Schemes of arrangement under Chapter 1, Part 9, Companies Act 2014 (Ireland)

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Practice notes | **Maintained** | Ireland

An overview of schemes of arrangement in Ireland in the context of both solvent and insolvent companies under Chapter 1 of Part 9 of the Companies Act 2014. The note explains the uses of and requirements for a scheme of arrangement and the issues that may arise when a company seeks the approval of its creditors or members or both and the High Court.

Scope of this note

This note examines schemes of arrangement in Ireland (schemes) under the *Companies Act 2014* (CA 2014). In particular, it:

- Considers the statutory procedure and the key benefits of using a scheme.
- Looks in detail at the requirements to implement a scheme under the CA 2014 including timing, the process to apply to the Irish High Court (High Court) and how to convene a scheme meeting.
- Examines the content and timelines for the required scheme circular and regulatory approvals.
- Considers the mechanics of voting at the scheme meeting
- Looks at the filing requirements with the Companies Registration Office (CRO) (that is, the registrar of companies in Ireland).
- Considers when to use a scheme and provides a list of the usual scheme documents and an indicative scheme timetable.

This note does not cover in-depth information on insolvent schemes. Reference is this note to members or creditors includes any class of them.

What is a scheme of arrangement?

Statutory procedure

A scheme of arrangement is a statutory procedure under Chapter 1 of Part 9 of the *CA 2014* whereby a company may negotiate either:

- The rearrangement of its capital structure with its members.
- The rearrangement (including a compromise) of its obligations and liabilities to its creditors.

A reference in Chapter 1 of Part 9 to a scheme refers to:

- A scheme between a company and its members **or** its creditors.

- A scheme between a company and **both** its creditors **and** its members.

(*Section 449(2), CA 2014.*)

For ease of reference in this note, we refer to creditors **or** members (as the case may be). However, a scheme can be between a company and both its creditors **and** its members.

The CA 2014 does not prescribe the subject matter of a scheme. Therefore, in theory, a scheme could be a compromise or arrangement about anything that the company and its creditors or members may properly agree on among themselves.

A company can effect almost any kind of internal reorganisation, merger or demerger using a scheme, if it obtains the necessary approvals from its creditors or members. The key concept for the approvals is that a "special majority" meaning a majority in number representing at least 75% in value of equals can agree to give up or modify their rights. This assumes not all members (and especially not all creditors) have equal rights. Therefore, the legislation requires that classes of members and creditors, which have the same rights, are constituted and the will of each class is established by way of a special majority at a meeting of each of these classes.

When to use a scheme

Examples of when schemes are commonly used include:

- **Restructuring insolvent companies.** Companies frequently use schemes to implement a wide range of debt restructuring mechanisms. In situations of insolvency, the High Court must approve the composition of creditor classes (see *Jurisdiction of High Court to sanction a scheme*). As noted in *Scope of this note*, this note does not cover in-depth information on insolvent schemes.
- **Group reorganisations.** A large proportion of schemes are carried out to implement solvent group reorganisations, for example, by adding a holding company above an existing company in a group's corporate structure. For example, companies may do this to change the group's domicile. Once a company has adhered to the statutory requirements and obtained the relevant court approvals, it can use a scheme to bind all its creditors or members (as divided by class) to almost any type of reorganisation.

  Various provisions of the *CA 2014* assist in effecting a reorganisation by way of scheme. Section 455 contains provisions for facilitating reconstructions and amalgamations of companies where the whole or part of the undertaking, assets or liabilities, or property of one company is to be transferred to another.
- **Acquisitions.** In certain circumstances, a scheme is an appropriate alternative to a straightforward takeover offer for a target company. The lower threshold for securing approval for acquisition of the target means that companies often use schemes to implement recommended deals. The threshold to acquire control is a special majority, which allows for compulsory acquisition of the minority's shares at a lower threshold than under a takeover offer, which requires the bidder to secure 90% of the shares to which the offer relates to acquire the minority's shares compulsorily.
- **Demergers.** In practice, a scheme does not usually provide the most tax-efficient route for effecting a group reorganisation. Therefore, companies commonly use schemes in conjunction with other structural changes, such as demergers.
- **Removing minority shareholders.** Companies often use schemes to:

    - remove minority shareholders. This is similar to using a scheme for an acquisition, although the majority shareholder is treated as a separate class and is bound by the scheme in question by virtue of their position as purchaser rather than shareholder; and
    - ensure dissenting shareholders are bound by the terms of the scheme.

- **Settling a solvent insurance company's uncertain, long-term liabilities.** Companies can use schemes to extinguish an insurance or reinsurance company's uncertain long-term liabilities by providing a mechanism to quantify and pay these liabilities, ensuring an orderly run-off of liabilities and a greater degree of cost-effectiveness and finality (*Re Colonia Insurance (Ireland) Ltd [2005] IEHC 115*). Other examples of schemes used in the UK in this context include:
    - *Re Hawk Insurance Company Ltd CA [2001] 2 BCLC 480*;
    - *Re Equitable Life Assurance Society [2002] BCC 319*; and
    - *Re Sovereign Marine and General Insurance Co Ltd and other companies [2006] EWHC 1335 (Ch)*.

- **Return of capital to shareholders.** A company can use a scheme to effect a return of capital to its shareholders. This involves a reconstruction: a new holding company is inserted between a company and its shareholders. The new holding company may also be share listed, adding to the complexity of the process.

  In addition to ordinary shares in the new holding company, shareholders may receive an additional class of shares (B shares). When the new B shares are redeemed, bought back or cancelled in either a court-approved scheme or a reduction of capital completed under Chapter 4 of Part 3 of the CA 2014, this effects the return of capital to shareholders. Where a company has limited distributable reserves, the use of a B share scheme allows it to create additional reserves which can also be used for future returns.

Key benefits of a scheme

The key benefits of using a scheme under Irish law include:

- There is no requirement to prove insolvency to avail of the procedure, so distressed entities can take action at an early stage.
- Dissenting shareholders or creditors can be crammed down if the scheme is approved by the requisite majorities (that is, a special majority present and voting in person or by proxy).
- Companies not incorporated in Ireland can use a scheme if there is sufficient connection with Ireland (see *Sufficient connection with Ireland*). As *Regulation (EU) 848/2015 on insolvency proceedings (recast)* (Recast Insolvency Regulation) does not apply to schemes, there is no need to satisfy the higher test of establishing a centre of main interests (COMI) in Ireland.

Sufficient connection with Ireland

For the Irish courts to assert jurisdiction over a scheme, a company must establish a sufficient connection or nexus with Ireland. This is similar to the approach adopted by the English courts whereby a sufficient connection with the

English jurisdiction is required for a scheme to be successfully implemented and sanctioned by the English courts. The requirement is considered in each case in the context of the applicable factual circumstances.

Circumstances in which the English courts (persuasive in an Irish context) have held that there was a sufficient connection to persuade it to sanction a scheme include the following:

- Key financial documents were governed by English law with a non-exclusive submission to English jurisdiction. Some of the secured assets and creditor operations were in England. (*Re Drax Holdings Ltd [2003] EWHC 2743*.)
- A "unitary" (single agreement) financing arrangement was in place with scheme creditors. The financing agreement was governed by English law and provided for the exclusive jurisdiction of the English courts (though, obiter, the court suggested that the position might be different where there were numerous unconnected bilateral arrangements). (*Re Rodenstock GmbH [2011] EWHC 1104 (Ch)*.)
- English law governed all the company's scheme debts and the intercreditor agreement (*Primacom Holding GmbH and others v Credit Agricole and others [2011] EWHC 3746 (Ch)* and *Primacom Holding GmbH and others v Credit Agricole and others [2012] EWHC 164 (Ch)*).
- The debtor had moved its business and COMI to England, though its debts were governed by New York law (*Re Zlomrex International Finance SA [2013] EWHC 3866 (Ch)*).
- The debtor had moved its COMI to England. Accordingly, an English insolvency process was the alternative if the scheme was not sanctioned. The company's principal debts were governed by New York law with a non-exclusive New York jurisdiction clause. (*Re Magyar Telecom BV [2013] EWHC 3800 (Ch)*.)
- Schemes were sanctioned where a group's finance facilities were governed by English law with a non-exclusive jurisdiction clause. The group comprised an English holding company and Spanish and US subsidiaries, where the subsidiaries had no business or operations in the UK. (*Re Hibu Finance (UK) Ltd [2014] EWHC 370 (Ch)*.)
- The debtor moved its COMI to England and changed the governing law and jurisdiction clauses in its finance documentation to English law (*Re Algeco Scotsman PIK SA [2017] EWHC 2236 (Ch)*).

Establishing sufficient connection solely by change of governing law or jurisdiction clause

It is possible to establish sufficient connection with the Irish jurisdiction merely by changing the governing law or jurisdiction clauses (or both) of the appropriate finance documents to Irish law.

This issue was considered in the English case of *Re Apcoa Parking Holdings GmbH and others [2014] EWHC 1867 (Ch)* which was later considered and endorsed by the High Court in *Re Nordic Aviation Capital Designated Activity Company [2020] No 162 COS*. In *Apcoa*, the English High Court sanctioned a scheme where the only connection with the English jurisdiction was that the company had changed the governing law and exclusive jurisdiction clauses of finance documents to English law and jurisdiction shortly before the scheme was proposed, and with the express intention of enabling the undertaking of a scheme.

However, in sanctioning subsequent schemes a few months later for the same group of companies, the court indicated that it would be wary of sanctioning a scheme where the claim to sufficient connection with the English jurisdiction was based solely on a change of law in relevant finance documents if any of the following criteria applied:

- The new choice is of a law which appears entirely alien to the parties' previous arrangements or with which the parties have no previous connection.
- The change in law has no discernible rationale or purpose other than to advantage those in favour at the expense of the dissentients.
- If in its discretion the court considers that, in the places in which the parties are, the extent of the alteration of rights between the parties for which sanction is sought is considered a "step too far".

(*Re Apcoa Parking Holdings GmbH and others [2014] EWHC 3849 (Ch)*.)

The English High Court considered the change of governing law of documentation as the basis of the sufficient connection test in *Re Algeco Scotsman PIK SA [2017] EWHC 2236 (Ch)* (see *Sufficient connection with Ireland*) and in *Re Frigoglass Finance BV [2017] (unreported)*. However, in those cases, there was also a change in COMI to provide an additional element of connection.

Approval of the scheme by the High Court

For a compromise or arrangement to become binding on the company and its members or creditors, the High Court must sanction or approve it under section 453(2)(c) of the *CA 2014*. The High Court will only approve the scheme if the subject matter of the scheme's proposals are fair, reasonable, and represent a genuine attempt to reach agreement between a company and its creditors or members (*Re Syncreon Group BV and Syncreon Automotive (UK) Ltd [2019] EWHC 2412 (Ch)*). See *Reporting a scheme meeting to the High Court and High Court sanction* for details of the test for sanctioning the scheme applied by the High Court.

In essence, the High Court must be satisfied that:

- The company has complied with the requisite provisions of the CA 2014.
- The majority of its members or creditors or both have been acting in a genuine manner.

The High Court will examine whether the scheme is one as to which persons "acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men" (*Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385*).

While the role of the High Court is not merely to confirm that the majority of its members or creditors or both are acting bona fide, it will be slow to reverse the decision of a scheme meeting (see *Key procedural steps*), unless it is of the view that:

- The company has not properly constituted the classes.
- The scheme meeting did not consider the matter in the light of the interest of the class which it is entrusted to bind.

Two-way compromise

The subject matter of the scheme must be a genuine and effective arrangement or compromise such that the participating members or creditors of the company must obtain some advantage as compensation for the scheme's

alteration of their rights. A compromise requires some element of accommodation between the parties involved. Therefore, a scheme that simply expropriates the rights of members or creditors is not a compromise or arrangement with the company (that is, there must be some element of "give and take") (*Re NFU Development Trust Ltd [1973] 1 All ER 135*).

In deciding whether a scheme represents a genuine compromise or arrangement, the High Court can consider the wider context of the restructuring (for example, by reviewing the position of the company's group). In the English decision of:

- *Re Bluebrook Ltd [2009] EWHC 2114 (Ch)*, the court considered three schemes to release creditors' claims against three group companies. The schemes were part of a wider restructuring arrangement under which the released claims were to be substituted by new claims against the restructured group. The court therefore found that the schemes constituted a valid compromise.
- *Re Uniq plc [2011] EWHC 749 (Ch)*, the fact that the court could examine the terms of the wider restructuring to ascertain whether it was a fair compromise underlines the court's ability to look at a scheme's context.

Company must be a party to the scheme

Chapter 1 of Part 9 of the *CA 2014* does not apply to arrangements between a company's creditors or members to which the company is not a party.

Companies within scope of section 450, CA 2014

Chapter 1 of Part 9 of the *CA 2014* applies in the case of a "compromise or arrangement" which is proposed between either:

- A company and its creditors **or** members.
- A company and both its creditors **and** members.

Any company that is liable to be wound up under the CA 2014 can fall within the scope of section 450. This includes both Irish incorporated companies and those deemed to have a sufficient connection with Ireland (*Re Drax Holdings*). See *Sufficient connection with Ireland*.

Generally, The High Court is required to consider issues relating to its jurisdiction to approve the scheme at the sanction hearing. However, the High Court will consider any obvious jurisdictional impediments to the scheme at the initial convening hearing if these impediments risk undermining the entire scheme process (*Re Stronghold Insurance Company Ltd [2018] EWHC 2909 (Ch)*).

Requirements for a scheme under Chapter 1, Part 9, CA 2014

Key procedural steps

The essential requirements for a successful scheme are set out in sections 450 to 455 of the *CA 2014*. Typically, they involve the holding of meetings of members or creditors at which proposals are put and passed by a special majority (scheme meeting). The key procedural steps are:

- **The company convenes a scheme meeting.** The directors of a company may convene and hold a scheme meeting of the different classes of creditors and members (*section 450(1), CA 2014*). Where the directors do not want to make the call on constituting classes, they can make an application to the High Court, which is expressly empowered to give directions on the constitution of classes (*section 450(3), CA 2014*).

  Persons with the same interests in the outcome of the scheme must constitute the classes. The importance of ensuring the classes are properly constituted cannot be overstressed. See also *Convening a scheme meeting*.

- **The company notifies the attendees of the scheme meeting.** Once the company has convened a scheme meeting, they send a notice, known as a circular (which includes the scheme document), to members or creditors summoning the scheme meeting. The circular:

  - explains the effects of the compromise or arrangement;
  - states any material interests of the directors of the company, whether as directors, members or creditors of the company or otherwise, and the effect of the compromise or arrangement on these interests, insofar as they are different from the effect on the similar interests of other persons; and
  - where the compromise or arrangement affects the rights of debenture holders of the company, explain the effects to the debenture trustees.

  (*Section 452(1), CA 2014.*)

- **The attendees meet to consider and vote on the proposed scheme.** The members or creditors vote to approve or reject the scheme at the scheme meeting. In practice, the attendees will have considered the scheme documentation provided in the circular in advance, so most scheme meetings largely consist of the voting process.

  A special majority must approve the scheme at the scheme meeting (*section 453(2)(a), CA 2014*).

- **The company advertises notice of approval and the High Court application.** Once the members or creditors have resolved to approve the scheme, the company must advertise:

  - notice that the members or creditors in the meeting have approved the scheme; and
  - that they will make an application to the High Court to sanction the scheme.

  The company must advertise notice of approval of the scheme and their intention to make an application in at least two daily newspapers circulated in the district where the registered office or principal place of business of the company is situated.

  (*Section 453(2)(b), CA 2014.*)

  Additionally, as there are often no named defendants to scheme proceedings, the High Court typically directs (pursuant to rule 4 of *Order 75* of the Superior Courts Rules), that the company must advertise the application in *Iris Oifigiúil*, as Ireland's official gazette. The choice of newspaper in which

the advertisements are placed is at the discretion of the High Court and is based on what is most appropriate to the company in question and the likely geographic location of any interested parties.

- **The company applies to the High Court to sanction the proposed scheme.** If the scheme is approved by the special majority of members or creditors, there is another High Court sanction hearing following the scheme meeting at which the High Court decides whether to sanction the scheme (*section 453(2)(c), CA 2014*). See *Formalities for High Court application to sanction a scheme*.
- **The scheme is effective on delivery of the High Court order to the CRO.** If sanctioned by the High Court, the scheme becomes effective on delivery of the High Court's sanction order to the CRO, which must be delivered within 21 days of the date of the order (*section 454(1), CA 2014*). From the date of the order, the company must attach, to every copy of the constitution of the company it issues, a copy of that sanction order (*section 454(2), CA 2014*).

Timeline

A scheme that proceeds in a relatively straightforward manner could be completed within two months following the date of the company's initial application to the High Court to convene the scheme meeting. A scheme that includes a reduction of capital or the agreement of complex commercial terms with different creditor groups can take considerably longer.

The company's financial, legal and other specialist advisers should agree a suitable timetable covering court filings and hearing dates and submissions to listing authorities well in advance of the desired effective date. In more complex cases, a scheme can take considerable co-ordination. The need to plan to in order to meet the deadlines of the scheme's timeline cannot be overstated. See *Indicative scheme timetable*.

Formalities for High Court application to sanction a scheme

In parallel with establishing the main tenets of the scheme, an Irish barrister, usually of senior counsel standing, is appointed to review and settle the High Court papers and present the scheme application to the High Court. Proceedings are started by the company issuing an originating notice of motion to the High Court seeking an order convening the scheme meeting. This is accompanied by:

- A grounding affidavit setting out in detail the background to the company and the scheme.
- A notice of motion seeking entry to the Commercial List of the High Court.
- An affidavit grounding the application seeking entry to the Commercial List of the High Court setting out the commercial nature of the proceedings.
- A solicitor's certificate which is required by rule 4(2) of *Order 63A* of the Superior Courts Rules and certifies that the proceedings are commercial proceedings and suitable for entry to the Commercial List of the High Court.

The application is heard by the commercial section of the High Court. The originating notice of motion typically seeks the following orders at this hearing:

- That a meeting of the shareholders or creditors is summoned pursuant to section 450(3) of the *CA 2014* to consider and, if thought appropriate, to approve (with or without modification) the scheme.
- An order pursuant to section 450(5) of the CA 2014 on class composition for the purposes of the scheme meeting.
- That the company advertises the summoning of the scheme meeting in two daily newspapers circulated in the district where the registered office or principal place of business of the company is situated and in *Iris Oifigiúil* by a particular date.
- That the company sends notice of the scheme meeting (together with a copy of the circular) by a certain date to all shareholders or creditors (save for any shareholder or creditor that is in a restricted jurisdiction) in accordance with the company's articles of association.
- That a certain director or, in their absence, an appropriate substitute chair the scheme meeting and report on affidavit the results of the meeting.
- The fixing of the voting record time for the purposes of determining who is entitled to be present and vote at the scheme meeting.
- That voting is carried out by poll (as opposed to by a show of hands) at the scheme meeting in such manner as the board of directors of the company determines (usually by the completion of polling cards).
- The procedure on voting by way of proxy at the scheme meeting and the fixing of the proxy return deadline.

Convening a scheme meeting

If the company applies to the High Court to convene the scheme meeting, the High Court must be satisfied that:

- The proposed scheme has a likelihood of being approved.
- The proposed voting classes are correctly constituted.

The High Court then normally orders meetings of the relevant class(es) of members or creditors to be convened. The form of the notice convening the scheme meeting, any advertisements of the scheme meeting and the proxy forms are agreed with the High Court at this stage, including the notice period for each scheme meeting.

The *CA 2014* does not prescribe a notice period for a court-convened scheme meeting and, therefore, the High Court considers the provisions relating to notices in the constitution of the company. Typically, the High Court requires companies to give 21 clear days' notice to members or creditors. However, the High Court has approved shorter notice periods in the case of creditor schemes where they are satisfied that this is required in the circumstances (*Nordic Aviation Capital*).

Scheme circular and changes in circumstances

The circular accompanies the notice of the scheme meeting and sets out the effect of the scheme (*section 452, CA 2014*). At the subsequent scheme sanction hearing, the High Court considers whether the circular was fair and provided, so far as possible, all the information reasonably necessary to enable a reader to decide how to vote. Section 452(1)(a)(ii) of the CA 2014 expressly requires the circular to disclose any material interests of the directors (in

whatever capacity) and the effect of the scheme on those interests (unless non-directors have similar interests and are affected by the scheme in the same way).

Generally, a scheme should not include modification provisions and cannot be altered after the creditors or members have voted on it and the High Court has sanctioned it, even if all the relevant members and creditors acquiesce to the alterations (*Devi v Peoples Bank of Northern India Ltd [1938] 4 All ER 337*). Subsequent variations require the consent of the relevant majorities of creditors and members who voted on the original scheme and the agreement of the High Court. However, a company can draft a scheme in a way that allows the High Court to modify it at the sanction hearing if the High Court deems this fair and a necessary condition of its sanction.

In most cases, the High Court assumes that any changes to directors' interests will influence members and creditors. However, in the English case of *Re Minster Assets plc [1985] BCLC 200*, the court accepted that there could be changes of a non-material nature that would not influence the way a member or creditor might vote. That said, the court also stated that it would, for reasons of public policy, approach the disclosure of directors' interests strictly and only tolerate non-disclosure of a de minimis nature. There is also authority which provides that where it is subsequently determined that directors have not properly constituted the classes, the High Court may entertain a second application. Costello J in *Re Pye (Ireland) Ltd v Hogan [1984] IEHC 23*held, "in normal circumstance a second application should not be entertained unless very exceptional circumstances arise, as to do so would be to allow the section be used as a means of improving a bid, which had failed under the first scheme, in favour of dissenting creditors".

If any change in information is not disclosed, the company must satisfy the High Court that no reasonable member or creditor aware of the information concerned would have changed their vote. It is therefore preferable that, between the despatch of the circular and the scheme becoming effective, no changes to directors' interests take place and no other material changes occur.

If there is a material change in circumstances while obtaining the necessary scheme approvals, the company has the following options (depending on the stage of the process):

- If the change occurs early enough in the process (before the convening hearing of the High Court and despatch of the circular), the company can notify members or creditors of the relevant information in the circular in the normal manner.
- If the change occurs after the convening hearing and the despatch of the circular, the company can return to the High Court for an order allowing the company to send an updated circular to the members or creditors in advance of the scheme meeting.
- If the change occurs after the scheme meeting, the company can request that the High Court reconvenes the creditors' and members' meetings and send out a new circular.

The company does not have to take any of the actions outlined above. However, there is a risk that, at the hearing to sanction the scheme, the High Court could decide that the creditors or members did not have all the information on which to base their vote and may refuse to sanction the scheme on the basis it was unfair.

Regulatory approvals

The scheme circular may need to comply with the requirements of:

- The Irish Takeover Panel where its rules apply to the transaction (public companies only).

- The listing rules of the appropriate stock exchange where the shares of the scheme company are listed.
- The *Prospectus Regulation ((EU) 2017/1129)* where new securities are issued pursuant to the scheme and the issuance of transferrable securities to the public is deemed to fall within the definition of "public offer", which triggers the requirement for an approved prospectus by the appropriate stock exchange.

Voting at a scheme meeting

A resolution to approve the scheme is proposed at each scheme meeting. A special majority must approve the scheme. As there is a value element in the voting process, the members and creditors must vote by poll as opposed to by a show of hands. The directors must review the constitution of the company to ensure that the chair of the scheme meeting has the power to demand that the voting is done by poll and in the manner they see fit.

The chair should have a detailed agenda to ensure the smooth running of the scheme meeting. They must also report to the High Court on the result of the scheme meeting by way of affidavit. The report must include certain details, including:

- The number of members or creditors present in person or by proxy.
- The results of voting, including abstentions.
- Particulars of those proxies that have been rejected.

It is common to appoint an independent party, such as the company's registrar (that is an institution, often a bank or *trust company*, responsible for keeping records of shareholders after an issuer offers securities to the public), to check and certify the counting of the votes. The chair relies on that certification for their report to the High Court.

Reporting a scheme meeting to the High Court and High Court sanction

Following the scheme meeting, the company lodges an affidavit of the chair, together with further evidence that correct notice was given to the creditors and members (by way of affidavit from the party responsible for printing and posting the circular), with the High Court. The chair's report provides evidence that the scheme was approved by the requisite majority.

The High Court hears this evidence and decides whether to sanction the scheme. The test applied by the High Court in deciding whether to sanction the scheme is well established and was reiterated recently in the judgment of Barniville J in *Nordic Aviation Capital* as being the test in *Re Colonia Insurance (Ireland) Ltd [2005] 1 IR 497*. In that case, the High Court set out the test to be applied in the case of a scheme concerning a solvent company.

In summary, the test requires the High Court to be satisfied that the following six requirements are fulfilled.

Sufficient steps

The company must have taken sufficient steps to identify and notify interested parties in accordance with section 452 of the *CA 2014*. This requirement is usually satisfied by an affidavit from the chair of the scheme meeting confirming this, having obtained these directions from the High Court at the initial convening hearing.

Statutory requirements

The company must have complied with the statutory requirements and all directions of the High Court. These are set out in sections 452 and 453 of the *CA 2014*. See *Key procedural steps*.

Proper constitution of class of members or creditors

The company must have properly constituted the class of members or creditors. Regarding class composition principles:

- It is well established that where the creditors or members did not object to the constitution of classes at the scheme meeting, the High Court will be slow to reach a different conclusion. However, the High Court has emphasised that it is not a rubber stamp exercise and it therefore must be satisfied that the company has properly constituted the classes.
- Several authorities have discussed the legal principles applicable to class composition. It was stated in the recent judgment of Barniville J in *Allergan plc [2020] IEHC 214* that:

  "the leading statement on the question of class composition of meetings is that made by Bowen LJ in the English Court of Appeal in *Sovereign Life Assurance Company v Dodd [1892] 1 QB 405*, where he stated: 'It seems plain that we must give such meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'"

  The question of class composition is a matter of judgement on the facts of each particular case. The key considerations were reiterated by Barniville J in *Nordic Aviation Capital*, as follows:

  - only those whose rights are sufficiently similar that they can properly consult together with a view to their common interest should be included in a single class; but equally, they should be required to do so (*Re Sovereign Marine & General Insurance Co Ltd [2006] EWHC 1335 (Ch)*;
  - the test should not be applied in such a way that it becomes an instrument of oppression by a minority (*Re Hawk Insurance Co Ltd [2001] EWCA Civ 241, Chadwick LJ at paragraph 33*);
  - in assessing class constitution, the High Court considers whether there is more that unites creditors than divides them (*Re Telewest Communications plc (No 1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 772, at paragraph 40*);
  - the High Court should take a broad approach; the differences may be material, certainly more than de minimis, without leading to separate classes; and
  - often, the High Court considers the appropriate comparator when determining the similarity or dissimilarity of the rights of the relevant members or creditors of the company.

No improper coercion of members concerned

It is widely acknowledged that every scheme involves some element of coercion because a dissenting creditor can be bound by a scheme even if they did not vote in favour of it. It was explained in *Re Ballantyne [2019] IEHC 407*

that this element of the test is more focused on improper coercion or pressure by one class of members or creditors on another.

Scheme approved by intelligent and honest person

An intelligent and honest person, being a member of the class concerned, must approve the scheme. In determining whether this test has been met, the High Court has made it clear that it will be very slow to second-guess the commercial judgement of the creditors or members concerned.

Scheme not ultra vires the company

The High Court must be satisfied that the scheme is not *ultra vires* the company.

Jurisdiction of High Court to sanction a scheme

Article 1, Recast Brussels Regulation

Where some of the members or creditors of the scheme company are domiciled in another EU member state, Article 1 of the *Recast Brussels Regulation (1215/2012)* provides for the recognition and enforcement of judgments between EU member states in civil and commercial matters. Article 1.2(b) provides that the Recast Brussels Regulation does not, however, apply to:

- Bankruptcy.
- Proceedings relating to the winding up of insolvent companies or other legal persons.
- Judicial arrangements, compositions and analogous proceedings.

In the English cases of *Re Magyar Telecom BV [2014] BCC 448* and *Lecta Paper [2020] EWHC 382 (Ch)*, the court noted that it will not generally make an order which has no "substantial effect" or sanction a scheme unless it is "satisfied that the scheme will achieve its purpose". The High Court in Ireland confirmed in *Re Nordic Aviation* that an application to sanction a scheme is not a bankruptcy or proceeding relating to the winding up on an insolvent company. However, it could technically fall within the term "judicial arrangements, compositions and analogous proceedings". However, the English courts have recently deviated from this position and found that the Recast Brussels Regulation and the *Recast Insolvency Regulation* were intended to dovetail each other. As Annex A of the Recast Insolvency Regulation does not list a scheme, a scheme would not fall within the provisions of Article 1 of the Recast Brussels Regulation.

In the English case of *Re Rodenstock GmbH [2011] EWHC 1104*, the court held that proceedings seeking court sanction for a scheme in relation to a solvent company fell within the scope of *Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (Original Brussels Regulation). It was not intended that the exclusion in Article 1.2(b) would exclude any civil or commercial matter which did not fall within the scope of the Recast Insolvency Regulation or which was not connected with bankruptcy or insolvency. Similarly, the court stated in *Re Magyar Telecom BV* that "it logically follows that the exclusion in Article 1.2(b) does not extend to a scheme involving an insolvent company, at least unless the company is the subject of an insolvency proceeding falling within the Insolvency Regulation".

In Ireland, the High Court in *Nordic Aviation Capital* followed the above approach and confirmed that "an application for court sanction in respect of a scheme in relation to an insolvent company is a civil and commercial matter for the purposes of Article 1.1 of the Insolvency Regulation and is not excluded under Article 1.2(b)".

Chapter II, Recast Brussels Regulation

Following confirmation that the scheme falls within the remit of Article 1 of the *Recast Brussels Regulation*, the High Court must confirm that it has jurisdiction to sanction the scheme under Chapter II of the Recast Brussels Regulation where some of the members or creditors are domiciled in other member states of the EU.

The approach adopted by the High Court is that Chapter II of the Brussels Recast Regulation does apply to the scheme such that scheme creditors or members are "defendants" who are being "sued" by the scheme company for the purposes of Chapter II. This is determined on the basis that one or more of the scheme creditors or members are domiciled in Ireland for the purposes of Article 4.1 of the Recast Brussels Regulation, which provides that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". For those creditors or shareholders who are not domiciled in Ireland, the High Court has jurisdiction pursuant to Article 8(1) of the Recast Brussels Regulation, which provides that a person domiciled in another member state may also be sued where they are:

"one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings."

Schemes within a group of companies and release of third-party obligations

In several instances, an Irish incorporated parent company of a group (which may include non-Irish subsidiaries) has used a scheme in respect of all of the obligations of that group. To create the appropriate nexus, the parent company has, in recent cases, executed a deed of indemnity by way of deed poll pursuant to which it assumes, as a primary obligation, all the obligations of the group. Although there is an element of artificiality involved in any deed poll mechanism, the English High Court has commented on and approved this previously in *Re Codere [2015] EWHC 3778 (Ch)*, even where the sole purpose of the deed poll is to establish the English court's jurisdiction over the relevant scheming company, as opposed to ensuring that all of the group's debts can be made subject to the scheme and released. It may also be acceptable to the High Court for the scheme to further provide that the deed of indemnity would cease to have effect on the effective date of the scheme (or indeed by a specific date in circumstances where the scheme is voted down by shareholders or creditors, whichever is the earlier) on the basis that it was only necessary to give legal or commercial effect to the compromise.

The High Court approved this approach in both *Nordic Aviation Capital* and *Re Ballantyne* such that the Irish analysis tracks the English analysis. In *Nordic Aviation Capital*, Barniville J placed particular emphasis on the fact that by entering into the deed of indemnity, the scheme company was not taking on any additional liability for which:

- It was not already liable before entering into the deed.
- It did not have an ability to mitigate against or control.

By putting the deed of indemnity in place, a primary obligation is created on the part of the scheme company, which provides for a "ricochet claim" in the form of a contribution claim. In both *Nordic Aviation Capital* and *Re*

Ballantyne, this assisted with the recognition of the scheme in the US pursuant to Chapter 15 of the US Bankruptcy Code.

For more on Chapter 15, see *Practice note, Corporate restructuring under the US Bankruptcy Code: overview*.

Filing the sanction order

The scheme becomes effective when the company files a copy of the High Court order with the CRO within 21 days of the date of the court making the order (*section 454(1)*, *CA 2014*). It is possible to provide for a later effective date to be included in the court order on request to the High Court.

Once effective, the scheme binds all the members and creditors of each class that approved the scheme (*section 453(1)*).

Section 454(2) provides that the company must attach a copy of the High Court order to every copy of the constitution it issues after the scheme order is made.

Staying proceedings where application made under section 451, CA 2014

Section 451(2) of the *CA 2014* gives the High Court the power to stay all proceedings or restrain further proceedings against the company for a period as the High Court sees fit. This jurisdiction is available where a scheme meeting is convened under section 450(1) or (3), however, there is no requirement for the company to have already held the scheme meeting.

List of scheme documents

A company must typically draft the following documents in connection with a scheme:

- The scheme circular comprising:
    - a letter from the chair to the shareholders or creditors and an explanatory statement;
    - a proposed amendment to the company's constitution (if required);
    - a summary of the scheme's tax consequences (if any);
    - the scheme;
    - the conditions of the scheme;
    - notice of the scheme meeting (and extraordinary general meeting (EGM) if consequential updates to the company's constitution are required); and
    - a proxy for the scheme meeting (and EGM if required).

- High Court papers for all High Court hearings including:
    - the originating notice of motion;

- the grounding affidavit;
- the notice of motion (entry into the Commercial List);
- the affidavit (entry to the Commercial List);
- the solicitor's certificate;
- the supplemental affidavit(s), if required; and
- theaffidavit of the entity responsible for printing or posting the scheme documents confirming that the company has sent them to the shareholders.

- A Regulatory News Service Announcement informing the market of the transaction (in the case of a listed entity on the appropriate stock exchange).
- The advertisements for the scheme meeting, the passing of the scheme resolution and the date of the High Court sanction hearing.
- The affidavit of the chair of the scheme meeting (or third-party referee) verifying the votes cast at the scheme meeting.
- The advertisement of the High Court sanction hearing (to be published seven clear days before the sanction hearing if reduction of capital is involved).
- Draft High Court orders convening the scheme meeting, setting the date of the sanction hearing and sanctioning the scheme.
- The CRO filings (High Court order or *Form G1*).

Indicative scheme timetable

This timetable assumes there is no reduction of capital and that the Irish Takeover Panel rules do not apply to the transaction.

Date	Event
Before issuing the circular	Engage: • A barrister to review and settle the High Court papers. • Tax advisers for analysis of tax implications of the scheme (if any).
12.00 pm (Irish Time) on the Wednesday before the initial High Court convening hearing (typically a Monday morning or afternoon)	Swear the affidavit and file the High Court papers for application to convene the scheme meeting (unless the directors convene the scheme meeting).
Day before the posting date	The High Court convening hearing.

	The High Court enters the matter into the Commercial List and grants (on a prima facie basis, subject to any objections raised by the creditors at an *inter partes* hearing) orders on: • Class composition. • Convening the scheme meeting. • The protocol for holding the scheme meeting. • Placing the requisite advertisements for the scheme.
Posting date	Post the circular containing notice of the scheme meeting and explanatory statement. Advertise notice of the scheme meeting in newspapers as directed by the High Court.
Posting date plus 19 days	The deadline for receipt of proxies for the scheme meeting (typically set as 48 hours before the scheme meeting).
Posting date plus 21 days	The scheme meeting takes place.
Posting date plus 21 days	File the High Court papers in advance of the second High Court directions hearing and final High Court sanction hearing to sanction the scheme. Advertise the passing of resolutions at the scheme meeting and the intention to apply to the High Court.
Posting date plus 28 to 35 days	The High Court directions hearing. The company updates the High Court on the outcome of the scheme meeting and applies for directions in relation to the scheme sanction hearing. This is only applicable if the scheme is approved by the requisite majorities at the scheme meeting.
Posting date plus 28 to 35 days	Place advertisements of the final High Court hearing to sanction the scheme.
Posting date plus 35 to 42 days	The final High Court hearing to sanction the scheme. The scheme only proceeds to the sanction hearing if the requisite majorities approved the scheme at the scheme meeting.
Posting date plus 56 to 63 days	The deadline for delivering the High Court order to the CRO.
"E"	The effective date of the scheme. The scheme becomes effective on the date on which a copy of the sanction order is delivered to the CRO.

END OF DOCUMENT

