An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Regulatory Impact Analysis

Protection of Employees (Employers' Insolvency) (Amendment) Bill 2024

April 2024

Contents

1 Summary of Regulatory Impact Analysis

Department: Enterprise, Trade and Employment	**Title of legislation:** General Scheme of Protection of Employees (Employers' insolvency) (Amendment) Bill 2024
Stage: Seeking Government approval to proceed to draft a Bill and publish the General Scheme	**Date:** April 2024

Related Publications:

- General Scheme of Protection of Employees (Employers' insolvency) (Amendment) Bill 2024
- Report of the Interdepartmental Directive 2008/94/EC Article 2(1)(b) Working Group (March 2023)
- Company Law Review Group: *Report on the Protection of Employees and Unsecured Creditors* (2017)

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Policy objectives being pursued

1. Ensure Directive 2008/94/EC is fully transposed into Irish law;
2. Further enhance the protection of employees in the event of their employer's insolvency;
3. Ensure the Scheme's operation aligns with broader Government policy on personal insolvency;
4. Further improve the operation and administration of the Scheme by ensuring policy certainty in how certain claims are processed.

Policy options considered:

1. Do nothing.
2. Make targeted amendments to the Protection of Employees (Employers' Insolvency) Act 1984.

Preferred option: Option 2.

OPTIONS

	Costs	***Benefits***	***Impacts***
1.	State Costs: • Potential infringement proceedings initiated by European Commission • Cost of legal cases taken by employees against State for failure to fully transpose Directive Employee costs: • No mechanism to claim pay-related entitlements where employer ceases trading without formally winding up	• No benefits identified	• Fails to vindicate employees' rights under EU law
2.	State Costs: • €558,500 per annum estimated costs to the Social Insurance Fund (SIF) • €14.52m once-off cost to the SIF • €172,000 per annum administrative costs, plus a €500,000 once off cost.	Benefits to State: • Ensures proper transposition of Article 2(1) of Directive 2008/94/EC • Alignment with Government policy on personal insolvency • Administrative efficiencies by providing policy certainty on application of salary ceiling to payments Benefits to employees: • Rights under EU law fully vindicated in simple, low-cost process • Expanding access to Insolvency Payments Scheme for employees of sole trader employers who enter into a Personal Insolvency Arrangement, Debt Relief Notice or Debt Settlement Arrangement • Ensures Circuit Court awards for gender discrimination are covered under the IPS	• Certain aspects of proposals exceed minimum requirements of the Directive: test used to deem insolvency; modifications for natural person employers (e.g. sole traders). • Potential risk of implications for definition of insolvency for other purposes (e.g. Companies Act / Bankruptcy Act) mitigated, as well as stakeholder consultation. • Relatively minor impact on WRC resourcing

2 Description of Policy Context and Objectives

2.1 Policy Context

2.1.1 INSOLVENCY PAYMENTS SCHEME

The purpose of the Insolvency Payments Scheme ("IPS" / "Scheme") is to protect outstanding pay-related entitlements due to employees, in the event of the insolvency of their employer.[1] Such entitlements include:

- Arrears of wages and sick pay (capped at 8 weeks)
- Outstanding holiday pay (capped at 8 weeks)
- Unpaid statutory minimum notice
- Certain arrears of pension contributions
- Various statutory awards made by the Workplace Relations Commission ("WRC") and Labour Court ("LC").

These entitlements are subject to a salary cap, currently €600 per week, and must have arisen in the 18 months prior to the date of insolvency (or 12 months in the case of unpaid pension contributions).

Payments are made from the Social Insurance Fund ("SIF").

When a liquidator or receiver is appointed, as part of the formal wind-up of the company following its insolvency, they compile each employee's entitlements and apply on the employees' behalf to the Department of Social Protection ("DSP") under this scheme. Payment is made directly to the liquidator, who disburses the monies less any statutory deductions to the employees.

2.1.2 LEGAL BASIS FOR THE SCHEME

The Scheme operates under the Protection of Employees (Employers' Insolvency) Acts 1984-2020 ("the 1984 Act").[2]

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 on "the protection of employees in the event of the insolvency of their employer" ("the Directive").[3]

Article 2(1) of the Directive defines the circumstances in which an employer shall be deemed to be in a state of insolvency for the purposes of the Directive as follows:

> *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*

[1] www.gov.ie/insolvency
[2] https://revisedacts.lawreform.ie/eli/1984/act/21/front/revised/en/html
[3] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0094

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. Under this section, an employer is deemed insolvent if (and only if):

(a) he has been adjudicated bankrupt or has filed a petition for or has executed a deed of arrangement (within the meaning of section 4 of the Deeds of Arrangement Act 1887); or
(b) he has died and his estate, being insolvent, is being administered in accordance with the rules set out in Part 1 of the First Schedule to the Succession Act 1965; or
(c) where the employer is a company, a winding up order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by any floating charge, of any property of the company comprised in or subject to the charge; or
(d) he is an employer of a class or description specified in regulations under section 4(2) of this Act which are for the time being in force and the circumstances specified in the regulations as regards employers of such class or description obtain in relation to him;
(e) the employer is an undertaking which is insolvent under the laws, regulations and administrative procedures of another Member State in accordance with Article 2(1) of the Directive, and the employees concerned are employed or habitually employed in the State; or
(f) the employer is insolvent under the laws, regulations and administrative procedures of the United Kingdom and the employees concerned are employed or habitually employed in the State.

2.1.3 *GLEGOLA* SUPREME COURT CASE

In December 2018, the Supreme Court found that Article 2(1)(b) of the Directive had not been properly transposed into Irish law.[4]

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.

[4] Glegola -v- Minister for Social Protection [2018] IESC 65

The 1984 Act does not currently provide for situations where an employer ceases to trade without engaging in any formal wind-up process. In such cases, former employees may have monies owed to them without having a legal mechanism to claim those payments from the IPS. This General Scheme proposes a solution to address the *Glegola* Supreme Court judgment.

2.2 Policy Objectives

The policy objectives of the General Scheme are to:

1. Ensure the Directive is fully transposed into Irish law;
2. Further enhance the protection of employees in the event of their employer's insolvency;
3. Ensure the IPS's operation aligns with broader Government policy on personal insolvency;
4. Further improve the operation and administration of the IPS by ensuring policy certainty in how the salary ceiling is applied to certain payments.

In identifying policy solutions to address the Supreme Court judgment, the following policy principles guided the work:

- 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 circumstances where a business ceases trading without formally winding up;
- To ensure any solution gives full effect to the requirements set out in the Glegola **Supreme Court judgment**.

3 Identification and analysis of policy options

3.1 Option 1: Do nothing

3.1.1 DESCRIPTION OF OPTION

Under this option, no legislative changes will be made.

3.1.2 COSTS

Costs to the State:

- Potential costs due to infringement proceedings being initiated by the European Commission.
- Continued costs associated with legal cases being taken by employees against the State for failure to fully transpose the Directive.

Costs to employees:

- Without a legal mechanism, employees would continue to not have a mechanism to claim pay-related entitlements in the event their employer ceases trading without formally winding-up.

3.1.3 BENEFITS

No benefits identified.

3.1.4 IMPACTS

This option fails to vindicate employees' rights under EU law.

3.2 Option 2: Make targeted amendments to the 1984 Act

3.2.1 DESCRIPTION OF OPTION

Under this option, the following legislative changes are proposed to the 1984 Act to fulfil the policy objectives:

Table 1: Proposed list of policy changes to Insolvency Payments Scheme

Proposed Changes to Insolvency Payments Scheme
a) Put in place a new Employer Deemed Insolvent Application for former employees to apply to have their employer deemed insolvent, where their employer ceases trading without going through a formal wind-up, for the purpose of claiming their pay-related entitlements from the IPS.
b) Provide for a time-limited Historical Employer Deemed Insolvent Application to cover historical cases falling within the scope of the *Glegola* judgment.
c) Expand access to the IPS to include the former employees of sole trader employers in insolvency arrangements (Personal Insolvency Arrangement, Debt Settlement Arrangement and Debt Relief Notice) set out in the Personal Insolvency Act 2012.
d) Amend the Employment Equality Act 1998 to ensure Circuit Court awards for gender discrimination are covered by the IPS.
e) Apply the statutory salary ceiling, currently €600 per week, to all types of payments from the IPS. This will restore the longstanding administrative approach used, but which was found to be *ultra vires* in a Court of Appeal judgment.

The rationale and a brief description of each change is set out in detail in this section.

3.2.1(a) Put in place a new Employer Deemed Insolvent Application for former employees to apply to have their employer deemed insolvent, where their employer ceases trading without going through a formal wind-up, for the purpose of claiming their pay-related entitlements from the IPS.

Description: A new Employer Deemed Insolvent Application will extend the protection of the IPS to include employees who fulfil the following criteria:

- They have lost their job and are owed pay-related entitlements by their employer,
- If their employer is a company, that it has ceased trading; or, if their employer is a natural person (e.g. sole trader), that they have ceased acting as an employer,
- The business hasn't been formally wound up (e.g. by entering liquidation, receivership or bankruptcy).
- the employment was insurable for all purposes under the Social Welfare (Consolidation) Act 2005.

The new process is outlined below. A number of case studies illustrating this application process are set out in section 9.1 of this RIA.

Table 2: Summary of Employer Deemed Insolvent Application

1. The employee serves written notice on the employer requesting payment of their outstanding entitlements.
2. If the employer has not paid after 8 weeks, the employee can make an application to the Department of Social Protection to have their employer "deemed insolvent".
3. The employee completes the application form, including swearing a statutory declaration and supplying relevant evidence to support the application.
4. The Department will then assess the application, including:
    - Checking to confirm that the employee is in insurable employment,
    - Using existing State data (such as from Revenue and the CRO), to determine:
        - If the employer has ceased trading (if a company), or
        - If the employer has ceased acting as an employer (if a natural person such as a sole trader).
    - Checking the debts claimed by the employee are valid.
5. If the claim is approved, the Department will then make a payment directly to the employee, less any statutory deductions at the highest rate.[5]

The employer will be notified and given an opportunity to respond during the process.

Rationale: this new process is required to give effect to the *Glegola* judgment, as set out in section 2 of the RIA.

[5] To avoid any potential underpayment of tax on these payments by employees, the Department makes statutory deductions at the highest rate. Employees can engage with Revenue to claim any refund owed.

3.2.1(b) Provide for a time-limited Historical Employer Deemed Insolvent Application to cover historical cases falling within the scope of the *Glegola* judgment.

Description:

This change provides for a mechanism for the Minister to determine an employer is deemed insolvent for the purpose of this Act for historical cases.

This Part of the General Scheme will cover claims where the employer ceased trading but did not formally wind-up between 22 October 1983 (the original transposition date) and the date of commencement of the Act.

In general, the same process will apply as is required for the Employer Deemed Insolvent Application. The following modifications apply:

- All claims under this Historical Employer Deemed Insolvent Application must be submitted within two years of commencement of the Bill. A comprehensive communications campaign will be conducted by the Department to advise former employees of their potential entitlements under this process (see section 5.4 below).
- An employee is not required to first serve notice on the employer, nor will the Minister notify the employer of the claim. This is because, given how far into the past some of these debts are, this will be a cost borne by the SIF and not recouped from the employer. This reflects the fact that there is normally a six-month time limit to pursue employment rights breaches to the WRC (extendable to 12 months with reasonable cause), and a 6-year limitation period for pursuing breaches of contract such as non-payment of wages. Furthermore, this is a cost being borne by the State because, as established by the Supreme Court in *Glegola*, the State failed to properly transpose Article 2(1) of the Directive.

A number of case studies illustrating this application process are set out in section 9.2 of this RIA.

Rationale: this new process is required to ensure historical claims are dealt with. This will ensure employees are not disadvantaged due to the State's failure to properly transpose Article 2(1) of the Directive.

The two-year window in which applications must be submitted is considered a proportionate length of time to ensure employees can inform themselves of their new rights under this Bill, while also avoiding a permanent and open-ended liability for the State.

3.2.1(c) Expand access to the IPS to include the former employees of sole trader employers in insolvency arrangements (Personal Insolvency Arrangement, Debt Settlement Arrangement and Debt Relief Notice) set out in the Personal Insolvency Act 2012.

Description: This change will allow employees of sole trader employers who enter into an insolvency arrangement within the meaning of the Personal Insolvency Act 2012 to access the IPS.

Under this process, employees will be able to seek payment from the IPS of the portion of the outstanding debt that is not already covered by the insolvency arrangement.

For example, an employee as a creditor is owed €1,000 by their former employer and will receive €50 for this debt under the terms of an insolvency arrangement over the lifetime of the arrangement. The employee would then be entitled to apply to have the balance (€950) paid through the IPS.

The Department of Social Protection would then assess the application to determine:

- whether the employee was in insurable employment with the former employer,
- whether the debts being claimed are covered by the Scheme. Where they are, the amount of the debts is also subject to DSP verification and may be subject to the salary ceiling.

If the application is successful, the Department would pay the amount owing directly to the employee (less any statutory deductions at the highest rate).

Rationale: Personal insolvency arrangements were introduced in 2013 as an alternative to bankruptcy for individuals. These are Personal Insolvency Arrangements, Debt Settlement Arrangements and Debt Relief Notices.[6] Currently, these arrangements are not covered in the definition of insolvency in the 1984 Act. This means that, where an individual avails of these arrangements and they have employees who are owed money, those employees cannot claim the amounts owed from the Insolvency Payments Scheme.

Government Policy is to encourage use of these personal insolvency arrangements instead of bankruptcy. This change will ensure employees of sole trader employers who avail of these personal insolvency arrangements are able to make a claim for their pay-related entitlements from the IPS.

[6] https://www.gov.ie/en/publication/5a151-debt-solutions/

3.2.1(d) Amend the Employment Equality Act 1998 to ensure Circuit Court awards for gender discrimination are covered by the IPS.

Description: This change will allow employees with Circuit Court awards for gender discrimination to recover this type of debt from the Scheme.

Rationale: Circuit Court awards granted to employees who suffer gender discrimination are not currently covered by the Insolvency Payments Scheme. Such awards are provided for in the Employment Equality Act 1998 and were previously covered by the IPS. They were not included in 2015 legislation.

This means that, if their employer becomes insolvent, employees with this type of award have no means of claiming this award from the State. The General Scheme amends the Employment Equality Acts to reinstate this type of debt under the Insolvency Payments Scheme.

3.2.1(e) Apply the statutory salary ceiling, which is currently €600 per week, to all types of payments from the IPS. This will restore the longstanding administrative approach used, but which was found to be *ultra vires* in a Court of Appeal judgment.

Description: The General Scheme provides that all types of payments made from the IPS (including employment rights awards) will be subject to a salary ceiling (currently €600 per week).

Rationale: The IPS applies a salary ceiling (currently €600 per week) to certain payments, for example arrears of wages and minimum notice payments. This means employees earning in excess of this amount have any payments to them made, capped at a maximum of €600 per week. Historically, all employment rights awards (e.g. from the WRC, Labour Court or their predecessor bodies) claimed from the IPS also had the salary ceiling applied to them.

Following a judicial review, the Court of Appeal found in 2019 that the longstanding approach to capping payment of employment rights awards was ultra vires.[7] Since then, the salary ceiling only applies where an award relates to the employee's weekly remuneration.

This means there is some ambiguity as to when the salary ceiling applies, which can depend on the specific wording used in an award from the WRC / Labour Court. Where the compensation is not related to the employee's remuneration (for example, a general compensation award of €25,000 for breach of the employee's rights), this award is not subject to the salary ceiling. In contrast, if an award of €25,000 is made and it is stated that this is 25 weeks' salary, the award is subject to the salary ceiling.

The rationale for this change is to bring legal certainty to how such awards are treated, by providing a statutory basis for the longstanding approach operated by the Scheme.

[7] Brady & Anor -v- Minister for Social Protection & Anor [2019] IECA 178.

3.2.2 COSTS

Costs to the State:

The costs of these proposals are borne by the Social Insurance Fund, as all IPS expenditure is made from the SIF. The expenditure from the Scheme is demand-led, driven by external factors such as the number of employer insolvencies, the number of employees affected and the value of the outstanding pay-related entitlements owed.

The total estimated cost of the proposal is:

€558,500 per annum for Scheme expenditure costs payable from the Social Insurance Fund, plus a once-off cost of up to €14.52 million payable over the first three years of the scheme.

€172,000 per annum for administrative costs payable from the Vote of the Minister of the Social Protection, plus a once-off cost of €500,000.

Costs for Employer Deemed Insolvent Application and Historical Employer Deemed Insolvent Application

Given the lack of available data on the number of employers who cease trading without formally winding up in the State, it is appropriate to provide an estimate cost range, ranging from low to high. The cost estimate is based on the following methodologies:

Table 3: Costing Methodology for Employer Deemed Insolvent Application and Historical Employer Deemed Insolvent Application

Ongoing Cost Methodology	Historical Cost Methodology
1. Establish median annual value (€) of Insolvency Payments Scheme expenditure from SIF (reference years: 2015-2023)	1. Establish total value (€) of Insolvency Payments Scheme expenditure from SIF (reference years: 1983 – 2023)
2. Estimate reasonable range (based on % of IPS expenditure) to approximate number of Employer Deemed Insolvent Application claims (low = 5%, middle = 10%, high = 15%)	2. Estimate reasonable range (based on % of IPS expenditure) to approximate number of Historical Employer Deemed Insolvent Application claims (low = 5%, middle = 10%, high = 15%)
3. Apply % range to median IPS cost	3. Apply % range to total IPS cost

The ongoing per annum cost of the Employer Deemed Insolvent Application is expected to range from €277,000 - €831,000, with a **mid-range estimate of €554,000 being considered likely.**

The once-off cost for the Historical Employer Deemed Insolvent Application is expected to range from €14.52 million - €43,56 million, with a **low-range estimate of €14.52 million being considered likely**.

Costs for other proposed changes to the Insolvency Payments Scheme

There are minor SIF costs associated with the other proposed changes. Given the demand-led nature of the scheme, it is estimated that the average net annual cost is €4,500 per annum. In all likelihood, there may be significantly higher expenditure versus the estimated amount in some years where an employee receives a Circuit Court award for gender discrimination and their employer subsequently becomes insolvent, and no expenditure in other years if this scenario does not arise.

Table 4: Cost estimate for other Scheme changes

Proposal	Estimated Cost (per annum)
3.2.1(c) Expand access to the IPS to include the former employees of sole trader employers in insolvency arrangements (Personal Insolvency Arrangement, Debt Settlement Arrangement and Debt Relief Notice) set out in the Personal Insolvency Act 2012.	€6,500
3.2.1(d) Amend the Employment Equality Act 1998 to ensure Circuit Court awards for gender discrimination are covered by the IPS.	€13,000
3.2.1(e) Apply the statutory salary ceiling to all types of payments from the IPS, which is currently €600 per week.	- €15,000

Administrative Costs

There are administrative costs associated with the General Scheme. These relate to IT development and staffing to administer the new proposals. These are outlined in the following table.

Table 5: Administrative Costs

Cost	Estimated Cost (per annum)
Staffing	€172,000
ICT development	€500,000

Costs to employers:

The proposals under the General Scheme will not give rise to additional costs for employers. Where payments are made from the Social Insurance Fund to employees via the Insolvency Payments Scheme, the employees' rights as creditors in respect of the debts owed by the employer transfer to the Minister.

Costs to employees:

There are minor costs for employees associated with the Employer Deemed Insolvent Application and the Historical Employer Deemed Insolvent Application. These costs mainly relate to the €10 charge associated with having a document sworn in front of a Commissioner for Oaths. This rate is set out in law.[8]

In keeping with the access to justice principle that guided the development of a policy solution, the application process has been designed to minimise the cost for employees.

However, in the absence of a liquidator or other relevant officer, it is appropriate to require an employee to swear their application. The penalties associated with swearing false information should help mitigate against unfounded or fraudulent claims under the Employer Deemed Insolvent Application and the Historical Employer Deemed Insolvent Application.

Costs to third parties:

The proposed changes set out in the General Scheme will not impose costs on third parties.

[8] S.I. No. 616/2003 - Rules of the Superior Courts (Fees Payable To Commissioners For Oaths), 2003 https://www.irishstatutebook.ie/eli/2003/si/616/made/en/

3.2.3 BENEFITS

Benefits to the State:

Implementing the Employer Deemed Insolvent Application and the Historical Employer Deemed Insolvent Application will ensure that the State has properly transposed Directive 2008/94/EC and will address the *Glegola* Supreme Court judgment. This will reduce the number of legal challenges and mitigate against the risk of infringement proceedings being taken by the EU Commission.

Amending the 1984 Act to expand the IPS to include former employees of sole trader employers who enter into a Personal Insolvency Arrangement, Debt Relief Notice or Debt Settlement Arrangement within will align the IPS with broader Government policy on personal insolvency.

Amending the 1984 Act to provide a legislative basis for the long-standing approach to capping payments from the Insolvency Payments Scheme will provide policy certainty of outcome, by ensuring all awards and claimants are treated the same. This will provide some financial savings and administrative efficiencies under the Insolvency Payments Scheme, although both are considered minimal.

Benefits to employees:

Implementing the Employer Deemed Insolvent Application and the Historical Employer Deemed Insolvent Application will ensure employees are able to fully vindicate their rights under EU law, by ensuring they have a mechanism to claim pay-related entitlements from the State where their employer ceases trading but does not formally wind-up. Employees will be able to avail of this process at minimal cost. At present, the principal remedies for employees require them to take High Court action.

Expanding the definition of employer's insolvency to also include insolvency arrangements under the *Personal Insolvency Act 2012* (e.g. PIA, DRN, DSA) will benefit employees by enabling them to access the Insolvency Payments Scheme. Although the expected take-up is likely to be low[9], expanding access to the Scheme will benefit those employees to whom it applies.

Including Circuit Court awards made for gender discrimination within the Insolvency Payments Scheme will benefit affected employees, by ensuring they can still receive compensation should their employer become insolvent.

[9] Insolvency Service of Ireland has advised that 7 / 37,000 (0.02%) of proposed insolvency arrangements under the 2012 Act listed employee(s) as creditors during the period 2013 – 2022.

3.2.4 IMPACTS

3.2.4(a) Areas of proposal that exceed the minimum requirements of the Directive

Test used to deem insolvency: Regarding verification of the employer's trading status, the proposed evidence threshold is that there is no evidence the employer is continuing to trade. This differs from the requirements of the Directive, which states that the employer has "definitively closed down". However, this modification is considered justified because it would be extremely challenging for any public body, outside of the High Court, to make a specific finding of fact that a company has "definitively closed down". Currently, the High Court deals with almost all insolvency related claims under the Companies Act 2014. The existing State data on the employer used in the proposal would not be sufficient evidence to determine that the higher threshold of "definitively closed down" has been met.

Modifications for natural person employers (e.g. sole traders): Where the employer is a natural person (such as a sole trader), it is proposed that test used to deem insolvency will be modified so that it is not a requirement that there is no evidence the sole trader is continuing to trade. This modification was recommended by the Working Group, following consultation with D/Justice (which has policy responsibility for bankruptcy and personal insolvency).

This means that the test will still verify that the sole trader is no longer acting as an employer, but will not require them to have ceased economic activity. In other words, the fact that sole trader is continuing to trade will not prevent an employee claim, although if they were continuing to employ staff it would prevent such a claim as this tends to suggest that they are refusing to pay, rather than being unable to.

This modification is considered justified for the following reasons:

- Sole traders, as individuals, have a constitutional right to earn a livelihood.
- The modification represents a balancing of individual rights: the employee's right to their outstanding pay should not be contingent on another individual (their sole trader employer) being unemployed.
- Government policy on personal insolvency encourages individuals to remain in (or return to) economic activity. There are no restrictions on individuals trading while in personal insolvency arrange

3.2.4(b) Implications for other definitions of insolvency

The proposed Employer Deemed Insolvent Application represents a departure from existing Irish law and policy. Before this, the definition of employer's insolvency under the 1984 Act was fully aligned with those set out in the *Companies Act 2014* and the *Bankruptcy Act 1988*.

As such, this proposal has presented certain complexities in terms of developing further safeguards and could result in unintended consequences. However, the risk of unintended consequences is mitigated as Heads 17 and 23 specifically provide that a determination that an employer is deemed insolvent for the purposes of the 1984 Act does not have bearing on any other Act or purpose. Furthermore, significant engagement with stakeholders (as outlined in the Consultation section of this RIA) will reduce this risk as well.

3.2.4(c) Impacts on the Workplace Relations Commission (WRC)

Certain decisions of the Minister under the 1984 Act may be appealed to the Workplace Relations Commission.[10] These include that the Minister failed to make a payment, or made a payment less than the amount required under section 6 or 7 of the Act, in respect of

- A debt related to arrears of wages, sick pay or holiday pay under section 6, or
- A debt related to pension contributions under section 7.

It is intended that the WRC's existing appeal functions will apply to a new cohort of employees covered under the General Scheme (i.e. those applying under the Employer Deemed Insolvent Application and Historical Deemed Insolvent Application). Head 26 sets out certain restrictions to this appeal function.

It is estimated that approximately 220 applications per annum will be made under the Employer Deemed Insolvent Process. Assuming an appeal rate of 1% (which reflects the current appeal rate from the Insolvency Payments Scheme)[11], this will result in approximately 2 appeals per annum.

It is estimated that there will be 4,750 Historical Employer Deemed Insolvent applications spread over the first two years following commencement. This may result in 48 appeals to the WRC, on a once-off basis spread over the first three years following commencement.

Considering these estimates, it is expected that the impact of these proposals on the operation of the WRC should be relatively minor. However, the WRC will monitor trends post introduction of the legislation, in the context of the cumulative impact of recent legislative changes which introduce new avenues for persons to take complaints to the WRC for adjudication.

3.3 Conclusion

Option 1 is not considered a viable option. As the Supreme Court held that the Directive was not fully transposed, Ireland has an obligation to comply with EU law.

Option 2 is the preferred option.

[10] Section 9, 1984 Act.

[11] For comparison, approximately 1% of decisions made by the Department of Social Protection in other DSP schemes are appealed to the Social Welfare Appeals Office (source: Social Welfare Appeals Office Annual Report 2022, Chapter 3).

4 Impact Analysis

4.1 National Competitiveness

No particular impacts have been identified.

4.2. Socially excluded or vulnerable groups including gender equality, poverty, people with disabilities and rural communities

Gender equality: Amending the Act to bring Circuit Court awards for gender discrimination within the ambit of the Insolvency Payments Scheme will ensure that individuals who suffer the effect of gender discrimination and receive an award of compensation from the Court are able to claim their award from the State in the event their employer is insolvent.

Poverty proofing: The proposals will ensure that former employees of employers who cease trading but do not wind up have a mechanism to claim their outstanding pay-related entitlements from the State. The claim can be made at significantly lower cost to the employee than trying to pursue civil debt recovery. This will particularly benefit lower paid employees.

4.3. The environment

No particular impacts have been identified.

4.4. Significant policy change in an economic market including impacts on competition and consumers

No particular impacts have been identified.

4.5. North-South, East-West relations

No particular impacts have been identified.

4.6. The rights of citizens/human rights

The proposals will enhance Ireland's regulatory framework by ensuring that European law is properly transposed, and that the Directive's protections are extended to employees of employers who cease trading without formally winding up their business.

4.7. Compliance burden on third parties e.g., citizens and business

No particular impacts have been identified.

4.8. SME Test

The possible impact on SMEs arising from the proposed legislative changes has been considered in line with the SME (Micro, Small and Medium Enterprises) Test.[12] This is an integral part of the European Commission's Better Regulation Guidelines since 2009. It asks each Member State to include an assessment of the burden on SMEs for relevant regulations and legislation.

Because the proposals in this General Scheme only apply where an employer is already insolvent, or has ceased trading, there is no impact on SMEs or other active employers.

The proposals under the General Scheme will not give rise to additional costs to employers. Where payments are made from the Social Insurance Fund via the Insolvency Payments Scheme to employees, the employees' rights as creditors in respect of the debts owed by the employer transfer to the Minister.

[12] https://enterprise.gov.ie/en/what-we-do/the-business-environment/better-regulation/sme-test/

5 Consultation

5.1 COMPANY LAW REVIEW GROUP

The Company Law Review Group (CLRG) is an expert, independent group that provides advice to the Minister on the operation of the Companies Act 2014.

In 2017, it examined a proposal submitted by Department of Social Protection to address the issue of companies never being formally wound up and employees' resulting lack of access to the Insolvency Payments Scheme.[13] D/Social Protection's proposal involved amending the Companies Act, including amending the definition of insolvency in that Act. The CLRG did not accept the proposal and concluded that a more comprehensive legislative change was needed.

The solution proposed in this General Scheme does not impact on the Companies Act 2014 and makes explicit that an employee receiving a payment under the proposed Employer Deemed Insolvent Application or Historical Deemed Insolvent Application does not have any bearing on the employer's insolvency for the purpose of any other Act, including the Companies Act 2014.

5.2 INTERDEPARTMENTAL WORKING GROUP

Following extensive engagement with legal advisers and the development of potential high-level policy options, the Department formed an Interdepartmental Working Group to examine the Supreme Court judgment and propose solutions in December 2022. The Working Group comprised representatives from DETE, DSP, the Corporate Enforcement Authority (CEA), the Companies Registration Office (CRO) and Revenue.

The Directive 2008/94/EC Article 2(1)(b) Working Group finalised its high-level policy recommendations to address this issue in March 2023. A copy of the report of the Working Group's recommendations is published alongside this RIA.

5.3 OTHER CONSULTATIONS

Department of Social Protection was extensively involved in the development of the proposed policy and General Scheme. The Insolvency Payments Scheme is administered by D/Social Protection and so full consideration has been given to the administrative, technical and operational implications of the proposals. That Department supports the proposal.

The **Department of Justice** was consulted multiple times over the period 2022-2023 on the implications of the proposals for employers who are sole traders or otherwise covered by personal insolvency legislation. The proposals account for the specific circumstances of such employers reflects these consultations. That Department supports the proposal.

[13] Section 6.2.2, Report on the Protection of Employees and Unsecured Creditors (CLRG, 2017)

The **Department of Children, Equality, Disability, Integration and Youth** was consulted in 2022 and 2023 on the proposal to amend the Employment Equality Act 1998 to cover Circuit Court awards for gender discrimination within the Insolvency Payments Scheme. That Department confirmed their policy intention is that Circuit Court awards for gender discrimination should be covered by the Scheme in the event an employer becomes insolvent. That Department supports the proposal.

5.4 PROPOSED INFORMATION CAMPAIGN

Given the relative complexity of the proposals contained in this General Scheme, the Department proposes that a comprehensive information campaign will be rolled out following the commencement of the Bill.

6 Enforcement and Compliance

Penalties for false declarations

Heads 14 and 21 oblige an employee to make a statutory declaration as part of their application under the Employer Deemed Insolvent Application and Historical Employer Deemed Insolvent Application respectively. This is because certain debts operate on the basis of an employee's self-declaration (supported by relevant evidence such as a contract of employment or payslips). A statutory declaration is required to ensure any claim made is fully accurate and truthful, and to provide certain penalties for false statements. This will help mitigate the risk of inappropriate expenditure from the SIF.

Under law, it is an offence to make a false statement in a statutory declaration.[14] The penalty for this offence is:

- on summary conviction, to a class B fine (currently €4,000) or to imprisonment for a term not exceeding 12 months, or both, or
- on conviction on indictment, to a fine not exceeding €100,000 or imprisonment for a term not exceeding 10 years, or both.[15]

Potential breaches of directors' duties under the Companies Act 2014

It is also proposed to create a mechanism to allow for appropriate information sharing where necessary between the Department of Social Protection and the Corporate Enforcement Authority (CEA). The CEA has a statutory role in investigating the conduct of company directors and has powers to disqualify individual directors. Where an employee makes a valid application from the Employer Deemed Insolvent Application and a debt is raised by DSP against the former employer, that information will be shared with the CEA.

This will allow the CEA, where appropriate, to take account of such information in its assessment of director conduct. This can act as a deterrent against poor practice or failure to comply with their overall duties as a director. Provisions authorising data sharing are included in the General Scheme, and this proposal will also be the subject of a Data Protection Impact Assessment (DPIA).

Matters outside the scope of this Bill

This Bill is concerned with the operation of the Insolvency Payments Scheme, and the protection of employees where (a) their employer is insolvent or (b) ceases trading without formally winding-up.

[14] S.6, Criminal Justice (Perjury and Related Offences) Act 2021.
[15] S.12, Criminal Justice (Perjury and Related Offences) Act 2021.

The issue of "phoenix companies" or an assessment of the conduct of directors of companies is outside the scope of this Bill. Such issues are a matter for the Corporate Enforcement Authority (CEA) and of company law policy more generally.

There a number of provisions in the *Companies Act 2014* to deter directors from walking away without winding up their company.

Directors have certain general and fiduciary duties under Part 5 of the 2014 Act and it is the duty of each director to ensure they are compliant with these provisions. The 2014 Act provides for two forms of sanctions in the case of a breach of duties by directors: restriction (s.819) and disqualification (s.842). The liquidator (or other applicant) may bring restriction applications to the High Court against a director. In this case, the onus of proof falls on the director to demonstrate they have acted honestly and responsibly in relation to the company.

If granted, a restriction order will restrict a director from acting as a director or secretary of a company for five years. Disqualification orders are more restrictive and require the liquidator (or other applicant) to demonstrate to the High Court that the director's misconduct justifies such court order. A disqualification order provides for the disqualification of a person from being appointed as a director or other officer, statutory auditor, receiver, liquidator or examiner of a company. The length of the disqualification period will be determined by the Court.

Furthermore, if a director fails to take reasonable steps or intentionally defaults in keeping proper books of account liable to a fine and imprisonment up to 10 years in some circumstances (s.286). Where a director breaches certain provisions of the 2014 Act such as in the case of fraudulent conduct by the director in relation to the company or where a director has failed to maintain proper books of account, they may be made personally liable for the debts of the company.

7 Review

The Department will prepare a post-enactment report, as required in the Standing Orders of both Houses of the Oireachtas, to review the functioning of the Bill, should it be enacted, 12 months following its enactment.

The Bill, if enacted, will also be periodically reviewed in line with submissions received by the Department.

8 Publication

The Department is publishing the General Scheme and this Regulatory Impact Analysis on its website.

9 Case Studies

Given the complexity of the proposals in this General Scheme, the following case studies illustrate some circumstances where an employee may make an application under the Employer Deemed Insolvent Application.

9.1 Employer Deemed Insolvent Application Scenarios

Table 6: Scenario 1- successful application (with salary cap applied)

Adam worked for Sample Company Ltd and was paid a salary of €1,000 per week. He knew his employer was having difficulties paying all the company's bills as they fell due. One day, his employer told him that the company had to cease trading and he was going to lose his job. His employer applied to the Redundancy Payments Scheme on his behalf, and he received his statutory redundancy pay. Adam calculated that he was still owed 10 weeks' pay at €10,000, comprising his last 4 weeks' pay (€4,000), two weeks' unpaid holiday pay (€2,000) and his minimum notice (€4,000 – 4 weeks' pay as he had between 5-10 years' service). His employer said they would pay him his outstanding wages owed once they figured out how they were going to wind up the company. Despite making contact, he never heard from them again nor got his money. When the new process opens, Adam learns about it from his friend. He completes the template form he downloads from gov.ie, setting out what he believes his employer owes him. He posts this to his employer's registered address, and keeps his receipt confirming proof of postage. He doesn't get any response from his employer after 8 weeks. He then completes the DSP application form and goes to a Commissioner for Oaths to swear the form. He then submits the application to the Department of Social Protection, along with the template form he sent to his employer. He waits a further 4 weeks while the Department of Social Protection notifies his former employer of his claim. He also provides copies of his payslips with his application. Adam receives a letter from the Department of Social Protection, confirming that his application is successful. Because his salary is more than the salary cap (€600pw), the amount he is due to receive is capped at €600 per week. As such, he receives €6,000 (10 weeks' pay at €600pw) less statutory deductions for tax and PRSI. The letter advises him that he may be entitled to claim back some tax from Revenue for this payment.

Table 7: Scenario 2 – unsuccessful application – employer still trading

Ciara worked for Bakers Ltd. Following a disagreement between Ciara and the employer, Ciara was informed that her contract was being terminated. Ciara made a complaint to the WRC and was awarded compensation for Unfair Dismissal. Ciara attempted to make contact with the employer to receive payment of the award. Her former employer would not communicate with her, and the award was never paid. When the new process opens, Ciara decides to apply. Like Adam in Scenario 1, she requests payment from her employer, then completes the Department of Social Protection (DSP) application form and goes to a Commissioner for Oaths, before submitting her application to DSP. While the employer does not respond to the template form, DSP are able to determine that there is evidence that the employer is continuing to trade. The employer is up to date with their returns to the CRO and they are making PRSI returns to Revenue for a number of employees. The claim was therefore unsuccessful as the employer has not ceased trading. Ciara, or her trade union acting on her behalf, is still entitled to seek enforcement of the unpaid WRC award at the District Court. She can also apply to the WRC to make an application to the District Court on her behalf.

Table 8: Scenario 3 – unsuccessful application – employer goes into liquidation

Liz worked in Factory Ltd. Until the company premises closed suddenly. Liz was still owed money, including 4 weeks' pay and her minimum notice. When the new process opens, Liz completes the template form, setting out what she believes her employer owes her. She posts this to the employer's registered address, and keeps receipt confirming proof of postage. Although her employer writes to her to say it is exploring options, after 8 weeks, it has not paid her the money she is owed. Liz then completes the Department of Social Protection (DSP) application form and goes to a Commissioner for Oaths, before submitting her application to DSP. One week later, Factory Ltd goes into liquidation. Because her employer has entered into liquidation, her application to deem her former employer insolvent is unnecessary and this application is disallowed. She is advised to contact the liquidator. The liquidator will arrange to claim her entitlements on her behalf from the Insolvency Payments Scheme, and will pay them to her.

9.2 Historical Employer Deemed Insolvent Application Scenarios

Table 9: Scenario 4 - Successful application

David worked in Grocery Shop Ltd for 4 years and was paid a salary of €300 per week. He was employed from June 2000 until August 2004 when the shop closed down. David did not know the shop was closing down until he arrived for his shift to find the doors locked.

David was aware that the shop was in financial difficulty as he was owed money prior to the shop shutting its doors. David calculated that he was owed €3,000, comprising his last 5 weeks' pay (€1,500), one week's unpaid holiday pay (€300) and his minimum notice (€1,200 - 4 weeks' pay as he had between 5-10 years' service).

When David made contact with the employer, he was informed that there was no money in the business to meet what was owed and the employer could also not afford to wind up the company.

When the Historical Deemed Insolvent Application opens, David reads on gov.ie that he has two years in which he can make an application.

David completes the application form, swears it before a Commissioner of Oaths, and makes an application to the Department of Social Protection (DSP). David also submits his payslips, contract of employment and some old correspondence with the employer to support his application.

DSP determines from their own records that David was employed with the company for the period claimed. DSP also checks existing State data, including the CRO, to determine the date of last returns, and Revenue, to determine that there was no evidence of the employer continued to trade. Based on this information, DSP deems the employer insolvent from November 2004.

As David's debts were within the 30-month (2.5 year) period from the date of deemed insolvency, they are in scope. DSP approves the claim. As such, he receives €3,000 from DSP less statutory deductions for tax and PRSI. The letter advises him that he may be entitled to claim back some tax from Revenue for this payment.

Table 10: Scenario 5 - unsuccessful application – debts not related to employer's insolvency

Jane worked as a builder for a sole-trader employer from 2004 to 2009 when a number of planned construction jobs fell through. Jane was owed several weeks' wages and was told that she would receive payment when things picked up and there would be more construction work available. She eventually found other work and did not pursue the employer further for money she was owed. Jane learned a number of months later that the sole trader had taken up other work with his other employee. When the new Historical Employer Deemed Insolvent Application opens, Jane completes the DSP application form, setting out what she believes her employer owed her – unpaid wages, minimum notice and holiday pay. She then swears the application form before a Commissioner for Oaths and submits this to the Department of Social Protection (DSP). DSP verifies Jane's employment with the sole trader employer. They also use Revenue records to determine that her employer continued to employ another employee until 2015. They also determine that the employer did not employ any employees after that date. DSP determines that the date of insolvency for this claim is 2015. As Jane's debts dated back to 2009, they are outside the 30-month (2.5 year) period prior to date of insolvency. As the debts are not related to the employer's insolvency, the claim is disallowed.

Table 11: Scenario 6 - unsuccessful application - sole trader employer continued to employ other employees

John was employed as an assistant electrician by a sole trader employer from 2016 to 2019. John was informed by his employer that his employer intended to emigrate and would no longer employ him. At the time, John was owed six weeks' wages. His employer told him that this money would be paid but he was waiting on payment from a number of other jobs. Over the next few months, John pursued his former employer for unpaid wages. After receiving no reply, John figured his former employer had emigrated. When the Historical Employer Deemed Insolvent Application opens, John completes the DSP application form, setting out what he believes his employer owes him: his unpaid wages. He then swears the application form before a Commissioner for Oaths and submits this to the Department of Social Protection (DSP). DSP verifies John's employment with the sole trader employer. They also use Revenue records to determine that his former employer continues to work in Ireland, and also continues to make PAYE and PRSI returns for other employees. Because John's former employer continues to act as an employer, his former employer is not deemed insolvent. As such, the claim is disallowed. However, John may have recourse to pursue his former employer in the courts as a simple contract debt, subject to the 6-year time limit set out in the Statute of Limitations.