

## Considerations for Directors When a Company Is in Financial Difficulty



This quick guide summarises the duties that directors of companies incorporated in Belgium are subject to and how those duties change when the company is insolvent or at risk of being insolvent.

It also gives an overview of the personal risk to directors when the company is in financial difficulty.

This note is intended as an overview and should not be relied on as legal advice. Should you require legal advice in relation to your specific circumstances, please contact the Restructuring & Insolvency team member listed at the end of this note.

### Directors' Duties When Solvent

- Directors are responsible for the overall and strategic management of the company.
- Directors must act in the interest of the company and promote its corporate objects.
- Directors must ensure proper organization, including appropriate controls and compliance policies. Directors should also organise proper accounting practices and controls to ensure that they can monitor the company's financial position on an ongoing basis.
- Directors have a general duty of care towards the company and a duty to act as "prudent managers" and comply with their fiduciary duties – they will be judged against a "reasonable, prudent and diligent person" standard.

### Financial Distress

### Directors' Duties When Insolvent or at Risk of Being Insolvent

- The board is obliged to regularly monitor certain financial thresholds and is obliged to report to the shareholders if certain thresholds are crossed. The relevant thresholds differ depending on whether the company is a BV/SRL or a NV/SA.
- Failure to submit a report to the shareholders and convene a meeting within two months may trigger directors' liability. Damages incurred by third parties are deemed to be the result of the lack of timely reporting by the board.
- Boards are also required to carefully assess any planned dividend distributions that are only possible if certain solvency and liquidity tests are met. The relevant tests differ depending on whether the company is a BV/SRL or NV/SA.
- Directors have a duty to try to overcome the financial difficulties of the company either in the form of continued operations, such as out-of-court or court supervised restructuring arrangements, or by filing for insolvency procedures.
- Subject to the moratorium set out below, directors are obliged to file for insolvency within one month of when the conditions for insolvency/bankruptcy are met (i.e. the company has stopped paying its debts and cannot obtain further credit).
- If the board knows or should reasonably expect that the business could not continue to trade without going into insolvency, it is required to file for insolvency/bankruptcy. Failure to do so can trigger directors' liability.
- A moratorium on enforcement and insolvency proceedings had been adopted by the government. Based on this moratorium, the obligation to file for insolvency/bankruptcy was suspended if the continuity of the company was threatened as a result of the COVID-19 pandemic and if the company had not stopped paying its debts prior to or on 18 March 2020. The moratorium applied until 17 June 2020 and also protected eligible companies against:
  - enforcement measures by unpaid creditors (save for enforcement measures against real estate and against financial instruments); and
  - third party claims in bankruptcy (save for claims in bankruptcy made by the public prosecutor's office). Any interested party could, however, request the court to rule that a company does not fall under the scope of the moratorium or that a company should not benefit from the moratorium
- During the moratorium, the obligation to file for insolvency/bankruptcy was suspended, but companies were nevertheless still entitled at their own initiative to file for insolvency/bankruptcy.
- The moratorium has not been extended after 17 June 2020.



It is important for directors to understand their directors' duties, as well as how their actions and the decisions the board makes when the company is in financial distress could expose them to personal liability, criminal sanction and risk.

Below is an overview of the potential claims and potential exposure for directors if the company is insolvent or at risk of insolvency.

### Civil Liability

A director will be personally liable to the company for any damage resulting from their failure to act as a "prudent manager".

The Belgian Companies and Associations Code (CAC) draws a distinction between a company that has a board of directors and one that does not. When the company does not have a board, then the directors remain personally liable. When the company is managed by a board of directors, all directors are jointly and several liable.

### Liability for Statutory Breach

The board of directors is collectively responsible for managing the company. A breach of the CAC or the company's articles of association may give rise to joint and several liability for all directors. Statutory breaches include, for example, not filing the annual accounts within 30 days following their approval by the shareholders or failure to comply with the rules regarding a director's conflict of interest.

### Wrongful Trading

Directors may be personally liable if a company continues a loss-making activity or maintains an irretrievable loss. A director could be liable if they knew or ought to have known (prior to insolvency) that there was no reasonable prospect of avoiding insolvency.

### Liability for Social Security Debts

Directors can be jointly and severally liable for unpaid social security contributions if the company is insolvent and either a serious fault caused the insolvency or the directors had prior involvement in bankruptcy procedures.



### Liability for Unpaid Company Debts

If the company becomes insolvent and is unable to pay its creditors in full, any director (or former director) who is found to have committed a serious breach of their duty of care which contributed to the company's insolvency may be held personally liable for any unpaid debts owed by the company.

### Liability for Payroll Taxes and VAT

Specific rules exist in relation to payroll taxes and VAT, under which directors can be jointly and severally liable for the entire amount of the relevant tax debt.

### Criminal Penalties

There are several specific criminal offences which can lead to criminal liability for directors, including deliberate filing of incorrect or false annual accounts, distribution of fictitious dividends.

### Preference/Transactions at Undervalue

Directors could be personally liable if, prior to insolvency, they cause the company to enter into transactions at an undervalue or transactions detrimental to creditors or prefer payment of one creditor over another.

### Obligation to File for Insolvency

The board is under an obligation to file for insolvency/bankruptcy within a month from when the conditions for insolvency/bankruptcy are met (i.e. the company has stopped paying its debts and cannot obtain further credit). Failure to comply with this obligation may give rise to directors' liability.

## Practical Tips to Mitigate Liability

- Monitor the financial situation of the company, including its net assets and cash forecast on a regular basis, and ensure timely compliance with the relevant reporting obligations if certain thresholds are crossed
- Ensure that all transactions are tested against the company's interest, which are not necessarily aligned to the group's interests
- Refrain from taking actions that are not in the interests of all creditors
- Consider measures which may be taken to alleviate the company's financial distress, including by applying for the government relief or support measures or for a judicial reorganization
- If the conditions are met, apply for insolvency/bankruptcy in a timely manner
- Take measures to avoid insolvent trading
- Prior to any dividend distribution, carefully assess whether the relevant conditions are fulfilled
- Carefully consider delaying payments of payroll taxes, VAT and social security contributions
- Regularly convene the board of directors and record the deliberation and decisions taken by the board, as well as the governments guidelines or recommendations which the decisions are based upon
- Consider whether they can make use of available government support (see below for a link to the financial support measures available)

For the latest updates on managing business risk during COVID-19, subscribe to [Restructuring GlobalView](#)

See our [Summary of European Government Financial Support Guide](#) to find out what financial support European governments are offering to help support businesses

For further information and to receive updates relating to the legal impact of COVID-19 please sign up to our [COVID-19 Resource Hub](#).

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