

Relate

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Personal Insolvency Bill 2012

The Personal Insolvency Bill 2012 has been published and is currently being discussed by the Oireachtas. The Bill, which is lengthy and complex, aims to introduce new arrangements for dealing with personal and mortgage debts. It sets out very detailed rules about the procedures for operating the new arrangements.

Here we describe the main features of the proposed new arrangements, with particular emphasis on those arrangements which will:

- Apply to people with low incomes and relatively small amounts of debt
- Deal with mortgage debts

It is likely that further changes will be made to the proposals as they are discussed by the Oireachtas. It is expected that the legislation will be passed into law before the end of 2012.

New arrangements for dealing with debt

The Bill proposes three new non-judicial arrangements for dealing with debt. *Non-judicial* usually means that the courts are not directly involved in the processes but the courts do have an oversight role in these new processes. The role of the courts is explained further below. That role will be exercised by the Circuit Court in the case of debts of up to €2.5 million and by the High Court for larger debts. There will be a new Insolvency Service to process the new arrangements.

The three new proposed arrangements are:

- Debt Relief Notices (DRN) – for debts of up to €20,000 and people with virtually no assets and very low income

- Debt Settlement Arrangements (DSA) – for the agreed settlement of *unsecured* debts over a period of five years
- Personal Insolvency Arrangements (PIA) – for the agreed settlement of *secured* debt of up to €3 million (which can be increased by agreement) and *unsecured* debt over a period of six years

Secured debts are debts arising from loans on which property or goods are available as security against non-payment.

Mortgages are the most common secured loans. If the property or goods on which the security is based are subsequently sold, the loan must be paid off before the proceeds can be used for any other purposes. In general, debts such as bank loans or credit card debts are not secured.

Bankruptcy will continue to be available in the current manner but the Bill also proposes a number of changes to the bankruptcy laws.

Insolvency Service

A new body called the Insolvency Service of Ireland will be established. Its main functions include:

- Monitoring the operation of the new arrangements
- Maintaining the various Registers – see below
- Considering applications for Debt Relief Notices
- Authorising approved intermediaries – see page 3
- Processing applications for *protective certificates* – protection from legal proceedings by a creditor while you are applying for either a Debt Settlement Arrangement or a Personal Insolvency Arrangement

The Insolvency Service will not have any role in negotiating or agreeing debt settlement or personal insolvency arrangements. It will publish guidelines on reasonable expenditure and essential income for debtors.

The Insolvency Service will have the power to charge fees for its services. It is expected that the service will be in operation early in 2013. Based on what has happened in the UK, the Minister for Justice and Equality estimates that there will be about 15,000 applications for the new non-judicial arrangements in the first year (of which between 3,000 and 4,000 will be for Debt Relief Notices) and over 3,000 applications for bankruptcy. There were about 30 applications for bankruptcy in Ireland in 2011.

Registers

The Insolvency Service will be obliged to establish and maintain the following publicly accessible Registers:

- Register of Debt Relief Notices
- Register of Protective Certificates
- Register of Debt Settlement Arrangements
- Register of Personal Insolvency Arrangements

General rules

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

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 will 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 will be required to complete a Prescribed Financial Statement. Regulations will be introduced setting out the form and content of the Prescribed Financial Statement. You will be 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. The Bill provides for penalties for failure to meet this requirement.

Access to personal data: In all cases, you will be required to allow access to certain personal data so that your financial situation can be verified. This includes allowing the Insolvency Service 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) will have the power to release certain information to the Insolvency Service.

Public information: If you avail of any of these new processes, your name and details will be on a register maintained by the Insolvency Service and accessible to the public. The success or failure of the process will also be recorded.

Debt Relief Notices

Debt Relief Notices are designed to deal with debts of up to €20,000 in the case of people who:

- Have 'no income and no assets'
- Are insolvent
- Have no realistic prospect of paying their debts within the following five years

The Debt Relief Notices process is a sort of simplified bankruptcy.

Who qualifies for a Debt Relief Notice

You may be eligible for a Debt Relief Notice if you have virtually no disposable income or assets. Your net monthly disposable income must be €60 or less. Your disposable income is your income after deductions for reasonable living expenses and payments to cover debts that are excluded from this process – see below. All income, with the exception of Child Benefit, is taken into account.

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

- Essential household equipment and appliances
- Books, tools or equipment needed for employment or business
- One motor vehicle up to a value of €1,200 or a vehicle that is specially adapted for you as a person with a disability

The process covers most types of debt, for example, debts arising from credit cards, overdrafts, personal loans and utility bills. If you owe money because of a hire purchase agreement, you must give up possession of the relevant goods. The outstanding amount can then be treated as a qualifying debt for the purposes of a Debt Relief Notice.

The following debts are excluded from the process:

- Debts under family law orders – for example, maintenance orders for spouses and children
- Taxes, duties or levies owed to the State including service charges, the Household Charge and rates
- Money owed to the Health Service Executive (HSE) under the Nursing Homes Support Scheme (where a loan is advanced to cover the amount due from the principal private residence – see *Relate*, July 2012)
- Debts due to owners' management companies in respect of annual service charges for multi-unit developments
- Debts due under court awards for personal injuries or death
- Debts arising from a loan (or *forbearance* of a loan – an arrangement to postpone or otherwise rearrange payments) obtained through fraud or similar wrongdoing

Who is not eligible

You will not get a Debt Relief Notice if:

- You have already had such a notice
- You have applied for a protective certificate (see page 5) in the previous 12 months
- You, as a debtor, are currently a party to a Debt Settlement Arrangement or a Personal Insolvency Arrangement or you have successfully completed such an arrangement within the previous five years

- You are involved in bankruptcy proceedings, you are an undischarged bankrupt or you have been discharged from bankruptcy in the previous five years
- You incurred 25% or more of the debts in the six months before you applied
- In the previous two years, you have entered into any transaction at an undervalue or given a *preference* to any person (where you have intentionally done something to put one creditor in a better position than others)

Approved intermediaries

You may apply for a Debt Relief Notice only through an approved intermediary (the Insolvency Service will decide who will be approved intermediaries.) The Money Advice and Budgeting Service (MABS) will be an approved intermediary and it is likely to be the main organisation involved. Other organisations have also expressed an interest in taking on this role. Any other approved intermediaries are likely to be non-profit organisations but the proposed legislation does not specifically preclude profit-making individuals or organisations.

Approved intermediaries may not charge you any fees for their services but the Insolvency Service may give them a grant out of the fees that it collects for its services. Approved intermediaries will not be liable for damages resulting from their actions unless there is bad faith involved – in effect, the usual rules about professional negligence will not apply to them.

You must disclose all details of your financial affairs to the approved intermediary. The intermediary will then advise you whether or not you meet the conditions for a Debt Relief Notice, 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 decide to proceed, you must confirm this intention in writing.

The intermediary will help you to complete the Prescribed Financial Statement and will process the application if they consider that:

- The information in your statement is complete and accurate
- You meet the conditions for eligibility
- It is appropriate for you to apply for a Debt Relief Notice (note that *appropriate* means that there is a reasonable prospect that getting such a notice would facilitate you becoming solvent within five years)

If the intermediary is satisfied about all of this, they will issue a statement to that effect.

The application is then made to the Insolvency Service. The application must include all the details of your financial affairs and your debts. If the Insolvency Service considers that the application is in order, it will issue a certificate to that effect and notify the Circuit Court. The Circuit Court will then review the application and documentation and, if satisfied that the conditions are met, will issue a Debt Relief Notice.

The Court will notify the Insolvency Service, the approved intermediary, you and the relevant creditor(s) of the notice. The notice will relate to specific debts and specific creditors; you may well have other debts that are not covered by it and those creditors are not affected by it. The Insolvency Service will put details of the notice on its Register of Debt Relief Notices.

Supervision period

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

During the supervision period, the creditor will not be allowed to pursue any action against you for the recovery of the debt. If the debt was guaranteed by another person, the creditor may take action against that person.

During the supervision period, you will be obliged to tell the Insolvency Service 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 Insolvency Service. If your net income (after tax, PRSI and Universal Social Charge) increases by more than €250 a month, you must surrender half of that increase as well. If you manage to surrender half of the total debts covered by the Debt Relief Notice, then you no longer have to surrender any further money. You may not get credit of €650 or more from any source without informing that source that you have a Debt Relief Notice.

If you pay half of the total amount to the Insolvency Service, then the Debt Relief Notice ceases to have effect, you are discharged from all the relevant debts and your name is removed from the register.

Any amounts surrendered to the Insolvency Service will be distributed proportionally to the relevant creditors.

The Insolvency Service will be able to 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 Insolvency Service.

Objections by creditors

Creditors may apply to the Circuit Court if they object to the inclusion of the debts owed to them in the Debt Relief Notice. The grounds of objection are limited to the following:

- You do not meet the conditions for eligibility
- There are inaccuracies in the documentation on which your application was based
- You have failed to inform the Insolvency Service of any changes in your circumstances or failed to surrender extra income as required
- You are an undischarged bankrupt
- You have committed an offence under the Personal Insolvency legislation since the notice came into effect
- The procedural requirements were not followed

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

The Insolvency Service may apply to the Court for the withdrawal of the notice on similar grounds and with similar consequences.

Ending of Debt Relief Notice

If the Debt Relief Notice 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.

Personal Insolvency Practitioners

Applications for Debt Settlement Arrangements and Personal Insolvency Arrangements must be made through a Personal Insolvency Practitioner (PIP). There will be a regulatory system for these practitioners but the details of how they will be regulated are not in this Bill at present. It is expected that these details will be added as the Bill makes its way through the Oireachtas.

The Minister for Justice and Equality has said that he expects that Personal Insolvency Practitioners will come from the legal and accountancy professions but there may be others who would be suitably qualified. Unlike approved intermediaries, (described on page 3), Personal Insolvency Practitioners will be liable for professional negligence in the normal way. Practitioners must have an indemnity bond of not less than €600,000 to cover the theft or misappropriation of the funds of debtors and creditors by the practitioner or must be protected by a compensation fund that has not less than €9 million available for compensating debtors and creditors.

Role of the practitioner

If you want to apply for either a Debt Settlement Arrangement or a Personal Insolvency Arrangement, you must give all relevant financial information to a Personal Insolvency Practitioner. The practitioner will meet you and advise 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.

If you then decide to go ahead, you appoint a practitioner – it need not be the person who has provided you with the advice – who will help you to complete a Prescribed Financial Statement. He or she will advise you of the options available to you, whether or not you are eligible for either a Debt Settlement Arrangement or a Personal Insolvency Arrangement and give an opinion on which of these is more appropriate for you.

The practitioner is obliged to advise you, among other things, on:

- 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
- Other possible ways of addressing your debt

You may then decide whether or not to instruct the practitioner to make a proposal for an arrangement.

The practitioner must confirm that he or she considers that:

- Your Prescribed Financial Statement is complete and accurate
- You are eligible for the relevant arrangement
- There is no likelihood that you will become solvent within five years
- It is appropriate for you to apply 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, that person will also have obligations towards your creditors and will be required to advise them about the outcome for them of any proposed arrangement. The practitioner will be 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 they become aware that you did not meet the requirements for an arrangement.

Debt Settlement Arrangement

A Debt Settlement Arrangement is the proposed new arrangement that applies to the agreed settlement of unsecured debts over a period of five years. You are not eligible for a Debt Settlement Arrangement if you have recently been involved in any of the other processes under the Personal Insolvency legislation or in bankruptcy.

As already outlined, you must process your application through a Personal Insolvency Practitioner. As well as drawing up a Prescribed Financial Statement with the practitioner, you must also make a declaration that you have been unable to agree an alternative repayment arrangement with your creditor(s) or that your creditor(s) have confirmed in writing that they are unwilling to enter into an alternative repayment arrangement.

Protective certificate

The application process for a protective certificate is initiated when the Personal Insolvency Practitioner makes an application to the Insolvency Service. The Service will check that all the details are in order and, if so, will issue a certificate to that effect and forward all to the relevant court (the Circuit Court in cases up to €2.5 million and the High Court in larger cases). The court will review the documentation and, if all is in order, will issue a protective certificate. The protective certificate will be in force for 70 days. The court may extend this by a further 40 days if satisfied that:

- You and the Personal Insolvency Practitioner have acted in good faith and with reasonable expedition, and
- It is likely that a proposal for a Debt Settlement Arrangement that is likely to be accepted by the creditors and successfully completed by you, will be made if the extension is granted

The Insolvency Service will put 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 your intention to make a proposal for a Debt Settlement Arrangement. While the protective certificate remains in force, you are protected against any legal proceedings that a creditor might take in respect of your debt. This means that a creditor may not:

- Start or continue legal proceedings in respect of the debt
- Take or continue any steps to enforce a judgment or contact you about the debt unless you agree to this
- Start or continue bankruptcy proceedings against you

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 Debt Settlement Arrangement. The creditors must be given your Prescribed Financial Statement.

A Debt Settlement Arrangement is a voluntary arrangement so its terms are those that are agreed by you and the majority of your creditors (see below). However, there are certain mandatory terms that it must contain:

- The maximum duration of the agreement must be five years but this may be extended by up to one year if this is agreed in the arrangement itself
- If you keep to the terms of the agreement your remaining debts to those creditors will be discharged
- You remain liable for certain debts unless the proposed arrangement explicitly provides for a compromise agreement and the creditor has agreed in writing to accept the compromise – these are the same debts as are excluded from Debt Relief Orders and that are listed above
- An arrangement cannot release you from fines or other monetary penalties arising from criminal offences
- An arrangement cannot require you to sell any assets that are reasonably necessary for your employment or business unless you agree to such a sale
- You must be left with enough income to maintain a reasonable standard of living for yourself and your dependants
- It must make provision for the Personal Insolvency Practitioner's costs
- It must outline how your debts will be treated in the event of your death or mental incapacity
- It must not require you to dispose of your principal private residence or to cease to occupy this residence unless specific conditions are met
- It must provide that your circumstances be reviewed by the Personal Insolvency Practitioner at regular intervals (not more than 12 months) during the currency of the Debt Settlement Arrangement; this review will involve the preparation of a new Prescribed Financial Statement that must be sent to all the creditors.

Creditors' meeting

When a proposal for a Debt Settlement Arrangement has been made, the Personal Insolvency Practitioner (PIP) must call a creditors' meeting. If there is only one creditor, he or she may write to the PIP indicating agreement or rejection. 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 Insolvency Service and tell creditors of their right to object to the relevant court. The Insolvency Service 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 and include the following:

- You arranged your affairs in the previous two years primarily with a view to becoming eligible for a Debt Settlement Arrangement or a Personal Insolvency Arrangement
- The procedural requirements were not followed
- A material inaccuracy or omission exists in your Prescribed Financial Statement that causes a material detriment to the creditor
- You did not meet the requirements when the arrangement was proposed
- The arrangement unfairly prejudices the interests of a creditor
- You have committed an offence under the Personal Insolvency legislation
- You have entered into a transaction at an undervalue or given a preference to a person in the previous three years that has materially contributed to your inability to pay your debts

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 Insolvency Service 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 the arrangement may not take any action against you for the enforcement of the debt. Payments under the arrangement will be made to the Personal Insolvency Practitioner who will distribute them on the agreed basis. You may not get credit for any amount over €650 without informing the lender that you are the subject of a Debt Settlement Arrangement. You may not sell or deal in property above a value to be prescribed other than in accordance with the arrangement.

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 ended 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 or that you entered the arrangement in the knowledge that you did not meet the requirements.

A creditor or a Personal Insolvency Practitioner may apply to the court at any time during the arrangement to have it ended. The grounds for such an application will be limited and include the following:

- Your Prescribed Financial Statement has a material inaccuracy or omission that 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 payments for a period of not less than 3 months

If you are in arrears for more than six months, the Debt Settlement Arrangement will be deemed to have failed. This will be 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 Personal Insolvency Arrangement 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 Debt Settlement Arrangement (see page 5). If all the secured creditors consent, the €3 million limit may be increased. The process is similar to that which applies to Debt Settlement Arrangements, including the arrangements for issuing protective certificates and for varying and ending arrangements. Most of the same conditions and consequences apply.

In this section we concentrate on the main areas in which this process differs from a Debt Settlement Arrangement. A proposal for a Personal Insolvency Arrangement 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; 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 Personal Insolvency Arrangement is a voluntary agreement and the terms are agreed between you and your creditors. It must contain certain mandatory terms. These are broadly the same as for the Debt Settlement Arrangement but with the following main differences:

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

Secured creditors

Secured creditors must provide an estimate of the 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.

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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 the Personal Insolvency 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 65% of the value of the total debt (secured and unsecured) vote in favour and if more than 50% of the secured creditors and 50% of the unsecured creditors vote in favour.

Effect of arrangement

In general, a Personal Insolvency Arrangement will 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.

You may not get credit for any amount over €1,000 without informing the lender that you are the subject of a Personal Insolvency Arrangement.

Review of Personal Insolvency Arrangements

The Bill provides that the entire Personal Insolvency Arrangements scheme be reviewed not later than five years after the scheme comes into effect and that review must be completed within a year.

Bankruptcy

The Bill includes a number of proposed changes to the bankruptcy laws. The main proposed changes are:

- The minimum debt level for bankruptcy will be increased to €20,000 (it is currently €1,900 for one creditor or €1,300 for combined creditors).

- There will be a requirement to give 14 days' notice of an application (the legal term for a bankruptcy application is a *petition*.) This is to allow the debtor to consider other options such as a Debt Settlement Arrangement or a Personal Insolvency Arrangement.
- When a creditor makes a petition for bankruptcy, the court must have regard to whether that creditor may have unreasonably refused a proposal for one of the alternative arrangements.
- The maximum value of the items that a bankrupt is allowed to retain, for example, household furniture or tools or equipment required for work, will be increased from €3,100 to €6,000.
- A bankrupt may be automatically discharged after three years (currently 12 years). 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 a further six months.

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