

# Assessing Your Business Viability and Director Risk Guide – Belgium

September 2022



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# Directors' Duties

## 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.



### 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)



# Summary of Government Financial Support to Businesses

This guide summarises the financial support measures that are available to Belgian 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	Availability
<b>Tax Exoneration</b>	<ul style="list-style-type: none"><li>Companies receiving grants from public authorities will not be required to pay any tax thereon.</li></ul>	<ul style="list-style-type: none"><li>Companies</li></ul>	<ul style="list-style-type: none"><li>Grants received from public authorities up to 31 December 2021.</li></ul>	<ul style="list-style-type: none"><li>N/A</li></ul>	<ul style="list-style-type: none"><li>The measure is currently in force for grants received from public authorities up to 31 December 2021.</li></ul>
<b>Other Measures</b>	<ul style="list-style-type: none"><li>Other COVID-19 related measures may apply depending on the region in which a company is established and the sector in which it operates.</li></ul>	<ul style="list-style-type: none"><li>Companies</li></ul>	<ul style="list-style-type: none"><li>Depending on the relevant measure.</li></ul>	<ul style="list-style-type: none"><li>Different procedures depending on the applicable measure.</li></ul>	<ul style="list-style-type: none"><li>Available now.</li></ul>

# Assessing Viability and Business Risk

## Key Points for Belgian 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. further restrictions impacting the business and economy), 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, and lessons learnt.

#### Repayment of borrowing

- Aggressive debt recovery
- Use of government financial support
- Other additional borrowing from existing lenders
- When and how will payments be met?
- Is there a need to restructure debt?

#### Deferred payments

- Paying deferred payments/rent/suppliers/tax (if applicable)

#### Forbearance

- Repaying existing lenders – forbearance may end and payments need to resume
- Availability of financial support

#### Employees

- Is a redundancy programme going to be necessary? If so, how should this be managed?

#### Rent

- Rent holiday/reduction agreed?
- Ability to meet future (and missed) rent payments
- Restructure future rent
- Dealing with rent arrears

#### Restrictions

- Impact of remaining worldwide COVID-19 restrictions on supply chain and demand

#### Suppliers

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

#### Cash Flow Pressures

#### Debtors

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



## Supply and Demand

### Operational

- Identify key suppliers: business critical and projected spend
- Able to meet demand
- Changes to delivery timescales
- Alternative sourcing? Costs consequences?
- Material/staffing shortages
- Impact of COVID-19 restrictions on suppliers

### Pricing and payment

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

### Stock

- What stock is available?
- Are goods stranded at port or elsewhere in distribution network?
- Right to reject
- Import/export tariffs and taxes

### Termination of existing contracts

- *Force majeure*
- Material adverse change
- Termination rights

### De-risking the supply chain for the future

- Enhanced IT due diligence
- Business continuity measures
- Review of whole supply chain
- Look to achieve greater diversity in supply chain
- Potential investments in technology



### Shape of demand

- Has demand returned? Increased?

### 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 restrictions in the UK or countries where end users/customers are based e.g. self-isolation and reduced operating capacity

## 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 or 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

### Long-term changes to contracts and remuneration

- Flexible remuneration plans
- Agree reductions in salary and bonuses

## Macro Economics

- Expected interest rate rises
- Rising inflationary costs (energy, food, etc.)
- Fuel inflation/rationing
- Impact of sanctions on Russia
- Shortage of or increased costs of major commodity supplies
- Cautious end users/customers
- Supply chain cost increases (shipping, re-routing)



## Operational Costs

### Licences

- 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

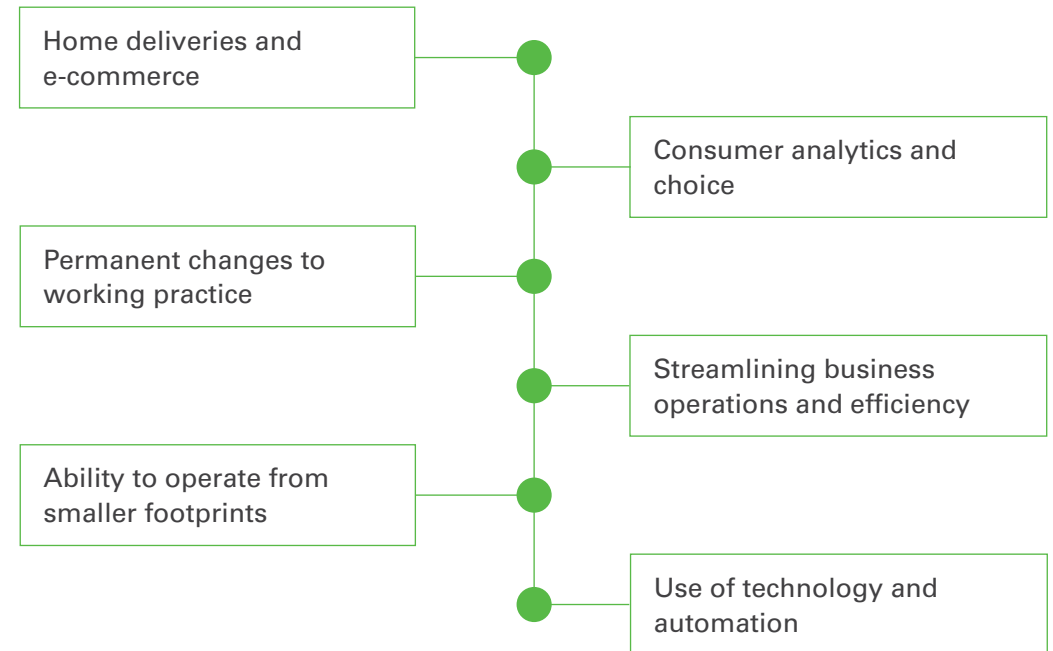
- Strategies for managing COVID-19 risk in the workplace
- Sanitisation and cleaning programmes

### 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

Many businesses have already made changes to their day-to-day operations, many changes will be permanent or will require further adaption to meet new government guidelines but all will impact on future cash requirements.







## Mitigating the Impact of Global Trade Disputes

Trade tensions between global superpowers, notably the ongoing tensions between the US and China, as well as the impact of sanctions on Russia, have the potential to disrupt supply chains globally. Different companies will be affected by the imposition of/increases in tariffs, blacklisting of companies and other trade restrictions in different ways, but it is possible to take steps to mitigate risks, including:

- Mapping the whole of the supply chain to identify high-risk areas and put in place measures to address any identified risks and develop contingency plans for worst-case scenarios (including dual/multi-sourcing).
- Actively monitoring potential future trade policy developments in key territories. The last few years have seen tariff threats between trade blocks, including on steel and aluminium. Proactive monitoring enables you to:
  - Lobby for changes before the scope of tariffs has been determined, either directly or through industry bodies
  - Assess likely consequences for the supply chain and plan accordingly, including amending long-term contracts and making alternative sourcing arrangements, where appropriate
- Identify any levels of the supply chain that may suffer from trade blacklists and plan how each element could be removed in short order if required. In recent times, the US has added dozens of companies to its trade blacklist, including many Chinese chipmakers, Huawei, and Israeli NSO Group whose Pegasus spyware made headlines in 2021. Accordingly, businesses need to have a clear understanding of the sources of all components and plans to address their loss where appropriate.
- Reviewing existing agreements to assess risks and scope for passing these down the supply chain or terminating arrangements that are/become uneconomical or unlawful.
- Identifying and applying for available exemptions. For example, by the end of 2018, the US had granted almost 1,000 waivers from tariffs on Chinese goods. More recently, China has extended existing tariff exemptions from on a list of 81 US products ranging from electric vehicle batteries to timber to shrimp.
- Looking for opportunities that may be presented by trade being diverted to third countries as a result of tariff impositions (while remembering that these opportunities may be temporary). For example, it has been estimated that the EU will be able to attract up to US\$90 billion of trade related to value chains as a result of US-China tariffs.



## Ensure Compliance With Data Protection Laws

The introduction of the General Data Protection Regulation (GDPR) brought new obligations for businesses, with significant fines for non-compliance being levied (e.g. Amazon- €746 million, H&M- €35 million). It has been followed by the California Consumer Privacy Act (CCPA), China's Personal Information Protection Law, the Brazilian Data Protection Law and the likelihood is that more countries will follow suit. With this in mind, in relation to the supply chain, companies should (if they have not already done so):

- Identify key territories in which the company's group is obliged to comply with local data protection laws, monitor changing requirements in those territories and ensure that compliance programmes take account of differing approaches between these key territories, in particular any data localisation requirements (e.g. in Russia and China).
- Review existing records of processing to ensure there is a clear understanding of what data is processed by the supply chain on the group's behalf, where it is processed and the procedures in place to ensure compliant processing by the supply chain.
- Reassess whether suppliers act as controllers or processors of company group data and update contracts as necessary to address this and to ensure all contracts include mandatory data protection clauses.
- Ensure that suppliers with access to company group data are regularly audited and monitored.
- Continue to monitor the effect of cases (notably the Schrems II decision on data transfers to the US) and enforcement action, and be ready to make changes to data hosting and transfer processes with suppliers and customers if required.
- Maintain and test breach response plans, to include dealing with breaches by suppliers, and ensure that supplier agreements contain appropriate breach notification and support commitments.

## Consider the Impact of Ransomware and Other IT Security Issues

Internal IT security has been a key risk area for businesses for some considerable time. However, we are now seeing an increased focus on the risks posed as a result of attacks on suppliers leading to loss of or interruption to critical supplies. Accordingly, in addition to addressing security of their own systems and of systems that connect to/interact with, parties should consider:

- Enhanced due diligence on IT security, disaster recovery and business continuity measures taken by critical suppliers.
- Including IT security, disaster recovery and business continuity commitments in contracts with all major suppliers and not just those who are providing IT services.



## Compliance With Anticorruption and Anti-bribery Laws

Anticorruption and anti-bribery laws gained heightened publicity following new legislation extending potential liability up and down the supply chain. Parties should:

- Establish, implement and enforce appropriate anti-bribery and anticorruption policies throughout their organisations and ensure that their contracts flow these requirements up and down the supply chain.
- Identify key risk areas (both in terms of geography and business function) and provide increased training, monitoring and audits for them.
- Draft and use appropriate anti-bribery/anticorruption provisions for contracts that provide a reasonable level of protection, but that procurement/marketing teams are realistically likely to be able to negotiate and police.
- Consider implementing whistleblowing policies across the supply chain, but take care to respect local restrictions (e.g. in France). Be aware of the EU Whistleblowing Directive 2021, which is likely to affect many EU-based businesses.
- Stay alive to advancements or changes in relevant anticorruption and anti-bribery laws, particularly failure to prevent tax avoidance and failure to prevent bribery. Where appropriate, seek external advice on these advancements, as violation could lead to significant reputational and financial damage.

## Environmental, Social and Governance

Environmental, Social and Governance (ESG) issues have come to the fore in recent months. Media and social activists are increasingly adept at identifying environmental and ethical issues arising within companies' supply chains and then tracing these back to the source.

We are also seeing more and more ESG-centred legislation targeted both at companies and their supply chains across Europe. This is only likely to increase, particularly following the conclusion of COP26. Legal teams can help support businesses' compliance efforts by:

- Designing ESG policies so that they have a particular focus on ESG issues most relevant to a businesses' industry or sector.
- Updating ESG policies regularly so they extend to cover key legislative changes promptly, and take account of policy and legislative changes that are on the horizon where appropriate.
- Help businesses stay on top of advances in the environmental law and policy (waste, water, air pollution, net zero targets, etc.) of countries in which they operate and possible implications.
- Incorporating into supply agreements a commitment from suppliers to comply with (and ensure that their own key suppliers comply with) the business' ESG policies and/or targets, or equivalent policies or targets approved by the business. It may also be prudent to include obligations to comply with (and provide the business with evidence to demonstrate compliance with) specific legislative requirements.
- Including ESG audit and reporting requirements in contracts and ensuring that these are exercised by the business and that the business has the right, if necessary, to terminate the contract for non-compliance (particularly where there has been some reputational damage).
- Checking that the business maintains adequate records to enable it to demonstrate compliance and the steps that it has taken to seek to achieve this.
- Utilising the data gathered internally and within a business' supply chain on ESG to inform future goal-setting.
- Ensuring that ESG commitments made by the business are not overly ambitious. Consumer and shareholder groups have already started to investigate the possibility of pursuing companies for failure to comply with published ESG statements.

## Ensuring Product Quality and Avoiding Expensive Product Recalls

Consumer protection and product safety legislation are becoming increasingly prescriptive. Suppliers must not only ensure their products are safe, but also provide certificates of compliance with a plethora of different industry standards. Failure by the supplier or its supply chain to do this can lead to expensive and very public product recalls. Supply contracts will generally include standard product quality and compliance warranties. However, consideration should also be given to:

- Agreeing a product recall process with key members of the supply chain in advance. This reduces the supply chain's exposure to the negative impact of a recall (i.e. the knock-on effects either up or down the supply chain) and ensures that there is an agreed plan of action when a recall occurs.
- Including express recall provisions in supplier contracts that give a business the ability to initiate recalls (and recover costs of this where appropriate) where requested by regulators or the business reasonably considers appropriate, to avoid arguments about whether a recall is/is not legally required.
- Ensuring traceability of individual batches of products/components to assist in root cause analysis and minimise the scope of any recall.
- Clearly identifying territory-specific certification and other requirements and allocating responsibility for compliance with this appropriately. While it may be tempting to seek to pass responsibility for this back up the supply chain, if the supplier is not familiar with requirements in the relevant consumer market, this may cause more problems than it solves.
- Including contractual rights to reject entire shipments/batches if a particular percentage of samples prove to be faulty. It is not uncommon to see contracts that only allow for return of products that are actually faulty, which would technically require testing of every single item before it is sent back.



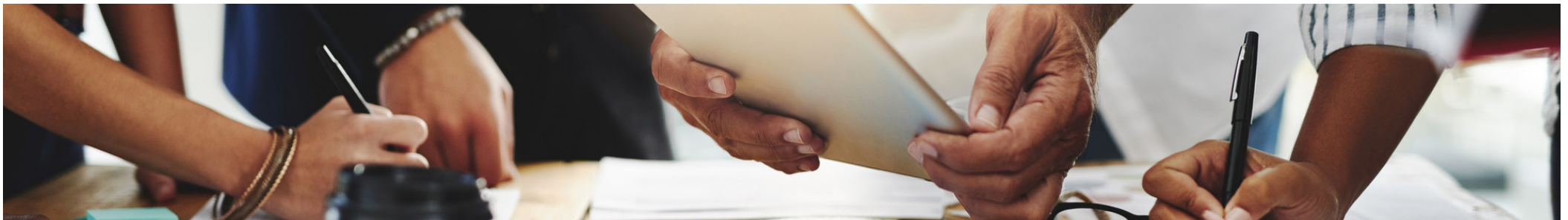


## Considerations for Supply Chain Disputes

Despite best intentions (and well-worded contracts and contractual protections), some supply chain disputes cannot be avoided. Supply chain partners may find themselves in a formal legal dispute due to a supply chain failure. For example, previously harmonious relationships may have broken down, with positions having become entrenched; one or both supply chain partners may be behaving unreasonably; product supplies may be late and/or not of sufficient quality, quantity, correspond to specification, etc.; a project may suffer unexpected losses, or margins may suddenly narrow and contracts become unprofitable/unworkable; and/or as a result of management and other stakeholders demanding that action be taken. Resultant litigation can be time consuming, inherently uncertain (in terms of outcome) and costly.

When disputes unavoidably arise, then a business/its advisers will (among other things) need to:

- Establish the applicable law.
- Consider geographic locations and jurisdictional issues, including enforcement.
- Confirm the contractually applicable dispute resolution mechanism (e.g. litigation, arbitration or other).
- Assess whether the appropriate contractual procedures have been followed, including any pre-dispute/pre-action requirements.
- Ascertain whether the contract provides for a particular or exclusive remedy.
- Consider whether you have sufficient resources internally to deal with the dispute.
- Consider whether external lawyers and experts need to be engaged.
- Undertake prompt documentary and information gathering and, thereafter, manage and collate documents. This should include suspending any routine document destruction policies, and ensuring both paper and electronic records are investigated and preserved.
- Assess the operative terms and conditions- is there a battle of the forms argument?
- Investigate whether any other parties are potentially involved/culpable.
- Assess whether there are helpful/unhelpful warranties and indemnities, any caps on liability, the nature of the losses (direct or indirect) and the extent to which loss and damage have been excluded (if at all).
- Understand who your key people/witnesses of fact are and what they are saying. This may extend to interviewing and drafting witness statements- preferably by lawyers and preferably before memories dim.
- Carefully and accurately assess the merits of the case and what your overall objectives are for the dispute/litigation- what are your best, most likely and worst-case outcomes?
- Ascertain your optimum resolution strategy.
- Establish the likely overall cost of the litigation.
- Make a prompt assessment of whether any time limits apply that could bar a claim (and, indeed, if the claim is already time barred).
- Investigate whether there is insurance cover. If there is, then a timely notification to insurers will likely need to be made.
- Understand whether the opposing party is/parties are likely to be good for the money.
- Assess whether the nature of the dispute will also expose the business to reputational damage.
- Ensure communications with your lawyers/third parties remain privileged (as far as possible).
- Take stock of whether it is a business-critical dispute and/or whether an emergency remedy needs to be invoked (e.g. an injunction).
- Assess the scope for an early resolution before trial (e.g. negotiation), including the appropriate use of settlement offers.
- Consider any enforceability issues should you obtain a judgment against the opposing party, particularly if that party is located in another country.



# Changes to Insolvency and Restructuring Laws

As a result of the impact of COVID-19, Belgium has introduced changes to its judicial reorganisation (Chapter 11) regime to facilitate the reorganisation of impacted businesses.

<b>“Pre-pack” Reorganisation</b>	<p>The law of 21 March 2021 modified the procedures of judicial reorganisation, making the process more accessible to companies in difficulty, including SME’s.</p> <p>This new Belgian judicial reorganisation regime also introduces new rules aimed at facilitating an amicable agreement with creditors prior to a judicial reorganisation procedure. Upon a request by the business, the insolvency court will appoint a court officer to oversee discussions with some or all of the business’s creditors.</p> <p>The “pre-pack” procedure does not automatically result in any stay of execution but this can be granted by the insolvency court at the request of the appointed court officer overseeing the “pre-pack”. If the amicable agreement is accepted by the relevant creditors, a formal reorganisation procedure is then started (shorter deadlines apply) in view of the homologation of the agreement.</p> <p>The temporary measures have been extended until 31 March 2023.</p> <p>This date corresponds to the date of entry into force of the Belgian legislation implementing Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.</p>
<b>Facilitation of Access to Judicial Reorganisation Procedures</b>	<p>The new rules also aim to facilitate access to the judicial reorganisation procedure by amending the rules in relation to the documents and information to be provided by the relevant business in view of the opening of judicial reorganisation proceedings.</p> <p>The new rules grant the business new extended deadlines to provide the required documents and information to the insolvency court and/or allow the business to explain why the information/documents are not available. The insolvency court may therefore now open judicial reorganisation proceedings even where all required information and documents have not been provided.</p>
<b>Extension of the duration of business investigations</b>	<p>When a company is facing financial difficulties, the chamber for enterprises in difficulties, which is part of the commercial court, can initiate an investigation.</p> <p>The objective is to be able to intervene as soon as possible when things threaten to go wrong.</p> <p>The law extends the duration of the business investigation from:</p> <ul style="list-style-type: none"><li>• four to eight months (with a possibility of extension to ten months) where a judge-reporter has been appointed, and;</li><li>• from eight to eighteen months where the investigation is conducted by the chamber for enterprises in difficulty itself.</li></ul>





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## Global HR Audit Tool

For any business, ensuring that the correct paperwork and human resource (HR) policies are in place is important, pandemic or no pandemic. [Global HR Audit](#) is our new, free, simple-to-use, innovative tool that helps employers determine the HR documents and policies they should have in 29 countries around the world, as well as any they should consider having on a global basis. It enables businesses to pinpoint quickly the documents and policies they need in each jurisdiction of operation, as well as those they may wish to consider if they are aiming to go beyond just compliance. The list of mandatory, strongly recommended and “nice to have” HR documents and policies contains further links to [Global Edge](#), where further information on the topics can be found.

## Blogs

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