with any provision of the PRD.

We respectfully and fundamentally differ from that view for the following reasons:

- The process under discussion is one specifically requested for SME's. In this connection it is important to note that the PRD clearly envisages it application to SME's, noting; inter alia, that SME's represent 99% of business in the Union (Recital 17). Other references to SME's are made at Recitals 7, 45, 58, 59& 93 and at Articles 3.4, 4.8, 8.2, 9.4, 11.1 &12.1.

- The reason why CLRG was asked to advise on a process for SME's, and small and micro companies in particular, is because the costs and complexity of Examinership are said to be prohibitive to SME's.

- Given the fact that SME's account for 98% of businesses in Ireland and account for circa 69% of employees, in effect what the CLRG was asked to do was to design a rescue framework which affects rather the vast majority of companies.

- It is therefore difficult to see, if the intention of the PRD is to "… increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt …", how it is possible, even credible, to design a rescue framework for the vast majority of companies in Ireland **without** reference to the PRD, and apparently on the basis that the state ticks the PRD boxes via Examinership ,which is strongly argued as being accessible to only a **small minority** of companies.

- In this connection the EU Commission's March 2020 communication on **"An SME Strategy for a sustainable and digital Europe" confirms its support for Member States "in transposing the PRD by helping them set up early warning mechanisms for companies in financial difficulties".**

- Moreover, the CLRG report makes reference to the PRD in consideration of a number of questions before it e.g. New and Interim Financing & Unfair Prejudice.

- Accordingly, it remains the view of Congress that the proposed procedure is well within the scope of the PRD, particularly in view of the fact that the PRD provides a consistent protective framework for the interests of workers who may be particularly impacted upon by any restructuring.

- Indeed Article 8 PRD provides a framework for the content of restructuring plans. Article 10 1 (c) on confirmation of restructuring plans and further provides that where such plans involve the loss of more than 25% of the workforce they are only binding if confirmed by a judicial or administrative authority. Subject to the conditions therein. Article 13.2 also refers to the mandatory approval of restructuring plans by workers where provided for in national law or collective agreements.

- Therefore, we reiterate the arguments previously made in this regard by our initial submission of August last (attached).

- In particular we reiterate our view as to the exclusion of workers claims as permitted under Article 1.5 and the application of Article 1.6 with regard to accrued occupational pensions.

Duration of the Process
Pragmatism and prudence suggest any proposals should operate initially for the Covid-19 period and should then be subject to further review before any general application.

That having been said, we don't necessarily accept there are no deficiencies in the current Examinership regime, for example "inter alia" with regard to automatic stay on employee claims, cross class cram down and the absence of provisions for employee involvement in any committee of inspection.

Scope of a new Process
We understand the purpose of the exercise is to design a rescue process for small and micro companies as defined in law. However there needs to be a clear understanding that in doing so what is proposed to be designed is a process for the **vast majority of companies in Ireland (see our remarks in Preliminary above).**

Purpose of the process- rescue company or salvageable part of the enterprise?
As to the question of the purpose of any process and whether it should seek to rescue the company or only whatever enterprise of the company that might be salvaged -we agree the purpose should be to save the company, its business and the jobs of the workers employed therein, and not just one element of the undertaking.

Should such a process be available once only?
Congress is concerned with regard to the possibility of abuse via multiple use, even at 5-year intervals. There is potential for its misuse as a substitute for normal management skill and normal commercial and industrial bargaining and relations. Neither would such temptation or moral hazard be necessarily tempered or cured by measures such as those envisaged in concerning miscreant directors, welcome though they would be otherwise. Accordingly safeguards to protect against this are a must and it should not simply be left to the market.

Interaction with other Processes
We are cogniscent that there may be exceptional circumstances in which a company might proceed to Examinership. However, though it is hard to see why or how, if it is the case that cost constrains them in the first place to use a process such as under discussion. This possibility underlines our concerns about abuse and safeguards are a must here also.

Insolvency Practitioner
Congress agrees the qualifications of any insolvency practitioner involved in any such rescue process for small companies should at a minimum be in conformity with the eligible classes of person identified in section 633(1) of the Companies Act 2014.

Congress also notes the provisions of Article 26 of the PRD with regard to the expertise and training of insolvency practitioners and Article 27 regarding their supervision and remuneration and any such rescue process must incorporate the provisions of these articles.

Mechanisms to Commence the Process
Congress notes that looking at comparable EU MS voluntary restructuring processes, that in the case of the French conciliation framework, which the Tánaiste asked the CLRG to look at in particular, the mediator (conciliateur) is appointed by the court. While it is noted that the intention is to reduce costs for small companies, especially at the commencement of any process, there should be some form of either judicial or administrative supervision at commencement, and further examination of the French conciliation process would be merited.

With regard to the question of notice of suspension of payment of debts: the suspension of such debts must be expressly other than debts incurred during the process including "inter alia" the payment of employee remuneration and taxes and levies in respect of such remuneration. In this regard we also reiterate paragraph 8 of our initial submission which referred to Article 18 of PRD on related transactions including inter alia the payment of workers' wages and other payments and obligations arising.

Finally, it is noted that the Statement of Affairs to be furnished in utmost good faith to the Process Adviser mainly deals with financials. It should be supplemented by a due diligence report on employee terms and conditions of employment, agreed with the employees and consistent with the statutory statement of same under the Terms of Employment Information Act 1994.

Stay on Proceedings
Without prejudice to our view expressed in Preliminary points above, that workers' claims should be excluded from the process, Congress agrees there should be no automatic stay. Further, even were there to be the facility for the company to apply to the court for such a stay, any resulting stay **should not apply to workers or their claims for the following reasons: -**

The PRD at Recital 1 stipulates that workers' fundamental rights and freedoms should not be affected. Central to those fundamental rights and freedoms is the right to the vindication of complaints and the opportunity to resolve disputes through the established dispute resolution machinery of the state at the WRC and the civil courts. This fundamental objective is amplified in some detail by the provisions of Article 13.

Article 6.5 of the PRD specifies that any stay as envisaged by Article 6.2 should not apply to workers claims (albeit with a possible derogation in the second paragraph which in turn is premised on a guarantee as described and which is not clear in the Irish context).

Section 678.2 of the Companies Act dealing with the winding up of companies provides that there shall be no stay on the taking of proceedings before the WRC.

There are even more compelling reasons for the same established principle to be applied in the pre-insolvency/ restructuring situation for the protection of workers and the potential stability of the rescue process itself.

Further, there are very strict limitation periods for the submission of complaints of breaches of employment rights legislation (6months extendable to 12 on reasonable grounds).

The limitation period for appeals to the Labour Court of Adjudication decisions is more stringent still at 42 days from the issuance of the Adjudication decision, extendable only in exceptional circumstances.

Finally, we understand that there is no stay on proceedings at all in either the ad hoc mandate or conciliation processes under French law which we have been asked to examine.

Timeframe
Congress agrees it seems sensible to adopt the same timetable of 70 days as for Examinership and which is not hugely different from a typical Part 9 timetable.

Proposals for Compromise or Scheme of Arrangement
With regard to the question of an initial meeting of creditors, Congress is strongly of the view that that there should be an initial meeting of creditors for the reasons stated, including transparency, an opportunity to ask questions, for information to the IP and as an aid to a fair outcome for all parties, especially employees and other small creditors.

It is simply not credible to put the onus on employees or small unsecured creditors to find a way of contacting the IP about concerns they would undoubtedly have, particularly so in employments, of which there are many in this sector, where there is no trade union or representative body to reflect and articulate such employee concerns.

Classes of Creditors
As per our initial submission Congress believes that workers should be constituted in a class of their own, particularly given the possible impact on jobs and terms & conditions of employment of any restructuring:

- Most importantly they invariably fulfil the verifiable criteria for a distinct class reflecting "sufficient commonality of interest "as described in Article 9.4 of PRD by virtue of the following: -

- Further as per the words of Keane J, referred to in CLRG, they also generally fulfil the criteria of a class whose rights are not so dissimilar "as to make it impossible for them to consult together with a view to their common interest."

- They generally have a distinct contractual relationship with their employer, usually a contract of service. Even where they work under a contract for services they may accrue certain rights under employment law.

- Their rights at work are underpinned by contract and/or collective agreement and/ or custom & practice as well as by statute.

- Their relationship with the employer is dependent and continuing.

- Workers are particularly vulnerable in that generally their livelihood and financial obligations are dependent on the progress of the employer company. In fact, it has been commented that they are in a position of "almost complete financial dependence on the income provided by their work" and further of "weak bargaining power when it comes to obtaining payment from their employer firm when it is in financial difficulties" (Employment Law Ed Reagan Tottel 2009 p 396).

- Moreover, in the context of small companies, unorganised (non-union) employees can be particularly vulnerable.

- Further, unlike the employer they do not have the benefit of limited liability and therefore have no insulation from company failure or retrenchment for those livelihoods or financial obligations other that those which they are (rarely)able to provide themselves or which are provided by the state.

- Finally, with regard to Keane J's requirement for consultation with a view to common interest (text of draft report), the right of workers to information and consultation is also underpinned in statute law. (see below at other issues)

Voting Majority and Quorum
Congress is concerned as to the operation in practice of a simple majority and identify with the concern that with a simple majority, only the large creditors are approached to try and get the proposal over the line ASAP without any consideration with regard to other creditors. These worries are amplified where the position of workers and small suppliers is concerned. Finally, we note that in the Dutch WHOA process, which the CLRG has been asked to examine, operates on a 66 &2/3 % majority.

Onerous Contracts
It is noted that according to practitioners such contracts generally relate to property. However, for the purposes of clarity, and existing employment law protections notwithstanding, it is important to state that any definition of onerous contracts must not extend to employment contacts.

In this connection Congress also again draws attention to, "inter alia", Recital 1 and Article 13 of the PRD cited above, and the non-interference with workers fundamental rights and freedoms. This includes the express and implied contractual rights of workers, including those derived from and/or implied by company level, sectoral or national collective agreements. Consequently, Congress is totally opposed to any facility for application being made to the court for the repudiation of employment contracts.

Cross Class Cram Down
Consistent with in our initial submission, Congress is **not in favour of cross class cram down.**

Cross Class Cram Down exclusion?
Again, without prejudice to our Preliminary comments above, as to the exclusion of workers' claims, Congress believes workers' claims **should not be subject to any cross-class cram down and should be excluded.**

In support of this we reiterate most of the arguments advanced in above and which also apply under this heading.

In this connection and consistent with our preliminary arguments above, it is with respect, not tenable to argue that a preventive restructuring process designed to cater for the significant majority of companies in the state is not required to be adjusted to the PRD, the permissive elements of recitals 13 & 16 and Article 4.5 notwithstanding.

However, again without prejudice, we strongly agree that court approval is necessary for any cross-class cram down.

It is noted also that under the Dutch WHOA process that where there is a cross cram down, it must be approved by the court.

It is further noted that, while under current? French law there is no cross class cramdown, under the French conciliation process; it can end on the approval of the court.

Finally, on this particular point, is it is noted that under the French Sauvegarde process, a sauvegarde plan requires court approval after it has heard the debtor company, the administrator, the representatives of the creditors, the supervising creditors and the employee representatives.

With regard to the question of new and interim financing, we reiterate our representations in paragraph 7 of our initial submission that any priority protection of new and/or interim financing should not lead to a worsening of the claims of workers in any resulting insolvency, (including inter alia the provisions of Article 18.4 (c) with regard to workers' wages for work carried out).

Unfair Prejudice Test
More clarification is required with regard to the comparison between the Unfair Prejudice Test in Examinership and the Best Interests of the Creditors Test in the PRD, especially with respect to criteria to be applied.

How should the scheme become binding?
Without prejudice to our arguments with regard to the exclusion of workers' claims, generally and in respect of cross class cram down, Congress does not necessarily oppose an all class creditor rescue plan where no cross-class cram down is proposed and a cooling off period expires without a legal challenge and all classes agree.

However, we identify with the observations of others with respect to court approval, even where all classes agree, particularly with respect to Article 10 of the PRD (already referred to above).

We also strongly agree that **court approval is a must where there is a cross class cram down.**

Finally, again without prejudice, we repeat the observation in our initial submission that the New Zealand Debt Hibernation Scheme law provides that such schemes, agreed with other creditors, are **not binding on workers**, which in turn is not only relevant under this question, but also under (14) & (15) above.

Miscreant directors and officers?
It is vital that there be robust measures put in place to scrutinise and deal with any abuse of process by miscreant directors and company officers.

Congress agrees that directors (and officers) duties should be codified in line with the CLRG 2017 Report and our repeated wider representations in this regard.

Congress also agrees that there should be a statutory duty on the "Process Adviser" to report in the prescribed form to the ODCE and that the current S 682 format should be examined to see if it is fit for purpose in this regard.

We are also of the view that there should be a specific report to the ODCE by the "Process Adviser" on the treatment of workers, similar to the proposals of the CLRG in the 2017 Report. To assist in all this, as per our initial submission we are in favour of the extension of annual compliance statements by directors and other officers.

Regard should also be had to the principles established under Article 19 of PRD.

Which court should have jurisdiction?
If the purpose it to provide for expanded access to preventive restructuring then it seems that the Circuit Court would be more appropriate.

Role for a Statutory Regulatory Body
Overall, Article 26 PRD provides that the Directive envisages any preventative restructuring (or rescue) framework as being under the aegis to some of a judicial or administrative authority.

It is therefore essential that consideration be given to the appropriate body to supervise the process.

Safeguards
It is necessary to encapsulate the safeguards referred to under the various questions above, in particular anti abuse and protective provisions.

Other issues / Information & Consultation
(a)We reiterate our earlier representations on workers' rights to information and consultation established under statute and on the application of the provisions of Articles 8 & 13 of PRD.

(b)Article 3 of PRD provides for Early Warning and Access to Information, including access for debtors and employees' representatives to relevant and up to date information about the availability of early warning tools as well as of the procedures and measures concerning restructuring and discharge of debt. (A 13.3) Also at Article 3.5 the PRD provides Member States may provide support to employees' representatives for the assessment of the economic situation of the debtor.

In this regard, in its March 2020 communication on "An SME Strategy for a sustainable and digital Europe", the EU Commission confirmed its support for Member States "in transposing the PRD by helping them to set up early warning mechanisms for companies in financial difficulties."

Michael Halpenny

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