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## Malta: Rescue procedures in insolvency

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Malta

Phase:

Management

Type:

Rescue procedures in insolvency

Last modified: 10 December, 2021

Native name:

Att dwar il-Kumpanniji

English name:

Companies act

### Article

Articles 327 to 329B - Companies act Companies act (company reconstructions fund) regulations, 2020. Legal notice 192 of 2020

### Description

The Maltese law allows for rescue operations under the Companies act. The company, or the board of directors, or more than half of the creditors, can file for an insolvency procedure. During the insolvency procedure the court, taking into account the specific case, might decide to appoint an administrator who looks after the business operations until the court decides to dissolve the company or to dismiss the insolvency procedure and let the company return to normal operation.

The Company Recovery Procedure (CRP), detailed in regulation 329B of the Companies act, provides ailing companies with the opportunity for recovery and rescue, rather than proceeding towards liquidation. A court of justice may accept an application for CRP if it is satisfied that:

- the company is unable to pay its debts (or is likely to become so) and
- the order will favour the survival of the company (in whole or in part), or would achieve a compromise or arrangement between the company and its creditors or members.

The company recovery application may be made:

- by the company following an extraordinary resolution;
- by the directors following a decision of the board of directors whenever, following a notice to convene a general meeting in terms of article 329A, the general meeting does not convene, or a quorum is not present at the said meeting, or a resolution with regard to the filing of a recovery application is not passed due to an unresolved tie following a vote; or
- by creditors of the company representing more than half in value of the company's creditors; or
- by creditors forming part of a class of creditors if such creditors represent more than half in value of the company's creditors in that class.

In the hearing of an application, the court may, after examining all the circumstances and the options that are available, either dismiss the application or issue a company recovery order, placing the company under the company recovery procedure.

The court shall accede to the application, and accordingly place the company under the company recovery procedure and issue an order, only if:

- it is satisfied that the company is, or is imminently likely to become, unable to pay its debts; and
- if it considers that the making of the order would be likely to achieve one of the following purposes:
  - the survival of the company as a viable going concern in part or in whole; or
  - the sanctioning under article 327 of a compromise or arrangement between the company and any of its creditors or members.

In making an order, the court shall take into account:

- the best interests of the creditors, regard being taken to the different classes of creditors, of the shareholders and of the company itself, and the possibility of safeguarding employment as appears to be reasonably and financially possible in the circumstances; and
- the cost that would have to be incurred by adopting the company recovery procedure, particularly the arising fees and charges.

Where the company is in possession of a licence or other authorisation under the laws regulating banking, insurance, investment

services, financial institutions or listing of securities on a Maltese regulated market, the court shall not proceed to make an order without first having consulted with the relevant competent authority responsible for supervising that company or any of its activities.

The court shall take its decision whether to dismiss the application or to make a company recovery order within not more than 40 working days from the filing of the application.

Under the CRP, a special controller is appointed. Special controllers are court appointed, following a due diligence exercise which includes verifying that applicants were not involved in financial crimes and that they have relevant management experience. The list of eligible special controllers is held by an official receiver.

The responsibilities of the special controller include, but are not limited to, an examination of the company's finances, the control of the property of the company and the assumption of the powers of the company's directors. The CRP leads to a number of mechanisms meant to safeguard the company until it regains financial health, such as the staying of any winding up application; any resolution for the dissolution and consequential winding up of the company; and the execution of claims of a monetary nature against the company. In addition to the functions and powers entrusted to the special controller by the court, the special controller shall have the power:

- to remove any director of the company and to appoint any individual to serve as a manager;
- to engage persons for the provision of professional or administrative services, and commit the company to the payment of their respective fees or charges; or
- to call any meeting of the members or creditors of the company.

At the end of the original period of appointment or at the end of each extension, the special controller shall submit to the court a comprehensive report in writing on the proceedings of his administration and of his proposals regarding the prospects for the recovery of the company as a viable going concern in whole or in part.

The special controller may, if deemed reasonably necessary, together with the said report, present an application to the court for a one-time extension of his appointment for a further period of four months up to a maximum period of appointment not exceeding 12 months. Any creditor or member or the registrar or the official receiver may at any time apply to the court for a declaration of the termination of the recovery procedure.

**Legal notice 192 of 2020** entitled 'Companies act company reconstructions fund regulations', 2020, was published to create and regulate the administration of a fund known as the company recovery fund (CRF). This fund totalling €500,000 annually is financed by the Malta Business Registry and is intended to facilitate and compliment the aforementioned company recovery procedures.

The CRF shall cover the remuneration and expenses of the special controller for the period of their appointments as stipulated in article 329B. The CRF will also cover other expenses which are deemed necessary for the continuation of the company recovery procedure up to a maximum of €5,000. The maximum cumulative amount claimed from the CRF for each recovery procedure should not exceed ten thousand euro. However, the limits mentioned in this paragraph may be increased by the official receiver acting upon a recommendation of the court, in complex cases, or cases involving cross-border elements.

Where the court issues an order for the termination of the company recovery procedure on the grounds that the company has no reasonable prospect of continuing as a viable going concern and will not be in a position to pay its debts regularly in the future, it shall order that the company be wound up by the court.

## Comments

Regulation 329B, which was inserted in the Companies act in 2003 (which was amended by L.N. 425 of 2007; IX. 2008.32; XXXI. 2015.20; XI. 2017.15) has rarely been used. In a couple of recent cases, court sentences have turned down requests for rescue operations under regulation 329B, quoting Prof. Andrew Muscat, who wrote in 'Principles of Maltese company law' that 'the primary aim of this far-reaching procedure is to allow, if practicable, companies in financial difficulty to recover rather than to put them into liquidation. The procedure is intended to be an alternative to the liquidation of a troubled business. It is not, however, intended to make effective insolvency or to merely postpone the inevitable crash'.

While the government ensured to provide assistance to entities facing challenges as a direct result of the COVID-19 pandemic, there are currently no public statistics which show how many companies have availed themselves of both the CRP and the CRF. The permanency of this recovery procedure and its complimentary fund is very likely for the foreseeable future. Malta, like many of its European counterparts, is still on the path of recovery from the economic ramifications of COVID-19. This, together with Malta's recent grey listing by the Financial Action Task Force (FATF), will probably make this instrument a mainstay for companies to avoid insolvency.

### Cost covered by

Not applicable

### Involved actors other than national government

Other



### Involvement others

Court, creditors

### Thresholds

No, applicable in all circumstances

## Sources

-  [Insolvency in Malta](#)
-  [Chetcuti Cauchi Advocates](#)

-  Court rejects unrealistic business recovery plan
-  No court order on Hamrun More Supermarkets under article 329B
-  Chapter 386: Companies Act 1995
-  Muscat, A. (2007) Principles of Maltese Company Law. Malta University Press
-  Companies Act (Company Reconstructions Fund) Regulations, 2020. Legal Notice 192 of 2020

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## Contact us

Eurofound, Wyattville Road, Loughlinstown, Co. Dublin, D18 KP65, Ireland

Phone: (00) 353 1 2043100

E-Mail: [information@eurofound.europa.eu](mailto:information@eurofound.europa.eu)

Press: [media@eurofound.europa.eu](mailto:media@eurofound.europa.eu)



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