

Assessing Your Business Viability and Director Risk Guide – Poland

December 2022



Contents

Directors’ Duties3

Summary of Government Financial Support to Businesses.....5

Assessing Viability and Business Risk..... 13

Managing Supply Chain Issues and Risk..... 16

Changes to Insolvency and Restructuring Laws21

Our Team22

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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 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.



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).



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.

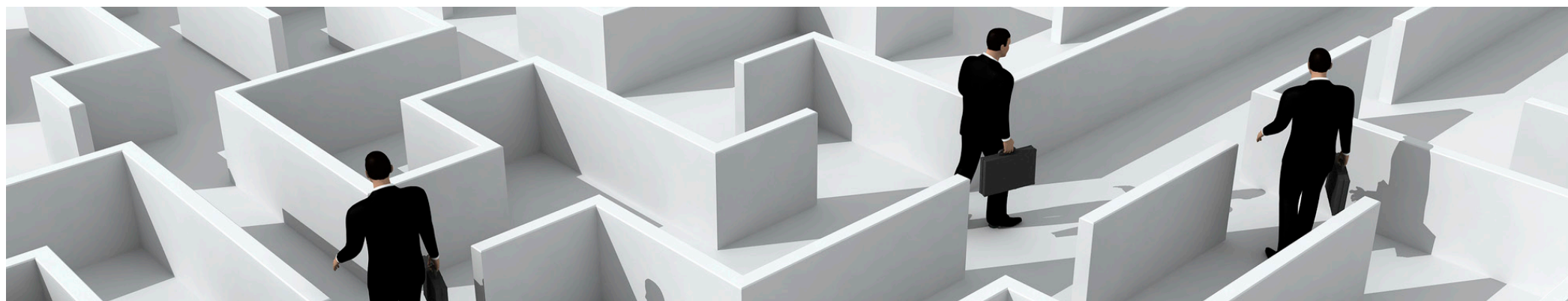
The directors are also personally liable for any payments made to the shareholders in breach of the law or articles of association.

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)



Summary of Government Financial Support to Businesses

This guide summarises the financial support measures that are available to Polish businesses.

Financing Facility Support

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Liquidity and Investment Guarantee	<ul style="list-style-type: none"> Guarantee and suretyship for loans drawn by entrepreneurs up to 80% of the outstanding loan amount (up to PLN250 million) Guarantee period: <ul style="list-style-type: none"> Up to 39 months – working capital loan Up to 72 months – investment loan 	<ul style="list-style-type: none"> Medium-sized and large enterprises, excluding financial institutions (in the meaning of respective EU regulations) See the Commission Recommendation of 6 May 2003, setting out the definition of micro, small- and medium-sized enterprises and respective Polish law implementing these 	<ul style="list-style-type: none"> The loan must have been entered into after 1 March 2020 	<ul style="list-style-type: none"> Businesses will need to apply with Bank Gospodarstwa Krajowego (BGK) via the crediting bank 	<ul style="list-style-type: none"> Available until 31 December 2022
De Minimis Guarantee (Amended)	<ul style="list-style-type: none"> Guarantee for loans (up to 80% of the amount outstanding). Maximum guarantee period of up to 75 months – working capital loan. Maximum guarantee period of up to 120 months – investment loan. Maximum guarantee amount of €1.5 million for guarantees up to five years and €750,000 for guarantees over five years (if the maximum de minimis aid ceilings are not exceeded). No commission for providing a warranty or renewal for a further period. 	<ul style="list-style-type: none"> Micro, small- and medium-sized enterprises (in the meaning of respective EU regulations) See the Commission Recommendation of 6 May 2003, setting out the definition of micro, small- and medium-sized enterprises and respective Polish law implementing these 	<ul style="list-style-type: none"> The company must be based in Poland The company cannot have arrears of tax and/or social security payments as at 1 February 2020 		<ul style="list-style-type: none"> Available until 31 December 2022

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Factoring Limit Guarantee	<ul style="list-style-type: none"> • Securing the repayment of a factoring limit granted for liquidity provision • Extent of guarantee – Up to 80% of the amount • Guarantee amount – Up to PLN200 million • Maximum limit amount – PLN250 million • Guarantee period – Up to 27 months (period not longer than the factoring limit extended by a maximum of three months) 	<ul style="list-style-type: none"> • Micro, small, medium and large enterprises, excluding financial institutions (in the meaning of respective EU regulations) • See the Commission Recommendation of 6 May 2003, setting out the definition of micro, small- and medium-sized enterprises and respective Polish law implementing these 			<ul style="list-style-type: none"> • Available until 31 December 2022
Biznesmax Guarantee With Subsidy	<ul style="list-style-type: none"> • Securing the repayment of loans financing business development, including investment projects of an eco-innovative nature with an environmental effect • Guarantee coverage – up to 80% of the loan amount • No guarantee commission • Maximum guarantee amount – €2.5 million • Guarantee security for BGK – blank promissory note • Guarantee period: up to 20 years, subject to a revolving working capital facility (including working capital overdraft facility: up to 39 months). • Form of public aid – de minimis aid or regional investment aid 	<ul style="list-style-type: none"> • Micro, small- and medium-sized enterprises (in the meaning of respective EU regulations) • See the Commission Recommendation of 6 May 2003, setting out the definition of micro, small- and medium-sized enterprises and respective Polish law implementing these 	<ul style="list-style-type: none"> • The company must be based in Poland 	<ul style="list-style-type: none"> • Businesses will need to apply with Bank Gospodarstwa Krajowego (BGK) via the crediting bank 	<ul style="list-style-type: none"> • The guarantee may also cover a liquidity loan, i.e. a revolving working capital loan (including an overdraft) and a nonrevolving noninvestment loan granted until 31 December 2022. Such a guarantee constitutes de minimis aid.

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Guarantee for the Agricultural Sector	<ul style="list-style-type: none"> Investments in agricultural holdings or in the processing and marketing of agricultural products Guarantee coverage – up to 80% of the loan amount Rate of commission – 0% of the guarantee amount Guarantee period: <ul style="list-style-type: none"> Revolving working capital loans – 39 months Nonrenewable working capital loans – 51 months Investment loans – 183 months or 120 months (for de minimis aid) Types of public aid – de minimis aid or public aid Maximum guarantee amount – PLN5 million (farmer) or PLN10 million (processor) 	<ul style="list-style-type: none"> Micro, small and medium-sized enterprises operating in the agricultural sector. (in the meaning of respective EU regulations) See the Commission Recommendation of 6 May 2003, setting out the definition of micro, small- and medium-sized enterprises and respective Polish law implementing these 	<ul style="list-style-type: none"> The guarantee may cover an investment loan or a working capital loan for an entrepreneur who is: <ul style="list-style-type: none"> A farmer A processor of agricultural products A processor of non-agricultural products 		<ul style="list-style-type: none"> A working capital loan granted between 1 January 2021 and 31 December 2022 for the ongoing financing of economic activities not linked to the implementation of an investment supported by the European Agricultural Fund for Rural Development (EAFRD)

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Guarantee for Leasing	<ul style="list-style-type: none"> • Security of leasing transactions • Extent of the guarantee – Up to 80% of the lease/loan amount • Currency of lease/loan – Zloty or foreign currency • Maximum guarantee amounts: <ul style="list-style-type: none"> – Lessees operating in the sector of primary production of agricultural products – €100,000 – Lessees operating in the fisheries and aquaculture sector – €120,000 – Lessees operating in other sectors – €800,000 • Guarantee fee: <ul style="list-style-type: none"> – 0.2% of the guarantee amount for the first, second and third years – 0.3% of the guarantee amount for the fourth and subsequent year of the guarantee • Maximum guarantee period – 120 months (minimum three months) • Guarantee security – Blank promissory note 	<ul style="list-style-type: none"> • Micro, small- and medium-sized enterprises (in the meaning of respective EU regulations) • See the Commission Recommendation of 6 May 2003, setting out the definition of micro, small- and medium-sized enterprises and respective Polish law implementing these 			<ul style="list-style-type: none"> • Available until 31 December 2022
Liquidity Loans Offered by Agency for Industrial Development	<ul style="list-style-type: none"> • Loans to finance working capital PLN800,000 – PLN5 million for six years, with 15 months grace period. The loan funds are disbursed either as a one-time payment or in tranches. • Leasing of cars (up to PLN5 million, six years). • Loans to finance remuneration of employees (paid to employees directly) up to two years, with 12 months grace period. The loan funds are disbursed either as a one-time payment or in tranches. 	<ul style="list-style-type: none"> • SMEs (in the meaning of respective EU regulations) 	<ul style="list-style-type: none"> • Annual turnover exceeding PLN4 million • Having positive earnings before interest, taxes, depreciation, and amortization (EBITDA) and profit for 2019 • Carried out business for 12 preceding months • Full accountancy 	<ul style="list-style-type: none"> • Apply online with Agency for Industrial Development (Agencja Rozwoju Przemysłu) 	<ul style="list-style-type: none"> • Available for the duration of the epidemic outbreak or until funds are exhausted

Other Financial Support

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Waiver of Interest on Delayed Social Security Premiums Payments	<ul style="list-style-type: none"> • Waiver of default interest on social security premiums payment where payments are delayed or are being paid in instalments • If the application for the payment to be prolonged and/or paid in instalment is granted, there is no prolongation fee on the amounts of prolonged tax payment • Prolongation fee is half the tax penalty interest 	<ul style="list-style-type: none"> • All payers of social security premiums 	<ul style="list-style-type: none"> • Application to be filed during the state of epidemic (or epidemic emergency) or within 30 days following the revocation of state of pandemic or pandemic emergency 	<ul style="list-style-type: none"> • File application with local social security office 	<ul style="list-style-type: none"> • Available now
Waiver of Interest on Defaulted Tax Payments	<ul style="list-style-type: none"> • Waiver of prolongation on tax payments where payments are delayed or are agreed to be paid in instalments • If the application for payment to be prolonged and/or paid in instalments, is granted, there is no prolongation fee on the amounts of prolonged tax payment • Further, the minister of finance has been empowered to issue a regulation waiving collection of penalty interest on unpaid taxes defining territory, timeframe and groups of taxpayers to whom such waiver will apply 	<ul style="list-style-type: none"> • All taxpayers 	<ul style="list-style-type: none"> • Application to be filed during the state of pandemic (or pandemic emergency) or within 30 days following the revocation of the state of pandemic or pandemic emergency 	<ul style="list-style-type: none"> • File application with local tax office 	<ul style="list-style-type: none"> • Available now
	<ul style="list-style-type: none"> • Some commercial banks will agree changes to the terms of loans extended to entrepreneurs 	<ul style="list-style-type: none"> • All enterprises 	<ul style="list-style-type: none"> • Loans entered into before 8 March 2020 • Change to loan term is justified by financial position of the applicant • Eligibility assessed by the bank before 30 September 2019 	<ul style="list-style-type: none"> • Businesses will need to contact their bank directly 	<ul style="list-style-type: none"> • This measure is discretionary • The applicant and the bank need to agree terms

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
IP BOX Preferential 5% Rate for Taxes on Income From IP Used To Counteract the COVID-19 Pandemic	<ul style="list-style-type: none"> • 5% preferential tax rate on income from qualified IP rights during the tax year • The solution will also be available in a situation where the taxpayer does not yet have a qualified intellectual property right or the prospect of obtaining it, provided that an application for such protection is submitted or submitted to the competent authority, within six months from the end of the month, for which when calculating the advance tax, the taxpayer used 5% tax rate 	<ul style="list-style-type: none"> • CIT taxpayer, PIT taxpayer settling on general terms or according to a uniform 19% income tax 	<ul style="list-style-type: none"> • CIT taxpayers achieving qualified income from qualifying intellectual property rights in the tax year that started before 1 January 2020 and will end after 31 December 2019 or started after 31 December 2019 and before 1 January 2021 • PIT taxpayers earning qualified income from qualified intellectual property rights in 2020 	<ul style="list-style-type: none"> • After the end of the tax year in the annual tax return 	<ul style="list-style-type: none"> • The solution is aimed at CIT taxpayers earning qualified income from qualified intellectual property rights in a tax year that started before 1 January 2020 and ends after 31 December 2019 or started after 31 December 2019, but no later than the month in which the epidemic declared due to COVID-19 is revoked • For PIT taxpayers, this arrangement is aimed at taxpayers earning qualified income from qualified intellectual property rights in the period from 2020 until the end of the tax year in which the epidemic declared due to COVID-19 is revoked

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Deduction From the Income of the Donations Made to Combat COVID-19 Pandemic	<ul style="list-style-type: none"> Up to 200% of the value of the donation in cash or in kind will be deductible: <ul style="list-style-type: none"> For donations made until 30 April 2020, a deduction of up to 200% donation value For donations made in May 2020, a deduction is made of an amount corresponding to 150% donation value For donations made from 1 June 2020 to 30 September 2020, a deduction is made for the amount corresponding to the value of the donation For donations made from 1 October 2020 to 31 December 2020, a deduction of up to 200% donation value For donations made from 1 January 2021 to 31 March 2021, a deduction of up to 150% donation value From 1 April 2021 until the end of the month in which the epidemic state declared due to COVID-19 is revoked, a deduction that is equal to 100% of the value of the donation 	<ul style="list-style-type: none"> Anyone who taxes their income on general principles according to the tax scale or according to the uniform 19% tax rates (for business income) A taxpayer who taxes income with a lump sum on recorded income CIT taxpayer 	<ul style="list-style-type: none"> One cannot take into account the value of the donation when paying lump-sum income tax in the form of a tax card, paying lump-sum income tax on capital funds and paying tax on the sale of real estate One will not be entitled to the relief if the expenses have been classified as tax deductible costs or have been deducted from taxable income in another form or have been returned to the taxpayer in any form In the case of a return of a donation, the recipient is obliged to provide the tax office with information about the donation returned to the taxpayer, within one month from the date of return 	<ul style="list-style-type: none"> With the relevant tax office 	<ul style="list-style-type: none"> Available for donations made from 1 January 2020

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
No Need To Increase the Income on Which the 2020 Advances Are Calculated With Outstanding Trade Receivables ("Bad Debt")	<ul style="list-style-type: none"> One does not have to increase the tax base when calculating advance income tax in 2020 (from March to December) by the so-called bad debt, i.e. unpaid trade receivables after 90 days from the date of expiry of the payment deadline At the same time, as a taxpayer (creditor) who has a claim in this respect, one retains the right to reduce one's income by the amount of the claim 	<ul style="list-style-type: none"> All CIT and PIT taxpayers 	<ul style="list-style-type: none"> Those that suffer negative economic consequences due to COVID-19, and obtain revenues that are at least 50% lower than the revenues obtained in the corresponding accounting period in the previous year. And, if one started running a business in 2019, it is in relation to the average income from nonagricultural business activity obtained that year. The 50% drop in revenue condition does not apply to taxpayers who: <ul style="list-style-type: none"> Used a form of taxation in 2019 for which revenue is not determined Started running a business in the last quarter of 2019 and did not receive any business income in this period Started their operations in 2020 		<ul style="list-style-type: none"> Available now

Assessing Viability and Business Risk

Key Points for Polish 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

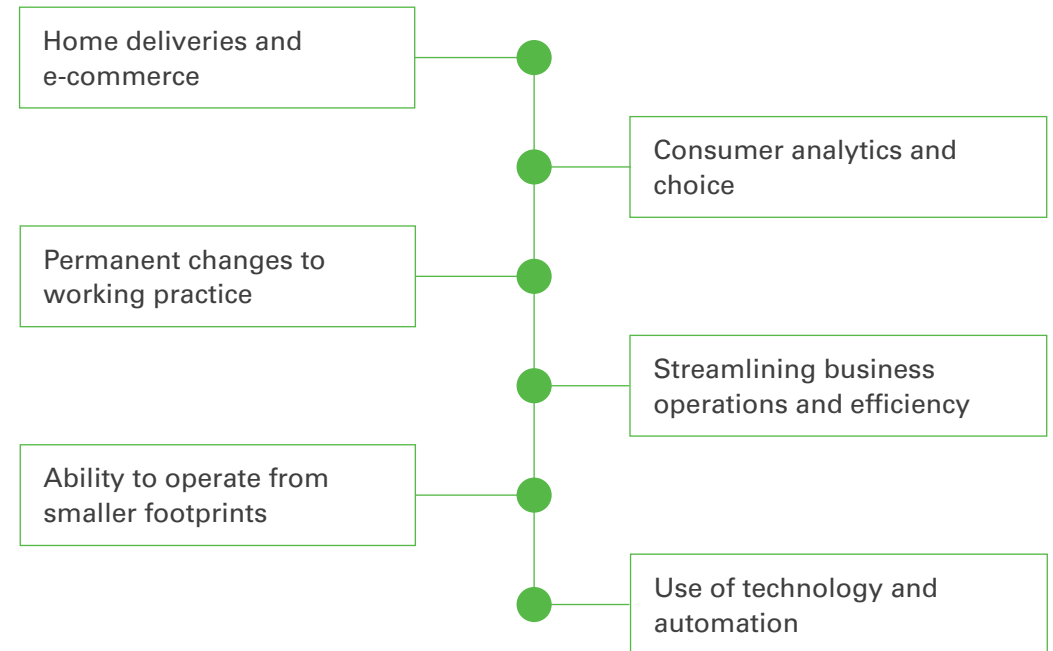
- Strategies for managing COVID-19 risk in the workplace
- Sanitisation and cleaning programmes

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

Poland has temporarily suspended bankruptcy filing obligations as a result of COVID-19 and implemented certain measures to allow restructuring.

Suspension of the Obligation to File for Bankruptcy	<p>According to Polish law, a debtor needs to file for insolvency within 30 days following the occurrence of insolvency, i.e. (i) it has lost the ability to pay its debts when they mature or to discharge its debts (there is a presumption that the debtor is insolvent if the delay in payment exceeds three months); or (ii) certain cash liabilities exceed a debtor's assets and such state of affairs persists for more than 24 months.</p> <p>Following the Act of 16 April 2020 on Specific Support Instruments in Connection With the Spread of the COVID-19 Virus during the pandemic emergency or pandemic (as declared in compliance with applicable legislation) the term for insolvency filing is currently suspended and if the 30 day period had already commenced, it is halted and will start again.</p> <p>For a debtor company, the temporary suspension of filing obligations releases the representatives of the debtor (e.g. the members of the management board of the companies) from liability for a delayed insolvency filing. However, it does not release the members of the board from considering and filing a motion for a restructuring proceeding as provided for under the Restructuring Law.</p> <p>The legislation also provides that, if bankruptcy occurs during the period of the pandemic emergency or pandemic, it is deemed to be caused by COVID-19 and it extends the periods provided for by the Bankruptcy Law, the calculation of which is dependent upon the day of the bankruptcy filing.</p> <p>The Polish government declared a state of pandemic in Poland on 20 March 2020, however since 16 May 2022, the state of pandemic was lifted and replaced with "state of pandemic emergency" that is still in force. This change does not influence the suspension described above.</p>
Introduction of Electronic Insolvency and Restructuring Proceedings	<p>Since 1 December 2021, all applications for declaration of bankruptcy (both by the debtor or by the creditor) or opening any type of restructuring proceedings should be filed through the electronic portal maintained by the Minister of Justice. All subsequent correspondence in the proceedings will be delivered through the portal and should be submitted through the portal. Such applications should be signed electronically either by qualified electronic signature or by trusted signature (ePuaP).</p> <p>Further, the portal provides access to one register, which discloses data on persons and entities against whom restructuring and bankruptcy proceedings are conducted, as well as persons against whom enforcement was conducted, which was discontinued due to ineffectiveness, and natural persons against whom enforcement is pending maintenance and enforcement of state budget receivables arising from benefits paid in the event of ineffectiveness of the enforcement of alimony in arrears, with the fulfillment of these benefits for a period longer than 3 months. The portal with access to all bankruptcy and restructuring proceedings discloses applications filed after 30 November 2021 and disclosable after this date.</p>

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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.

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