SQUIRE PATTON BOGGS

Local Connections. Global Influence.

Quick Guides to Directors' Duties Across Europe

Europe - October 2022

Contents

Directors' Duties

Different countries frame the exact description of the role of directors of a company in different terms. One feature is common to all – the obligation not to continue trading if a company is insolvent. Again, the detailed implications of doing so vary from one jurisdiction to another. However, this obligation not to continue wrongful trading is at the heart of trust in a market-based economic system.

Whether you are a supplier, creditor, shareholder, customer or employee, you rely on the directors of the company you are dealing with to discharge this duty diligently. Sanctions for breach of this duty are rightly personal and serious.

Although the pressure and impact of COVID-19 on businesses has eased, issues such as supply chain disruptions and rising inflationary costs are having an acute impact on recovery. The judgements directors have to make about the future prospects of their business are, therefore subject to greater uncertainty and sensitivity than usual. But while such judgements are an essential element of how directors exercise their duties, directors are not required to be able to predict the future.

How directors exercise their duties is one key factor in determining how companies can and should respond to the new challenges we are now seeing. This set of short guides gives pointers to how directors should think about those duties.

We encourage boards to ensure that decisions are well documented, showing how the decisions taken are based on evidence, a clear purpose and rationale. In some jurisdictions, it may be advisable to cover aspects of the decision-making with legal privilege. Use of external legal counsel may be desirable or necessary in order to do so.

Matthew Kirk
International Affairs Advisor, London
T +44 207 655 1389
E matthew.kirk@squirepb.com

Directors’ Duties – Belgium

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.

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, subscribe to Restructuring GlobalView

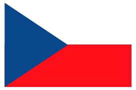
See our Summary of European Government Financial Support Guide to find out what financial support European governments are offering to help support businesses

Contact

Bart Vanderstraete
Partner, Brussels
T +322 627 1120
E bart.vanderstraete@squirepb.com

Directors' Duties – Czech Republic

Considerations for Directors When a Company Is in Financial Difficulty



This quick guide summarises the duties that directors of companies incorporated in the Czech Republic 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 members whose contact details are at the end of this note.

Directors' Duties When Solvent

- Directors are obliged to act for the welfare of the company. In particular, directors are obliged to act with due managerial care, which includes, among others, the duty of loyalty or the duty of confidentiality.
- Directors must also act with diligence, based on sufficient information and in the defendable interest of the company.
- Directors are responsible for managing the company's business affairs (*obchodní vedení*), which generally includes organising and directing the conduct of the company's business, including the decision-making relating to business strategies.
- Directors are also responsible for proper bookkeeping and proper management of prescribed records of the company.

Financial Distress

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

- Directors of a limited liability company shall convene a general meeting without undue delay after becoming aware of the company's impending insolvency (*hrozící úpadek*), or from other serious reasons, in particular where an objective pursued by the company is jeopardised.
- Directors of a joint stock company shall convene a general meeting without undue delay after finding out, that the accumulated loss of the company reached such a level, that if paid from the company's disposable resources the remaining loss would reach a half of the company's registered capital, or given all circumstance the occurrence of this situation can be expected, or because of other serious reasons.
- Directors are obligated to file an insolvency petition on behalf of the company without undue delay when they learn of the company's insolvency, or should have learned of it had they exercised due managerial care.
- The above-mentioned duties applicable to when the company is solvent apply in the case of insolvency, as well.

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.

Liability for Damage Caused to the Company

If a director breaches their duties, they must compensate the company for any damage and/or harm caused to the company resulting from such breach. This also includes compensation for non-proprietorial harm. A director can be relieved from the duty to compensate if they prove that the failure to act with due managerial care was caused by an extraordinary impediment that emerged independently of their will.

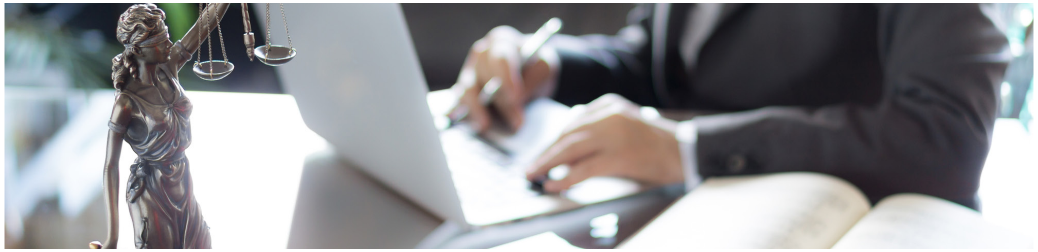
Liability for Damage Caused to the Creditors

A director who does not file an insolvency petition on behalf of a company, although they are obliged to do so, is liable to the company's creditors for damage, harm and/or other injury caused by such breach of duty.

A director can be absolved of liability only if they can prove that the breach of duty (to file the insolvency petition) had no impact on the amount available to satisfy claims lodged by creditors in the insolvency proceeding. A director may also be absolved if failure to fulfil the duty to file for insolvency was due to facts that occurred independently of the director's will and they could not have averted them even if they had used their best efforts, as may be reasonably required from a person in the same position.

Obligation to Make up a Shortfall in the Company's Assets

- In case of a bankruptcy (*konkurs*) of a company, if a director contributed to the bankruptcy by breaching their duties, an insolvency court can order them to provide a performance up to the difference between the total of the company's debts and the company's insolvency estate (in Czech: *majetková podstata*).



Obligation to Surrender Profit or Benefits Received

- **Violation of the duty to act with due managerial care**. If the director breaches their obligation to act with due managerial care, they are obliged to surrender any profit or benefit they received in connection with such breach. If the director cannot surrender the profit, they are obliged to compensate the company for such profit in monies.
- **Contribution to insolvency of the Company**. If a company is declared insolvent based on an insolvency petition filed by other person than the company and the director contributed by breaking their duties to insolvency of the company, they shall, upon the request of the insolvency trustee approved by the insolvency court's decision, surrender any profit they received in performance of their function (e.g. remuneration) and any other proceeds received from the company within up to two years preceding the commencement of the insolvency proceedings.

Criminal Liability

A director may be criminally liable for their actions. The criminal liability of the director is separate and independent from the criminal liability of the company.

Czech law recognises a special category of so-called "insolvency criminal offences" under which the director may be sentenced and banned from activities or imprisoned for up to eight years. Insolvency criminal offences include damaging the creditor, preferential treatment of the creditor, causing insolvency, breach of duty in insolvency proceedings and plots in insolvency proceedings.

A director may commit a number of other criminal offences in connection with the (impending) bankruptcy of the company or insolvency proceedings, such as breach of duty in the administration of other's property or misrepresentation of management and assets.

Also, a director may be subject to criminal liability if he fails to secure proper bookkeeping of the company.

Financial Penalties

A director may also be liable for the misdemeanours committed in connection with the performance of their office, as a result of which they can be, most typically, fined with a penalty or sentenced with a ban on activities. However, there are also other types of administrative penalties.

Liability as Guarantor

Liability for other damage or other loss – If a creditor of the company cannot recover its debt from the assets of the company, the director acts as a guarantor of such debt up to the amount of damage and/or harm that the director caused to the company, and that they failed to compensate.

Disqualification

- **Contribution to insolvency of the company** – The insolvency court disqualifies a director from holding office as a member of the statutory body of any company, when the insolvency court imposes an obligation to the director to surrender profit or benefits received or an obligation to provide a performance up to the difference between the total of the company's debts and the company's insolvency estate.
- **Disqualification for failing to act with due managerial care** – A court may, even ex officio, decide that a director may not hold the office as a member of the statutory body of any company, if the director, anytime during the past three years before the commencement of the proceedings, repeatedly or seriously breached their duty of due care or, where applicable, any other duties associated with the exercise of their office.

For the latest updates on managing business risk, 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

Contacts

Ivan Chalupa
Of Counsel, Prague
T +420 221 662 274
E ivan.chalupa@squirepb.com

Marek Hrubeš
Associate, Prague
T +420 221 662 246
E marek.hrubes@squirepb.com

Practical Tips to Mitigate Liability

- Consider D&O insurance (note: the extent of D&O insurance cover depends on the specific policies of each insurance company).
- Seek instruction to act by shareholders' meeting (note: shareholders' instructions do not relieve the director from the obligation to act with due managerial care; however, shareholders' awareness could constitute a mitigating factor).
- Seek advice from legal professionals and financial advisers and keep track of other steps taken before making a business decision.
- Take all precautionary measures to avert an impending insolvency and do everything in order to minimise the damage to the creditors of the company, e.g. by applying for state aid and/or the temporary measures; protecting cash flow by collecting overdue receivables; and extending payables (note: the Late Payment Directive restriction).
- Directors should constantly observe the commercial and financial situation of the company and assess whether the company is solvent.
- Directors should avoid preferential treatment of specific creditors.
- If liquidity issues arise, the directors need to assess whether the company is insolvent and, therefore, obliged to file an insolvency petition.
- Directors should consider if the company's creditors will agree a voluntary solution, i.e. to defer payments or agree a repayment schedule.
- Directors should verify whether any company loan repayments are due in the upcoming period. Identify the key contractual provisions and the risk of (cross) defaults happening (e.g. due to COVID-19), while considering the imminent implications of the defaults.
- Directors should make use of available governmental support (further details of which can be accessed on the left panel), as not doing so may be considered a failure to act with due managerial care and result in their personal liability.

Directors’ Duties – France

Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that directors of companies incorporated in France 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 members whose contact details are at the end of this note.

Directors’ Duties When Solvent

- Each director owes individual duties to the company, to promote the success of the company for the benefit of its shareholders as a whole.
- Directors’ duties must be exercised in good faith.
- The directors can be held liable, with both civil and criminal liability, individually or jointly, to the company or third parties for breach of applicable laws and regulations, the company’s constitutional documents or for mismanagement of the company.
- There may be other specific duties, depending on the form of the company.

Financial Distress

Directors’ Duties When Insolvent, or at Risk of Being Insolvent

- If a company is facing serious financial difficulties (but not yet insolvent) the director(s) can apply to the court for the appointment of an agent (mandataire ad’hoc) or a conciliator (conciliation) to carry out specific rescue measures and assist in negotiations with the main creditors on a confidential basis.
- If the company faces serious difficulties, but is not yet insolvent, the director(s) can also resort to safeguard proceedings or accelerated safeguard proceedings to restructure all or part of its debts, while benefiting from the protection of the insolvency regime.
- However, if the company can no longer pay its current debts with its available assets for more than 45 days, the legal representative of the company or the director must file a declaration to the court to file for insolvency (*déclaration de cessation des paiements/ dépot de bilan*). Not doing so is considered as mismanagement.
- ·Depending on the financial situation of the company and the possibility of redress, the director can either file for rehabilitation or liquidation proceedings.

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 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.

Wrongful Trading

Continuing to Trade

- The directors may be liable for wrongful trading if they continue to trade in circumstances where the company has been unable to pay its current debts with its available assets for more than 45 days.
- The directors can be ordered to compensate creditors for any additional losses that they suffer as a result of that continued trading.

Extending Credit

- A director (including shadow director) may be liable for granting or extending credit or specific advantages to a company facing irremediable financial difficulties, to keep it artificially operating when it should have filed for bankruptcy.
- In cases of safeguarding, restructuring or liquidation proceedings liability is limited to circumstances of (i) fraud, (ii) indisputable interference with management of the subsidiary/debtor, or (iii) providing guarantees obtained from the creditor, in return for disproportionate credits or loans. If liable, the director can be liable for all or part of the company's debts.

Mismanagement Errors

Once insolvency proceedings have been initiated, a director can be liable for all or part of the company's debts if, as a consequence of mismanagement errors a company's assets do not cover its debts.

Bankruptcy

It is compulsory for a director to cooperate with the receiver and/or the judicial representative appointed by the court following filing for rehabilitation or liquidation proceedings, otherwise a personal bankruptcy action may be brought against the director.

Liability Towards Employees

Under certain conditions, the employer obligations can be imposed on a third party, including a director (legal entity) or a shadow director.

Wrongdoing

Directors may also be exposed to non-pecuniary/professional sanctions ("*faillite personnelle*") and/or criminal sanctions known as "*banqueroute*". The below are examples of types of action that may lead to sanction:

- Using the company to conduct and conceal business transactions for the director's benefit
- Using the company's assets or credit for the director's benefit, or to the benefit of another legal entity in which the director holds a direct or indirect position
- Fraudulently continuing to trade at a loss (whether to further one's own interests or not), knowing that this would lead to the company's insolvency
- Fraudulently embezzling or concealing all or part of the company's assets or fraudulently increasing the company's debts
- Failing to file for insolvency within 45 days of the date on which director(s) knew, or ought to have known, of the company's insolvency
- Obtaining credit at rates that are significantly higher than commercial rates or selling assets below market value, with intent to avoid or delay the opening of insolvency proceedings
- Undertaking, on behalf of a third party, without consideration, commitments deemed too onerous at the time they were undertaken in view of the company's situation
- Paying or causing the payment to a certain creditor, by defrauding other creditors, after the insolvency date and knowing that such a date had occurred
- Obstructing proceedings by voluntarily refraining from cooperating with the administrator/liquidator
- Concealing accounting documents or failing to keep the accounts

Preference

Any payment made, or contract created, in the period before the insolvency can be voidable if it was not made or concluded in the interest of the company and/or had a detrimental effect on other creditors.

Where the company is subject to insolvency proceedings (rehabilitation or liquidation), directors can be subject to professional sanctions if they paid or caused the payment, after the date of insolvency, of a pre-petition creditor to defraud other creditors.

In addition "*de jure*" or "*de facto*" directors who carried out certain wrongful transactions in the framework of insolvency proceedings, such as paying a pre-petition creditor by preference, could face criminal sanctions.

Practical Tips to Mitigate Liability

- If the company is facing financial difficulties that are likely to cause insolvency (but crucially the company is still solvent), the director can request the intervention of an agent (*mandataire ad'hoc*) or a conciliator. These preventive measures are confidential. This can limit the directors' exposure in this sensitive period, while negotiating (confidentially) the restructuring of the debt with the main creditors.
- If these preliminary preventive measures are insufficient, safeguard proceedings (public) are also an option to restructure its debt, while benefiting from the protection of the court.
- To limit the risk of acts taken before insolvency being nullified, any agreements, settlement agreements, etc. can be subject to the "homologation" of the court.
- Great caution should be taken before making any redundancy plans or taking serious structural decisions for the company. In many cases employee representatives or work councils must be consulted.
- Parent company directors should ensure it remains independent, refrains from interfering in the subsidiary's management or providing excessive financial support.
- Appointing various directors can also reduce the risk of liability, as the decision-making and the liability is not then resting on one person – but this is not customary in France.
- Directors should not take any action with the intention of putting a creditor in a preferential position if the company is facing financial difficulty.

For the latest updates on managing business risk, 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

Contacts

Antoine Adeline
Partner, Paris
T +33 1 5383 7400
E antoine.adeline@squirepb.com

Laure Perrin
Associate, Paris
T +33 1 5383 7522
E laure.perrin@squirepb.com

Directors’ Duties – Germany

Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that a managing director of a German GmbH (hereinafter “director”) is 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 whose contact details are at the end of this note.

Directors’ Duties When Solvent

- Each director has a general obligation to act with the diligence of a prudent businessperson.
- Directors must exercise their duties in compliance with applicable laws, the company’s articles of association and bylaws, any instructions issued at shareholder meetings, and the obligations under their employment agreement.

Financial Distress

Directors’ Duties When Insolvent, or at Risk of Being Insolvent

- Directors are obliged to continuously monitor developments, which could endanger the continuation of the company’s existence, and to take appropriate countermeasures.
- In an insolvency or close-to-insolvency scenario, German Insolvency Law imposes various duties on directors, which are designed to protect the interests of the company’s creditors, including an obligation to file for insolvency in a timely manner.
- Directors are obliged to file for insolvency without undue delay and at the latest (i) within three weeks after the company is unable to pay its debts when due (other than in case of a temporary and minor liquidity shortage) (illiquidity); or (ii) within six weeks after the company has become over-indebted, combined with a negative going concern prognosis.
- After the company has become insolvent, directors may not make any payments unless they are in line with the diligence of a prudent businessperson even in an insolvency. During the permitted insolvency filing period, payments made in the ordinary course of business are deemed to be made with the diligence of a prudent businessperson provided that the directors pursue the insolvency filing or aim to overcome the insolvency.
- In case the company initiates restructuring proceedings under the newly introduced restructuring laws, the directors need to observe the interests of the rights of its creditors (shift of fiduciary duties).

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.

Criminal Liability

Failure to file for insolvency in a timely manner constitutes a criminal offence. Directors may be sentenced to imprisonment up to three years (or up to one year in case of negligence) or a fine.

Furthermore, directors will be precluded from future director positions for a period of five years if convicted for failure to file for insolvency.

Personal (Civil) Liability

The insolvency administrator may hold directors personally liable if the company suffers damage as a result of violating directors' duties. There is a significant liability for directors arising from transactions at an undervalue or transactions detrimental to creditors, unless the insolvency administrator can successfully claw back the respective funds from the recipient under applicable claw back rules.

Directors may also be personally liable for:

- Payments made after the company became insolvent, which were not made with the diligence of a prudent businessperson even in an insolvency
- A failure to pay certain taxes and social security contributions
- Making payments to shareholders to the extent these payments result in the company becoming unable to pay its debts when due
- Repaying statutory share capital to shareholders in violation of statutory capital maintenance rules (including by way of upstream guarantees)

Practical Tips to Mitigate Liability

- Directors should consider whether they can receive indemnification from the company or the shareholder.
- D&O insurance might be available for insolvency-related liabilities.
- Directors can mitigate their risk by acting upon resolution of the shareholders or if the shareholders ratify the directors' previous actions (although this may be ineffective against company claims).
- Properly document the basis for decisions.
- Avoid transactions at an undervalue or preferential treatment of specific creditors, unless these are justified by extraordinary circumstances (and such circumstances should be properly documented). Directors should also consider requesting shareholder approval for such transactions.
- Prepare and review short-term and mid-term liquidity forecasts to assess whether the company is illiquid and, therefore, obliged to file for insolvency and to help determine whether the company can survive the crisis.
- Consider appointing restructuring legal advisors, as well as auditors, to support the company to confirm the positive going concern prognosis, in case of over-indebtedness.
- If the company was not illiquid on 31 December 2019 and the directors expect any illiquidity to be remedied, the directors should document this and their reasons to benefit from the suspension of insolvency filing obligations and reduce the risk of personal liability.
- Consider whether they can make use of available government support, as not doing so may be considered a failure to act like a prudent businessperson and result in liability (see below for a link to the financial support measures available).
- If the company is insolvent but the directors do not file for insolvency immediately and want to use the three-week period (at the end of which they would otherwise have to file for insolvency) to come out of insolvency, any payment made by the directors during this time needs to be reviewed very carefully. There are multiple German court decisions, which have clarified the scope of allowed payments in a very restrictive manner, and the directors should seek legal advice as to which payments may be made.

Contact

Andreas Lehmann
Partner, Frankfurt
T +49 69 1739 2420
E andreas.lehmann@squirepb.com

For the latest updates on managing business risk, 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.

Directors' Duties – Italy

Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that directors of companies incorporated in Italy 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 members whose contact details are at the end of this note.

Directors' Duties When Solvent

- Directors must fulfil duties imposed by law and company bylaws, with the diligence required by the nature of their duties and their specific competences.
- These duties include the duty to monitor and ascertain the occurrence of an event that would result in the insolvency of the company.
- Since 2019, all companies have been obliged to set up and maintain organisational, accounting and administrative measures adequate to the nature and size of their businesses, to promptly detect any signs of an impending crisis.
- As soon as signs of a crisis are detected, the company's directors should adopt all appropriate remedies to address it and (if appropriate) a voluntary reorganisation, i.e. entering into a composition with creditors, restructuring agreements or extraordinary administration.
- A new Italian Code for Distress and Insolvency which, inter alia, creates new directors' duties and liabilities in respect of distressed situations (see Financial Distress box below), is scheduled to come into force on 16 May 2022. However, new rules introducing alert procedures for companies with financial difficulties are not scheduled to come into force until 31 December 2023.

Financial Distress

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

- 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 insolvency procedures.
- If signs of financial distress that may have a negative impact on share capital are detected, directors must immediately convene a shareholders' meeting for the adoption of appropriate measures in respect to the financial situation of the company. During such meeting, the directors must share a report on the financial situation.
- When a company is insolvent, its directors must preserve the asset value of the company; avoid making preferential payments; not continue trading in a way that would be detrimental to the financial position of the company; and if the statutory minimum share capital is lost, not enter into new transactions.
- Directors must file a petition for insolvency without undue delay, to avoid further worsening the company's financial position.
- If the company is in crisis, the duties of the directors do not shift to the creditors of the company; however, they can be held liable to them.
- The board must avoid carrying out transactions that may cause the dissipation of the company's assets.

The new Italian Code for Distress and Insolvency, due to come into force on 16 May 2022, provides that, during the implementation of restructuring agreements with creditors, insolvency regulation proceedings and the preceding negotiations, directors must ensure that the company:

- Explains the company's situation in a complete, truthful and transparent manner, providing creditors with all the necessary information appropriate for the crisis or insolvency regulation instrument chosen.
- Takes appropriate initiatives for the rapid settlement of the procedure in due time, in order to safeguard the rights of creditors.
- Manages its assets during the crisis or insolvency regulation proceedings in the priority interest of creditors.

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.

Liability to the Company

If a director negligently failing to fulfil duties imposed by law or the company's bylaws fails to supervise the general conduct of the company or fails to take appropriate action upon becoming aware of their prejudicial acts, it could result in a civil action for damages.

Liability to Creditors

A director may be liable to a company's creditors if the company's assets are insufficient to satisfy creditor claims as a result of failure by the directors to preserve the company's assets, e.g. unduly preferring certain creditors to others in breach of the statutory order of priority or continuing to trade in the absence of a reasonable prospect of continuing activities as a going concern.

Liability to Third Parties

A director could face a claim for damages by a shareholder or a third party if they suffer damage as a consequence of the director's conduct.

Criminal Liabilities

A director could face criminal sanctions if the director:

- Hides the company's crisis and insolvency or continues to obtain loans from credit institutions
- Attributes non-existent assets to themselves, for the sole purpose of being admitted to a composition with creditors or obtaining approval of a restructuring agreement with financial intermediaries
- Simulates claims that are wholly or partially non-existent, in order to influence the formation of necessary majorities to obtain approval of a restructuring agreement

Fraudulent Bankruptcy

A director may be criminally liable if the director:

- Disposes of or transfers all or part of the company's assets with the intent to defraud creditors of the company
- Destroys or falsifies all or part of the corporate books or other accounting records
- Before or during judicial liquidation proceedings, makes payments with the intent to prefer one or more creditors

Simple Bankruptcy

A director could be criminally liable if the director:

- Carries out high-risk transactions with the intent of delaying the commencement of bankruptcy proceedings
- Increases the company's liabilities by failing to file a petition for the commencement of the insolvency proceedings when the company was insolvent or over-indebted
- During the three years preceding the declaration of insolvency, did not keep the corporate books and the other accounting records prescribed by law

Directors' Disqualification

If a company facing a situation of financial distress is admitted to insolvency proceedings, directors remain in office but are no longer allowed to exercise their powers to the full extent. Breaching such prohibition may lead to disqualification from managing a commercial enterprise or even imprisonment.

Practical Tips to Mitigate Liability

- Directors should exercise extreme caution when selecting payments if there are any signs of insolvency or prospective insolvency.
- Directors should consider how creditors are ranked under the statutory provisions of Italian law and the role that creditors may play in ensuring the continuity of the business.
- Directors should convene board meetings on a more regular basis (possibly as often as weekly) when they can no longer be confident that the company will remain solvent.
- The board should closely monitor the company's financial performance and, in particular, whether that performance is in line with its business plan, KPIs and cash-flow forecasts.
- The board should take even greater care to document its decisions, including the rationale for those decisions, and the information and advice relied upon in order to reach them.
- During board meetings, directors should make sure that any dissenting opinion given in the best interest of the company is reported in the minutes of that meeting, in the record book of the meetings and resolutions of the board of directors.
- The board must avoid carrying out transactions that may cause the dissipation of the company's assets.
- Great caution should be taken before making any redundancy plans or taking serious structural decisions for the company

For the latest updates on managing business risk, 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.

Contact

Ian Tully
Partner, Milan
T +39 02 1241 27702
E ian.tully@squirepb.com

Directors' Duties – Poland

Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that directors of companies incorporated in Poland 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

- Each member of the management board of a Polish limited liability company (sp. z o.o.) or the joint-stock company (S.A.) (hereinafter director) has a general obligation to manage the company's affairs and represent the company to third parties, with the diligence of a prudent business person.
- They must also exercise their duties in compliance with applicable laws, the company's articles of association and bylaws, any resolutions of the shareholder meetings and the obligations under their employment agreement (if any).

Financial Distress

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

- If the company is close to insolvency, the directors should analyse and consider whether the company can reorganise or restructure (as provided for by Polish Restructuring Law of 2015 (as amended)) and agree a settlement with its creditors or whether to file for insolvency.
- Directors are obliged to file for insolvency without undue delay and at the latest within 30 days after the company is (i) unable to pay its debts when due (with presumption that the company is insolvent when delay in payment exceeds three months) or (ii) over-indebted, i.e. the liabilities exceed assets and such state of affairs persist for over 24 months.
- Under new regulations the obligation to file for insolvency will be suspended. The suspension will be applicable for the period.

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 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.

Professional Liability

The directors may be precluded from future director positions or carrying out commercial activity for a period from one to 10 years if they fail to file for insolvency.

Liability for Company's Debts

In the case of a limited liability company, the directors may become personally liable for the debts of the company including unpaid taxes. In the case of a joint-stock company or a corporation, liability is limited to unpaid taxes. However if the directors file for insolvency in a timely manner this may exonerate them from such liability.

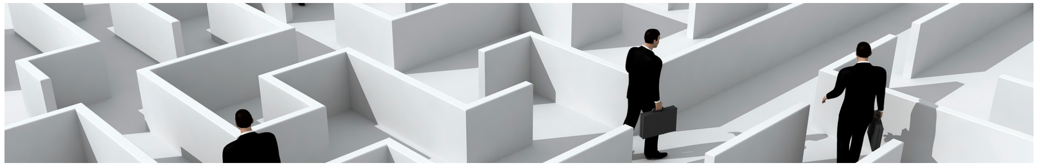
Personal Liability

The directors are liable, with a rebuttable presumption of fault, for any damage to the company caused by action or inaction breaching the law or articles of association, e.g. where the directors fail to file for insolvency in a timely manner.

The directors are also personally liable for any payments made to the shareholders in breach of the law or articles of association.

Criminal Liability

Failure to file for insolvency in a timely manner constitutes a criminal offence.



Practical Tips to Mitigate Liability

- Directors should consider whether they can receive indemnification from the company
- D&O insurance might be available
- Directors can mitigate their risk by acting upon resolutions of the shareholders or if the shareholders ratify the directors' previous actions (although this may be ineffective against company claims)
- Properly document the basis for decisions
- Constantly review the commercial and financial situation of the company to assess whether it is solvent, can survive the crisis and react to changes in circumstances as necessary
- In some cases, where the company accrues losses exceeding certain thresholds, the directors should convene a shareholders' meeting seeking a resolution whether the company should continue.
- Prepare and review short-term and mid-term liquidity forecasts to assess whether the company is illiquid and, therefore, obliged to file for insolvency
- Consider whether they can make use of available government support, as not doing so may be considered a failure to act like a prudent businessperson and result in liability (see below for a link to the financial support measures available)

For the latest updates on managing business risk, 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.

Contact

Marcin Wnukowski
Partner, Warsaw
T +48 22 395 5503
E marcin.wnukowskisquirepb.com

Directors' Duties – Slovakia

Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that directors of companies incorporated in Slovakia 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 whose contact details are at the end of this note.

Directors' Duties When Solvent

- Each director has a fiduciary duty to act with the diligence of a prudent businessperson.
- Directors must exercise their duties in compliance with applicable laws, the company's articles of association and bylaws, any instructions issued at shareholder meetings, and the obligations under their agreement.

Financial Distress

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

- A company will be bankrupt if it is (a) insolvent, or (b) over-indebted under a "balance sheet test", where it has at least one creditor and the company's liabilities (actual, contingent and prospective) exceed its assets.
- If a company is bankrupt, directors are ordinarily obliged to file for the company's bankruptcy within 30 days of the date the directors knew of the company's over-indebtedness, or when they ought to have known about it, if they were exercising professional care.
- Apart from the above, the company may also find itself within "crisis". The company is in crisis when it is either bankrupt or the company is in danger of going bankrupt, i.e. when the ratio of company's equity to company's liabilities is less than 8 to 100. In such case, the directors are obliged to act with due diligence and do everything to overcome the crisis. The company in crisis has various statutory obligations, including an obligation not to enter into any transaction where the company would provide disproportionate consideration to the company's shareholder.

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.

Liability to Creditors

If a director fails to file a petition on time, they may be obliged to compensate creditors for the damage suffered by creditors in relation to the creditors' receivables deficit due to insufficient assets at the end of the bankruptcy process, or for a different amount of proved damage.

Obligation to Pay Contractual Penalties

If the petition is not filed on time, the directors will be obliged to pay a contractual penalty of €12,500 into the bankruptcy estate.

Fines

A director must cooperate and assist a bankruptcy trustee. Failure to do so renders a director liable to a fine of up to €165,000.

Disqualification

If a court decides that a director breached the obligation to file for bankruptcy and is, thus, liable for damages, the relevant director will be disqualified from being a member of the statutory body or supervisory body, the head of a branch or a procurist (disqualified representative) for a period of three years from the effective date of the decision.

Criminal Liability

Failure to submit a petition for bankruptcy proceedings in a timely manner may constitute a criminal offence.

Directors may be criminally liable if they do not fulfil their statutory duties. This may result in a prison sentence and/or other punishments available under the Criminal Code.

Preference

If a company is in financial difficulties, directors may be committing a crime if they make preferential payments to creditors.

Practical Tips to Mitigate Liability

- Maintain good lines of communication on a regular basis with suppliers, logistics providers and end customers as to what they are doing and the steps they are taking to mitigate the impact of the virus on the business.
- Agreeing extended payment terms could be considered as a legitimate tool for maintaining the business and avoiding illiquidity of the company. The Slovak Commercial Code allows parties to agree payment terms longer than 60 days only if it is expressly agreed and such payment terms are not grossly unfair to the creditor. Public sector entities can only extend for a maximum of 60 days.
- Consider if the company can pay in instalments.
- Prepare and review short-term and mid-term liquidity forecasts to assess whether the company is illiquid and, therefore, obliged to file for insolvency, and to help determine whether the company can survive the crisis.
- Seek professional advice, if cash flow issues cannot be managed.
- Keep records of key decisions. This will help the directors if the company does not survive and they later have to justify their decisions.
- Consider whether the company can make use of available government support, as not doing so may be considered a failure to act like a prudent businessperson and result in liability (see below for a link to the financial support measures available).
- Directors should consider convening the general meeting to consider appropriate measures to deal with current issues. However, currently, only public joint-stock companies are able to vote remotely and an amendment to the Commercial Code is, therefore, required.
- Directors should avoid preferential treatment of creditors.

For the latest updates on managing business risk, 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.

Contact

Tatiana Prokopova
Partner, Bratislava
T +421 2 5930 3433
E tatiana.prokopova@squirepb.com

Directors’ Duties – Spain

Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that directors of companies incorporated in Spain 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 whose contact details are at the end of this note.

Directors’ Duties When Solvent

- Directors have a general duty of diligence for the good management and control of the company.
- They have a duty to demand and the right to collect adequate and necessary information from the company so that they can fulfill their obligations.
- Directors are required to act in good faith, without personal interest in the matter that is under decision, with sufficient information, and in accordance with an appropriate decision process.
- Directors also have a duty to keep the company’s information and affairs confidential and to avoid conflicts of interest.

Financial Distress

Directors’ Duties When Insolvent, or at Risk of Being Insolvent

- When the company is insolvent, the directors must prioritise the interest of the creditors over the interests of the shareholders.
- Directors are required to:
  - Call a General Shareholders Meeting to dissolve the company within two months from the existence of losses that reduce the equity (being the book value of the assets of the company, as evaluated every year by the auditors of the company or, if the company does not need to be audited, by the board) to an amount that is less than 50% of the share capital, unless the equity is increased or the losses are reduced to remedy that situation
  - Request a judicial declaration of insolvency within a period of two months from when they knew or should have known that the company is insolvent

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.

Liability for Company Debts

In the event directors breach their obligations, the directors can be made jointly and severally liable for the company's debts.

However, directors are currently exempt from liability for company's debts incurred during the state of emergency in Spain but only in cases where the "legal or statutory cause of insolvency had occurred during the period of the state of emergency".

Therefore, if the cause of the company's insolvency occurred before 14 March 2020, directors will continue to be liable, although they will not have the duty to call the General Shareholders' Meeting until the end of the state of emergency.

Personal Liability

Directors are at risk of personal liability for their actions, including if they:

- Enter into agreements, new obligations or debts while the company is already in dissolution or an insolvency processes
- Pay monies in advance to certain creditors where it is apparent that the company is insolvent and cannot avoid an insolvency process
- Pay dividends to the detriment or fraud of creditors
- Conceal assets to the detriment of creditors
- Prevent the *de facto* dissolution of the company, without resorting to the legal means of dissolution or liquidation

They could also be personally liable to the company, partners or the company's creditors for any damage caused by their acts or omissions, which are contrary to the law or the bylaws.

Directors may also face personal liability for acts or omissions carried out in breach of duties that are inherent to the performance of their posts, if those acts or omissions are based on intent or gross negligence. Where the act is contrary to the laws or bylaws, intention is presumed, unless proven otherwise.

Directors will not be exonerated even if the act or board decision is adopted, authorised or ratified by the general meeting of shareholders.

The government has announced that during the COVID-19 state of emergency, the following corporate and insolvency obligations have been suspended until the state of emergency ends:

- The obligation to call a General Shareholders Meeting to dissolve the company
- The obligation to request a judicial declaration of insolvency
- For two months after the end of the state of emergency, the Courts will not accept involuntary declarations of insolvency applications
- Directors will not be liable for the company's debts contracted during the duration of the state of emergency

Practical Tips to Mitigate Liability

- Analysis of the company's existing liquidity, as well as short-term forecasts, to determine if the company will be able to meet payment obligations.
- Increase the equity value in the business if the equity in the company is reducing and could reach a level that is less than 50% of its share capital; however, directors should seek legal advice at the earliest opportunity about this.
- For companies where the legal or statutory cause of insolvency had occurred before the commencement of the state of emergency, directors must be especially cautious before committing the company to additional liabilities or obligations because there is a risk that they could be jointly and severally liable for those new liabilities.
- Directors must avoid authorising new agreements, new obligations or debts if they believe that the company is in a situation where it is at risk of becoming insolvent.
- If directors fear that the company might become insolvent, they must avoid paying certain creditors instead of others of the same rank.
- Directors must recommend stopping paying dividends if they consider that the company is at risk of becoming insolvent.
- When the state of emergency ends, the timeframe for calling the General Shareholders Meeting or requesting a judicial declaration of insolvency resets. Therefore, if the company had been insolvent for one month prior to the declaration of the state of emergency, the directors would be required to call the General Shareholders Meeting within a month of the state of emergency ending.

For the latest updates on managing business risk, 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.

Contact

Fernando Gonzalez
Partner, Madrid
T +34 91 426 4843
E fernando.gonzales@squirepb.com

Directors' Duties – England & Wales

Considerations for Directors When a Company Is in Financial Difficulty


This quick guide summarises the duties that directors of companies incorporated in England and Wales are subject to, and how those duties change when the company is insolvent or at risk of being insolvent. It also provides 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 members whose contact details are at the end of this note.

Directors' Duties When Solvent

- Each director owes individual duties to the company to promote the success of the company for the benefit of its shareholders as a whole.
- 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.
- Directors' duties must be exercised in good faith.
- 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.

Financial Distress

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

- The focus of directors' duties shifts at the point where the directors can no longer be confident that the company will remain solvent.
- Solvency is tested on either a cash flow basis (i.e. ability to pay creditors within terms) or balance sheet basis (i.e. assets exceeding liabilities).
- Directors' duties switch to a requirement to take decisions for the benefit of the company's creditors as a whole.
- The duty owed to shareholders will be secondary; whilst 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.

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.

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

Wrongful Trading

Directors may be liable for wrongful trading if they continue trading a company where they knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. Although, if the directors can show that they took every step possible to minimise creditors suffering additional losses during that continued trading, they may have a defence to the claim.

Mismanagement Errors

A director could also be ordered to make contributions to the company's assets if the director knowingly carries on the business of the company with intent to defraud creditors.

Liability for Tax Debts

Legislation gives HM Revenue and Customs (HMRC) the power to issue a notice making directors (including former directors) and shadow directors jointly and severally liable for unpaid tax owed to HMRC by the company.

The circumstances in which the notice can be issued are complex but are designed to combat tax avoidance, tax evasion and cases of repeated insolvency.

Liability for Antecedent Transactions

- **Preference** – Directors could face personal liability for loss to creditors if they enter into a transaction that places a creditor in a better position than they otherwise would have been in an insolvent liquidation (if that preference had not occurred) (e.g. repaying debt due to a connected entity, ahead of other creditors). The "lookback" period is either six months or two years prior to the onset of insolvency, depending on the circumstances of the transaction.
- **Transaction at an undervalue** – Directors may be ordered to compensate the company and its creditors for any losses suffered as a result of the company entering into a transaction at an undervalue. A transaction at an undervalue is one where the company either gifts an asset to a third party or receives less than reasonable market value for it. The "lookback" period is two years prior to the onset of insolvency.
- **Transactions defrauding creditors** – Directors may be ordered to compensate the company and its creditors for any losses suffered as a result of assets transferred from the company at an undervalue, with the intention to put those assets beyond the reach of creditors. There is no "lookback" period for such transactions

Personal Guarantees

Directors should be aware that if they have given personal guarantees, they may be personally liable for the company's debts under them. Repaying creditors to discharge a debt that a director has personally guaranteed may also constitute a preference.

Liability for National Insurance Contributions (NIC)

- If a company does not pay the correct amount of NIC, HMRC has the ability to recover the unpaid NIC plus interest and penalties from the directors if the failure to pay was due to fraud or neglect.
- Circumstances where HMRC may investigate and use its powers may include persistent failures to pay NIC, whilst at the same time the company made significant and/or regular payments to other creditors, connected persons or companies, or in the form of directors' salaries.

Liability for Misfeasance

Directors may be required to compensate the company for losses caused as a result of breaches of their duties. A breach arises if a director fails to exercise reasonable 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 of that director, and the actual experience of that director.

Repayment of Dividends

A dividend may be unlawful to the extent that the dividend is in excess of available distributable profits. A director who authorises the payment of an unlawful dividend may be acting in breach of their duties and may be personally liable to repay the company, even if the director is not a shareholder. Dividends may also be challengeable as transactions at an undervalue (see above).

Director Disqualification

Directors can be disqualified from acting for between two and four years. Insolvency practitioners have a duty to report to the Secretary of State on the conduct of each of the directors of an insolvent company, and the Secretary of State may bring disqualification proceedings if the directors' conduct is thought to be unfit.

Criminal Liability/Liability for Company Debts

Directors 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 to the liquidated company for a period of five years beginning with the day on which the 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. A director is at risk when buying back the business and assets of an insolvent company unless certain steps are taken to avoid that.

Defined Benefit Scheme

Anybody involved with the running of a defined benefit pension scheme or the operation of an employer (e.g. a company director) could be caught by two new offences of "avoidance of an employer debt" and "conduct risking accrued scheme benefits" if they do not have a reasonable excuse for their actions.

For the latest updates on managing business risk, 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.

Contacts

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

Jon Chesman
Senior Associate, Leeds
T +44 113 284 7190
E jon.chesman@squirepb.com

Practical Tips to Mitigate Liability

- Directors should consider appointing restructuring legal (and possibly accounting) advisers to support the company where they believe there may be a risk of insolvency.
- Board meetings should be convened regularly (possibly weekly), financial performance should be closely monitored and decisions clearly documented.
- The board should consider whether the company continues to operate within its existing finance facilities and should carefully scrutinise any extension of facilities or additional credit (with support from the advisers).
- Contingency plans should be created and discussed with advisers.
- The board should not enter into any transactions at an undervalue unless the board believes in good faith that the transaction would benefit the company (and in which case, the basis of that belief should be fully documented).
- The board should not take any action with the intention of putting a creditor in a preferential position, unless absolutely necessary due to creditor duress (in which case, the rationale should be fully documented).

squirepattonboggs.com

52737/09/22