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Department of Enterprise,
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Recommendations of the Directive 2008/94/EC Article 2(1)(b) Working Group

**Prepared by
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1. Introduction

1.1 PURPOSE

The Working Group was formed to propose policy solutions to properly transpose Article 2(1)(b) of Directive 2008/94/EC “on the protection of employees in the event of the insolvency of their employer” (“the Directive”). This was required in light of the Supreme Court case *Glegola v Minister for Social Protection* [2018] IESC 65.

1.2 TERMS OF REFERENCE

The Working Group’s Terms of Reference were agreed at its first Workshop. The Terms of Reference are as follows:

“To consider and propose policy solutions to properly transpose Article 2(1)(b) of Directive 2008/94/EC, by providing access to the Insolvency Payments Scheme where an employer ceases trading without going through formal wind-up. This includes:

- To ensure access to justice is a key principle underpinning any solution(s);
- To consider the “customer journey” in the development of any solution(s);
- To ensure policy solution(s) have suitable checks and balances to mitigate liability of the State/Social Insurance Fund, while recognising the lower standards of evidence inherently available in such situations.
- To ensure any solution gives full effect to the requirements set out in the *Glegola* Supreme Court judgment;”

1.3 MEMBERSHIP

The Working Group’s membership is listed at Appendix 1.

1.4 MEETING DATES

The Working Group’s work was conducted by way of five interactive workshops. Each Workshop addressed a different theme or policy issue. The Working Group met on the following dates:

Workshop No	Date	Workshop Theme
1	5 Dec 2022	Background, Terms of Reference, Review of High-Level Options
2	16 Jan 2023	Test 1: verifying employer debt
3	23 Jan 2023	Test 2: verify employer trading status
4	30 Jan 2023	Test 2: verify employer trading status
5	13 Feb 2023	Review of process, wrap-up

RIPU provided briefing papers in advance of each Workshop. Minutes for each Workshop were considered and approved by the Working Group members.

2 Policy Background

2.1 BACKGROUND TO POLICY ISSUE

The purpose of the Insolvency Payments Scheme is to protect certain outstanding pay-related entitlements due to employees in the event of the insolvency of their employer. Payments are made from the Social Insurance Fund.

The scheme operates under the Protection of Employees (Employers' Insolvency) Act 1984, as amended ("the 1984 Act"). The 1984 Act was derived initially from EU Directive 80/987, as amended by Directive 87/164 and Directive 2002/74, which was ultimately substituted by Directive 2008/94/EC ("the Directive"). The Directive does not define a state of insolvency. However, Article 2(1) of the Directive outlines the circumstances in which an employer shall be deemed to be in a state of insolvency for the purposes of the Directive as follows:

Article 2(1)

For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on the insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent to the said provisions has:

- (a) either decided to open the proceedings; or*
- (b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of proceedings.*

Article 2(1) has been transposed by way of Section 1(3) of the 1984 Act which provides for the various circumstances in which an employer shall be taken to be insolvent for the purposes of the Act.

For the purpose of the Act, an employer is deemed insolvent if (and only if) they:

- a) are declared bankrupt or has filed a petition/executed a deed of arrangement;
- b) have died and the estate is insolvent;
- c) are a company in formal wind-up procedure (e.g. liquidation or receivership); or
- d) are insolvent under the laws of another Member State or the UK.

The legislation does not provide for situations where an employer ceased to trade without engaging in any formal wind-up process. In such cases, often referred to as 'informal insolvency', former employees may have monies owed to them without having a legal mechanism to claim those payments from the Social Insurance Fund.

In February 2017, in a legal case taken against the Minister for Social Protection, the Court of Appeal granted a declaration that the State had failed to correctly transpose Directive 2008/94/EC by failing to provide in Irish law for the procedure required by Article 2(1)(b) of the Directive.

In December 2018, the Supreme Court upheld the Court of Appeal decision that Article 2(1)(b) of the Directive had not been properly transposed into Irish law.

The Supreme Court found that the Directive requires Member States to have a mechanism allowing a competent authority to determine that a state of insolvency arises permitting employee claims to be met from the Social Insurance Fund without making a winding up order.

2.2 CONSIDERATION OF HIGH-LEVEL OPTIONS

The Working Group considered four high-level options for a policy solution to address the Supreme Court judgment. These options, along with the pros and cons of each, are set out in the below table.

It was noted that any solution would require a legislative basis.

Table 1: High Level Options

Process	What this means	Pros	Cons
Administrative solution	Employee applies to public body. State uses existing information to verify debts & confirm employer has closed down	<ul style="list-style-type: none"> Minimal/no costs to employee Proportionate to value of debts 	<ul style="list-style-type: none"> No public body currently performs this role
Courts solution	<ul style="list-style-type: none"> Amend debt thresholds in Companies Act 2014 Verify debt via statutory demand High Court application & hearing High Court makes determination 	<ul style="list-style-type: none"> Kept within High Court's jurisdiction Strong assurance that claims are genuine 	<ul style="list-style-type: none"> Cost of High Court action (employee / SIF) Approach rejected by Company Law Review Group (CLRG) in 2017 May not be proportionate from an access to justice perspective

New State Body to liquidate companies	Set up a new public body to wind-up companies where there are insufficient funds	<ul style="list-style-type: none"> • No change to existing insolvency definition 	<ul style="list-style-type: none"> • Significant cost • Approach repeatedly rejected by CLRG
Self-certification	Employee & employer “self-declare” they are unable to pay	<ul style="list-style-type: none"> • Easy for some employees to access 	<ul style="list-style-type: none"> • Doesn't fulfil requirements of Supreme Court judgment • Few checks & balances • Employer may refuse to engage/sign a declaration

The Working Group agreed that an administrative solution underpinned by amendments to the 1984 Act is the most appropriate high-level option. Potential options for an administrative solution approach were considered in the Working Group's approach.

3. Recommended Policy Solution

3.1 OUTLINE OF PREFERRED POLICY SOLUTION

The Working Group considered that three tests should be applied to any administrative solution:

- Test 1: verify employee debt
- Test 2: verify employer trading status
- Test 3: insurable employment

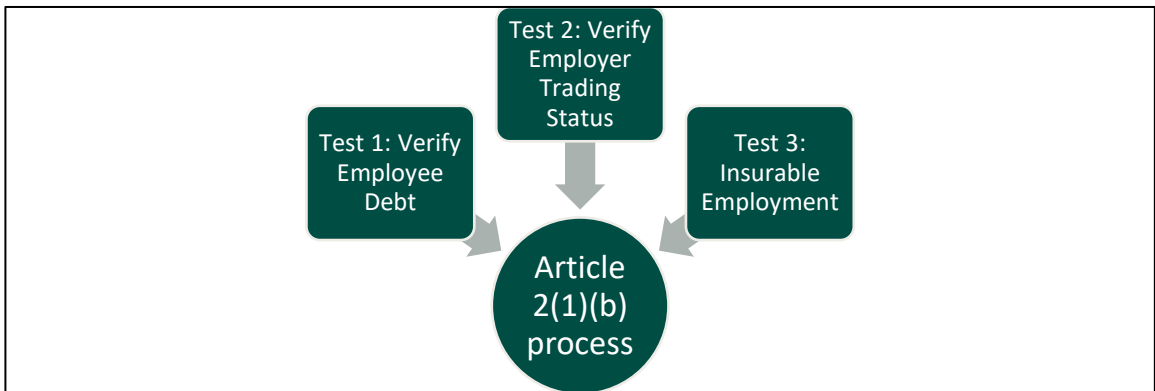


Figure 1: Tests Used

3.2 TEST 1: VERIFYING EMPLOYEE DEBT

The purpose of this test is to ensure debts claimed from the Department of Social Protection (“DSP) are legitimate. Secondly, it can differentiate between an employer who does not wish to pay, and one who is unable to pay due to its financial circumstances.

Four levels of debt verification were considered by the Working Group. These were:

- Statutory declaration: employee provides necessary details on statutory form.
- WRC / Labour Court award: employee makes complaint to WRC, which makes an award detailing the amounts owed. The WRC award is submitted as part of the claim.
- District Court order: employee seeks District Court order enforcing WRC award (under s.43 of the Workplace Relations Act 2015). The order is submitted as part of the claim.
- Circuit Court and Sheriff / County Registrar: employee seeks Circuit Court order for Sheriff / County Registrar to seize employer’s goods. A return of no goods order is submitted as part of the claim.

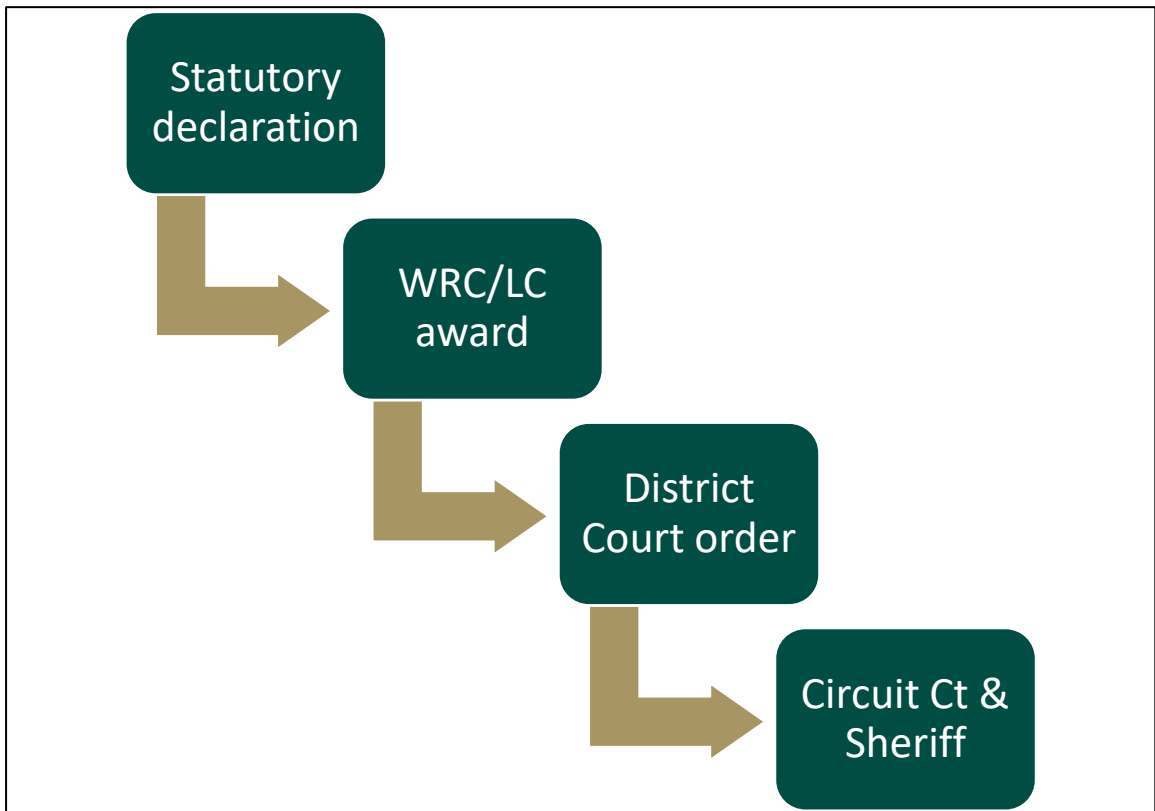


Figure 2: Options of Debt Verification

In its discussion, the Group considered a number of factors:

- In this process, there is no liquidator or similar appointee whose responsibility it is to review and process employee claims. In a normal insolvency claim, liquidators can certify employee claims for arrears of wages, minimum notice entitlements, holiday and sick pay.
- The employee should be required to provide certain documentation / evidence that would normally be available to them in support of their claim.
- The State does not have access to company records or personnel files.
- Each additional level of verification adds assurance, but there are significant trade-offs in terms of complexity of the process for employees raising access to justice issues.
- Each additional level of verification adds delays of many months to the process.

The Working Group recommended the following policy approach in respect of Test 1:

Recommendation 1: Policy Principles for Test 1 – Verify Employee Debt

- A statutory declaration from the employee is the appropriate level of verification for the following types of debts: Arrears of wages, minimum notice entitlements, holiday and sick pay. The exact format of the statutory declaration should be considered by DETE and DSP.
- DETE should consider requiring that the form be notarised, as an additional form of verification and mitigation against fraud.
- Along with the statutory declaration, employees should also be required to provide evidence they would ordinarily hold or have access to (e.g. payslips, bank statements) to support their claim.
- As in formal insolvency claims, the evidence required for debts arising from employment rights claims should be the relevant WRC / Labour Court award.

3.3 TEST 2: VERIFYING EMPLOYER TRADING STATUS

The purpose of this test is to verify whether an employer is still in business or has closed down.

The Directive protects employees where their employer is insolvent. It is not the policy objective for the State to cover employee debts that are due from an employer in all circumstances. This test is important to differentiate debts which may be owed to the employee from an employer who continues to trade. The State already provides mechanisms for employees to pursue such claims via the Workplace Relations Commission (WRC) and / or civil debt recovery.

Three standards of verification were considered by the Working Group. These were:

- The employer has “definitively closed down” (wording from Article 2(1)(b))
- The employer, on balance of probabilities has closed down
- There is no evidence the employer is continuing to trade.

In its discussion, the Working Group considered a range of factors:

- The challenges associated with any public body outside of the Courts making a specific finding of fact that a company has “definitively closed down” or “on balance of probabilities has closed down”.
- The challenges associated with asking employees to provide information / supporting evidence to meet this test, given they would not normally have access to this information.
- What existing State data could be used to verify this test, and how frequently that data is updated. This includes Revenue data (PAYE and PRSI returns, VAT returns,

corporate tax returns, Merchant Acquirer information on card transactions) and CRO data (company annual returns).

- Which public bodies should verify this information as part of the claim.
- What practical steps are required to give effect to any information sharing between public bodies (data protection, legal basis).

The following types of data held by the State were considered:

Table 2: Types of State Data considered

What data?	Who holds it?	How current is it?
PAYE Modernisation (employee income tax etc.)	Revenue	<ul style="list-style-type: none"> • Real time: updated based on the frequency of pay period (weekly, fortnightly, monthly) • Nil returns can be considered “deemed returns” if there is no contact.
PRSI contributions (employee/employer)	Revenue	<ul style="list-style-type: none"> • This is the same return as above returns.
VAT Returns	Revenue	<ul style="list-style-type: none"> • Not real time • Range of taxable periods (monthly/annual) • Not all businesses are required to register for VAT
Merchant acquirer (credit / debit card transactions)	Revenue	<ul style="list-style-type: none"> • Annual basis (information due by April of following year) • A move to accessing Merchant Acquirer data more regularly is under consideration. • Not all businesses have merchant acquirer
Corporation tax returns	Revenue	<ul style="list-style-type: none"> • Due 9 months after end of financial year
Company annual returns	CRO	<ul style="list-style-type: none"> • Required at least once a year • 9 months after the return is due the company is struck off
Employment activation schemes	DSP	<ul style="list-style-type: none"> • A check of Employment Activation schemes in relation to employers does not provide a useful data source for this purpose

The Working Group recommended the following policy approach in respect of Test 2:

Recommendation 2: Policy Principles for Test 2 – Verify Employer Trading Status

- The appropriate verification for this test is that there is “no evidence the employer is continuing to trade”.
- This test should be verified through use of existing State data. Given its real time nature, Revenue data on PAYE and PRSI returns should be used.
- Information should be available from Revenue to DSP through an API as part of the process, with the appropriate mechanism put in place to provide for the automatic sharing of data between DSP and Revenue for the purpose of this verification step, having regard to data protection and legal considerations. Detailed discussions should take place between DETE, DSP and Revenue to progress this.
- Employees should not be required to provide supporting documentation / evidence for this test.

3.4 TEST 3: INSURABLE EMPLOYMENT

Section 3 of the 1984 Act provides that the Act applies to employees who are insured for all benefits under social welfare legislation. Generally this means an employee who pays class A PRSI. The Act also applies to employees who would normally be insurable but for the fact that they are over 66 years of age.

The Working Group noted that, unlike entitlement to statutory redundancy, there is no minimum service required for employees under the 1984 Act.

The Working Group considered that there was no rationale to depart from this longstanding approach for the Article 2(1)(b) process.

Recommendation 3: Policy Principles for Test 3 – Insurable Employment

- The existing, longstanding approach to eligibility under the 1984 Act should continue to apply to employees applying under an Article 2(1)(b) process.

3.5 ADDITIONAL CONSIDERATIONS

3.5.1 Sole Trader Employers

The Working Group considered the application of Test 2: Verify Employer Trading Status to sole traders who are governed by bankruptcy and personal insolvency legislation.

The factors considered included:

- Sole traders are personally liable for their debts.
- Individuals have a constitutional right to earn a livelihood.
- There are no restrictions on individuals trading while in personal insolvency arrangements. An individual may also be eligible to trade while in bankruptcy (subject to disclosure requirements and notifying the Official Assignee).
- Government policy on personal insolvency encourages individuals to remain in (or return to) economic activity.
- DETE's consultation with D/Justice, which has responsibility for personal insolvency policy and legislation.

The Working Group agreed there was objective justification to exceed the minimum requirements of the Directive in such cases, and recommended the following policy principle:

Recommendation 4: Sole Trader Employers

Where an employer is a sole trader, Test 2 (Verify Employer Trading Status) should be appropriately modified so that it is not a requirement for a sole trader to have fully ceased trading.

The Working Group notes this policy approach exceeds the minimum requirements of the Directive.

3.5.2 Appeal mechanisms for employees

The Working Group considered the appropriate appeal mechanisms that should be put in place in any Article 2(1)(b) process.

The Working Group notes that DSP can and does seek further information / evidence if they have a query about part of the claim. This applies before any claim is rejected.

Table 3: Appeal Mechanisms

Test	Relevant decision	Appeal mechanisms open to employee
1 Verify Employee Debt	<ul style="list-style-type: none"> Employee receives less than the amount claimed DSP applies €600pw limit to claims where weekly pay is in excess of this amount 	<p>Complaint to WRC under s.9 of 1984 Act (existing process) for arrears of wages, minimum notice, sick pay or holiday pay <u>only</u></p> <p>(Note: there is no appeal to the WRC for regarding debts arising from employment rights decisions from the WRC / Labour Court).</p>
2 Verify Employer Trading Status	<ul style="list-style-type: none"> Revenue data indicates employer is continuing to trade 	<ul style="list-style-type: none"> Administrative review Employee waits and reapply later if circumstances change (e.g. company is struck off) Employee pursues employer through existing civil debt mechanisms
3 Insurable Employment	<ul style="list-style-type: none"> Employee not in insurable employment for the purpose of the Social Welfare Acts 	Employee applies to Records section of DSP for review (existing process)

Recommendation 5: Appeal Mechanisms for Employees

- The appeal mechanisms outlined in Table 3 should be used.
- DETE and DSP should ensure any rejection letter to employees provides clear and definitive information on what the employee's options are.

3.5.3 Employer role in process

The Working Group considered the role of the employer in this process. During its discussion, the Working Group considered the following:

- Employees should make reasonable efforts to recover the debt from the employer in the first instance.
- It is important that an employer is given adequate notice and right of reply during this process, as it can result in a debt being raised against them.
- In balancing the rights of employees and employers, care should be taken that an employer cannot “veto” the process by claiming they are still continuing to trade if this is not supported by evidence.
- The length of time given to allow for an employer’s reply should be proportionate, giving adequate time for response without resulting in inordinate delay from an employee’s perspective.
- Any employer notification or right of reply should not impact on DSP’s existing processes regarding the timing of payment or audit / C&AG requirements.
- Consideration should be given to sharing information about companies which have a debt raised against them from this process with the relevant public body, as it may indicate failure on the part of directors to comply with their responsibilities.

Recommendation 6: Employer’s Role in Process

- The employee should send a formal request to the employer before applying to DSP. A template form should be developed to assist in this regard (similar to the RP77 form). Proof of delivery should be required. The employer should be given 4 weeks to respond.
- The employer should receive notification when an application is being made by their employee, with adequate right of reply given. The exact details of this should be discussed and agreed between DETE and DSP.
- DETE should consider providing for the sharing of information about companies which have a debt raised against them from this process with the relevant public body.

Appendix 1: Working Group Membership

Name	Organisation
Dara Breathnach (Chair)	Redundancy & Insolvency Policy Unit, DETE
Peter O'Brien Hogan	Redundancy & Insolvency Policy Unit, DETE
Orla Mulready	Redundancy & Insolvency Policy Unit, DETE
Josh Byrne	Redundancy & Insolvency Policy Unit, DETE
Tara Coogan	Industrial Relations and WRC Liaison Unit, DETE
James Scanlon	Legal Adviser, DETE
Sarah Mc Nerney	R&I Payments Unit, DSP
Amy Reville	Insolvency Unit, Revenue
Paul McHenry	Companies Registration Office
Cathy Shivnan	Insolvency Supervision, CEA
Kathleen Glackin	Insolvency Supervision, CEA