

Submission by the Department of Social Protection to the Department of Jobs, Enterprise and Innovation on the Cahill Duffy review of laws protecting employee interests

1. Summary

The Cahill Duffy review of laws protecting employee interests was initiated by the Minister of Jobs, Enterprise and Innovation following the Clerys' liquidation. It makes three employment law proposals which would provide enhanced financial benefits for employees in situations of insolvency. These benefits would become payable under the redundancy and insolvency payments schemes, giving rise to a potential liability at between €80 and €215 million, which is a multiple of the 2015 expenditure of €43 million.

2. Remit of Department of Social Protection

The mission of the Department of Social Protection is to promote active participation and inclusion in society through the provision of income supports, employment services and other services. Among its strategic objectives are to put the client at the centre of services and policies and to drive cost, efficiency and effectiveness.

DSP administers two schemes which benefit employees faced with situations of company redundancy and insolvency: the redundancy payments schemes¹ and the insolvency payments scheme². Both of these schemes are funded from the social insurance fund, which is made up of PRSI contributions from employers, employees and the self-employed. In 2015, the total expenditure from the social insurance fund on these schemes was in excess of €43 million.

¹ The redundancy payments scheme compensates employees for the loss of their jobs where the employer is unable to pay statutory redundancy due to financial difficulties or insolvency. Payments are based on the employee's length of reckonable service and reckonable weekly remuneration, subject to a ceiling of €600 per week. Payment is capped at two weeks per years of service, plus one bonus week.

² 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. These include wages, holiday pay, sick pay, payment in lieu of minimum notice and certain pension contributions. Various statutory compensation awards made through the Workplace Relations Commission and the Courts are also covered by the scheme (mainly relating to unfair dismissal, unequal treatment and non-payment of wages). Payments under the scheme are made from the social insurance fund. The scheme caps the payments to employees through a limit of €600 per week on reckonable earnings, subject to a general maximum period of 8 weeks. The exception is for unfair dismissal, employment equality or similar employee rights enactments, where the maximum payment is 104 weeks.

The Cahill Duffy report makes a number of proposals for enhanced employee entitlements which would have indirect implications, both policy and financial, for the two schemes and for the social insurance fund.

The observations of DSP relate to four main issues which pertain to its remit:

- Broadening the remit of the insolvency payments scheme to provide for a compensation award against the liquidator of an insolvent company (proposal 1)
- Broadening the remit of the redundancy payments scheme to provide for enhanced redundancy payments, above the statutory minimum (proposal 6)
- Increasing the expenditure burden on the social insurance fund (proposals 1, 6 and 3)
- Extending the power of the Minister for Social Protection to delegate and fund liquidators to take legal actions to recover assets in cases of insolvent companies (proposal 4)

It should be noted that DSP was not consulted in the preparation of the report, neither were the department's views sought on the implications of its proposals on the redundancy and insolvency payments schemes or the social insurance fund.

DSP does not have a view on the merit of the proposals for protecting the interests of employees or for reforming existing provisions in the Companies Act 2014. These are matters outside the remit of the department.

Proposal 1 pertains to the existing statutory right of employees facing collective redundancy to consult with their employer for a minimum period of 30 days, before any collective redundancy can take effect (section 14, Protection of Employment Act). Under current legislation, this requirement does not apply in cases of insolvency (section 14 (3)).

Cahill Duffy propose to remove the exemption prohibiting the giving effect to collective redundancies until the expiry of 30 days' notice in situations of insolvency. This would constrain a liquidator from dismissing workers by way of a collective redundancy until the expiry of the 30 day consultation process.

The effect would be to give employees an entitlement to their normal wages. If unpaid, the employees would be entitled to compensation under the insolvency payments scheme. The maximum compensation that can be awarded by the Workplace Relations Commission to an employee who is not consulted for the minimum 30 days in situations of collective redundancy is four weeks' pay.

DSP is concerned that this proposal broadens the remit of the insolvency payment scheme to provide for a compensation award against the liquidator of an insolvent company. This would appear to undermine a ruling of the High Court that a company is insolvent and therefore unable to

trade, as the liquidator of the company would be required (in theory) to continue employing staff, thereby adding to the debts of the company. While acknowledging this legal dilemma, the report suggests that it could be recognised as a defence to trading while insolvent that this was done to comply with protection of employee legislation. This would change the role of the liquidator in the insolvency process and make them party to compensation awards. At the same time, DSP would have no input into the adjudication of such compensation awards, even though the department would ultimately end up as the payee of these awards. These changes could lead to an abuse of the insolvency payments scheme, which the department would be unable to defend against.

Proposal 6 provides for enhanced redundancy payments, which would have implications for the redundancy payments scheme. The report notes that a practice has developed of employers and trade unions negotiating enhanced or ex-gratia redundancy payments either voluntary or compulsory redundancies are proposed. The report proposes that the level of compensation that can be awarded should be increased and that the enhanced awards would be recoverable under the redundancy payments scheme, where the employer is insolvent. Currently, such enhanced payments are not regarded as payable under the redundancy payments scheme.

The mechanism to enhance redundancy payments would be to increase the level of compensation that can be awarded by under the Protection of Employment Acts by the Workplace Relations Commission. It is proposed that determining whether an entitlement to enhanced redundancy arises would be based on information provided under the Terms of Employment (information) Act. The effect of this would be to undermine the existing statutory guidelines on redundancy payments.

Furthermore, it would run counter to **the Government decision to abolish the rebate system in 2013**, whereby the social insurance fund had paid up to 60 percent of all redundancy payments.

An additional concern is the creation of a **possible anomaly in the treatment of redundant workers arising from insolvency and those of a more general nature**. The report acknowledges that there are difficulties in principle in confining this proposal to redundant workers in insolvency situations and not to apply to all redundant workers.

Proposals 1 and 6 individually and collectively could all lead to significant additional expenditure for the insolvency payments scheme. This, in turn, could affect the sustainability of the social insurance fund. The report itself acknowledges that this additional demand on the fund 'may not be considered a desirable outcome (from a policy perspective) unless the amounts paid out could be recovered from another undertaking'.

An estimate of the likely financial impact of proposal 1 can be calculated based on the number of claims on the insolvency payments scheme in 2015, which was 3,187. Assuming in all these claims the employees were not consulted for a minimum period of 30 days and they were awarded the maximum compensation of 4 weeks' pay, then the liability of the social insurance fund (subject to the statutory limit of €600 per week) would be €7.5 million. If the average wage was lower, at €400 per week, then the liability would be €5 million. To put these amounts in context, the expenditure

on the insolvency payments scheme in 2015 was €8.3 million. The additional liability would represent between 60 and 90 per cent of 2015 expenditure.

An estimated costing of proposal 6 for enhanced redundancy payments is in the region of €10 million. There were in the region of 2,500 redundancy claims arising from insolvency situations in 2015, with an average payment of just over €8,000. These payments are capped at two weeks per year of service. Assuming that an enhanced redundancy payment would be double this level (ie 4 weeks), and that half of all claimants benefited from such an arrangement, **then the additional liability would be c €10 million**. This would represent an increase of almost a third on current expenditure.

Widening the pool of beneficiaries to all employees who claim redundancy payments under the redundancy payments scheme could increase expenditure by a further 50 per cent to €15 million.

In addition to proposals 1 & 6, proposal 3 would have a cost implication for the social insurance fund. This proposal relates to sanctions and redress where an employer (solvent or insolvent) fails to meet the 30 days' consultation period prior to collective redundancy. Currently, this is set at a maximum of four weeks' wages. The report proposes that the amount that can be awarded should be increased to a maximum of two years' wages, in line with other employment awards. This would represent an increase of 100 weeks or 2,500 per cent.

The estimate of the cost of this proposal can be based on a multiple of the previous calculation for the costs of proposal 1 (between €5 and €7 million). The variable factor here is the level of the award, as it could range from 1 week to a maximum of 104 weeks. Assuming a compensation award of up 1 year, the cost would be between €65 and €99 million per annum. If the maximum award of 2 years was made, the cost would increase to between €130 and €198 million per annum. The additional liability would be the equivalent of between 16 and 24 times current expenditure under the scheme.

DSP views this proposal as **the equivalent of writing a blank cheque, drawn on the social insurance fund, to provide enhanced compensatory awards made against an insolvent employer by a third party, the Workplace Relations Commission**. DSP would have no input to these proceedings, despite the additional liability that would arise for the social insurance fund. Furthermore, **the resultant financial burden would de-stabilise the sustainability of the fund**.

Limited consideration is given to how these additional costs would be funded. There is a separate proposal in relation to recovery of assets. However, the potential value of this proposal is not set out. Overall, there is no cognisance taken in the report of the budgetary implications of the proposals and the 'pull' effect that could arise if they were to be implemented.

Cahill Duffy propose a mechanism (proposal 4) by which employee entitlements could be ringfenced in a liquidation situation. This pertains to the recovery of an asset or proceeds of an asset under Section 608 of the Companies Act 2014.

Currently, the recovery rate is less than 10 per cent of expenditure under the social insurance fund. It is unclear to what extent the above proposal would generate additional revenue. Furthermore, it is unlikely to match the additional expenditure proposed in the report.

Finally, in proposal 4, the **report makes a further recommendation that the Minister (for Social Protection), as creditor of an insolvent employers, would have the power to delegate the bringing of applications for asset recovery to the liquidator and to provide funding to the liquidator for this purpose.** The rationale for this proposal is that many of the provisions of the Companies Act which pertain to asset recovery are seldom or never invoked. The reason it puts forward for this is the costs and risks involved.

The financial and administrative costs associated with such an application are likely to be substantial. Whether these costs could be recouped from the social insurance fund requires further consideration.

Other issues

The report notes that the proposal could disadvantage employees who might not be entitled to claim a jobseeker's payment because they are not technically unemployed. This would be a matter of concern to DSP as it might prompt claims under Supplementary Welfare Allowance from worker's dependants who might be without an income for the 30 day period.

It should be noted that many of the proposals are based on compensation awards, ie they would require an adjudication from the Workplace Relations Commission. **There is no automatic entitlement, as would be the case in redundancy or loss of wages.** Thus, not all employees whose employer becomes insolvent might benefit. Employees in larger companies and with union representation would be more likely to benefit. This would create an inequity in the treatment of employees, with some employees receiving very significant payments depending on third-party awards. This would be most evident in regard to the second proposal (sanctions and redress), where employees could stand to gain from €600 to €62,400. Under the third proposal, employees could also receive significantly larger redundancy awards that are currently paid (c €4,000). The social insurance fund is not designed to provide such large discretionary payments to individual employees.

Department of Social Protection
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