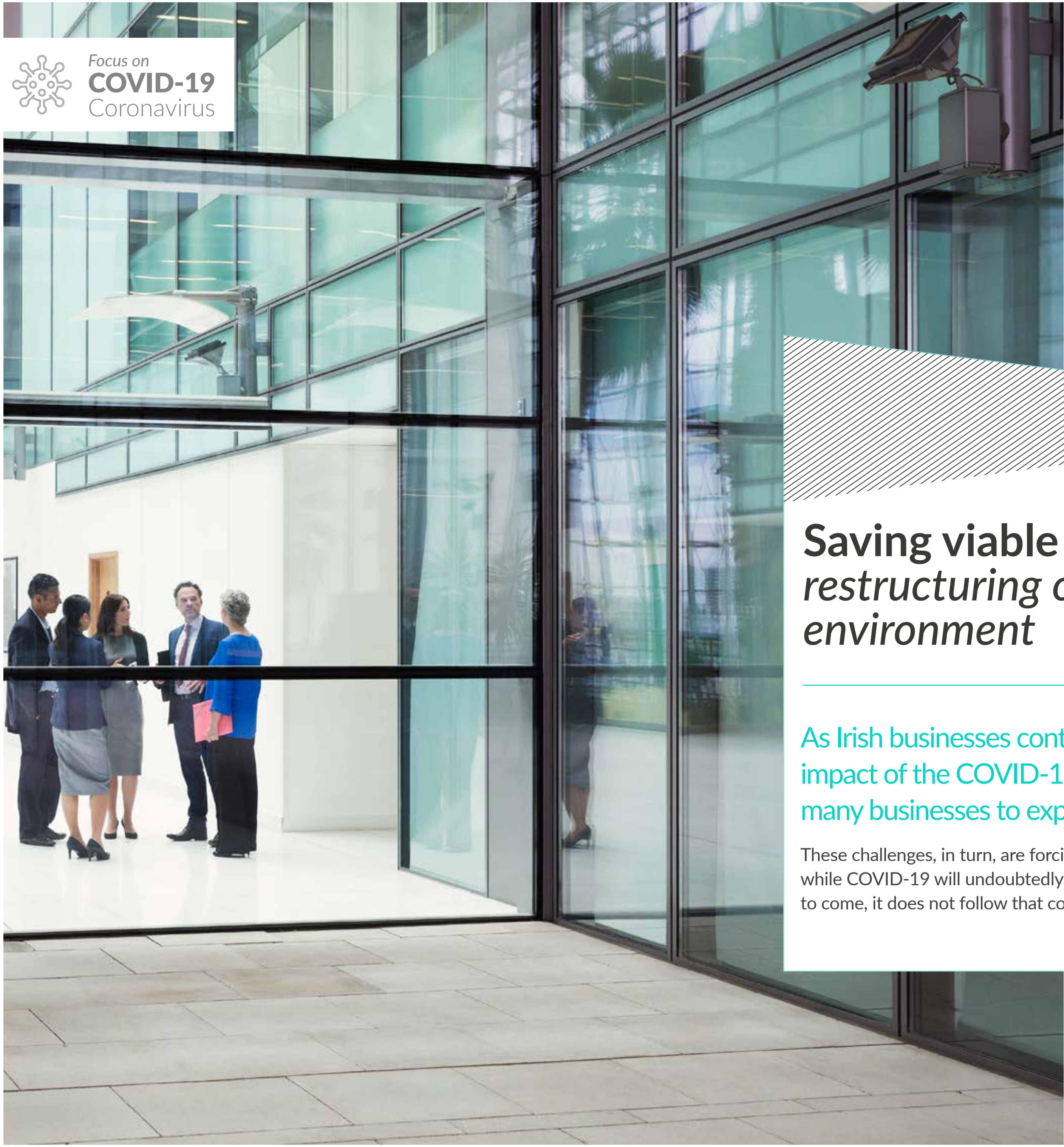
Focus on
COVID-19
Coronavirus



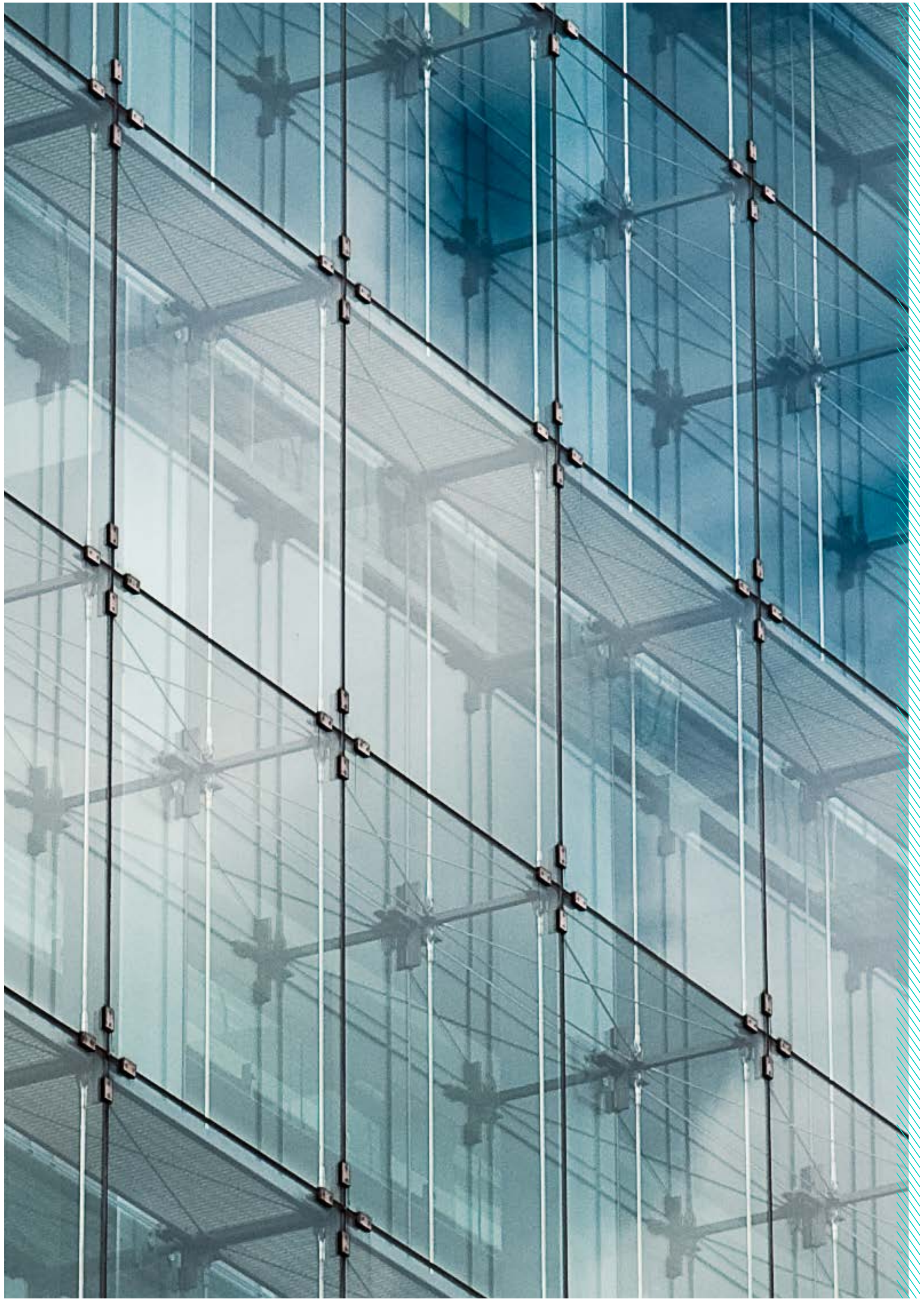
A&L Goodbody

Saving viable businesses – *a look at restructuring options in the current environment*

As Irish businesses continue to do what they can to mitigate the impact of the COVID-19 pandemic, the knock on effects have led many businesses to experience severe liquidity challenges.

These challenges, in turn, are forcing directors of Irish companies to make difficult decisions. But while COVID-19 will undoubtedly continue to have a negative impact on businesses for some time to come, it does not follow that companies should be forced out of business.

You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.



A&L Goodbody

To alleviate the working capital challenges faced by businesses, the Irish government has announced measures, including the establishment of:

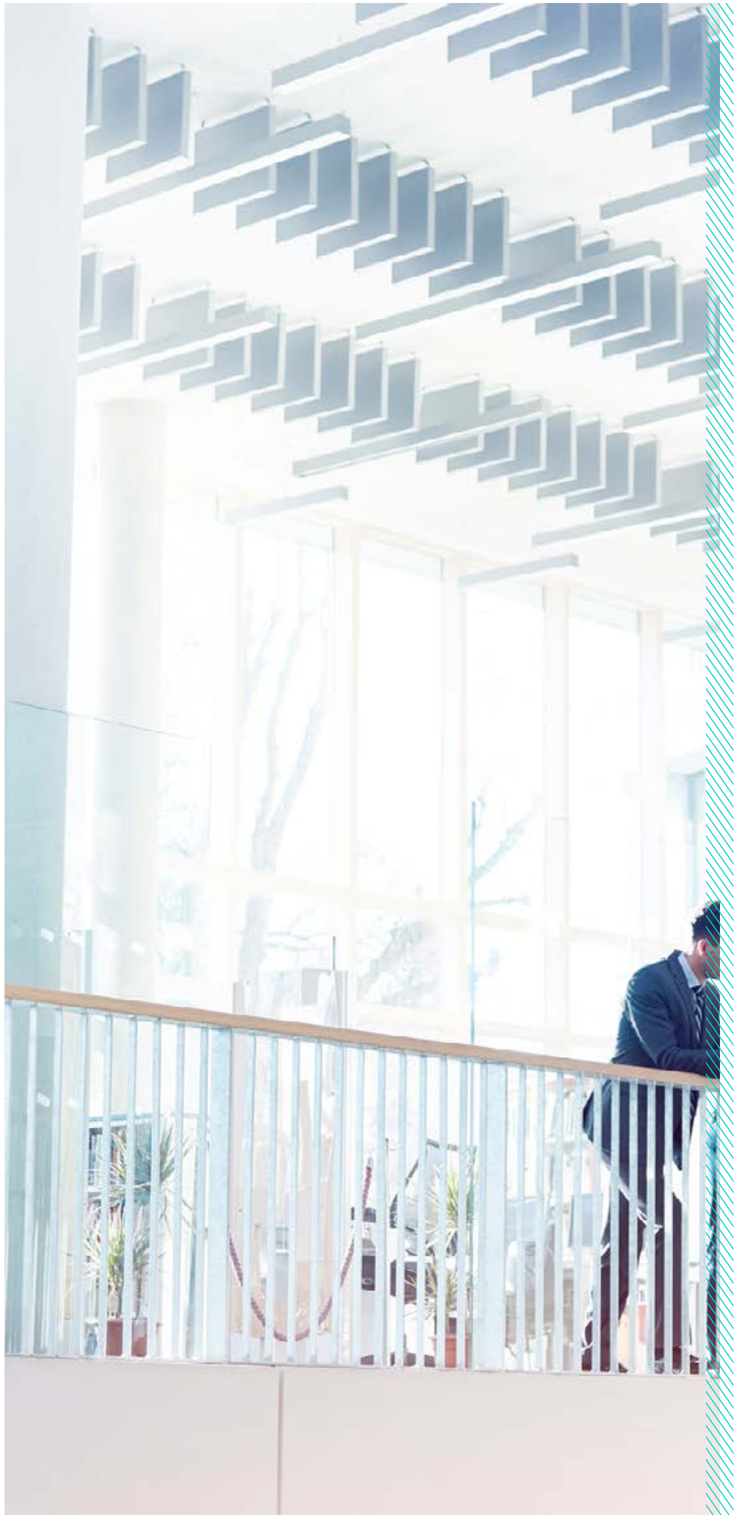
- the Strategic Banking Corporation of Ireland Covid-19 Working Capital Scheme, which is aimed at supporting viable micro, small and medium sized enterprises (SME) and Small MidCap enterprises that meet eligibility criteria. Loans of €25,000 to €1.5m are available to eligible enterprises. SMEs are enterprises that have fewer than 250 employees and a turnover of €50m or less. A Small Mid-Cap enterprise is a business that is not an SME but has fewer than 500 employees;
- the COVID-19 Business Loan from Microfinance Ireland, which allows any "microenterprise" that is (a) currently trading, (b) not in a position to avail of bank finance and (c) experiencing a COVID-19 "negative impact" on their business, to apply for Business Loans up to €50,000, if eligible. A micro-enterprise is a business with fewer than 10 full-time employees and a turnover of €2m or less; and
- the National COVID-19 Income Support Scheme, which includes a temporary wage subsidy to cover up to 70% of employees' take home pay, up to a maximum tax free amount of €410 per week. This helps affected companies pay their employees while keeping them on their books.

While these government measures are to be welcomed by companies in the SME space, many larger businesses may not meet the eligibility criteria. What has become clear in recent weeks is that the impact of COVID-19 is not confined to small businesses or any particular sector, and we have already seen several larger corporate failures around the world linked to COVID-19. Indeed, stress on liquidity levels will have wider application, extending to other types of financing such as bonds and structured financial products, with debt issuers, as well as holders, carefully monitoring the impact COVID-19 has on cash flows and underlying assets.

Where uncertainty arises as to whether a company can trade through financial difficulties, directors should take steps to engage with their lenders and other creditors at an early stage to first understand the impact of the current difficulties on their commercial arrangements and, if needed, negotiate amendments to the terms of the relationship on a consensual basis.

A consensual solution is most beneficial to all stakeholders. If this cannot be achieved, rescue procedures are available in Ireland that can give way to a sustainable re-emergence into the market by struggling debtors of all sizes, across all sectors. Often, the prospect of these "Plan B" remedies being available can create important negotiating leverage to gain concessions from creditors in distressed situations.

This note considers the restructuring options available to companies with an Irish presence – both consensual and court-supervised.



01

Consensual Restructuring

Out-of-court debt restructurings can take many forms and vary in complexity, but always with a common goal –finding a mutually acceptable solution for a debtor and its creditors.

The form a restructuring will take depends entirely on what best suits the business and can involve any combination of:

- a renegotiation of debt terms
- a standstill agreement to prevent creditors' enforcement action
- new funding
- sale of non-core assets and/or
- changes to management or other internal operational reorganisation.

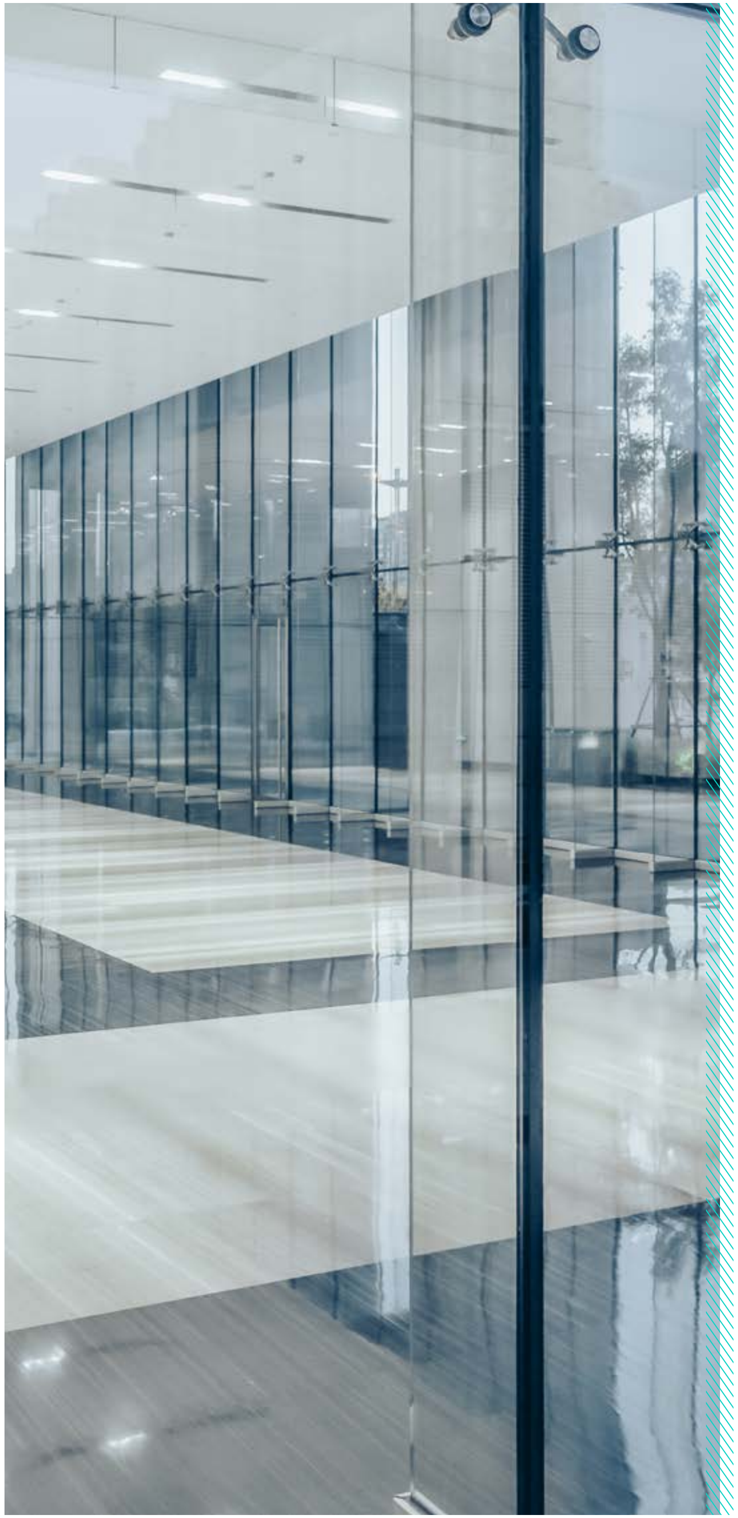
The two stand-out benefits of a consensual restructuring are cost and privacy:

Cost: Professional fees will be incurred in the course of a consensual restructuring but, if the negotiations are handled efficiently, costs will be lower than with a formal court process. In a formal process, creditors' professional fees may be borne by the debtor's estate as part of the deal, in addition to the debtor's own professional fees.

Privacy: Restructurings as part of a court process require broad disclosures from the debtor company (for example, a report of an independent expert in the case of examinership and a scheme circular in the case of a scheme of arrangement). There is the additional risk that parties may request discovery and generally be heard on any issue of concern in front of the court. This publicity may be unwelcomed for certain companies and, in some instances, could have a negative impact on enterprise value. Such publicity can, in most cases, be avoided by a consensual restructuring.

The obvious drawback with a consensual restructuring is that it can be difficult to get unanimous buy-in from all creditors and stakeholders, including common creditors within a specific category or class that the debtor is looking to compromise. In those circumstances, debtors may opt for a court process (such as examinership or scheme of arrangement) where a lower approval threshold will nonetheless bind all creditors, including hold-out creditors. It is for this reason that debtors should embark on consensual negotiations always in the knowledge that a pivot to a formal process may be required at a particular stage.

Quite often, the threat of a formal process can be enough to bring dissenting creditors into line to consummate the restructuring. Indeed, as negotiations develop, it may transpire that there are certain aspects of the consensual restructuring plan that can only be achieved with the help of a formal process (such as the repudiation of lease obligations using examinership) which results in all stakeholders willingly entering a formal process.



A&L Goodbody

Examinership

Examinership allows a struggling business to maximize value, preserve jobs and operations and weather a crisis. It offers an attractive one-stop shop insofar as it enables debt compromise and change in ownership (where required) all within a prompt implementation timeframe.

Control of the restructuring vests largely in the examiner (an independent insolvency practitioner) with management typically retaining operational control of the business throughout the process. In that regard, examinership is the closest equivalent in the EU to Chapter 11 of the US Bankruptcy Code which is widely regarded as the most powerful restructuring tool for US corporations. It is no surprise that Chapter 11 has already been relied upon during the current public health crisis, with global communications company, OneWeb and USA Rugby filing for Chapter 11 in the US, both citing COVID-19 as the cause of their economic troubles.

Key features

» Once the entry tests have been satisfied – ((a) that the company is (or close to) insolvent and (b) there is a reasonable prospect of survival of the company and its undertaking as a going concern) – the company has court protection for 70 days from petition date (which may be extended by further 30 days with court sanction) and an examiner is appointed to the company.

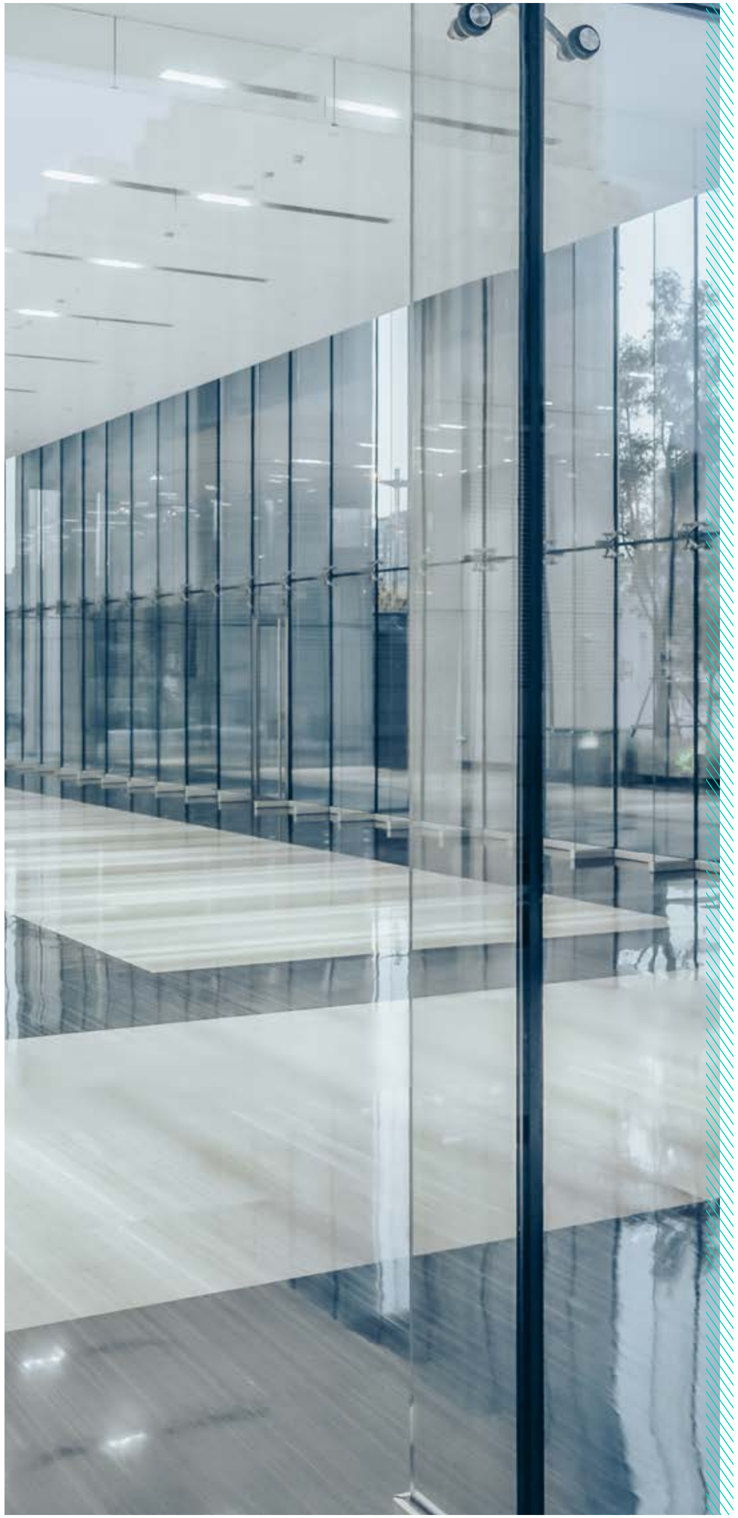
» During the protection period, creditors are prevented from taking steps to wind up the company; appointing a receiver; realising security; seizing assets of the company and issuing proceedings against the company unless the examiner and court consent.

» The examiner will test the market for investment interest and draft a reorganisation plan which is considered at a meeting of creditors and shareholders. The examiner's plan is deemed to have been accepted when more than 50% in number representing more than 50% in value of the claims represented at the meeting, of any impaired class, have voted in favour of the proposals. Where the court confirms the plan, it is binding on everyone concerned including all members and creditors.

Key considerations

» Cash-flow: One of the challenges faced by any company affected by COVID-19 that is considering examinership is the availability of sufficient working capital to allow the company to survive through the process. While the examiner has the power to raise finance during examinership, companies can face an uphill battle in examinership if there is no clear line of sight from the outset as to how the process will be financed. In our note on 'Supporting directors during financial uncertainty' we consider in more detail the importance of preserving cash in a liquidity crisis and other recommended steps for directors.

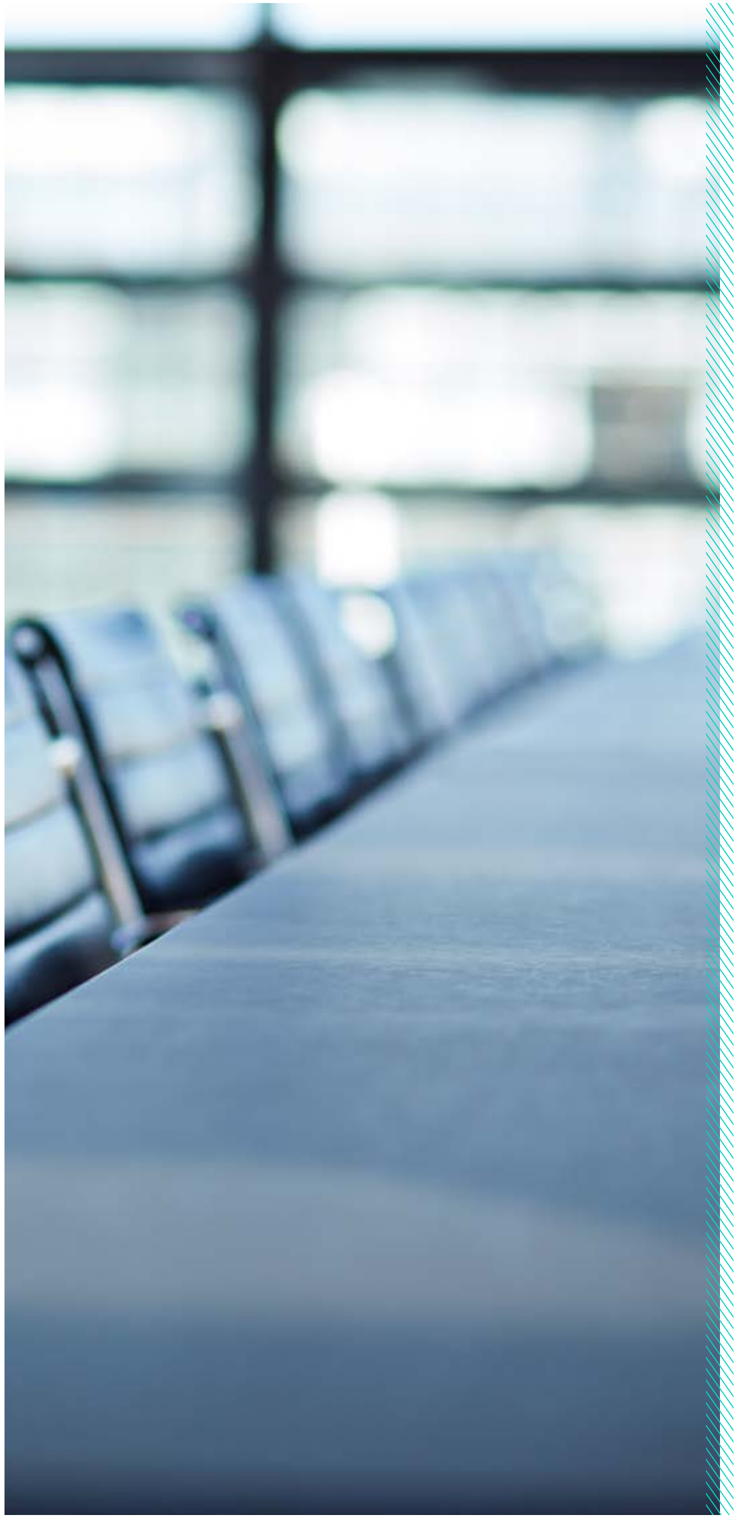
» Importance of pre-planning: In certain circumstances, scheme proposals (i.e. the draft restructuring plan) can be formulated by the company and its key creditors before the examinership commences. In such cases, the examiner can come to the role with at least one potential restructuring proposal available, offering some level of creditor support, a smoother path to implementation which can reduce the risk of significant challenge at the confirmation hearing. A shorter process may also mitigate cash-flow issues to an extent.



A&L Goodbody

In the 2012 restructuring of eircom, the senior lender group took control of the group's equity in return for a 15% write-down of their debt, while more than €1.3bn worth of junior debt was written off. With significant pre-process planning by the company and senior lenders, the examinership concluded within 54 days and that timeframe included an unsuccessful challenge by a disappointed investment bidder asserting that it was better placed to own this telco business.

- Strong business: While examinership offers the ability to cram down a company's creditors (thereby quickly transforming its balance sheet), an examiner should only proceed with a reorganisation plan if the company has a sufficiently good underlying business to take advantage of a debt restructuring and trade on successfully.
- New money: One of the reasons for failed examinerships has been the inability of incoming investors to attract sufficient funding to support a successful exit of the process. The availability of liquidity can be key to a successful reorganisation.
- Bank support: While the support of existing bankers is not a pre-requisite, the process is more likely to succeed with bank support.
- Jobs: Although the legislation does not stipulate that examinerships must result in jobs being saved, this is always a key factor in the court's consideration as to whether to grant the company protection.
- Change of control: Shareholders of a company going into examinership need to appreciate that the company is effectively "in play" from an acquisition perspective. Indeed, in the vast majority of examinerships, ownership of the company typically changes from the existing shareholders to the new investor.



Schemes of arrangement

Unlike examinership, a scheme of arrangement is not a formal insolvency process and provides an attractive means of restructuring financial obligations through a flexible company law procedure.

Not every company is a suitable candidate for examinership. As mentioned, one of the entry requirements for examinership is that there is a reasonable prospect of survival of a company's undertaking as a going concern.

The market perception, therefore, is that examinership is primarily reserved for trading entities with an identifiable undertaking (business operation, employees, etc). There are no such constraints for scheme candidates and schemes particularly lend themselves to financial restructurings and adjustments to capital structures.

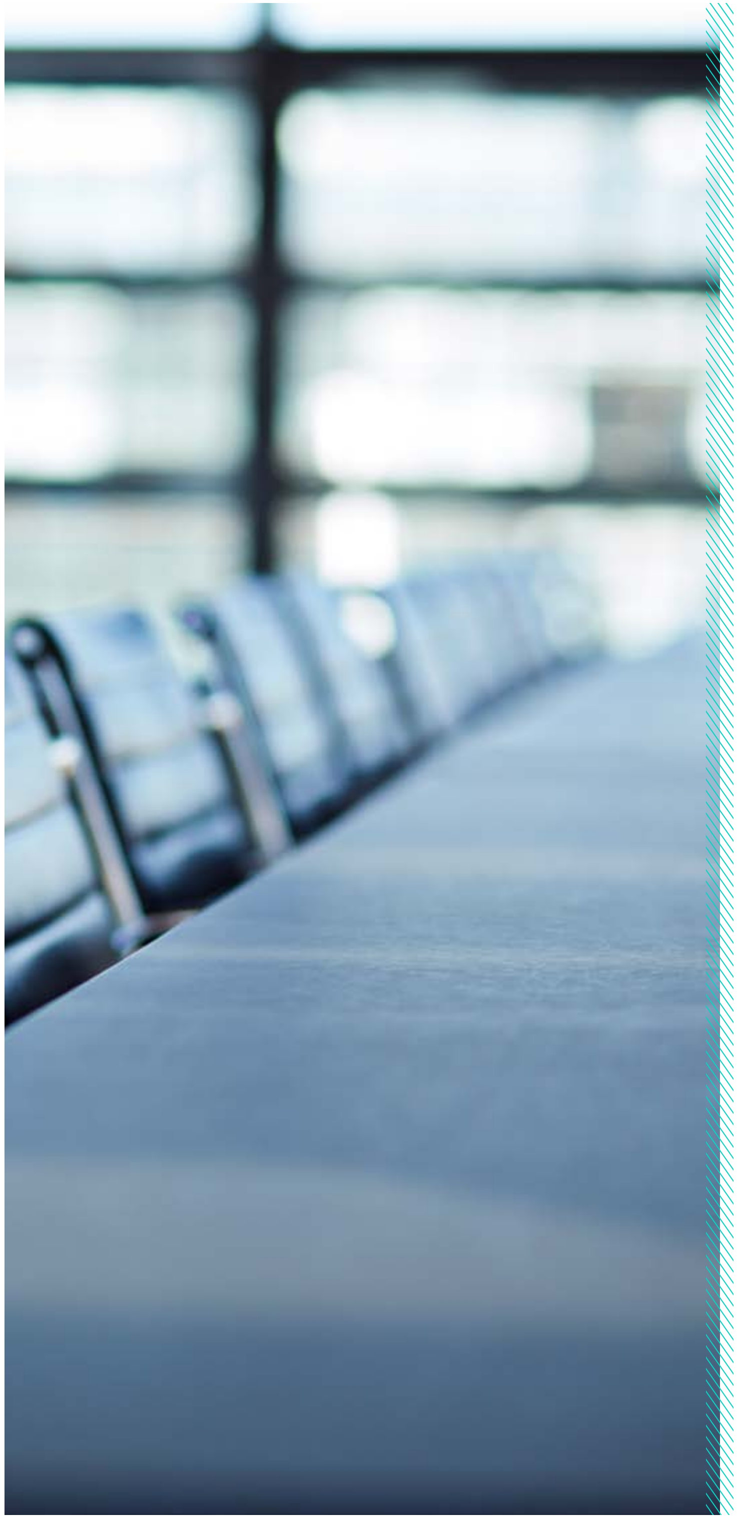
Furthermore, it is necessary for an applicant in examinership to have its "centre of main interest" (the place where the company conducts the administration of his business interests on a regular basis) in Ireland. A scheme candidate need only demonstrate a sufficient connection to Ireland in order to avail of the process, which means that the Irish scheme process is available to non-Irish companies.

The recent restructuring of US$1.6bn of New York law governed notes in the Ballantyne Re plc scheme of arrangement confirmed that Irish schemes can effectively implement the most complex of financial restructurings, and that the Irish judiciary will take a pragmatic approach to facilitate scheme sanction and implementation. Structured finance transactions are not immune to the ongoing economic turbulence caused by COVID-19 as lenders respond to the implications for their debt finance documents. Ireland has been a significant contributor of debt issuing structured finance vehicles within cross-border structures which, within certain sectors, may now require their debt terms to be revisited.

Key features

A scheme is a restructuring procedure which permits a company to enter into an arrangement or compromise with its members or creditors (or any class of them) which, if approved by the requisite majority and then sanctioned by the court, will bind all of them, whether or not they voted in favour of what was proposed. In many cases a scheme will be the fall-back strategy for use in cases where consensual changes to creditors' rights under finance documents cannot be negotiated.

- Not insolvency: A scheme is not an insolvency process which may make its use more appealing to directors and sponsors wishing to avoid any perceived insolvency-related stigma.
- Stay: The Irish High Court has discretion to stay all proceedings and restrain further proceedings against a company in respect of which application is made 'for such period as to the court seems fit'.
- Guarantees: The court will allow the release of guarantee claims against the scheme company if it is necessary to give effect to the scheme.
- Hold-outs beware: A scheme is an effective way of overriding voting thresholds in finance documents. Quite often, the threat of a scheme can be enough to bring creditors in line for a consensual restructuring.
- Flexible: A scheme can provide a broad range of restructuring solutions, including debt for equity swaps, re-setting of payment terms or simple debt compromise.



A&L Goodbody

The scheme will be approved if it is voted in favour of by (i) a majority in number of each class; and (ii) 75% in value of the creditors of each class of creditors. Separately, once those statutory majorities are obtained, a court application must be made to sanction the scheme. The sanction hearing is not a rubber-stamping exercise as the court has complete discretion to decide whether or not to sanction the scheme. The court must be satisfied that the statutory requirements have been met, the vote is fairly representative of the creditors concerned, and the scheme is substantively fair.

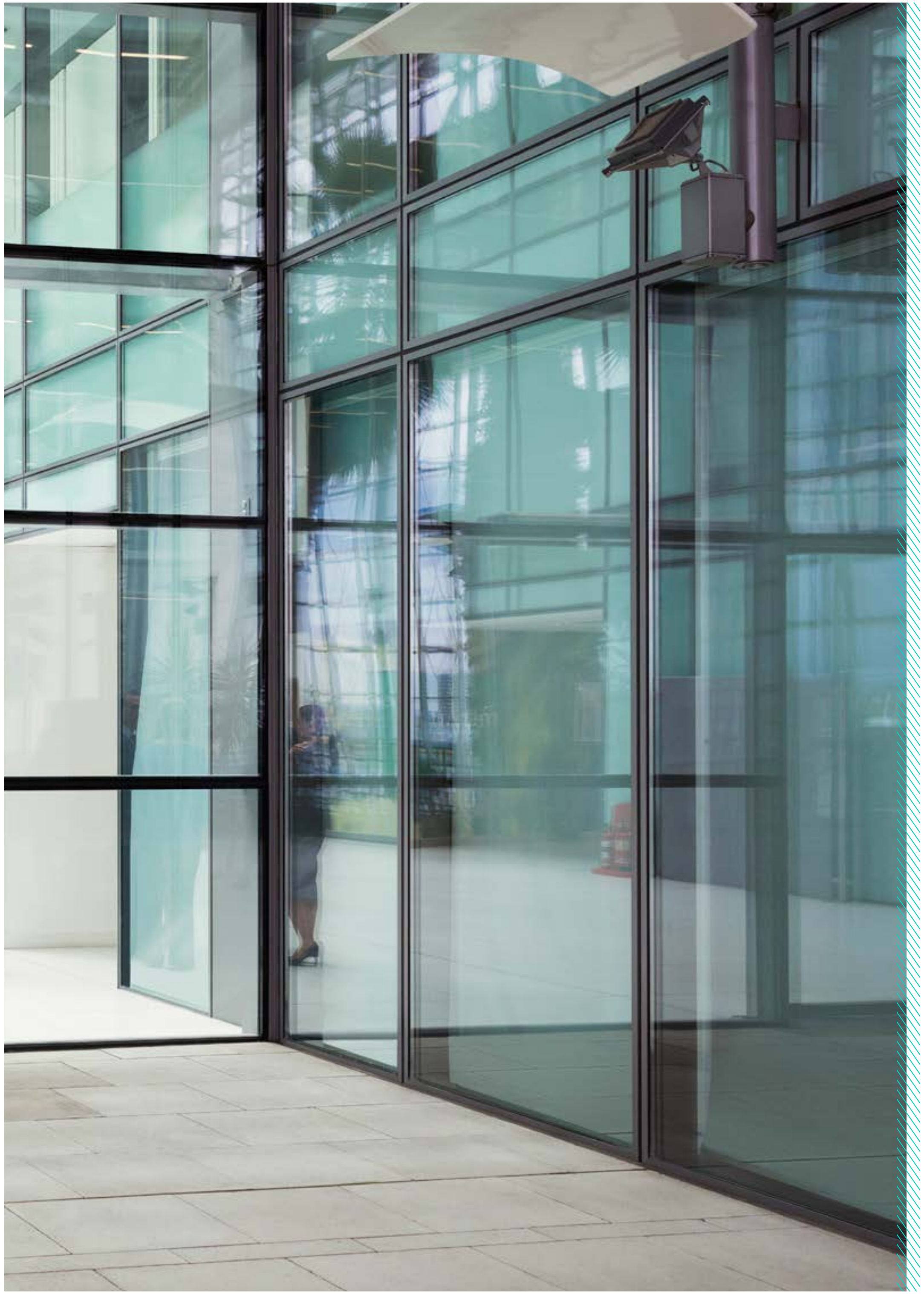
The complexity of the proposed scheme typically dictates the timing. Negotiations involving the commercial terms of the scheme itself lengthen the timetable. In practice, the overall scheme process is usually front-loaded with the greater portion of the time incurred in advance of the court process. During that period, the terms of the proposed scheme and any ancillary documents will need to be negotiated with the relevant stakeholders, and the scheme and ancillary finance and other documentation drafted.

Once the process commences, there is typically a period of six or seven weeks between scheme documents being posted to creditors and a scheme being sanctioned by the Irish High Court and becoming effective. By way of example, in the recent scheme of arrangement of Ballantyne Re plc, the High Court oversaw a process that lasted just over five weeks.

Schemes of arrangement are typically utilised for restructuring of financial obligations. For that reason (as well as the lower approval threshold in examinership) examinership is seen as a more attractive process, particularly where an operational as well as financial restructuring is required.

Conclusion

Out-of-court and in-court restructurings should not necessarily be viewed as two distinct concepts and companies should have a clear understanding of the alternative solutions that are available when entering negotiations with creditors. The current economic landscape is changing from day to day and companies are finding it difficult to assess whether breaches in their financial covenants in debt or other agreements can be avoided. In the meantime, directors should familiarise themselves with all available options.



A&L Goodbody

Please do not hesitate to contact A&L Goodbody, including any member of the Restructuring & Insolvency team, if you wish to discuss the impact of COVID-19 or any of the matters raised in this publication.

You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.

Disclaimer: A&L Goodbody 2020. The contents of this document are limited to general information and not detailed analysis of law or legal advice and are not intended to address specific legal queries arising in any particular set of circumstances.