SQUIRE PATTON BOGGS

Local Connections. Global Influence.

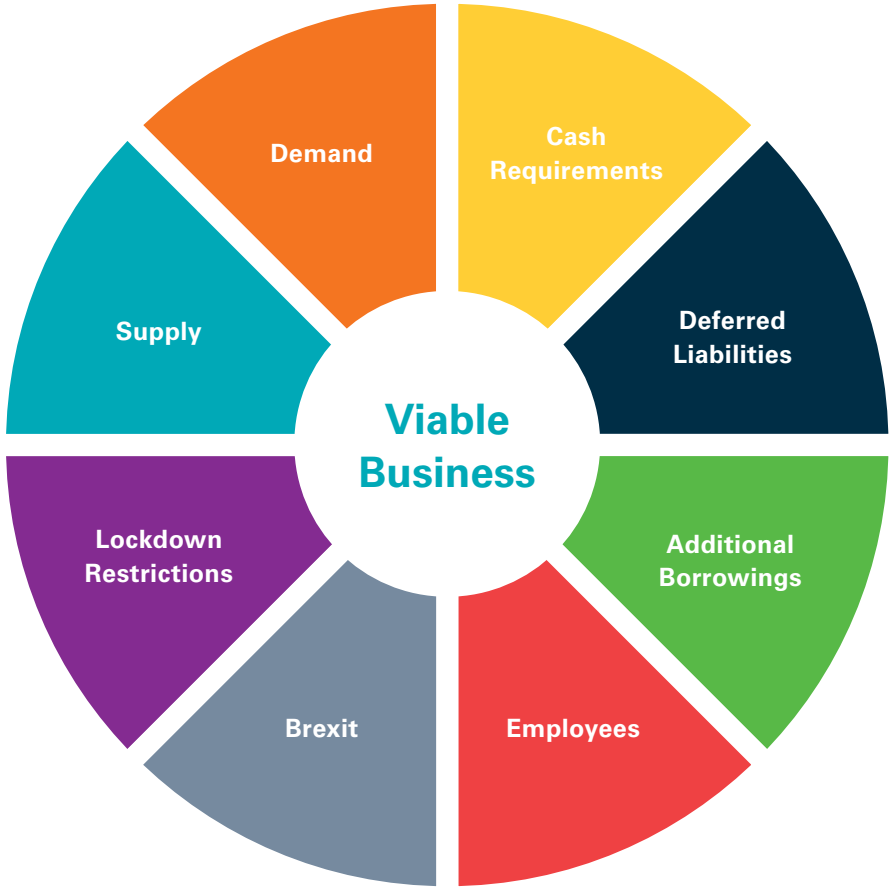
Assessing Your Business Viability and Director Risk Guide

14 July 2021

Contents

Business Viability and Director Risk

The end of lockdown restrictions are in sight, with 19 July 2021, or "freedom day", set to be the date when all remaining restrictions in the UK are lifted.



This is great news for UK businesses, the economy and consumers – but it is fair to say that it is difficult to know the true impact that COVID-19 restrictions and lockdown measures have had on UK businesses. Are they still viable in a post-lockdown environment?

The next few months are likely to be critical for businesses and directors alike, as government support and other temporary protections come to an end.

Most notably, the furlough scheme that has offered many businesses a financial lifeline is due to close at the end of September 2021, at the same time as the current restrictions on winding up petitions are lifted.

Many businesses have been protected from aggressive debt collection due to the restrictions on statutory demands and winding up petitions, and avoided eviction if they have been unable to pay rent given landlords are prohibited from forfeiting due to non-payment. However, these protections will also end soon.

Although the government intends to introduce new legislation to help landlords and tenants manage rent arrears, this will only apply to rent accrued during periods of lockdown and for businesses in specific sectors (the finer detail will be in the legislation that is still awaited). This means that other rent payments falling outside of the legislation will be payable when due, unless tenants reach agreements with their landlords.

A key consideration for all business owners is that decisions must be taken carefully in light of directors' duties to act in the best interests of the company and its creditors as a whole.

Until 30 June 2021, the rules around wrongful trading were relaxed, but the temporary suspension of the wrongful trading rules is now at an end. For directors, there is now an increased risk of personal liability if the financial position of the company deteriorates. There are a number of ways that directors can reduce the risk of personal liability, and positive steps that can (and should) be taken to protect the business, which are explained in this brochure.

The brochure also includes a road map highlighting financial crunch points for businesses in the coming months, explains what financial support is still available, as well as a more detailed section explaining how accrued tax liabilities can be managed and the expected approach of HMRC when it comes to tax collection.

HMRC's role in supporting businesses as they seek to get back on their feet will be pivotal in ensuring businesses are viable moving forward.

In addition, we have a team of experts, whose details are set out at the end of this brochure, who can help with decisions about employees, cash requirements and borrowings, as well as provide advice on restructuring options.

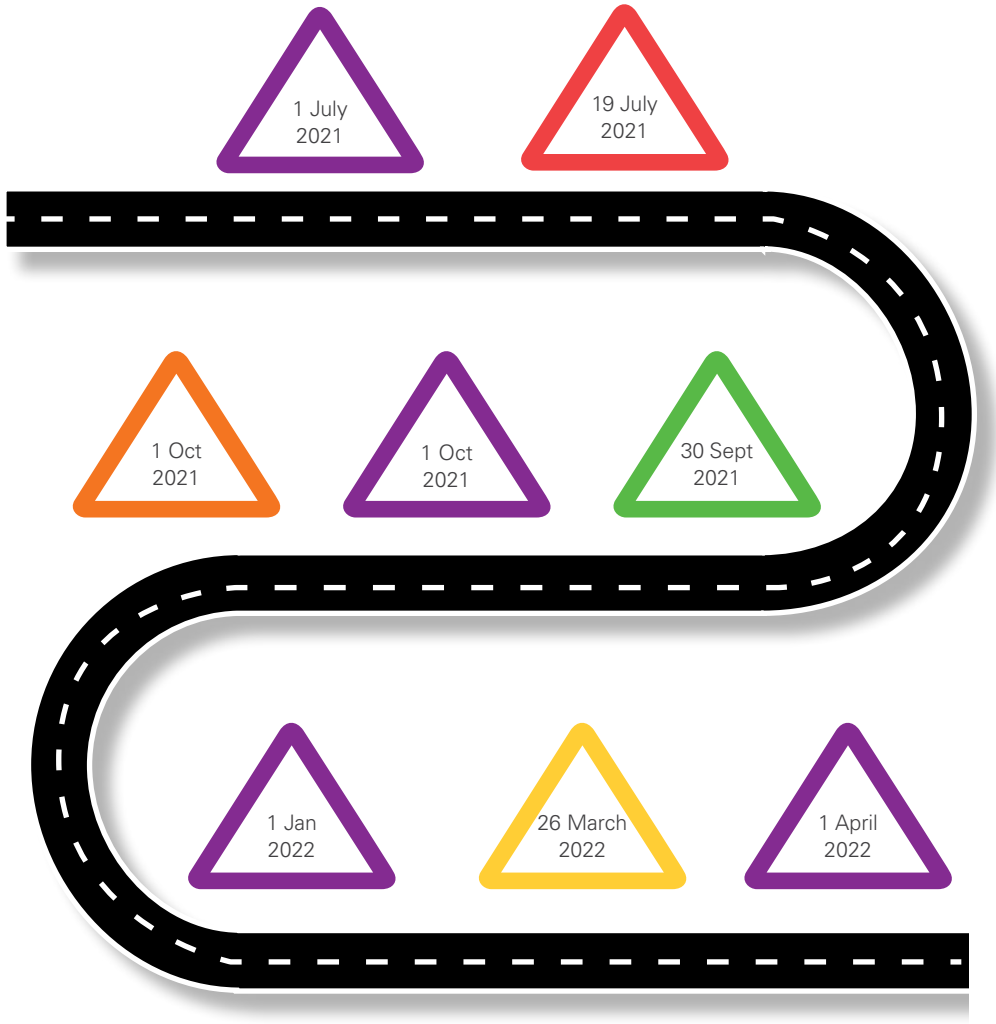
Financial Health Roadmap

UK Business Key Dates To Manage Financial Health

This financial health roadmap helps identify key dates that may impact cash flow in the coming months and should be considered (alongside the specific financial needs of the business) when planning.

It highlights when the measures put in place by the UK Government and HMRC will change and consequently when creditor pressure may increase, when a business will be required to fund ongoing operational costs that are currently supported by the UK Government or where payment is deferred for instance by HMRC.

Click on each date for more information



Roadmap Destinations

July 2021

100% Business Rates Relief in England Ends

- From 1 July 2021, the 100% business rates relief available to certain businesses in the retail, hospitality and leisure sectors in England will come to an end.
- From 1 July 2021 to 31 March 2022, 66% business rates relief will be available. The reduced rate relief is capped at £2 million per business (for properties that were required to be closed on 5 January 2021) or £105,000 per business for other eligible properties.
- The next business rates revaluation in England, which had been due in 2021, has been postponed. However, affected businesses should also note that the government is consulting on a fundamental review of business rates which could result in significant changes being made to the system in the medium-to-long term.

Lockdown Restrictions

- All remaining lockdown restrictions will be lifted on 19 July 2021. All remaining premises will be permitted to re-open including nightclubs.

September 2021

Coronavirus Job Retention Scheme Ends (CJRS)

- Support under the CJRS expires on 30 September 2021.

October 2021

VAT Rate Reduction for Hospitality, Leisure and Accommodation Expires

- From 1 October 2021, businesses in the hospitality, leisure and accommodation sectors that have been supplying food, non-alcoholic drinks, hotel and holiday accommodation or admission to certain attractions at the reduced rate (5%) of VAT, should ensure they have systems in place to reapply the standard rate (20%) for supplies made on and after that date and account for any VAT due accordingly.
- Budget 2021 extended the period during which the reduced rate applies to 30 September 2021.
- Businesses utilising the Flat Rate Scheme, the Tour Operators Margin Scheme or any other applicable special retail scheme should consider the impact of the reduced rate, and subsequent reversal, on their VAT calculations and accounting.

Stage Two of UK Border Operating Model Takes Effect

- From 1 October 2021 imports of products of animal origin and other regulated animal by-products, plants and plant products will require pre-notification and the relevant health documentation.

Restrictions on Debt Collection and Creditor Action Lifted

- From 1 October 2021 the temporary restrictions on presenting a winding up petition for an unpaid debt (which apply where the reason for non-payment is COVID-19 related) end. In addition the temporary restrictions on presenting a winding up petition based on an unsatisfied statutory demand end.
- Unless arrangements have been made to pay unpaid suppliers, HMRC or landlords, aggressive creditors may threaten or bring winding up proceedings.

NB: other enforcement action (court action/enforcement of retention of title) is not restricted.

January 2022

Full Application of UK Border Operating Model

- From 1 January 2022, businesses importing any goods will have to make full customs, safety and security declarations at the point of importation and pay all relevant taxes and duties.

March 2022

Recovery Action for Non-Payment of Rent Can Commence

- From 26 March 2022, the temporary restrictions on landlords taking forfeiture proceedings ends as do the temporary restrictions on pursuing Commercial Rent Arrears Recovery (CRAR) to recover unpaid rent.
- Unless rent has been paid or new arrangements to pay outstanding rent have been agreed, landlords will be able to take recovery action against tenants for unpaid rent.
- NB: the UK Government intends to introduce new legislation to help tenants and landlords manage accrued rent arrears. The legislation is awaited but is expected to require the parties to reach agreement, waive payments or arbitrate. It will only apply to businesses impacted by closure and to accrued rent arrears.

April 2022

66% Business Rates Relief in England Ends

- From 1 April 2022, the 66% reduced business rates relief available to certain businesses in the retail, hospitality and leisure sectors in England will come to an end.

Other Cost Considerations

Redundancy Costs

- The government hopes that the extended CJRS will avoid the need for redundancies. Some businesses may, however, consider that some redundancies are still necessary. Proper advice should be sought and if redundancies are unavoidable, the costs will need to be factored into cash flow.

Deferred Payments or Forbearance

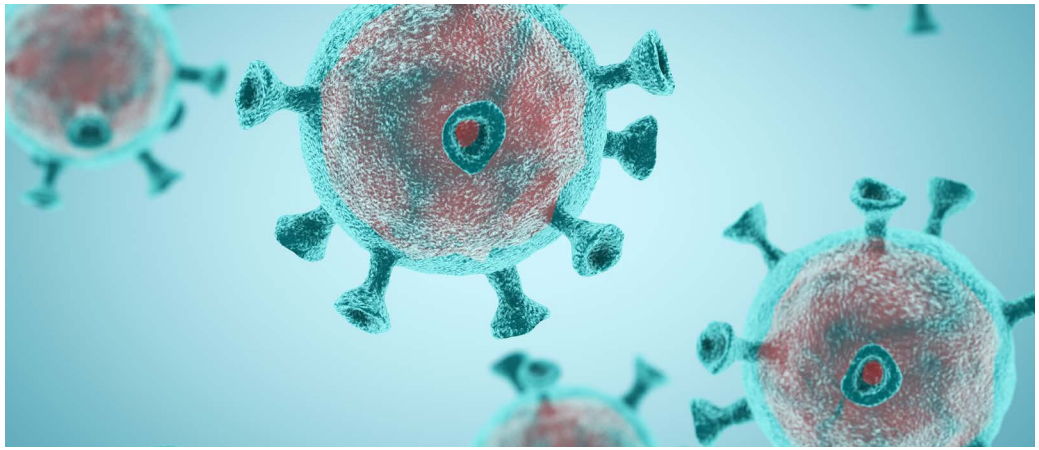
- If a business has agreed to defer repayment, adjusted payment terms or agreed a period of forbearance with its creditors, the terms of deferral, repayment or forbearance should be reviewed, re-negotiated if appropriate and factored into future cash flow requirements – including any agreement with the company's lenders, suppliers, landlord or time to pay agreements with HMRC.

Directors' Duties and Related Matters, in the Context of COVID-19

Scope and Purpose of This Note

This note summarises the duties that directors of companies incorporated in England and Wales are subject to.

This note explains those duties, and matters that directors should consider in relation to them, in the context of the COVID-19 pandemic.



Commentary

Directors' Duties

- Directors have statutory duties that they owe to the company. Each director owes these duties individually. In the exercise of those duties, generally and while the company trades solvently, the directors must act in the way they consider in good faith would be most likely to promote the success of the company for the benefit of its members as a whole. Their statutory duties require that directors also take into account wider factors, such as the environment, employees, the standard of their business conduct, business relationships with suppliers and customers, and any other relevant circumstances.
- If the company becomes insolvent, while these statutory duties are still owed legally to the company, they become subject to other interests to which the directors should have regard, such as those of the creditors of the company. However, the interests of the shareholders are still relevant.
- A breach of any of the statutory duties is actionable by the company, and any right of action could be exercised by an appointed insolvency practitioner should the company later enter a formal insolvency process.
- The law makes no distinction between executive and non-executive directors or shadow directors. All members of the board have the same duties to the company. A director must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may be reasonably expected of a person carrying out the functions carried out by a director in relation to the company and the general knowledge, skill and experience of that director.
- While the interests of shareholders remain relevant during any period in which the company is or may be insolvent, the directors should not be influenced by any power any individual shareholder has to remove or replace the directors (or any of them) and must act in what they consider to be in the best interests of the company's creditors as a whole.

Trading Insolvently/Wrongful Trading

- A company is likely to be insolvent if:
  - It cannot meet all its present and due payment obligations (i.e. it is unable to pay its debts when they fall due), in which case it is likely to be insolvent on a cash flow basis.
  - The value of its assets is less than the amount of its liabilities (taking into account its contingent and prospective liabilities), in which circumstances it is likely to be insolvent on a balance sheet basis.
- Within these two tests of insolvency, there is much case law (recent and historical) beyond the scope of this note, setting out exactly what must be taken into account. However, in the current COVID-19 environment, it will, in many cases, be incredibly challenging (if not impossible) for businesses to accurately project their cash flow forecasts and/or value their assets for the purposes of these tests. In those circumstances, directors should take a cautious approach on the solvency tests, and if in doubt, presume insolvency.
- Directors should be aware that while there is no statutory prohibition against trading while insolvent, there could be some degree of risk of the directors being required to contribute personally to the assets of the company if they continue to do so.
- If the directors continue to trade in circumstances where they knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, then they may be liable for wrongful trading under section 214 of the Insolvency Act 1986 (IA 1986).
- In such circumstances, the directors could be personally liable for any losses suffered by creditors caused by continued trading **unless** they take **every** step possible with a view to minimising those losses that they ought to take.
- The key consideration for directors is, therefore: "Is there a reasonable prospect of avoiding insolvent liquidation?" If there is, the directors will not be liable for "wrongful trading" so long as they hold that belief reasonably, having regard to information available to them and the standards of skill and care expected of them.
- The directors should, among other things, consider whether:
  - The company is presently operating within existing facilities while managing the position with creditors generally
  - The company qualifies for the government's Coronavirus Business Interruption Loan Scheme (CBILS), Coronavirus Large Business Interruption Loan Scheme (CLBILS) or the COVID Commercial Financing Facility (CCFF)[1] (while these measures are still available), and have received an indication from the company's bankers that they would support the company with those facilities
  - The company is eligible for any grants, rates relief or other support being made available by the government[2] in response to COVID-19
  - The company's financiers have withdrawn any facilities previously made available to it (such as overdraft facilities) or have indicated that they will be unable to provide ongoing support
  - The impact on the company's cash flow will be material if the company has chosen to defer payment of any VAT for the period from 20 March to 30 June 2020 or the impact on cash flow of any other payments that the business has agreed to defer (note that the company will also have the option to apply to repay that deferred VAT liability in up to 11 monthly instalments between March 2021 and March 2022)[3]
  - The company is able to take advantage of the extended three year period for which trading losses (made by the company in accounting periods ending between 1 April 2020 and 31 March 2022) can be carried back against previous profits[4]
  - The company is able to apply for a "time to pay" (TTP) arrangement with HMRC to spread its current tax liabilities over a period of three to 12 months[5]
  - Its shareholders have been made aware of any additional working capital requirements and have indicated a willingness to extend facilities to the company
  - The company is able to furlough employees (i.e. grant them a period of leave instead of making them redundant) given that the government will pay up to 70% of wages (reducing to 60% in August and September 2021)
  - There is a realistic prospect that the company can be sold as a going concern at a value sufficient to ensure all creditors will be paid in full, with a return to shareholders, and have instructed advisors to market the business; note that this is likely to be far less achievable in the current climate compared to a non-COVID-19 impacted market
- The directors should be aware that there may be a risk of challenge to their view if any assumptions that they were making relating to these points prove to be materially inaccurate, particularly as a result of the fast-developing situation with COVID-19. If the company subsequently enters into an insolvency process, then the period of trading prior to that formal insolvency process will be reviewed by an insolvency practitioner with the benefit of hindsight. To mitigate against this risk, the following matters should be carefully and regularly reviewed during this period of uncertainty to ensure that so far as possible:
  - Any new credit, supplies and services are necessary and bona fide for the purpose of continuing the business; if the business intends to take on further credit by way of CBILS, CLBILS or CCFF, the directors should be of the view that the funding will enable the business to survive the pandemic and continue on a business-as-usual basis once the pandemic recedes and normal trading patterns resume; the directors should ensure that when applying for funds under CBILS, CLBILS or CCFF, they provide full disclosure to its bankers regarding its financial position.
  - Any transactions out of the ordinary course of trade are the subject of particular scrutiny and avoided wherever possible.
  - The company is able to meet payroll for those employees that it has "unfurloughed".
  - It is appropriate for the company to utilise the Coronavirus Job Retention Scheme.
  - No creditors are specifically preferred (see below) or transactions entered into at an undervalue (see below) unless in good faith and that are critical to ensure the survival of the business and the prospects of achieving a turnaround and/or solvent disposal/restructuring.

1 Further detail can be found at www.businesssupport.gov.uk/coronavirus-business-support.
2 See above link for further detail.
3 Further detail can be found at www.gov.uk/guidance/deferral-of-vat-payments-due-to-coronavirus-covid-19
4 Further detail can be found at https://www.gov.uk/government/publications/temporary-extension-to-carry-back-of-trading-losses-for-corporation-tax-and-income-tax/temporary-extension-to-carry-back-of-trading-losses-for-corporation-tax-and-income-tax
5 Further detail can be found at https://www.gov.uk/government/organisations/hm-revenue-customs/contact/coronavirus-covid-19-helpline

- The directors work to develop expeditiously a credible business plan for the immediate term with as realistic and prudent assumptions as it is possible to make in the current circumstances, incorporating reasonably achievable options for a recovery for creditors and (if possible) a return to shareholders.
- The directors consider what contingency strategies could be put in place to protect the interests of creditors should the new business plan prove unsuccessful (see below).
- The directors consider the net deficiency position of the company's assets immediately and analyse whether it is believed continued trading will either reduce or increase that deficiency. The directors should keep this under regular review with a comparative analysis of the net deficiency compared against what would be the position if continued trading had not occurred and regularly forecasted for a week in advance. This will provide supporting evidence that losses to the company were constantly under review and corrective action to reduce losses was taken at an early stage. The analysis must show that any continued trading is intended to reduce the net deficiency of the company, but also that it is designed appropriately so as to minimise the risk of loss to individual creditors. This exercise should be further reinforced by circulating the net deficiency analysis to an insolvency practitioner each week for advice in respect of continued trading.

- The board should keep full and accurate minutes of its reviews, decisions (including any dissenting views of individual directors), the reasons for those decisions and the information (particularly financial information that should be attached to the minutes) upon which such decisions are based.

Impact of Relaxation of Wrongful Trading Rules

- On 25 June 2020, the Corporate Insolvency and Governance Act received Royal Assent and temporarily relaxed the wrongful trading provisions under UK Insolvency Laws.
- Under the initial temporary provisions (that applied from 1 March until 30 September 2020 to all companies (save for some exceptions such as building societies and banks)) when determining whether a director is liable to make a contribution to the assets of a company for wrongful trading, the courts had to assume that a director was not responsible for any worsening of the financial position of the company.
- The measure enabled businesses to continue to operate and/or to be mothballed without creating additional unnecessary risks for directors, encouraging companies to take advantage of the unprecedented financial support offered by the government to help support cash flow if the directors reasonably believed that doing so was in the best interests of the company/creditors.
- On 26 November 2020, the temporary provisions described above were re-introduced, so that they applied to any trading during the period between 26 November 2020 and 30 April 2021, and were subsequently extended to expire on 30 June 2021. Note that the temporary provisions did not, therefore, apply to any trading between 1 October 2020 and 25 November 2020.
- **The temporary provisions have now lapsed, meaning that the courts will no longer assume that a director was not responsible for any worsening of the financial position of the company from 1 July 2021 onward.**
- The directors should therefore ensure that they continue to still adopt the best practice outlined in the section above, including:
  - Ensure that they monitor UK government advice that impacts their business and any new or amended UK government financial support that is made available
  - Seek professional advice at the earliest opportunity
  - Refrain from entering into transactions that are not in the ordinary course of their business
  - Minimise their outgoings and preserve cash as best they can

Possible Redundancies

- The directors should consider, at an early stage, whether redundancies to the company's workforce may be necessary in order to save the business, and if so, whether consultation is required pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).
- If the business is contemplating redundancies, but only because of the impact of COVID-19, they should also consider whether it is instead preferable to furlough those employees that would otherwise have been made redundant (this scheme is now available until 30 September 2021).
- Under section 188 of TULRCA, there is an obligation on the company to inform and consult appropriate representatives of affected employees when 20 or more redundancies are proposed to take effect in a period of 90 days or less. The appropriate representatives of affected employees are either trade union representatives or, where no trade union is recognised, employee representatives elected for the purposes of consultation. The directors should consider what steps will need to be taken to effect collective consultation. Consultation must last for a minimum of 30 days where 20-99 redundancies are proposed (or at least 45 days if 100 or more redundancies are proposed) prior to any dismissals taking effect.
- For completeness, where an employer proposes to dismiss fewer than 20 employees within a 90-day period, there is no requirement to consult collectively with representatives of affected employees. However, an employer is still required to follow a fair procedure if it wishes to avoid unfair dismissals.
- Under section 193 of TULRCA, there is an obligation on the company to notify the Secretary of State (currently via the Department for Business, Enterprise and Industrial Strategy (BEIS)) in writing using Form HR1 in a collective redundancy situation. Again, notification is to be received by BEIS at least 45 days before the first dismissal takes effect where the company is proposing to dismiss 100 or more employees, reduced to at least 30 days for between 20 and 99 employees.
- The directors should keep full and accurate minutes of the board's proposals, and in respect of decisions taken to make any employees redundant, ensure that consideration has been given to the company's obligations to consult collectively and to notify the Secretary of State. In the case of the collapse of parcel delivery firm City Link Limited, a prosecution was initially brought against the directors for not notifying the Secretary of State. While the City Link directors were eventually acquitted on the narrow facts of that case, there is a real risk that directors who are proposing to make redundancies could be prosecuted for failing to notify in the event of any delay in doing so. The directors may even wish to notify the Secretary of State as a protective measure. While it remains to be seen how strictly this requirement will be enforced in the current circumstances, directors should continue to comply with the notification provisions to avoid risk of prosecution.

Contingency Strategy

- Given the ongoing restrictions in the UK placed upon businesses and individuals and the economic conditions as a result of the pandemic, directors should immediately consider what steps they should be taking in order to protect the business. A number of businesses in these circumstances will be at risk of trading while insolvent (and may be in real difficulty in assessing the company's financial position, given the dramatic impact caused to cash flows, trading and the value of assets). The directors will need to take every step to minimise losses to creditors. This does not necessarily mean an immediate cessation of trading, but a number of businesses are likely to need to restructure to address the changes in supply and demand and we would recommend taking urgent further advice on the options available.

Challengeable Transactions

- **General**

  Certain transactions that take place at a time when a company is insolvent, or becomes insolvent as a result of the transaction, are open to challenge by an appointed insolvency practitioner if the company subsequently enters a formal insolvency procedure.

  Directors, to the extent responsible for such transactions, can be held personally liable for any loss suffered by the company as a result of the transaction, both under IA 1986 and as potential misfeasance.

  Directors should be aware of the grounds for such challenges and, in considering any relevant transactions, determine whether it is appropriate for such transactions to proceed. Any such decisions should be carefully minuted.

- **Transactions at an Undervalue (s 238 IA 1986)**

  A transaction will be at an undervalue if it is a gift by the company, or the company receives no consideration, or the value of the consideration received by the company (in money or money's worth) is significantly less than the value of the consideration given by the company in the transaction. It will be challenging in the current circumstances to value certain classes of assets accurately, but directors should keep records of the basis on which the disposed asset was valued, and why.

  Any such transactions taking place within two years of formal insolvency will be open to challenge, if they took place at a time the company was insolvent or became insolvent as a result of the transaction (which is presumed if the transaction was with a connected party).

  However, the transaction will not be subject to challenge if:

  – It was done in good faith for the purpose of carrying on the business
  – The directors had reasonable grounds for believing that it would benefit the company

  Therefore, in considering any asset disposal to raise liquidity (for example) at less than market value, the directors should address specifically whether it is justifiable on the grounds set out above. We recommend specific advice is taken in relation to any relevant transaction, and the decision is carefully minuted at the time.

- **Preferences (s 239 IA 1986)**

  A preference is a transaction with a creditor (or a surety or guarantor of any of the company's liabilities) under which the creditor is placed in a better position than it would have been in if the transaction had not occurred and the company proceeds into insolvent liquidation.

  A preference is open to challenge if the company proceeds into formal insolvency within six months of the transaction in question if the creditor is not a connected party, and within two years if the creditor is connected. This is provided the company was insolvent at the time, or became insolvent as a result of the transaction (which is presumed if the creditor is connected).

  However, in effecting the preference, the company must have been influenced by a desire to give the creditor the preferential position. This is presumed for transactions with connected creditors, but can be rebutted.

  In circumstances where decisions have to be made on a daily basis during cash flow difficulties as to which creditors to pay, preference issues are highly relevant. In this regard, the directors should consider the following:

  – Is the payment necessary for the continued operation of the business and, therefore, necessary to preserve the prospects of a going concern survival and payment in full to creditors, i.e. **is it business critical**? This may include payment to key suppliers of goods and/or services where such supplies are critical and cannot easily be resourced elsewhere at the speed and price required. Consideration should be given as to whether payment over time for historical debt can be agreed as a condition of continued supply.

  – Is the payment necessary to avert action being taken by the creditor, which may prejudice the survival of the business? If payment is made under threat of winding up proceedings, or legal proceedings that the company cannot defend or afford to defend, or to avoid distraint on goods, it is unlikely to be considered a preference. Evidence of this threat and the company's response should be documented.

- **Directors' Remuneration, Expenses and Employees**

  – As connected creditors of the company, particularly careful attention should be paid to discharging outstanding expenses claims and arrears of remuneration to directors. If the company is continuing to trade on the basis that the directors hold a reasonable belief that the company will avoid insolvent liquidation and pay all creditors in full, it would be questionable if, at the same time, significant arrears of expenses and remuneration are discharged when other creditors are not being paid.

  – Employees, on the other hand, will be a necessary part of continuing to operate the business. As directors under a contract of employment are employees and a critical requirement to ensure the company is managed through this phase, ongoing payments of remuneration and expenses (and general payroll) may be appropriate to ensure continued services to the company. This is subject to any requirement identified in the business plan to effect employee cost reductions, in particular those resulting from the furloughing of employees, to take advantage of the government underwriting 80% of the employment costs of those furloughed employees. Payment of arrears of remuneration and expenses claims may be justifiable in the circumstances, if not to do so would cause genuine financial hardship for the director personally, such that the director could not continue with their responsibilities without seeking an alternative source of income. If such circumstances exist, any such director should consider taking independent advice on their personal position if the directors as a whole consider such payment cannot be made presently within the resources available.

- **Unpaid National Insurance Contributions (NIC)**

  – If a company does not pay the correct amount of NIC, HMRC has the power under s121C of the Social Security Administration Act 1992 to issue Personal Liability Notices to recover the unpaid NIC plus interest and penalties from the directors or any other officers personally. Before issuing a notice, HMRC must be satisfied on the balance of probabilities that the failure to pay was due to fraud or neglect, judged by an objective test.

  – HMRC will consider issuing a notice where, in the face of persistent failure to pay NIC, a company made significant and/or regular payments to other creditors, connected persons or companies, or in the form of directors' salaries.

- **Offences Under the IA 1986**

  The directors should be aware that since 1 October 2015, the right to bring claims for certain offences under the IA 1986, including Fraudulent Trading and Wrongful Trading, has been extended to an administrator and/or can now be assigned by an appointed insolvency practitioner (i.e. either a liquidator or administrator). For the sake of completeness, we set out below a summary of the other main offences that will be investigated by the appointed insolvency practitioner if the company proceeds into formal insolvency:

  – **Fraudulent Trading: (s213 IA 1986)**
  It is an offence to knowingly carry on the business of a company with intent to defraud creditors and any person who does so may be ordered by the court to make such contributions to the company's assets as it thinks fit.

  – **Misfeasance or Breach of Fiduciary Duty: (s212 IA 1986)**
  It is an offence for a director of a company to have misapplied or retained or become accountable for any money or other property of the company or been guilty of an misfeasance or breach of fiduciary duty in relation to the company, allowing the court to order the director to repay, restore or account for the money or property together with interest or contribute to the company's assets by way of compensation.

Director Disqualification

- Where a company proceeds into formal insolvency, the appointed insolvency practitioner has a duty to report to the Secretary of State on the conduct of each of the directors and former directors of the company. The Secretary of State must then decide whether to bring proceedings against the directors to disqualify any of them from acting as a director or in the promotion, formation or management of any company on the grounds of unfitness, for between two to 15 years.
- The directors should, therefore, be aware that should it not prove possible ultimately to effect a solvent turnaround and/or disposal, their conduct as directors (particularly at this time and going forward) will be subject to such scrutiny.
- It is, therefore, critically important for this reason, and to deal with risks in relation to all the matters raised in this note, that the directors regularly (i.e. at least weekly, and preferably every few days during the pandemic) review the ongoing financial position and progress of the business plan, any relevant transactions for which particular consideration should be given, and its continuing belief in the appropriateness of continuing trading (or continuing to "mothball", as applicable).
- All such reviews should be carefully minuted, to include the information available to the directors, matters discussed, all views expressed and considered, any decisions reached and the rationale for such decisions having regard to the points and recommendations made in this note. The directors should also keep a notebook of daily discussions and matters, so that there is always a contemporaneous note to support their actions in the conduct of the business during this time.

Personal Guarantees

- Directors should be aware that any who have given personal guarantees may be personally liable for the company's debts under them.

Deposits and Trust Accounts

- There is no case law or statutory authority that states, in the company's present circumstances, the directors are under a duty to protect deposit creditors by the operation of a trust account to "ring-fence" deposit monies.
- By contrast, there is case law authority that highlights the risk of a preference in creating a trust for such creditors and using company funds to place monies into a trust account for this purpose. Further, within the context of director disqualification, the courts have held that where directors are pursuing a reasonable prospect of avoiding an insolvent liquidation and a full return to all creditors, there is no legal obligation to depart from normal trading practice so as specifically to protect deposits and pre-payments by a trust account.
- Where there is uncertainty regarding the current position, we do not believe the directors could be criticised for seeking to protect deposits received going forward by the operation of a properly constituted trust account, but would make the following comments:
  - At the time of receipt of the deposit, it must be paid on an express trust obligation (or on terms that evidence a trust) such that the deposit is properly held on trust. This would require clear terms and conditions with such customers to this effect (which we would be happy to assist with) and making sure operational practices are in place to ensure those terms apply. Even if deposits have been received, and placed in a separate account, there would remain a preference risk if the account is not properly constituted as a trust account to avoid the fund being regarded as an asset of the company.
  - Placing deposits on trust would reduce the working capital available to the company with which to pursue a recovery strategy that protects all creditors and a return for shareholders, thereby shortening the time available to achieve this.
  - If, in light of these comments, the directors elect not to proceed with arrangements for placing deposits on trust, we would nevertheless recommend that an account be set up or kept open (as applicable) for that purpose should it prove necessary in due course. In the meantime, the directors should take care not to actively encourage higher levels of deposits than would ordinarily be experienced to avoid any criticism in that regard.
- Should the company be at risk of trading while insolvent, we believe the courts are likely to consider placing deposits on trust as a step that "ought to be taken" to minimise losses to creditors.

Restriction on the Use of Company Names: (s 216 IA 1986)

- In the event that the directors wish to consider a management buyout from insolvency practitioners, they should be aware that it is an offence for a director or shadow director of a liquidated company to be involved either directly or indirectly with a new company with a similar name for a period of five years beginning with the day on which the old company went into liquidation. If a director breaches this provision, the penalties include imprisonment, a fine or both, together with personal liability for the debts of the new company.
- However, there are specific circumstances in which the above section will not apply and we can advise you further if required.

Managing HMRC

HMRC has published a policy paper setting out its approach to debt enforcement post-COVID-19. The paper states that HMRC will soon restart its debt collection work and will be getting in touch with customers who appear to have outstanding tax liabilities. However, the paper also assures taxpayers that HMRC will "take an understanding and supportive approach":

"Our message to customers is simple: if you can pay your taxes then you should do so – but if you're struggling, we want to work with you to agree a plan based on your financial position."

HMRC will initially contact relevant businesses by phone, post or text message to better understand their position and, if necessary, agree a way to proceed. Businesses contacted in this way should respond to these communications as soon, and as fully, as possible to assist HMRC to identify whether the business is one that needs support and how best that support can be provided. Failure to respond or engage heightens a risk of HMRC concluding that the business is unable, or simply refusing, to pay.

HMRC have said that they will work with businesses to work out the best way of paying the tax debt as quickly as possible, and in a manner that is affordable for them. This may include:

1. Time to pay arrangements (see further below)
2. Short-term deferrals (i.e. nothing would need to be paid for a set period of time, and no further action to collect the tax debt would be taken until that time has lapsed)
3. Discussion regarding other support available (e.g. bounce back loans)

Early engagement with HMRC will be crucial. If businesses refuse to respond to initial contact, HMRC will escalate matters and may conduct a site visit at the business' address in an effort to ensure the business is aware of the debt, assess any support required and agree a suitable way to proceed to ensure the tax liability is settled.

From September 2021, where businesses have failed to contact HMRC or refused to acknowledge or engage with HMRC's attempts to contact them, HMRC may start the process of collecting the debt using their extensive enforcement powers. These powers include taking control of goods, summary warrants and court action (including insolvency proceedings). HMRC has reconfirmed that insolvency proceedings will only be used as a last resort and generally only where businesses have been found to be fraudulent, deliberately non-compliant, or where they are continuing to accrue debt with no realistic prospect of being able to settle their existing debts.

While HMRC will take a "cautious approach" to collecting debts, it is clear that businesses should proactively and candidly engage with HMRC (and should do so as soon as possible) to protect themselves against avoidable recovery proceedings being initiated.

What Is TTP?

HMRC expects all UK taxpayers to pay the tax they owe, in full and on time, whenever they are able to do so. However, in circumstances where a taxpayer is unable to meet its liability, HMRC is able to exercise a discretion to allow the taxpayer to pay tax after the due date, over an agreed period, and without incurring late payment penalties. This is known as "Time to Pay" (TTP). The primary purpose of TTP is to assist HMRC to collect taxes due efficiently and effectively. It is worth emphasising that there is no right for taxpayers to be granted TTP.

It is important to establish that HMRC is bound to operate TTP in a particular way and in accordance with its published guidance.

TTP arrangements help HMRC collect tax effectively. They recognise that in certain circumstances, outside of the control of businesses, a tax deadline can lead to commercial difficulties. TTP is intended to allow viable businesses, which genuinely cannot pay tax on the date it is due, to pay it over a realistic period of time. Most arrangements will last for a period of months and will involve regular monthly payments. They rarely exceed 12 months and will only do so in exceptional circumstances.

Who Is Eligible for TTP?

There are no fixed rules. The same principles should be applied to all taxpayers, with each case being considered on its merits and the level of risk to the Exchequer (that is, of non-payment of tax). As a result, any TTP arrangement should be agreed "on a case-by-case basis and … tailored to individual circumstances and liabilities".

Generally, larger tax liabilities, requests for longer TTP periods and a questionable compliance record are likely to attract greater due diligence, information requests and investigation by HMRC. The business' previous compliance record is likely to be especially important in relation to the success or otherwise of obtaining TTP.

Where a business has a good record, and has made tax payments on time, HMRC is more likely to consider a request for TTP to be genuine. In contrast, a poor record, previous late payments and repeat applications will result in closer scrutiny. Even in COVID-19 situations, HMRC is likely to view previous payment problems as symptomatic of deeper problems and will be less likely to agree TTP.

Making a successful application for TTP depends on the business being able to show it is:

- In genuine difficulty
- Unable to pay its tax on the due date
- Able to pay if HMRC allowed more time – this necessitates not only proving that it has (or will have) the means to meet the scheduled TTP payments, but also that it can meet any other tax liabilities that will (or may) become due during the TTP period

HMRC will seek to make the TTP period as short as possible. Importantly, in light of improving post-COVID-19 trading conditions, where a business' ability to pay improves during the TTP period, it has an obligation to contact HMRC to increase its payments and clear the debt more quickly.

Briefly put, the business must be ready to engage and be fully prepared to explain and evidence the situation in which it finds itself. It should be willing to enter into reasonable negotiations with HMRC in relation to the terms and conditions of the TTP arrangement, including in relation to the amount covered and the overall time period involved.

Business Viability – Cannot Pay or Will Not Pay?

TTP is only available to viable businesses. Before agreeing to TTP, HMRC will try to understand why a business cannot pay (in COVID-19 situations, this will be pretty straightforward) and, just as importantly, what it is doing to address this in the future. HMRC will assess whether the business' plans (whether to reduce costs or increase sales) are realistic in the context of the size of the tax debt relative to the business' turnover. This will be the benchmark against which any TTP agreement will be monitored.

Critically, the TTP arrangement must be reasonable. Neither the business nor HMRC will want to enter a TTP arrangement that commits the business to a repayment schedule that it cannot afford such that it results in further default. Equally important, to HMRC at least, is that the business does not request a period that is longer than absolutely necessary to clear the debt.In deciding whether a business is eligible for a TTP arrangement, HMRC will draw a distinction between:

- **Eligible "cannot pay" businesses** – That is, those that want to make the payment but currently do not have the means to do so, or, although they do, making that payment could force them out of business (because other liabilities could not be met). HMRC will expect businesses to have explored accessing new or increased borrowing facilities before approaching HMRC for a TTP arrangement. It should be noted that wanting to pay, however genuinely held, is not enough: a business that cannot pay, or cannot satisfy HMRC that it has a realistic plan to ensure it can afford its future liabilities, will be refused TTP.
- **Ineligible "will not pay" businesses** – That is, those that can, but will not, pay the tax. HMRC will refuse TTP and is likely to take swift enforcement action in such cases.

HMRC will be looking to the business to prove that it is eligible for TTP. Therefore, when preparing to apply, the business should be ready to provide HMRC with as much information as is relevant to support the submission. This will ideally include providing:

- **Detailed financial information** – this should include recent management accounts and (even more importantly) future budgets and cash flow expectations.
- **Details of the steps the business has taken to seek support from other stakeholders** – this might include outlining discussions the business has had concerning new or additional financial support from existing or new lenders, current shareholders, management and any other forms of support (e.g. extending credit or relaxing payment terms) from other creditors and suppliers.

Early engagement, followed by regular and transparent communications, with HMRC by the business are also imperative, especially in situations where the facts and particular circumstances are not entirely straightforward. As might be expected, many businesses affected by COVID-19 are contacting HMRC to discuss their tax affairs and to seek a TTP arrangement. This has created delay in the system, which will be exacerbated by complex situations that HMRC wants to examine more closely.

Monitoring, Review and Enforcement

Even if a TTP arrangement is in place, businesses should be aware that HMRC will actively monitor and review the agreement to ensure compliance. HMRC will be looking to confirm that:

- The agreed payments are being made as agreed on time
- Other tax liabilities are being met
- Tax administration and compliance obligations are being satisfied (i.e. computations and returns are being submitted)

At the same time, HMRC is likely to be using the data it collects to identify any change in the business' ability to pay the tax due.

Nonetheless, once it agrees to it, HMRC is bound by a TTP agreement and businesses should take a degree of comfort from the fact that, provided they continue to abide by the terms and conditions of TTP, HMRC cannot seek to unilaterally accelerate recovery of the tax debt.

That said, HMRC will assert its right to withdraw from (i.e. cancel) a TTP arrangement in the following specific circumstances:

- New facts come to light that mean TTP is no longer appropriate or available in the circumstances, or mean recovery of the tax due is at increased risk
- The business has misled or lied to HMRC
- The business defaults on the terms or conditions of the arrangement

In cases where HMRC believes a business is in breach of a TTP agreement, its first course of action will be to contact the business by issuing a reminder letter. In cases where an instalment payment has been missed, the reminder letter will set out the amount of tax that is now overdue, demand immediate payment and explain that failing to comply will mean the TTP arrangement will be cancelled.

If the business fails to respond, HMRC will issue a cancellation letter. At that point, the TTP arrangement falls away and HMRC will demand full payment of all tax amounts overdue. The chance of agreeing a new TTP arrangement at that point is remote and, if the tax is not paid, HMRC will initiate enforcement proceedings utilising all and any of the (growing number of) powers at its disposal.

It is worth noting that the restrictions on winding-up petitions (introduced as a direct result of the pressures on business arising from COVID-19) remain in place until 30 September 2021. The moratorium is being observed by HMRC and so provides a layer of protection against any immediate HMRC action. However, when the restrictions lift businesses are best advised to ensure that they proactively manage their tax affairs, ensuring they are up-to-date with payments and submissions, processes are efficient and effective, and everything is well documented.

Time to Pay?

TTP is a valuable formal procedure that will protect viable, compliant businesses facing genuine difficulties in meeting their tax liabilities on time. The protection a TTP arrangement affords can provide a business with critical time to plan for recovery without tax liabilities weighing on its cash flow.

However, it is also important to appreciate that TTP merely defers the point at which the tax is payable; the liability does not go away and will instead simply fall due under the TTP schedule. In addition, new tax liabilities and compliance obligations will continue to arise.

Entering into a formal arrangement with HMRC for the payment of overdue tax provides certainty, but also brings additional compliance obligations and opens the business to greater scrutiny from HMRC. A TTP arrangement should not be sought lightly and, once it is obtained and agreed, a business must make every effort to comply with its terms and conditions. It is crucially important that businesses do not overpromise under TTP, continue to monitor their own compliance and promptly communicate any change in circumstance that could affect the agreement (positively or negatively) to HMRC.

HMRC examines requests for TTP carefully and will be monitoring a business' compliance with an agreement equally carefully. It is worth remembering that the primary purpose of HMRC is to collect taxes due and protect the Exchequer. In appropriate cases, HMRC uses TTP as a tool to help it achieve that aim. However, where there is a breach of a TTP agreement, HMRC will not shy away from exercising its enforcement powers to recover the tax owed. In addition, as the extraordinary challenges presented by COVID-19 start to recede, one might expect HMRC to adopt an increasingly aggressive stance on enforcement and revenue recovery.

Summary of UK Government Financial Support

Around the globe, many Governments have reacted quickly to try to mitigate COVID-19's impact by implementing financial support schemes and resources to help support local businesses. This guide summarises the financial support measures that are available to UK businesses.

Financing Facility Support

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Recovery Loan Scheme ('RLS')	• This replaced the previous COVID-19 loan schemes when they closed. • The loans are available through a network of accredited lenders. • Ensures businesses of any size can continue to access loans and other finance up to £10 million per business. • The finance can be used for any legitimate business purpose, including growth and investment. • The government guarantees 80% of the finance to the lender, to ensure they continue to have the confidence to lend to businesses. • Types of finance available: – Term loans and overdrafts between £25,001 and £10m per business. – Invoice finance and asset finance between £1,000 and £10m per business. • Finance terms are up to six years for term loans and asset finance facilities. For overdrafts and invoice facilities, up to three years. • No personal guarantees will be taken on facilities up to £250,000, and a borrower's principal private residence cannot be taken as security.	• Trading in the UK. • Is viable, or would be viable were it not for the pandemic. • Has been impacted by the coronavirus pandemic. • Is not in collective insolvency proceedings. • Businesses that have received support under the previous COVID-19 guaranteed loan schemes will still be eligible to access finance under the scheme, if they meet the other criteria.	• Please see column to the left. • Businesses which cannot apply: – Banks, building societies, insurers and reinsurers (but not insurance brokers); – Public-sector bodies; and – State-funded primary and secondary schools	• Businesses can find the list of accredited lenders and details of how to apply on the British Business Bank website.	• The scheme launched on 6 April and is open until 31 December 2021.

Other Financial Support

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Employment measures:					
Coronavirus Job Retention Scheme (CJRS)	• The CJRS has been extended until 30 September 2021. • Businesses that cannot maintain their workforce due to COVID-19 can continue to furlough their employees and apply for a grant under the scheme. • For July 2021, CJRS grants will cover 70% up to a cap of £2,187.50, and in August and September 2021 this will reduce to 60%, capped at £1,875. These wage caps are proportional to the number of hours not worked, so someone working 75% of their normal hours in September, for example, would receive under the CJRS no more than 25% of that £1,875. For July to September 2021, employers will be expected to top up the government's contribution so that furloughed staff continue to receive 80% of their usual wages for any unworked hours, up to the cap of £2,500 per month (or beyond it to 100% if the employer wishes). Employers must also continue to pay the associated employer National Insurance contributions and pension contributions.	• All UK businesses whose operations have been severely affected by COVID-19. • Any entity with a UK payroll including businesses, charities, recruitment agencies and public authorities. The government expects that publicly funded organisations will not use the scheme, but partially publically funded organisations may be eligible. • There is no financial impact assessment test.	• For periods starting on or after 1 May 2021, eligible employers will be able to claim for employees who were employees and on their payroll on 2 March 2021, as long as they made a PAYE Real Time Information submission to HMRC between 20 March 2020 and 2 March 2021, notifying a payment of earnings for those employees. • Employees do not need to have been furloughed under the CJRS previously. • Employees can be on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts. • To be eligible for the grant, employers must have confirmed to their employee (or reached collective agreement with a trade union) in writing that they have been furloughed or flexibly furloughed.	• Applications will be through an online gateway. • There is a template on HMRC's website which employer's must complete if they are claiming for 16 to 99 employees, or 100 or more employees. • Employers must keep a written record of any agreements with employees for at least five years. Records of the amount claimed and the claim period for each employee must be kept for 6 years.	• Support under the extended scheme has been available from 1 November 2020 and will run until September 2021. • Claims for furlough days in March and April are closed, but late claims may still be accepted – see HMRC website for different exceptions. • Claims for furlough days in May and June 2021 are now closed.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Statutory Sick Pay (SSP)	• Refund to cover up to two weeks' SSP per eligible employee off work due to COVID-19. • Refunds would cover employees in a variety of circumstances, including those who are eligible for SSP because they or someone they live with has coronavirus symptoms or has tested positive for coronavirus, they have been notified by the NHS or public health authorities that they have been in contact with someone with coronavirus, etc. • A business can claim from the first qualifying day the employee is off work. A 'qualifying day' is a day an employee usually works on. Employees must self-isolate for at least four days to be eligible for SSP. • The current weekly rate is £96.35. Employers who pay more than the weekly rate of SSP can only claim up to the weekly rate paid. • The scheme covers all types of employment contracts, including full-time employees, part-time employees, employees on agency contracts and employees on flexible or zero-hour contracts.	• Businesses must be UK based. • Businesses must be SMEs. • Businesses must have a PAYE payroll scheme that was created/started on or before 28 February 2020. • Businesses must maintain records of the statutory sick payments for at least 3 years following a claim.	• Employers must have fewer than 250 employees determined by the number of people employed as of 28 February 2020. • The scheme covers periods of sickness starting on or after 13 March 2020. • Employers should maintain records of staff absences and payments of SSP, but a GP fit note is not required from employees. • If evidence is required by an employer, those with COVID-19 symptoms can get an isolation note from NHS 111 online and those living with someone that has symptoms can obtain a note from the NHS website.	• There is an online service to claim back SSP. • Records of all SSP will need to be kept including: reasons why an employee could not work, details of each period when an employee could not work including start and end dates, details of the SSP qualifying days when an employee could not work, National Insurance numbers of all employees SSP has been paid to.	• There is an online service to claim the rebate. The Chancellor confirmed in the Spring Budget that the scheme will continue to support employers while sickness levels are high, but it will be closing in due course.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Self-Employment Income Support Scheme (SEISS) grant extension	• The grant extension is for self-employed individuals who are currently eligible for the Self-Employment Income Support Scheme and are actively continuing to trade, but are facing reduced demand due to coronavirus (COVID-19). • The final grant will cover May to September 2021. The value will be determined by a 'turnover test'. People whose turnover has fallen by 30% or more will continue to receive the full grant worth 80% of three months' average trading profits, capped at £7,500. People whose turnover has fallen by less than 30% will receive a 30% grant, capped at £2,850.	• Must have submitted an Income Tax Self-Assessment tax return for 2018-19 tax year and for the fourth grant, filed a 2019-20 Self-Assessment tax return, • Must have traded in 2019-20 tax year. • Must either be trading when applying or would be trading were it not for COVID-19. • Must intend to continue trading in 2020-21 tax year. • Must have lost trading/ partnership profits as a result of COVID-19.	• To be eligible for the grant extension self-employed individuals, including members of partnerships, must: – have been previously eligible for the Self-Employment Income Support Scheme (although they do not have to have claimed the previous grants); and – declare that they intend to continue to trade and either: - are currently actively trading and intend to continue to trade; or - were previously trading but are temporarily unable to do so due to coronavirus.	• Further guidance can be found on GOV.UK here.	• The final grant can be claimed from late July 2021.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Tax measures:					
Temporary extension to carry back of trading losses	• Temporary extension to carry back trading losses for Corporation Tax for incorporated businesses (and Income Tax for unincorporated businesses). • Subject to certain caps, businesses will be able to carry trading losses arising during company accounting periods ending in the period 1 April 2020 to 31 March 2022 (and, for unincorporated businesses, during tax years 2020-21 and 2021-22) back for relief against profits of earlier years to get a repayment of tax paid. The normal restriction on the carry back of trading losses will be extended from the current one year entitlement to a period of three years. Losses will need to be carried back and utilized against later years first.	• All companies (unincorporated businesses) making losses from carrying on trades (or professions or vocations) during the relevant two year period.	• No formal criteria other than making trading losses during the relevant two year period. However, certain caps apply to the amount of relief available. • The amount of trading losses that can be carried back to the preceding year remains unlimited. However, after carrying losses back to the immediately preceding year, a maximum of £2,000,000 of unused losses will be available for carry back under the extension against profits of the same trade to the earlier 2 years. The £2,000,000 limit applies separately to the unused losses of each 12 month period during the extension. In corporate group scenarios, the £2,000,000 cap will be subject to a group-level limit that, in certain circumstances, will require the cap to be apportioned between group companies.	• There is no formal application process. Businesses should apply the loss carry back in the course of completing their normal business tax computations and returns.	• The extension applies to trading losses made by companies in accounting periods ending between 1 April 2020 and 31 March 2022 (and by unincorporated businesses in tax years 2020 to 2021 and 2021 to 2022). Legislation making provision for the temporary extension will form part of the Finance Act 2021.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Temporary reduced rate of VAT for hospitality, holiday accommodation and attractions	• On 8 July 2020, the government announced that it would introduce a temporary 5% reduced rate of VAT for certain supplies of hospitality, hotel and holiday accommodation, and admissions to certain attractions. • At Budget 2021, the government extended the temporary reduced rate until 30 September 2021. • The temporary reduced rate will apply to supplies that are made between 15 July 2020 and 30 September 2021. • From 1 October 2021, a new temporary rate of 12.5% will apply until 31 March 2022. • From 1 April 2022, affected supplies will revert to the standard (20%) rate of VAT.	• The following supplies will benefit from the temporary reduced rates of VAT: – food and non-alcoholic beverages sold for on-premises consumption, for example, in restaurants, cafes and pubs – hot takeaway food and hot takeaway non-alcoholic beverages – sleeping accommodation in hotels or similar establishments, holiday accommodation, pitch fees for caravans and tents, and associated facilities – admissions to the following attractions that are not already eligible for the cultural VAT exemption such as: - theatres - circuses - fairs - amusement parks - concerts - museums - zoos - cinemas - exhibitions - similar cultural events and facilities	• Being an organisation that make supplies of hospitality, hotel and holiday accommodation or provides admission to certain attractions.	• No formal application • Operation through Normal VAT returns and compliance	• The temporary 5% reduced rate of VAT applies now until 30 September 2021. • The temporary 12.5% reduced rate of VAT will apply from 1 October 2021 until 31 March 2022.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Support for Businesses Paying Tax	• Support made available for businesses and self-employed people in financial distress with their outstanding tax liabilities. • Support is provided through HMRC's Time to Pay service. • This allows businesses and individuals to enter an agreement to pay outstanding tax liabilities in instalments, over a period of time, with the possibility of delaying the first payment for up to 3 months.	• All arrangements are to be agreed on a case-by-case basis. • Arrangements will be tailored to individual circumstances and liabilities.	• Businesses and self-employed people in financial distress with outstanding tax liabilities.	• Calls can be to HMRC's dedicated helpline on 0800 024 1222 (Monday to Friday 8am to 4pm).	• Calls can be made as of now.
Expanded Business Rates Retail Discount (Retail, hospitality and leisure sectors)	• A business rates discount relief for retail, hospitality and leisure businesses for 2020/21 and 2021/22 tax years. • For 2020/21, the discount for eligible businesses is 100%. • For 2021/22, the discount for eligible businesses is: – 100% (without any cash cap) from 1 April 2021 to 30 June 2021; and – 66% (capped at £2m per business where the business occupies a property that was required on 5 January 2021, or, in all other cases, capped at £105,000 per business) from 1 July 2021 to 31 March 2022	• Retail, hospitality and leisure businesses. • Properties that will benefit from the relief will be occupied properties wholly/mainly used as shops, restaurants, cafes, drinking establishments, cinemas, live music venues, properties for assembly and leisure, hotels, guest and boarding premises, and self-catering accommodation.	• Eligibility for the relief is related to occupation of a rateable property by an eligible business. • Business must be based in England. • Similar schemes are available in Scotland, Wales and Northern Ireland.	• No action to be taken. Local councils will apply the discount automatically. • A business rates calculator is available here to calculate the charge saved.	• Relief is currently available in accordance with local schemes operated by local authorities.
Business Rates Relief Fund	• A nationwide fund of £1.5bn for businesses outside the retail, hospitality and leisure sectors that have been adversely affected by COVID-19. • The pot will be allocated to local authorities based on the stock of properties in the area whose sectors have been affected by COVID-19.	• All rates paying businesses in England, outside of the retail, hospitality and leisure sectors, that have been adversely affected by COVID-19.	• Relief will be targeted at sectors that have suffered most economically. It will not be based on falls in property values. • Businesses must be based in England. • Similar schemes are available in Scotland, Wales and Northern Ireland.	• Businesses will need to apply to their local authority. • Local authorities will then use their knowledge of local businesses and the local economy to make awards.	

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Additional Restrictions Grant scheme (ARG)	• The Additional Restrictions Grant (ARG) provides local councils with grant funding to support businesses that are severely impacted by restrictions, and that may or may not be in the business rates system. • Local councils can determine which businesses to support and determine the amount of funding from the ARG scheme. • The new domestic subsidy allowance for the COVID-19 business support grant took effect on 4 March 2021. • This scheme is covered by 3 subsidy allowances: – Small Amounts of Financial Assistance Allowance – you're allowed up to £335,000 (subject to exchange rates) over any period of 3 years – COVID-19 Business Grant Allowance – you're allowed up to £1.6m – COVID-19 Business Grant Special Allowance – if a company has reached its limits under the Small Amounts of Financial Assistance Allowance and COVID-19 Business Grant Allowance, a business may be able to access a further allowance of funding under these scheme rules of up to £9m, provided certain conditions are met • Grants under these 3 allowances can be combined for a potential total allowance of up to £10,935,000 (subject to exchange rates).	Local councils are encouraged to support: • Businesses from all sectors that may have been severely impacted by restrictions but are not eligible for the Restart Grant scheme, including those which do not pay business rates • Businesses from sectors that had to remain closed or have been severely impacted by the extended restrictions, even if those businesses have already been in receipt of Restart Grants. This may include the travel and tourism sector, wedding industries, nightclubs, theatres, events industries, wholesalers, English language schools, breweries, freelance and mobile businesses including caterers, events, hair, beauty and wedding related businesses • The grants are discretionary. Local Authorities will determine which businesses are eligible for grants from this additional funding. • Local Authorities will also have discretion on how, and how much, funding will be provided.	• Businesses which cannot get funding include those that: – Are in administration, insolvent, or have been struck off the Companies House register; and/or – have exceeded the permitted subsidy limit	• Applications are made through the business's local councils.	• Contact your local authority's website to find out what is available and how to apply

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Other measures:					
Insurance	• Insurance claims for pandemic related losses.	• Businesses with insurance cover for pandemics and/ or government-ordered closure.	• Businesses will need to check the terms and conditions of their specific policies.	• Businesses will need to contact their insurance providers.	• Claims can be made as of now.

Additional Guidance

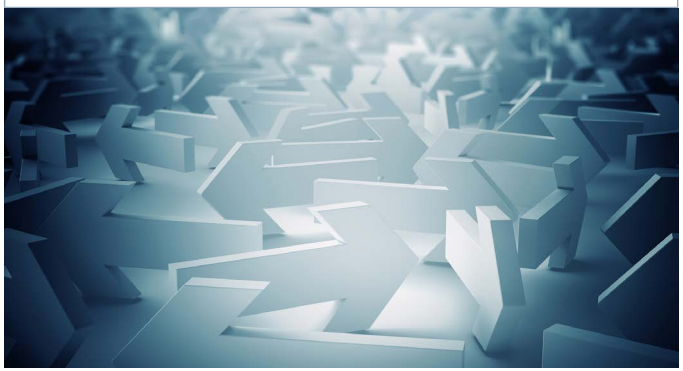
The below alerts and blogs are particularly helpful to those businesses working in the retail and hospitality sector, looking at some of the practicalities around re-opening premises, from licencing to employment issues that could impact cash requirements and business viability.

Hospitality Specific	
	Key Issues for Closures (and Re-Openings) of Licensed Premises This alert considers health and safety risks that may have accrued during the period of closure such as lack of maintenance and hygiene/cleaning, expired safety certification and/or overdue inspections or tests before re-opening.
	Pavement Licences and Consumption Off the Premises The Business and Planning Act 2020 was introduced by the government in the wake of COVID-19. This insight highlights the main changes that operators of licensed premises need to be aware of, especially as 'al fresco' dining will be allowed sooner than indoor dining as restrictions are lifted in the coming months.
Retail Specific	
	The Impact of Brexit on E-Commerce The UK-EU Trade and Cooperation Agreement provides free trade between the UK and EU but there are a number of caveats that retailers must consider. This guide highlights the key questions that all e-retailers need to consider including tariffs, rules of origin, customs compliance, VAT and the impact on e-commerce.
	UK/EU Trade Deal Analysis – What This Means for Retailers This guide discusses the implications of the UK-EU trade deal on retailers including tariffs, red tape, cross-border e-commerce and EU trade deal extensions.
Both Sectors	
Compliance	Key considerations around alternative sourcing; supply chain visibility; regulatory compliance; force majeure and material adverse change provisions; and financial support
Cash flow	Business Interruption Insurance: A Lifeline for Struggling Landlords and Tenants? This alert considers the Supreme Court judgment on business interruption insurance that clarifies the circumstances when a business can claim under their business interruption insurance.
	Turnover Rent A move towards turnover rent could offer a genuine solution to challenges presented by the market. This alert highlights points for tenants and landlords when considering a move to a turnover rent.
Employment	Practical considerations for employers making redundancies This blog sets out considerations for decision-makers when contemplating redundancies.
	Employment law considerations around COVID-19 vaccine This series of blogs discusses whether employers are required to provide the vaccine to their employees, whether the refusal to take the vaccine will be unreasonable failure to comply with managements' request, and finally, what can an employer do when an employee refuses to take the vaccine.

Assessing Viability and Business Risk

Key Points for UK Businesses to Consider

The purpose of this quick guide is to help organisations focus on key issues that impact viability and sustainability.



Cash Flow and Financing

Directors should prepare new cash flow forecasts for best and worst case scenarios (i.e future lockdowns), considering any expected changes to supply and demand, any changes to operational costs and factoring in any deferrals of historic liabilities, and any new debt which has been taken on. Forecasts and projections should be continually reviewed and updated to reflect changes in the market, lessons learnt and expected government changes.

Cash Flow Pressures

Repayment of borrowing

- Use of government schemes (e.g. CBILS, CLBILS, Future Fund, etc.?)
- Other additional borrowing from existing lenders
- When and how will payments be met?
- Is there a need to restructure debt?

Suppliers

- Catching up on payments to suppliers
- Agreeing and abiding by new terms
- Ability to meet future obligations – increased costs
- Aggressive debt recovery action

Debtors

- Have debtor days slipped during COVID-19?
- What action can/should be taken to address any potential bad debt issues?
- Reduced credit terms/payment on delivery/increased prices/ credit insurance

Rent

- Rent holiday/reduction agreed?
- Ability to meet future (and missed) rent payments
- Restructure future rent turnover or similar arrangements
- Aggressive action from landlords when restrictions are lifted (stat demands, forfeiture, winding-up petitions)

Forbearance

- Repaying existing lenders – forbearance may end and payments need to resume
- Impact of protective measures lifting, after 30 September 2021 i.e. restrictions on forfeiture and winding up petitions
- Availability of government support

Employees

- Impact of required employer contributions for furloughed staff and furlough audits
- Payroll funding following end of the Coronavirus Job Retention Scheme and impact on cash and employee requirements
- End to contractual variations for paycuts
- Is a redundancy programme going to be necessary? If so, when does any consultation need to start?

Deferred payments

- Paying deferred VAT payments/rent/suppliers
- Meeting tax payments under 'time to pay' agreements

Supply and Demand

Operational
- Identify key suppliers: business critical and projected spend
- Staggered approach to resuming supply
- Able to meet expected demand
- Changes to delivery timescales
- Alternative sourcing? Costs consequences?

Pricing and payment
- Changes to payment terms/cost (e.g. cash on delivery)
- Financial health of suppliers
- Ability to obtain credit

Stock
- Import/export tariffs and taxes

Termination of existing contracts
- *Force majeure*
- Material adverse change
- Termination rights

De-risking the supply chain for the future
- Review of whole supply chain
- Look to achieve greater diversity in supply chain
- Potential investments in technology

Supply → **Company** → **Demand**

Shape of demand
- What demand is there?
- Impact of lockdown on future demand

End-user/customer
- Decrease in consumer confidence
- Cash-strapped customers

Changes to product and offering
- Changes to consumer habits (e.g. e-commerce and importance of home delivery)
- Increase in appetite for online suppliers and delivery services

Pricing and payment terms
- Review pricing structure, are pre-COVID-19 margins still achievable?
- Consider credit terms and customer insolvency risk
- Is credit insurance still available?
- Is invoice discounting an option to improve working capital?

Government/Other Restrictions
- Impact of any future lockdown e.g reduced/no footfall
- Impact of restrictions e.g self-isolation

Employee Considerations

Business requirement/need
- Does the business need the same number of employees in light of any changes to supply/demand/business model? Are redundancies necessary?
- Re-allocation of resource according to business plan

Availability/Costs
- Impact on employees (fear of infection, childcare responsibilities, self-isolation etc.)
- Will there be any permanent changes to working patterns/habits that impact operational costs (i.e. increase in homeworking and decrease in office space)?
- Psychological support – assisting employees to adapt, support with bereavement – costs?

Long-term changes to contracts and remuneration
- Flexible remuneration plans
- Agree reductions in salary and bonuses

Operational Costs

Licences

- Renewals/periodic fees payable to ensure licence continuation
- Inability and capacity of named individuals/licence holders/trained individuals to carry out role (e.g. long-term absences, sickness, self-isolation)
- Licence amendments to reflect changed trading arrangements (e.g. changes to hours or activities)

Increased health and safety costs

- Strategies for effective social distancing whilst restrictions are still in place – screens, changing shift patterns, use of different parts of premises, monitoring symptoms, track and trace, etc
- Travel to work and transport
- Sanitisation and cleaning programmes

Changes in operational practices and procedure

- Changes to real estate footprint to accommodate changes to employee and working practices (e.g. reduced office space or larger warehouses)
- Investment in technological capabilities to accommodate changes
- Greater automation of processes (or parts of processes)

Opportunities and Lessons Learnt from COVID-19

Many businesses have already made changes to their day-to-day operations, many changes will be permanent or will require further adaption to reflect a change in consumer behaviour but all will impact on future cash requirements.

- Home deliveries and e-commerce
- Consumer analytics and choice
- Permanent changes to working practice
- Streamlining business operations and efficiency
- Ability to operate from smaller footprints
- Use of technology and automation

Our Team

John Alderton
Partner, Leeds
T +44 113 284 7026
M +44 788 505 8896
E john.alderton@squirepb.com

Russ Hill
Partner, Birmingham
T +44 121 222 3132
M +44 792 160 0409
E russell.hill@squirepb.com

Caroline Noblet
Partner, London
T +44 20 7655 1473
E caroline.noblet@squirepb.com

David Whincup
Partner, London
T +44 20 7655 1132
E david.whincup@squirepb.com

Paula Laird
Partner, London
T +44 207 655 1255
E paula.laird@squirepb.com

James Collis
Partner, London
T +44 207 655 1355
E james.collis@squirepb.com

Mark Simpson
Partner, Leeds
T +44 113 284 7046
E mark.simpson@squirepb.com

Robert O'Hare
Senior Tax Policy Advisor, London
T +44 207 655 1157
E robert.ohare@squirepb.com

Blogs

For the latest updates on legal issues and business risk during COVID-19, subscribe to *Restructuring GlobalView*.

For the latest unique global insight into practical and legal HR issues relevant to employers everywhere, subscribe to our Employment Law Worldview

For the latest discussion on legal issues that arise in the supply chain, both those that cut across industries and those that are industry specific, subscribe to Global Supply Chain Law