Terms of Reference for Detailed Expert Examination of protection of employees' interests in situations where assets of significant net value are separated from the Operating Entity (company or body corporate employing employees) by moving the asset(s) to a separate legal entity

Context

There is evidence of some companies separating assets from operations by moving assets to a separate legal entity from that of operations. It is understood that there are a variety of factors which may prompt this course of action. It is accepted that many such actions are taken for sound business reasons. However, in instances where the operating entity subsequently becomes insolvent and is placed into liquidation, the legal separation of assets from operations may have very significant adverse impacts for employees of the operations entity, leaving them only with the Social Insurance Fund. This has been evidenced by high profile cases such as Connolly Shoes and Clerys, but these are by no means unique. Legal provisions in relation to the lifting of the corporate veil have neither been applied nor tested in these cases.

Interface Between Employment Law and Company Law

Situations of insolvency highlight the complex interface between company law and employment rights law. Notwithstanding that the two codes have been devised for very different purposes, both, to some degree, recognise the purpose of the other. For example, company law specifically provides for the protection of employees' interests in a winding up situation by giving employees' preferential unsecured creditor status (section 621 of the Companies Act, 2014). Employment law recognises the realities of company law by exempting employers from the 30 day consultation period in the case of collective redundancies in the event the company goes into liquidation (section 14(3) of Protection of Employment Act 1977). This recognises the fact that when an insolvent firm goes into liquidation it can no longer trade as it can no longer accrue debts which it is in no position to discharge.

Any examination of how employees' interests can be protected in the event of assets being separated from operations requires an overview of employment law and company law, and an understanding of where they intersect.

Protection of Unique Position of Employees

The solution to be explored must recognise the unique position of employees vis a vis other creditors in a winding up. Through their years of service to a company, employees have contributed to the value of the company.

It is recognised that employees whose employers become insolvent are protected as a class of unsecured creditors by virtue of being awarded preferential status in relation to many of their claims in both receiverships and winding-up (section 621 of the Companies Act 2014).

Furthermore, section 49 of the Workplace Relations Act 2015 added compensation payable to an employee by a company by virtue of an award made under the Workplace Relations Act to the list of preferential payments in the event of a winding up.

However the reality is that the effectiveness of employees' priority status depends on the amount of available assets for distribution by the liquidator(s) in a wind up situation once the fixed charge holders, if any, have been paid. The position of employees is more precarious where assets with significant net value are no longer available for section 621 of the Companies Act payments because they were moved to a separate legal entity. Their situation would be significantly improved if such assets had not been moved.

New Solutions- Recognising Quantificable Pecuniary Entitlements

If a company proposing to move such assets goes into liquidation on the day prior to the legal separation of asset from operations, the asset can be used to discharge the employees quantifiable pecuniary entitlements (e.g. statutory redundancy payments, minimum notice etc.). These entitlements have been built up by the employees through their years of service.

Consideration could be given as to whether, and if so how, such quantifiable pecuniary entitlements could be "ringfenced" in the event of the separation of assets from operations so as to ensure they remain available to the employees in the event of insolvency of the operations company. Could this, for example, be done by way of a bond arrangement, or a lien on the asset?

Negotiating Beyond Statutory Accrued Rights

The presence of a valuable asset on the balance sheet of a company has the potential to strengthen the hand of employees' in negotiating better terms in situations where an employer is seeking to make voluntary redundancies. Consideration should be given as to how employees could negotiate better terms and conditions in circumstances where the employer entity is separating an asset of significant net value from the operations entity.

Solutions Based on Existing Law

Any Expert Examination of how to protect employees' interests should not just consider new solutions, but whether more effective use could be made of existing provisions.

The provisions of the Employees (Provision of Information and Consultation) Act 2006 may be relevant in this regard. It provides for the establishment of an Information and Consultation Forum to consider, inter alia, the recent and probable development of an undertaking's activities and economic situation.

The key point of the TUPE Regulations is to ensure that in the event of a transfer of a business the employees retain the same terms and conditions. If assets are moved into a separate legal entity on the occasion of a TUPE, which may happen for a variety of reasons, can it be argued that moving a valuable asset to a separate legal entity fundamentally changes the terms and conditions of the employees in the undertaking being transferred, as their entitlements are no longer "secured" or backed by the valuable asset in question.

The Expert Examination could consider whether, in certain instances, the TUPE may be an appropriate legislative vehicle for a solution, or part of a solution, to the challenge of protecting employees' interests when assets are being separated from operations.

Matters for Consideration

The Experts are asked to consider how employees' interests can be protected in situations where assets are separated from operations. Questions for consideration include:

- Could more effective use be made of current legislation to safeguard employees' interests, e.g. the Protection of Employment Act 1977, the Employees (Provision of Information and Consultation) Act 2006, the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 – S.I. No. 131 of 2003 (the TUPE Regulations)?

- At what point in time could any new measures to protect employees' interests be triggered?
    - At the time of separation of assets from operations, possibly by way of some type of bond or lien quantified by reference to the employees' uncrystallised pecuniary entitlements at that time?
    - At the time of the liquidation, possibly by way of some type of "look back" provision?

- Are there changes to employment rights legislation that could be considered, or changes at the interface of employment law and company law, including powers to set aside transfers of assets and time periods for same?

- What solution/framework of measures is required?

Timeline

The Experts are asked to report by Friday 11 March, 2016.