

Collection Manual

Examinership Caseworking Guidelines

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1 Background/Legislation

Examinership is a process whereby there is a petition before the court for the appointment of an examiner which provides a company with protection from its creditors with the aim of restructuring the company and securing investment. It is an option available to companies as an alternative to liquidation or receivership, where certain criteria are met. The period of protection of the company is 70 days from the date of issuing the court papers but can be extended to 100 days if the examiner is unable to formulate a scheme of arrangement, which will allow the company to survive after examinership, within the initial 70-day period. Once the court makes an order appointing an examiner, no legal proceedings may be initiated against the company and creditors cannot collect any debt incurred by the company up to the date the petition papers are filed with the court.

1.1 Which Court deals with the Examinership

The examinership can be dealt with by the High Court or the Circuit Court. The size of the company may determine which court deals with the company. In general, an examinership application by a company that is considered a small company in respect of the latest financial year ended prior to the date of presentation of the petition, will be dealt with in the Circuit Court.

A company qualifies as a small company if it satisfies 2 of the following 3 conditions:

- (a) the amount of the turnover of the company does not exceed €8.8 million
- (b) the balance sheet total of the company does not exceed €4.4 million
- (c) the average number of employees of the company does not exceed 50.

1.2 Application Process

Section 508-558 Companies Act 2014 deals with examinership. Examinership is initiated by a petitioner making an ex-parte application to either the High Court or Circuit Court. Applications can be made by the company itself, the directors, the shareholders or a creditor of the company. An ex-parte application is one in which the petitioning party is present in court seeking various directions or emergency orders pending a full hearing at a later date. There is an onus on the petitioning party to demonstrate that the ex-parte application is made in the utmost good faith.

Once the applicant issues papers to the court, the company will come under the protection of the court. The court may appoint an interim examiner if deemed appropriate. Once court protection is granted to a company, a date is given by the Judge for a full hearing to appoint the examiner or, where an interim examiner has been appointed, confirm the appointment of the interim examiner over the company. The hearing normally takes place 1-2 weeks after court protection is first granted.

A legal notice is placed in two national newspapers and the *Iris Oifigiúil* and as otherwise directed by the court, advertising that a petition for examinership was presented in respect of the company/companies. The legal notice gives details of the date the petition was presented to the court, whether an interim examiner has been appointed and the date the petition will be heard in court. The legal notice gives creditors and other interested parties notice of the examinership and the hearing and allows them the opportunity to support or oppose the examinership.

1.3 Papers presented to the court

The petition papers grounding the application for examinership are filed with the court by solicitors acting on behalf of the petitioner. Once the ex-parte application is granted, copies of these papers should be served on the notice parties as directed by the court. Some of the documents included in the petition papers are:

- (i) Petition seeking the appointment of an examiner
- (ii) Grounding affidavit sworn by the petitioner (usually, but not always, a director of the company)
- (iii) The Independent Expert Report (IER)
- (iv) Affidavit of suitability

The IER and grounding affidavit should contain certain information including background information on the company, the company's trading history, an outline of the circumstances which led to the petition being presented, a summary of the factors that indicates that the company has a 'reasonable prospect of survival' as a going concern, and that creditors are likely to receive a higher dividend in an examinership than in a liquidation or receivership.

The main conditions that must be met when petitioning to place a company into examinership (and which must be included in the IER) include:

- The company must be insolvent or pending insolvency and unable to pay their debts as they fall due
- There is no resolution for the winding up of the company and no order has been made for the winding up of the company; (If a petition to wind up has been issued, the winding up petition will be adjourned to be heard with the examinership petition)
- No receiver has been appointed within the previous 3 days prior to the company petitioning for the appointment of an examiner
- The company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency (NAMA), or if the company has such an obligation – (i) a copy of the petition has been served on that agency and (ii) the court has heard that agency in relation to making of the order
- There must be a reasonable prospect of survival of the company as a going concern.

It is a statutory prerequisite that every petition for examinership must include an IER, except in very limited circumstances, i.e., when the petition has been prepared in a very short

timeframe. In the IER, the Independent Expert must provide an opinion as to the company's prospects of survival and must exhibit projections to support his/her opinion. The IER should set out initial projected trading results as follows:

- (i) for the period of examinership which should show that the company can trade and pay its debts as they fall due, and
- (ii) 12-month post examinership projections which should demonstrate that the company will be able to trade profitably once it successfully exits examinership.

All applicants have a duty to act in upmost good faith. The court, pursuant to Section 518 of the Companies Act 2014, may decline to hear a petition if there is a breach in this regard.

1.4 Notice Parties

The papers outlined above are served on a number of notice parties and Revenue is usually a notice party. Counsel for the petitioner will open the papers to the court. The court will hear from all creditors and interested parties who appear in court.

1.5 Role of the Examiner

While the examiner is nominated by the petitioner, he or she is also an officer of the court and must act independently. The role of the examiner is to ensure the company continues to trade during the protection period while he or she attempts to secure investment and formulate proposals for restructuring the company to allow it to survive after the examinership concludes. The outcome for creditors must be better than in a liquidation or receivership. The investment will assist in providing a dividend to creditors and working capital into the company, if required.

2 Role of the Insolvency Section before the appointment of an Examiner

When the Insolvency Section is notified about a company entering Examinership, a number of steps are taken:

2.1 Input stop

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

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2.2 Contact Debt Management

The insolvency caseworker will contact the relevant segment in Debt Management to have all enforcement withdrawn and direct debits cancelled. Where relevant a commonality check must be completed by the DM caseworker. The insolvency caseworker will request any background information on the company if this is available.

2.3 Contact Branch

The audit manager in the relevant branch will be contacted to check whether an audit or other intervention is underway or likely to be carried out.

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2.4 Review of company's compliance history

A review of the company's compliance history is carried out to determine Revenue's approach to the examinership. Some areas reviewed include:

- The number of times the company has been referred to enforcement
- The liability owing to Revenue
- Have returns been filed and paid on time
- Has the company been trading and the length of time it has been insolvent
- Other directorships of the directors and the compliance of those companies
- Review documents filed with the Companies Registration Office (CRO) for any useful information such as details of charges held by the bank on company assets or judgements registered against the company
- The company's interaction with Debt Management. Where a company is in an instalment arrangement (Phased Payment Arrangement) or has applied for one, a copy of the PPA1 should be examined to ensure the details in the PPA1 are in line with the details outlined in the IER

2.5 Review of the IER

Following a review of the company, the IER should be examined to ascertain whether the company has a reasonable prospect of survival. When examining the IER, some factors to be considered by the caseworker include:

- Has the Independent Expert (IE) had access to the books and records to make an informed decision?
- The reason for the company becoming insolvent
- Can the company trade during the examinership period and pay all debts as they fall due?
- Are the figures on the cashflow projections realistic? Are the VAT and PREM payments in line with the returns previously filed by the company?
- The number of employees the company has.

Once the insolvency caseworker has reviewed all relevant information, he or she will submit a report to the line manager and the RSD recommending an approach that Revenue should take. Once Revenue have considered the application, an instruction should be forwarded to the relevant RSD Official on the approach to the hearing.

2.6 Revenue Position

Depending on the circumstances of the case, an agreed court strategy is decided upon. Revenue will adopt a position on a case-by-case basis. Revenue may choose to object to an examinership, or not object and monitor the case closely.

Some of the factors that will inform Revenue's decision include:

- It appears to Revenue that the main reason the company has petitioned to the court for the appointment of an examiner is to avoid paying taxes
- It appears to Revenue the company does not have a 'reasonable prospect of survival' on a going concern basis
- The conduct of the company's directors in the past, along with the company's compliance history.

Agreement must be reached between the Insolvency caseworker, their manager and RSD prior to advising the court of Revenue's position. Should Revenue have any concerns during this process, the caseworker will liaise with RSD where an agreed approach can be taken on the particular issue. Due to the limited timeframe concerns must be acted on as and when they arise.

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2.7 Orders of the Court

Where an examiner is appointed by the court, a number of orders may be made on the application of counsel for Revenue. It must be noted that these are discretionary orders that are usually granted but can be refused. One of the orders directs the company to file and pay their taxes as they fall due during the examinership period. If the company fails to comply with the order Revenue may seek directions from the court.

3 Role of the Insolvency Section during the Examinership

3.1 Establishing Revenue's claim

During the examinership, the insolvency caseworker must monitor the case closely. The caseworker will liaise closely with the examiner's office during this time. Unlike other creditors, Revenue will not be able to definitively establish its claim at the start of the examinership and therefore will require the company to submit all outstanding returns to Revenue.

The insolvency caseworker will write to the examiner requesting details of all taxes owing. The insolvency caseworker will need to establish the portion of tax that is owing from the first day of the relevant tax period up to the day before protection was granted (pre-petition) and the taxes owing from the date protection was granted until the end of the relevant tax period (post-petition).

The insolvency caseworker will also ask for details of any liability that may occur under Section 62A VATCA 2010. This liability may arise post examinership as a result of the write down in payments to creditors where a VAT deduction on the payment has been claimed by the company prior to, or during, the examinership.

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3.2 Pre-petition/Post-petition liabilities

The insolvency caseworker will monitor all returns falling due during the examinership period. For the tax period in which the examinership falls, only the post-petition taxes must be paid in full. The pre-petition taxes in that period form part of Revenue's claim. For example, court protection was granted on the 14th of the month. The company is required to pay the taxes owing from the 14th – 31st of the month. The taxes owing from the 1st – 13th of the month form part of Revenue's claim.

3.3 VAT Refund

Where the company is in a VAT refund position in the period in which the examinership falls, the sales and purchases must be split between pre and post-petition. This could result in a refund for the pre-petition and a liability for the post-petition. In this case the company is obliged to pay the liability owing on the post-petition in full and the pre-petition refund is offset against other pre-petition debts. VAT refund example –

Total VAT on Sales	€10,000
Total VAT on Purchases	€15,000
Total VAT refund	€ 5,000
Pre-petition VAT on sales	€ 4,000
Pre-petition VAT on purchases	€11,000
Pre- petition VAT refund	€ 7,000
Post-petition VAT on sales	€6,000
Post-petition VAT on purchases	€4,000
Post-petition VAT due	€2,000

The company is obliged to pay Revenue €2,000 and €7,000 will be offset against other debts due.

4 Role of DMS during Examinership

4.1 Commencement of the Examinership

When the Insolvency Section is notified that a company has petitioned for examinership, the insolvency caseworker will contact the relevant segment in Debt Management to have all enforcement withdrawn and direct debits cancelled. Where relevant, a commonality check must be completed by the DM caseworker. The insolvency caseworker will look for any available background information on the company.

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5 Duties of the Examiner during Examinership

During an examinership, the examiner must carry out statutory duties set out in the Companies Acts. This includes conducting an examination of the company's affairs with a view

to formulating proposals for a scheme of arrangement, laying the proposals for a scheme of arrangement before the creditors for approval and, finally, presenting the scheme to the court for its ultimate approval. The examiner is also required to report periodically to the court during the examinership on the affairs of the company and the progress he or she has made in respect of formulating proposals during the protection period.

While an examiner is an independent person appointed by the court, a significant amount of the examiner's time involves working with the directors, employees and suppliers of the company to ensure its ability to continue trading successfully. The examiner must monitor the cash flow of the company throughout the protection period to ensure the company trades in accordance with the projections furnished to the court at the petition stage. The examiner must be able to show the court that, based on the trade of the company during the protection period, the company has a reasonable prospect of survival as a going concern.

5.1 Day to Day responsibility for running the Company

During the protection period, the day-to-day responsibility for running the company lies with the directors in accordance with the Companies Act 2014. In exceptional circumstances the examiner will be given executive powers by the court.

5.2 Reporting to Court

An examiner is required to formulate proposals for a scheme of arrangement in respect of the company within the given timeframe 35-100 days. If he or she is unable to do so within that timeframe, he or she must apply to court to extend the time for the presentation of such proposals. Each application for an extension of time must be accompanied by a report to the court outlining the work completed, including a summary of the trading results of the company along with details of the work undertaken in securing investment into the company.

The case is generally listed for hearing on the following occasions:

- for the appointment of the examiner/confirmation of the appointment of the interim examiner
- on day 35 of the examinership (or such other day as the court may order)
- on day 70 of the examinership, and
- for the hearing to either confirm or refuse the scheme of arrangement.

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➤ Day 35

The protection of the court is initially for 35 days following the date the examiner is appointed. At day 35 (or such other date as the court may order), the examiner is required to prepare a report to the court, outlining details of the work carried out during the examinership, along with details of the trading of the company. This report must be made available to any notice party listed at the start of the examinership. Revenue is usually a notice party in an examinership and will receive a copy of the report. It is highly unlikely an examiner will have the scheme of arrangement formulated by day 35 and will usually return to court and seek an extension to day 70 of the protection period.

When Revenue receives the report accompanying an application by the examiner to extend time, the insolvency caseworker must review the report and liaise with RSD in a short period of time.

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➤ Day 70

At day 70 of the examinership, an examiner must return to court to present his or her scheme of arrangement or to seek an extension of time up to day 100. This stage of the examinership is similar to what happens at day 35. A report must be presented to the court and sent to all notice parties. At this stage, an examiner should have an investor secured or an interested party willing to invest.

➤ Day 100

Once the extension of time to day 100 has been granted, an examiner must formulate the scheme of arrangement and hold the creditors meetings. An examiner must present his or her final report containing the proposals for a scheme of arrangement, which the creditors have voted upon, to the court no later than 100 days after the presentation of the petition. The hearing to confirm the scheme of arrangement may, however, take place after that 100 day period has elapsed.

6 Scheme of Arrangement

A scheme of arrangement is a statutory compromise or arrangement, under Sections 534-544 of Companies Act 2014, between a company and its creditors or members for a payment of a dividend in an examinership.

The scheme of arrangement is formulated by the examiner once he or she has secured investment which is a requirement of the examinership. The investment is used by the

examiner to pay a dividend to the different classes of creditors, as working capital in the company if required and to pay the examiners fee.

6.1 Securing Investment

To secure investment, the examiner will seek investment through a vigorous process. Each interested investor is given the opportunity to submit an investment proposal. The examiner is required to review each proposal and carry out due diligence. Once completed, the examiner will choose the investor who offers the best result for the creditors of the company.

Once the preferred investor is chosen, the examiner will formulate a scheme of arrangement. Formulating the scheme of arrangement will involve the examiner determining how the investment will be utilised. The examiner must determine what level of dividend can be paid to each class of creditor and whether any of the investment will be required for working capital for the company once they successfully exit examinership.

6.2 Class of Creditor

There may be several different classes of creditors in every examinership. Revenue usually has a liability in up to four classes: Super-preferential, Preferential, Contingent Preferential and Unsecured.

- **Super-preferential** is the employee's portion of all unpaid PRSI.
- **Preferential** is PAYE/employer PRSI/USC for the previous 12 months from the date of the examinership, highest CT liability where there is a liability owing for more than 1 year, RCT for the previous 12 months from the date of the examinership and VAT for the previous 6 months ending in the period prior to the date of examinership.
- **Contingent Preferential** is any VAT due under Section 62A VATCA 2010.
- **Unsecured** is PAYE/Employer PRSI/USC owing for more than 12 months prior to the date of examinership, CT not included in Preferential class, RCT owing for more than 12 months prior to the date of examinership and VAT owing for the VAT period in which the examinership falls in (up to the date of examinership) and any owing for more than 12 months prior to the date of examinership.

6.3 Dividends

In an examinership, all creditors should receive a higher dividend than they would expect to receive if the company was placed into liquidation or receivership.

6.4 Conditions for a Successful Scheme

For the scheme of arrangement to be successful, it must meet the criteria as set out in Section 541(3A) of the Companies Act. The proposals must not unfairly prejudice the creditors of the company. This means an examiner must ensure each class of creditor will fare better

under the proposals he/she has formulated than they would in a liquidation or receivership scenario.

6.5 Meeting of Creditors

Following the formulation of the scheme of arrangement, the examiner will convene meetings for all relevant creditors. A notice of the meeting is issued to each creditor, together with a copy of the scheme of arrangement. The meetings give every relevant creditor who attends (either in person or by proxy) the opportunity to ask questions of the examiner relating to the scheme of arrangement prior to voting on it.

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6.6 Reviewing the Scheme of Arrangement

Before attending the meeting and voting on the scheme, the insolvency caseworker will review the scheme of arrangement. The caseworker reviews the expected dividend and the write-down. The insolvency caseworker will speak with management and agree Revenue's position in respect of the scheme.

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6.7 Contingent Creditor

Occasionally, there may be an ongoing audit that is not finalised by the end of the protection period. Any liabilities arising from the audit should be clearly included in the scheme of arrangement. The scheme should refer to the tax, interest and penalty. Where the audit liability hasn't been established, a provision should be included in the scheme for some form of payment of any liability arising from the audit.

6.8 Voting in favour of a Scheme

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6.9 Opposing a Scheme

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The main reasons for opposing the scheme are:

- Revenue believes one of its purposes is the avoidance of tax
- Revenue is unfairly prejudiced by the scheme i.e. Revenue would receive a higher dividend in a liquidation or receivership
- Revenue does not believe that the scheme provides for a reasonable prospect of the company's survival
- Revenue is of the opinion that there has been serious non-disclosure of material facts.

In certain examinership cases, Revenue may seek the opinion of their own Independent Expert on the scheme.

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6.10 Report to the Court of the Creditors' Meeting

Once all attendees at the various creditor meetings have considered and voted on the scheme, the examiner must present a report to the court on the outcome of the meetings and setting out any modifications to the proposals adopted at the meetings. This report is designed to indicate to the court the views of the various classes of the company's creditors. It will be up to the court to approve the scheme of arrangement.

6.11 Court Approval/ Disapproval of Scheme

Once the court has heard from all parties present at the hearing, the court will make the final decision on whether to approve or reject the scheme. Where the court approves the scheme, Revenue must accept the dividend provided for in the scheme. If the court refuses to confirm the scheme, it will be rejected, and the company will be placed into liquidation or receivership.

7 Conclusion of Examinership

When the scheme of arrangement has been approved by the court, the court will order the date on which the scheme will become effective (“the effective date”). The effective date is the time at which the scheme of arrangement becomes binding on all parties affected by the scheme. This is usually the same day on which the scheme is approved by the court. At the effective date, court protection is removed, and the examiner’s role will cease. Payment to all creditors must be made within the timeframe outlined in the scheme of arrangement. This is normally within 30 days of the effective date.

7.1 Dividend Payments Received

Normally Revenue will receive the dividend payment 30 days after the effective date has lapsed. When the dividend payment is received, the insolvency caseworker will advise the CG’s Payment and Accounts Section as to which tax periods the payment should be offset against. This will depend on the percentage of dividend being paid under each class of creditor.

7.2 Write-Outs

Once the full payment has been allocated, the insolvency caseworker will arrange to have the balance of the debt written-out. This debt is never collectable.

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7.3 Debt Management post Examinership

The DM caseworker should carefully consider enforcement options going forward for post-examinership cases. Companies which successfully exit examinership will have no creditor balance owing once the dividends due under the scheme are paid (which is usually no later than 30 days after the effective date of the scheme), therefore they should be able to pay all creditors in full and on time post-examinership. It is critical that post-examinership cases are closely monitored by the relevant DM team to ensure such companies maintain a good compliance record and do not allow Revenue debt to escalate once again.

7.4 Removal of Protection

If, at any time during the protection, the examiner believes the company no longer has a reasonable prospect of survival as a going concern or the examiner is unable to secure

investment, he or she must return to court immediately to have protection removed. If this happens, the company may be placed into liquidation or in circumstances where the petition was presented in response to a receiver being appointed, may be placed in receivership.

7.5 Liquidation

Where court protection is lifted, it is likely that a liquidator will be appointed. If the examinership is dealt with in the High Court, a liquidator can be appointed at the time the court protection is withdrawn. The examiner may be appointed liquidator.

Where the examinership is dealt with in the Circuit Court, a liquidator cannot be appointed straightaway as the Circuit Court does not have jurisdiction to appoint liquidators. An application must, therefore, be made to the High Court to have a liquidator appointed or, alternatively, the company may elect to hold a creditors' meeting to appoint a voluntary liquidator. The onus is on the company to have a liquidator appointed.

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8 Causes of Examinership Failing

There are a number of reasons why an examinership might fail. Potential reasons may include:

- It has become apparent to the examiner that the company no longer has a prospect of survival on a going concern basis
- The projections outlined in the IER have not been met and the company is unable to pay their debts as they fall due
- The examiner is unable to secure investment to formulate a scheme of arrangement
- A creditor has concerns during the examinership and successfully objects to an extension of time being granted by the court
- The Judge refuses to grant the application to appoint an examiner.

As outlined above, where it becomes apparent that there is no prospect of survival or the examiner fails to secure investment or formulate a scheme of arrangement, the examiner must return to court at the earliest opportunity and apply to have the protection removed. This will result in the company being liquidated or (in circumstances where the petition was presented in response to a receiver being appointed) being placed in receivership. If the examinership fails, the examiner is obliged under the Companies Act to

make an application for fees and remuneration to the court. Revenue will review any such application and associated papers