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Contents

Personal insolvency

Introduction

The new personal insolvency arrangements are due to come into effect from June 2013.

Three new formal processes for dealing with personal debts are available and bankruptcy continues to be available with some changes to its rules. You may be able to make arrangements with your creditors, including financial institutions, to deal with your debts without going through any of the formal arrangements. In general, you should try to make such arrangements before getting involved in the formal processes.

The new processes and the changes to bankruptcy are provided for in the Personal Insolvency Act 2012. Some further, relatively minor changes are expected to be included in the amendments to the Courts Bill 2013. Here we outline the main elements of the new formal arrangements.

The three new arrangements for dealing with debt are:

- Debt Relief Notices (DRN) – to allow for the write-off of unsecured debts of up to €20,000, subject to a three-year supervision period, for people with virtually no assets and very little income
- Debt Settlement Arrangements (DSA) for the agreed settlement of unsecured debts over a period of five years (that can increase to six years)
- Personal Insolvency Arrangements (PIA) for the agreed settlement of secured debt of up to €3 million (that can be increased by agreement with the creditors) and unsecured debt over a period of six years (that can increase to seven years)

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The Insolvency Service of Ireland (ISI) is responsible for overseeing the new arrangements. The ISI expects to start processing applications from the end of June 2013. Detailed information is available on the ISI website: **isi.gov.ie**.

Final decisions on these processes are all made by the courts. The Circuit Court makes the decisions in the case of debts of up to €2.5 million and the High Court deals with debts above this amount.

General rules

Each of the new processes has its own rules and procedures but there are certain rules that apply to all. The following are the main such rules:

One process at a time

As a general rule, you may be involved in only one of these processes (the three new processes and bankruptcy) at any one time and, if you avail of one process, you generally have to wait a number of years before applying to use another.

Once in a lifetime

You may avail of each of the new processes only once.

Full honesty and co-operation

In all cases, you are required to complete a Prescribed Financial Statement. You are required to provide full and honest information about your financial circumstances, act in good faith and co-operate fully with the process. This includes bringing any mistakes to the attention of the relevant people and disclosing any new matters that may arise.

Approved Intermediaries and Personal Insolvency Practitioners

It is not possible to apply directly for any of the new processes. You must apply through an Approved Intermediary (AI) or a Personal Insolvency Practitioner (PIP).

Approved Intermediary
You may apply for a Debt Relief Notice only through an Approved Intermediary. The ISI is responsible for authorising Approved Intermediaries. MABS will provide an Approved Intermediary service and other providers may also be authorised to offer a service.

Personal Insolvency Practitioner
Applications for Debt Settlement Arrangements and Personal Insolvency Arrangements must be made through a Personal Insolvency Practitioner. The ISI is responsible for regulating these practitioners. A Register of Personal Insolvency Practitioners will be available on the ISI website.

Arrangement of your financial affairs

You may be refused access to any of these processes if you have arranged your financial affairs in such a manner as to enable you to qualify or if you have given preferential treatment to one creditor over another.

If you have given preferential treatment to a creditor in the last two years before the application date, you will be ineligible for a DRN.

For DSA and PIA, preferential treatment given to a creditor in the preceding three years can be grounds for a challenge by a creditor which, if successful, can prevent the DSA or PIA coming into effect.

Recent debts

You are not eligible for any of these new processes if you have incurred 25% of the relevant debts in the previous six months.

Excluded and excludable debts

Certain debts are *excluded* from the three new processes and certain other debts are *excludable*. Excludable debts may be included in the process if the relevant creditor consents. If that happens, the excludable debts are described as *permitted* debts.

Excluded debts
These include:
- Debts under family law orders, for example, maintenance orders for spouses and children
- Debts due under court awards for personal injury or death
- Debts arising from a loan (or forbearance of a loan) obtained through fraud or similar wrongdoing
- Debts arising under court orders made under the Proceeds of Crime Acts or fines imposed by the courts for criminal offences.

You will still be liable for these debts in full.

Excludable debts
These are mainly debts owing to the State:
- Taxes, duties or levies owed to the State such as income tax, Local Property Tax, VAT, capital taxes
- Service charges owed to local authorities
- The Household Charge
- Rates
- Money owed under the Nursing Homes Support Scheme

(in respect of a loan advanced by the HSE to a nursing home resident to cover the amount due from the principal private residence)
- Money owed to the Department of Social Protection
- Debts due to owners' management companies in respect of annual service charges or contributions due for multi-unit developments (this is the only non-State debt in this category)

Reasonable standard of living/Reasonable living expenses

The new arrangements provide that debtors must be left with enough income to maintain a reasonable standard of living for themselves and their dependants. The ISI has published guidelines on what constitutes reasonable living expenses and a reasonable standard of living. These guidelines will be updated regularly.

Pensions

None of the new processes requires you to hand over your investment in a pension scheme (what is generally described as your *pension pot*) or to draw down your pension early. However, your income from a pension is taken into account in all cases. If you are entitled to receive a pension income but have not exercised an option to do so, you are regarded as receiving it. This also applies if you are entitled to exercise such an option within six months of applying for a DRN or within six years and six months of applying for a protective certificate in respect of a DSA; or within seven years and six months of applying for a protective certificate in respect of a PIA (applying for a protective certificate is the first step in the process of getting a DSA or PIA. This is to protect you from your creditors until an arrangement can be agreed.)

An Approved Retirement Fund (ARF) is not a pension pot in this context and may be taken into account in the arrangements.

Excessive pension contributions

If you apply for a DSA or a PIA, a creditor or the Personal Insolvency Practitioner may apply to the court for relief if it is considered that you made excessive contributions to your pension in the three years before the protective certificate was issued. If the court considers that this happened, it can order the pension administrators to pay the excess amount to the PIP for distribution among your creditors. The court must consider a range of factors in making any such order – the main point is to establish whether your pension contributions were designed to meet your genuine pension obligations and needs or whether they were designed to put your assets beyond the reach of your creditors.

Access to personal data

In all cases, you are required to allow access to certain personal data so that your financial situation can be verified. This includes allowing the ISI to make enquiries of banks and other financial institutions about your financial affairs. Government departments and agencies, including the Revenue Commissioners and the Department of Social Protection, have the power to release certain information to the ISI.

Public information

If you avail of any of these new processes, your name and details are on a publicly accessible register maintained by the ISI. The success or failure of the process is also recorded. It is intended to introduce some further rules on this in the amendments to the Courts Bill 2013.

Consequences

While the new processes have elements in common with bankruptcy, the consequences are not necessarily the same. If you are declared bankrupt you are debarred from certain public employments. For example, you may not be a TD. You are also debarred from serving on various State boards. You may not be in certain positions (for example, as director) in public companies. There is no similar general ban on people who avail of the new insolvency processes. Certain professions exercise restrictions on members who are bankrupt. Some or all of these may introduce restrictions on members who are involved in these new processes.

Ability to borrow whilst in one of the processes

In all cases, including bankruptcy, you may not borrow more than €650 without telling the lender that you are involved in one of the processes.

Debt Relief Notice

Debt Relief Notices (DRN) are designed to deal with debts of up to €20,000 in the case of people who have very little income or assets, cannot pay their debts and have no realistic prospect of paying their debts within the following three years. The process covers most types of unsecured debt, for example, debts arising from credit cards, overdrafts, personal loans and utility bills. It does not cover secured debt such as mortgages. At the end of the process, your remaining debt which was subject to the DRN is written off.

You may be eligible for a DRN if you have virtually no disposable income or assets.

Disposable income

You must have a net monthly disposable income of €60 or less. This is calculated by taking account of income from all sources, including contributions from other household members. The only payment that is not taken into account is Child Benefit. Deductions are then made for:

- Income tax, PRSI and other charges or levies on income (for example, the Universal Social Charge)
- Payments made in respect of *excluded* debts and *excludable* debts (unless they are *permitted* debts – see page 2)
- Reasonable living expenses calculated according to the ISI's published guidelines for your family circumstances

The Local Property Tax is not deductible as it is a tax on property.

Assets

The total value of your assets must be €400 or less. Assets are assessed at market value and include savings, shares and property. The following assets are not assessed:

- Essential household equipment and appliances and books, tools or equipment needed for employment or business, up to a total value of €6,000
- Pension assets – the value of your pension pot
- Where you (or a dependant) are attending primary or secondary school, books or equipment that are reasonably necessary to enable you to participate in and complete the course
- One item of personal jewellery to a maximum value of €750
- One motor vehicle up to a value of €2,000 or a vehicle which is specially adapted for a person with a disability (the debtor or a dependant of the debtor)

Note that a motor vehicle or piece of jewellery cannot be excluded from the asset test if the cost of buying it forms part of your qualifying debts.

Applying for a Debt Relief Notice

You must disclose all details of your financial affairs to the Approved Intermediary. The intermediary will then meet you and advise you whether or not you meet the conditions for a DRN, the consequences of getting such a notice, the alternative options that may be available to you and the fees (if any) that you may incur in the process. If you then want to proceed, you must confirm this intention in writing.

The ISI charges fees for an application for a DRN but Approved Intermediaries may not charge you any fees for their services.

The AI helps you to complete the Prescribed Financial Statement. If the intermediary considers that the information in your statement is complete and accurate and that you meet the conditions to apply for a DRN, he or she makes a statement to that effect.

The application is then made to the ISI. If the ISI considers that the application is in order, it issues a certificate to that effect and notifies the Circuit Court. The Circuit Court then reviews the application and documentation and, if satisfied that the conditions are met, issues a DRN. The notice relates to specific debts and specific creditors; you may well have other debts that are not covered by it – those creditors are not affected by it. The ISI puts details of the notice on its Register of Debt Relief Notices.

Supervision period

If you get a Debt Relief Notice, you are subject to supervision for three years. This period may be extended by the court in certain circumstances.

During the supervision period, the creditors are not allowed to pursue any action against you for the recovery of the debts that are covered by the DRN. However, if the debt was guaranteed by another person, the creditor may take action against that person.

During the supervision period, you are obliged to tell the ISI of any change in your circumstances, for example, any increases in income, assets or liabilities. If you receive a gift worth €500 or more, you must surrender half of it to the ISI. If your net income (after tax, PRSI, USC and payments made in respect of excluded and non-permitted excludable debts) increases by more than €400 a month you must surrender half of that increase as well.

If you pay half of the total relevant debt to the ISI, then the DRN ceases to have effect, you are discharged from all the relevant debts and your name is removed from the register.

Any money paid to the ISI is distributed proportionally to the relevant creditors.

The ISI may apply to the Circuit Court for directions if any issues arise in relation to the notice. You or your creditors may also apply to the court if you or they are aggrieved by any action of the ISI.

Objections by creditors

Creditors may apply to the court if they object to the inclusion of the debts owed to them in the DRN. The grounds of objection are limited mainly to procedural issues and your eligibility for the process.

The court has the power to make various decisions, including the withdrawal of the DRN. You would then be liable for the debts involved, including any arrears and interest that have built up during the supervision period.

Ending of Debt Relief Notice

If the DRN ceases to have effect in the normal way, that is, at the end of the supervision period, you are discharged from the relevant debts and any interest or penalties on those debts. Your name is then removed from the register and you are given a Debt Relief Certificate.

Debt Settlement Arrangement

A Debt Settlement Arrangement is an arrangement for the agreed settlement of unsecured debts over a period of five years (or six years if this is agreed in the arrangement).

Applying for a Debt Settlement Arrangement

Anyone with unsecured debts may apply. You must process your application through a PIP to whom you must give all relevant financial information. The practitioner then meets you and advises you on whether or not you meet the conditions, what the procedures are, the costs involved (including the fees to be charged by the practitioner) and what other options may be available to you. The practitioner helps you to complete a Prescribed Financial Statement. The practitioner is obliged to advise you on, among other things:

- Whether or not you are likely to be able to meet your commitments under an arrangement
- The likelihood of any arrangement being made on terms that would provide an acceptable alternative to bankruptcy for you and a majority of your creditors
- The effect of any such arrangement on your credit rating
- The consequences of failing to comply with the arrangement and
- Other possible ways of addressing your debt

The practitioner must confirm that he or she considers that:

- The information in your Prescribed Financial Statement is complete and accurate
- You are eligible for the proposed arrangement
- There is no likelihood of your becoming solvent in the next five years
- It is appropriate for you to make a proposal for an arrangement as there is a reasonable prospect that an arrangement would facilitate you becoming solvent within five years

Even though you, the debtor, choose and appoint the practitioner, he or she also has obligations towards creditors and is required to advise them about the outcome for them of any proposed arrangement. The practitioner is obliged to take various actions if it transpires that your circumstances have changed and you are unable to meet the terms of the arrangement or if he or she becomes aware that you did not meet the requirements for an arrangement.

Protective certificate

The application is made to the ISI, which checks that all the details are in order. If so, the service issues a certificate to that effect and forwards all to the relevant court (the Circuit Court in cases up to €2.5 million and the High Court in larger cases). The court reviews the documentation and, if all is in order, issues a protective certificate. The protective certificate remains in force for 70 days. The court may extend this by a further 40 days in certain circumstances. The ISI puts the details of the protective certificate on its Register of Protective Certificates.

The Personal Insolvency Practitioner then notifies each of your creditors of the existence of the protective certificate and that you intend to make a proposal for a DSA. While the protective certificate remains in force, you are protected against any action that a creditor might take in respect of your debt. This includes initiating or continuing legal proceedings, bankruptcy proceedings or enforcement of judgments.

A creditor may apply to the court for an order directing that the protective certificate not apply to him or her. The court will grant this order only if satisfied that failing to give it would cause irreparable loss to the creditor that would not otherwise occur and that no other creditor to whom notice of the protective certificate has been given would be unfairly prejudiced.

The arrangement

Once the protective certificate has been granted, the practitioner must invite the relevant creditors to make proposals about the manner in which the debts might be dealt with as part of a DSA. The creditors must be given your Prescribed Financial Statement.

A DSA is a voluntary arrangement so its terms are those that are agreed by you and the majority of your creditors. However, the agreement has to include terms that are required by the personal insolvency law. For example, it must leave you with enough income to maintain a reasonable standard of living for yourself and your dependants, it must provide for the practitioner's costs and it may not require you to sell or cease to occupy your principal private residence unless you do not want to stay there or the costs involved in remaining there are disproportionately high.

Creditors' meeting

When a proposal for a DSA has been made, the practitioner must call a creditors' meeting. The creditors vote on whether or not to accept the proposed arrangement. Each vote is proportional to the amount of debt owed to that creditor. If creditors representing 65% of the value of the debt vote in favour, the arrangement is accepted. If the creditors reject the proposal, the protective certificate ceases to have effect.

If the proposal is accepted, the Personal Insolvency Practitioner must inform the ISI and tell creditors of their right to object to the relevant court. The ISI notifies the court. If there is any objection, the protective certificate remains in place until the matter is decided.

Objections by creditors

The grounds on which an objection to the coming into effect of the arrangement may be made are limited mainly to procedural matters, the accuracy of your application and considerations of how you have dealt with your creditors in the past.

Effect of the arrangement

If there is no objection or an objection is not upheld, the court approves the arrangement if satisfied that all the conditions have been met. The ISI records the arrangement in its Register of Debt Settlement Arrangements and the arrangement comes into effect.

While the arrangement is in effect and while you are keeping to its terms, the creditors who are party to it may not take or continue any action against you for the enforcement of the debt. You make payments under the arrangement to the Personal Insolvency Practitioner who distributes them to your creditors on the agreed basis. If you keep to the terms of the agreement your remaining debts to the relevant creditors are discharged at the end of the five-year period (or six).

Varying and ending arrangements

Debt Settlement Arrangements may be varied – the procedures are the same as those for setting up the arrangement. An arrangement may be varied by a creditors' meeting if the Personal Insolvency Practitioner considers that there has been a material change in your circumstances that would affect your ability to make repayments under the arrangement.

A creditor or a PIP may apply to the court at any time during the arrangement to have it ended. The grounds for such an application are limited and include:

- A material inaccuracy or omission in your Prescribed Financial Statement which causes a material detriment to the creditor
- You did not meet the requirements when you started the process
- You did not comply with the terms of the Debt Settlement Arrangement
- You have committed an offence under the personal insolvency legislation since the arrangement came into effect
- You are in arrears with your agreed payments to your creditors for a period of not less than 3 months

If you are in arrears for more than six months, the DSA is deemed to have failed. This is recorded in the Register of Debt Settlement Arrangements.

If the arrangement ends other than by successful completion you are liable for all debts covered by it including any arrears, interest or charges that have accrued unless the arrangement itself provides otherwise or the court orders otherwise.

If the arrangement is successfully completed, you are discharged from the debts covered by the arrangement and the successful completion is recorded on the register.

Personal Insolvency Arrangement

You may apply for a PIA if you have secured debts of less than €3 million. At least one of your creditors must be a secured creditor – if there are no secured creditors you should apply for a DSA. If all the secured creditors consent, the €3 million limit may be increased. The process is similar to that which applies to DSAs, including the arrangements for issuing protective certificates and for varying and ending arrangements and many of the same conditions and consequences apply. In this section, we concentrate on the main areas in which this process differs from a DSA.

A proposal for a PIA must be made through a Personal Insolvency Practitioner. As well as the usual requirements about disclosing your financial affairs, you must make a declaration that you have co-operated with your secured creditors for at least six months in respect of your principal private residence in accordance with the Central Bank's Code of Conduct on Mortgage Arrears (CCMA) and that, in spite of this, you have been unable to agree an alternative repayment arrangement or the secured creditor has confirmed in writing its unwillingness to enter into an alternative repayment arrangement.

A PIA is a voluntary agreement and the terms are agreed between you and your creditors. However, the agreement has to include terms that are required by the personal insolvency law. These are broadly the same as for the DSA but with the following main differences:

- The PIA must clearly distinguish between secured debts and unsecured debts and must make provision for the manner in which the security held by the secured creditor is to be treated
- The maximum duration is six years but the agreement may specify that this is to be extended by a further year

In general, an arrangement may not require you to sell or cease to occupy your principal private residence unless you do not want to stay there or the costs involved in remaining there are disproportionately high.

Secured creditors

Secured creditors must provide an estimate of the market value of the security and indicate how they wish to have the security treated in the arrangement. The Personal Insolvency Practitioner must take this into account. The rules in respect of secured creditors are complex but, in general, they have greater powers within the arrangement than unsecured creditors. Unless they agree otherwise, they may get the full value of their security or the full amount of the debt if the property is sold. If they agree to accept less than the full value of the security, there is a clawback if the security is sold for greater than the value estimated at the time of the arrangement.

If there is a disagreement about the value of a security that is included in the arrangement, an independent valuation may be got – the cost of this must be met half and half by the creditor and the PIP.

If the arrangement is successfully completed, all the unsecured debt is discharged but the secured debt is discharged only to the extent specified in the arrangement.

Creditors' meeting

The arrangement is accepted if creditors representing at least 65% of the value of the total debt (secured and unsecured) vote in favour and if more than 50% of the secured creditors (by value) and 50% of the unsecured creditors (by value) vote in favour.

Bankruptcy

You, as a debtor, may apply to the High Court to be declared bankrupt or your creditor(s) may apply. Technically, a *petition* for bankruptcy is presented. If you are declared bankrupt, your property and assets are transferred to a trustee to be sold for the benefit of your creditors. In most cases, the trustee is the Official Assignee in Bankruptcy. Fees are charged for the bankruptcy process – these are set out in SI 110/2012.

The Personal Insolvency Act 2012 provides for some changes in the rules governing bankruptcy. These sections are not commenced yet.

Interaction with new processes

Consideration must be given to the new insolvency processes in applications for bankruptcy. If you, as a debtor, are looking for bankruptcy, you must swear an affidavit that you have made reasonable efforts to reach an appropriate arrangement with your creditors by making a proposal for a DSA or a PIA to the extent that your circumstances would permit you to enter such an arrangement.

If a creditor petitions for a debtor to be made bankrupt, the court may take account of any unreasonable refusal by the creditor to enter into a DSA or a PIA when deciding on the award of costs.

In deciding on the petition, whether initiated by the creditor or the debtor, the court must consider whether the matter could be more appropriately dealt with by way of a Debt Settlement Arrangement or a Personal Insolvency Arrangement and, if it could, may adjourn the hearing in order to allow the debtor an opportunity to enter into such an arrangement.

Debt level

The minimum debt level for bankruptcy is increased to €20,000.

Retention of assets

Under the Act, the maximum value of the items that a bankrupt is allowed to retain, for example, household furniture or tools or equipment required for work, is increased from €3,100 to €6,000 or a higher amount if the court allows this.

Discharge from bankruptcy

Under the Act, a bankrupt may be automatically discharged after three years, instead of 12 years as at present. Bankruptcies that exist at the time the new rules come into effect and that have already existed for three years will be automatically discharged after six months. The Official Assignee or a creditor may apply to the courts to object to the discharge of a debtor from bankruptcy if the debtor has failed to co-operate with the Official Assignee or has hidden or failed to disclose income or assets. The court may suspend the discharge or extend the period – up to a maximum of eight years.

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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Pensions

The Act provides for the treatment of pension pots in bankruptcy. A future entitlement to a pension will not vest in the Official Assignee. However, pension income which is in payment or where there is an entitlement to payment may be claimed by the Official Assignee or a trustee in bankruptcy. Where a bankrupt has made excessive contributions to a pension scheme in the three years before being adjudicated a bankrupt, the Official Assignee or trustee may apply to court for an order to make the excessive amount available for distribution to the creditors.

Reasonable living expenses

When making an order for a bankrupt to make payments to the Official Assignee from income or assets, the court must have regard to the reasonable living expenses of the bankrupt and his or her family. The court may also have regard to guidelines issued by the Official Assignee or the ISI.

Official Assignee in Bankruptcy

The Office of the Official Assignee in Bankruptcy is currently part of the Courts Service. It is intended transfer it to the Insolvency Service and this is expected to be done by way of amendment to the Courts Bill 2013.

Tax issues

The Finance Act 2013 deals with a number of tax issues that may arise in the new personal insolvency processes and in bankruptcy.

Income tax

An income tax liability could arise in relation to certain trade debts of an insolvent person if there is a debt write-off but this can happen only in very limited circumstances. Income tax does not generally arise if debts on your home or rental property are written off.

Capital Acquisitions Tax

In certain circumstances, debt write-off or debt forgiveness can be regarded as a gift to the debtor and could be liable for Capital Acquisitions Tax. The Finance Act 2013 clarifies that any debt forgiveness within the context of the formal personal insolvency arrangements will not be regarded as a gift.

In other non-formal arrangements, for example, where a bank agrees to restructure or forgive an element of mortgage or other debt without going through the formal procedures, the debt forgiveness is not regarded as a gift provided it is a genuine commercial arrangement and the financial institution has no intention of making a gift.

Transfers of property

The Act also deals with the consequences of property transfers in Debt Settlement Arrangements and Personal Insolvency Arrangements. It provides that the transfer of a debtor's property under a DSA or PIA to a person to be held in trust for the creditors will not change the treatment of rental income from the property. So for example, the debtor remains liable for any income tax on the rental income.

The transfer of assets to a PIP will not give rise to any charge to Capital Gains Tax (CGT).

Payment of current tax liabilities

Any DSA or PIA must provide for the payment of current tax liabilities to the Revenue Commissioners.

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