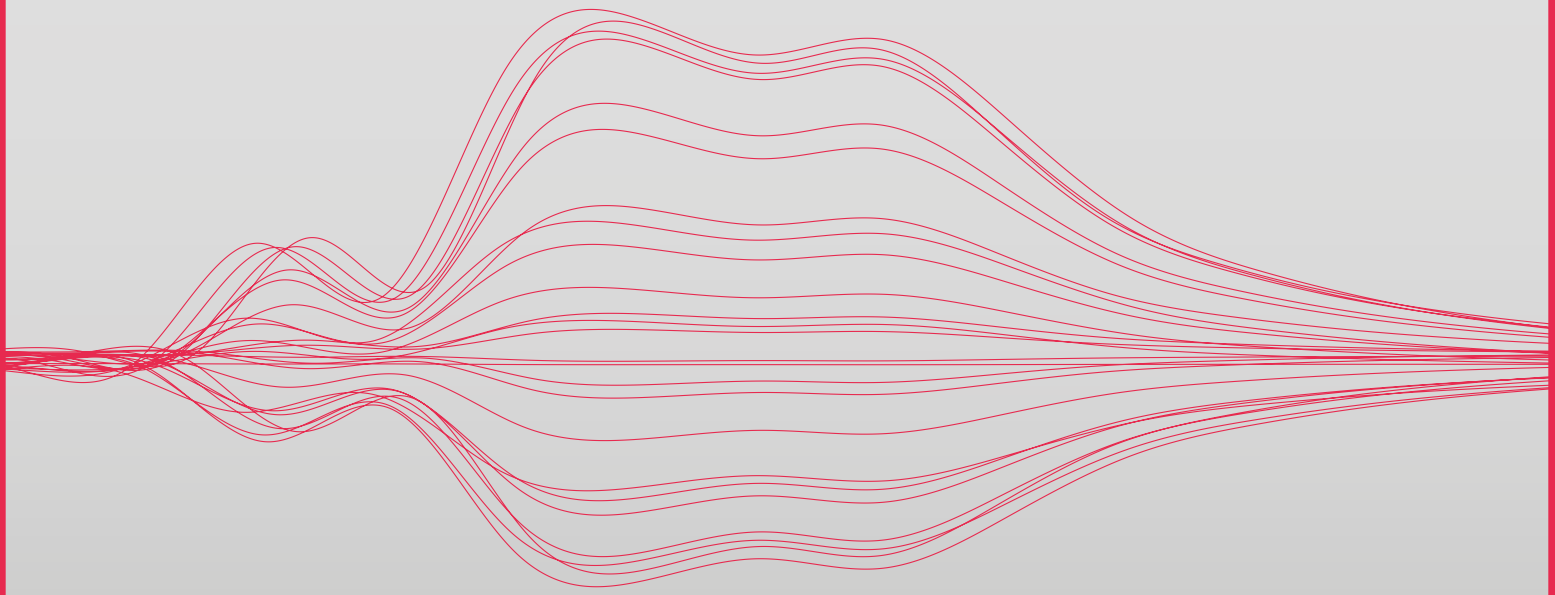
# An international guide to changes in insolvency law in response to COVID-19



DLA PIPER

COVID-19 ALERTS

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Please note that owing to the dynamic nature of the COVID-19 crisis and its effects on the economies of these jurisdictions, the governmental responses and measures that are being introduced are subject to change and ongoing assessment. This document focusses on changes to directors' duties and insolvency laws, in response to the COVID-19 crisis.

This document is in summary form only and the information is accurate at the time of publish on 22 June 2020. Should you require further information, please do not hesitate to get in touch with the key DLA Piper contacts noted below.

# COVID-19 response: Austria

## Changes to insolvency laws

### Filing duties

If a business is insolvent or over-indebted within the meaning of the Insolvency Code *(Insolvenzordnung)*, the company's management is generally required to file for insolvency without undue delay and within 120 days at the latest (extended from 60 days). It should be noted that this extended maximum period only applies to insolvency applications by the debtor where the illiquidity or over-indebtedness is caused by a natural disaster such as COVID-19. The natural disaster does not need to be the sole cause of insolvency, but it is a necessary condition. Insolvency applications by creditors are not affected.

Under the insolvency law amendments set forth by the Fourth COVID-19 Act, companies no longer have to file for insolvency solely due to over-indebtedness, provided that it occurred between 1 March 2020 and 30 June 2020. Correspondingly, insolvency proceedings are not to be opened during this period, even at the request of a creditor. This exemption does however not apply in case of illiquidity. If the debtor becomes illiquid, the insolvency petition must still be filed without culpable delay and there is no relief from any liability for the management.

### Default under the Insolvency Act

A written dispatched reminder of an outstanding liability which has become due after the entry into force of the COVID-19 Act on 27 March 2020 until the end of 30 April 2020 does not lead to default under the Insolvency Act.

COVID-19 will be accepted as a reason for: (i) an extension of the deadline for a debtor to file for insolvency; and (ii) for the postponement of the execution of an insolvency.

### Deadlines in insolvency proceedings

The general interruption of time limits in court proceedings until 30 April 2020 under Section 1 1. The COVID-19 Judicial Accompanying Act does not apply to insolvency proceedings. Periods already interrupted by this provision begin to run anew. The insolvency court can reasonably extend procedural deadlines by official means or upon request by a maximum of 90 days. A decision to extend a time limit shall be published in the insolvency record; it may not be contested.

### Directors' liability

Directors' liability for payments made after the occurrence of over-indebtedness, under the Joint-Stock Corporation Act *(Aktiengesetz)*, will not apply between 1 March 2020 and 30 June 2020.

As the obligation to file for insolvency caused by over-indebtedness occurring between 1 March 2020 and 30 June 2020 has been suspended (please see above), there is also no management liability for payments made after the occurrence of over-indebtedness under the Limited Liability Company Act *(GmbH-Gesetz)*.

### Deferred payment period for credit agreements

In case of a loss of income that renders a consumer or a small business (less than 10 employees and annual turnover or budget not exceeding EUR 2 million) unable to make payments on a credit agreement caused by COVID-19, claims for repayment, interest, and principal payments due between 1 April 2020 and 30 June 2020 are deferred for three months from the due date.

The lender cannot terminate the contract based on late payment or significant deterioration of the borrower's financial circumstances, until the end of the deferred period. The borrower may continue to make the contractual payments during the deferred period, in which case the deferral will not apply.

### Delay in fulfilling the restructuring plan

The consequences of default in the restructuring plan will not occur in relation to a debt falling due at or after 22 March 2020, if the creditor's payment request is sent between 22 March 2020 and 30 April 2020.

## Avoidance law limitation

Avoidance law shall be limited in the case of bridge loans granted between 1 March and 30 June 2020 to finance COVID-19 short term work assistance. This only applies if (i) no collateral from the borrower's assets was provided for the loan and (ii) the lender was not aware of a possible illiquidity of the borrower at the time the loan was granted.

## Shareholder loans

Short-term (up to 120 days) shareholder loans in the period until 30 June 2020 are not reclassified as equity, as may otherwise be the case with shareholder loans during a crisis under the Equity Replacement Act (Eigenkapitalersatz-Gesetz).

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# COVID-19 response: Belgium

## Changes to insolvency laws

### Moratorium

On 11 April 2020, a proposal was submitted to the Federal Government for the establishment of a temporary moratorium on bankruptcy procedures and creditor enforcement. Royal-Decree No 15 has been adopted in Belgium on 24 April 2020 establishing a statutory moratorium during the COVID-19 crisis.

The statutory moratorium initially ran from 24 April 2020 until 17 May 2020, but has already been extended until 17 June 2020 (and might be further extended).

Companies whose continuity is threatened by the COVID-19 crisis will benefit from additional protection, provided that they were not already in a state of cessation of payments on 18 March 2020. The protection includes:

1. no precautionary or executive attachment on the company's assets will be possible. Any means of enforcement will be suspended, except for attachments on immovable property;
2. the company cannot be declared bankrupt (or dissolved) by the court following a summons in bankruptcy (or dissolution) by a creditor. However, insolvency filings by the public prosecutor are still possible;
3. a lasting inability to meet due payment obligations triggers a statutory duty for a company's management to file for insolvency. This obligation on the company's management is suspended during this period. This does not affect the debtor's ability to file for bankruptcy itself;
4. agreements concluded before 24 April 2020 cannot be unilaterally or judicially terminated for reasons of default payment. However, this provision does not apply to employment contracts;
5. payment terms under a restructuring plan (achieved in the framework of formal insolvency proceedings) are extended by the duration of the suspension; and
6. certain legal provisions of the Civil Code and the Code Economic Law (chapter 'bankruptcy') related to claw-back actions do not apply to new credits obtained during the period of this moratorium and securities granted in connection therewith or other acts performed to obtain new credit. Additionally, the lenders of these new credits cannot be held liable (e.g. for contributing to a false impression of creditworthiness of the debtor) solely because the new credits would not have effectively enabled the continuity of debtor's activities in the end.

It is important to note any interested party (e.g. creditor) can request the President of the Enterprise Court, through summary proceedings, to lift the moratorium in respect of a company (debtor). In that case, the President will examine whether the decrease in turnover or activities of the debtor is due to the COVID-19 crisis, whether economic unemployment was invoked, whether the Government ordered the closure of the company, and what interest the applicant has in all this. The President has wide discretionary powers in this respect.

Lastly, this protection regime does not waive a debtor's general obligation to pay due debts and certain general contract law sanctions such as set-off, non-performance exception *(exception non adimpleti contractus)* and retention right can still be invoked by a creditor.

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# COVID-19 response: Czech Republic

## Changes to insolvency laws

### Extraordinary moratorium

The Lex COVID-19 has introduced a protective measure called the extraordinary moratorium. An insolvent debtor who has not been insolvent on or prior to 12 March 2020 and is facing financial difficulties due to the emergency measures adopted in connection with the COVID-19 crisis, should have the opportunity to file a petition for an extraordinary moratorium (based on the extraordinary measures) until 31 August 2020. Unlike the ordinary moratorium under the regular circumstances, the extraordinary moratorium does not require the approval by an absolute majority of creditors to become effective. Also the amount of information required has been reduced to a minimum. The petitioner does not have to attach lists of assets, liabilities and employees or financial statement, only the information on a number of employees and turnover of the last accounting period is required. The petitioner also has to declare that during the 2 months prior to 12 March 2020 or after, he has not distributed any profit, own financial resources or other extraordinary payment to the listed group of persons. The extraordinary moratorium shall be declared by the competent court for up to three months and may be prolonged, however, an extension of up to six months is subject to the consent of the majority of creditors. In addition, the debtors can give priority to the repayment of liabilities according to their importance in terms of keeping their business running.

### Suspension of insolvency petitions

Under Lex COVID-19, the statutory duty of the debtor to file a debtor's insolvency petition in the case of a debtor becoming insolvent was suspended until the lapse of the six-month period of the end of the emergency measures, but will end no later than 31 December 2020, regardless of the end of the emergency measures. The provision applies to all debtors who became insolvent after 12 March 2020 and only if the insolvency occurred as a result of the emergency measures adopted in connection with the COVID-19 crisis.

A creditor's right to file an insolvency petition is suspended until 31 August 2020, all petitions filled by creditors in the period in question shall be disregarded.

### Summary of further changes in new Czech regulation

The regulation also brings in the following

1. procedural terms adjustment and the possibility of their waiver;
2. temporary change in way of delivery to persons with the right to appeal in insolvency proceedings;
3. mitigation of debt discharge conditions - debt discharge *(oddlužení)* will not be cancelled even in cases where the debtor does not fulfil a payment schedule regarding the extraordinary measures;
4. mitigation of the conditions for granting exemption from payment of debts at the end of debt discharge - the debtor does not have to pay even 30% (or 50%) of the debts, but he may still be granted an exemption from the payment of debts; and
5. performance of a reorganisation plan that was approved by the court before 12 March 2020 may be temporarily suspended upon the debtors application for a period of 6 months following the cancellation or termination of the emergency measures.

### Directors' liability

As it is the director who is responsible for filing the insolvency petition, this liability has been suspended for the above-mentioned period. Apart from this there have been no other changes relating to directors' liability and we do not expect any such changes to be carried through.

### Service of documents

Rules concerning the service of documents in the course of insolvency proceedings have been modified for a period of 12 months following the cancellation or termination of the emergency measures. The list of recipients to whom the documents have to be served directly has been reduced and for the given period does not include the creditors, who now have to carefully control the information published in the Insolvency Register.

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# COVID-19 response: Denmark

## Changes to insolvency laws

### No changes to insolvency laws

There have been no formal changes to Danish insolvency law in response to the COVID-19 crisis, and we do not expect to see any such changes carried through. Consequently, the general rules still apply.

Under Danish insolvency law, an entity is considered insolvent when it can no longer fulfil its obligations in due time and there is no realistic prospect of turning the business around.

The management team of a Danish company is under an obligation to ensure that the company always has sufficient capital and liquidity to conduct its business and fulfil its obligations. If the required liquidity is no longer generated through the course of the business (e.g. due to COVID-19 lock down), the management has an obligation to take appropriate measures to secure the necessary liquidity in other ways. Examples of such measures can be cutting costs, downsizing the business or getting new capital injected into the company.

However, if is not possible to implement measures that sufficiently strengthens the company's liquidity, the management will have to consider alternative measures such as a sale of the business or as the ultimate consequence filing for either in-court restructuring or bankruptcy.

In response to the COVID-19 crisis, the Danish Government has implemented several bailout packages to support the Danish industry and businesses. Some of these provide the companies with compensation for loss of revenue, compensation for salaries and compensation for business overheads.

The Danish rules on management liability give a wide discretion for management judgement when deciding on the necessary measures to navigate the company out of its distressed situation, as long as there is a realistic prospect of the company overcoming the difficulties. It is in this regard important that the management team secures that every decision and the reasoning behind the decisions are well documented.

The bailout initiatives by the Danish Government are affecting the assessments of management teams, as management teams can take both the existing financial and capital foundation of the company but also the Government compensation into consideration.

However, if the company is on the verge of insolvency, the management team should focus on refraining from transactions that favour specific creditors, especially if those creditors are connected to the company (e.g. a shareholder, sister or parent company). Further, the management should refrain from having the company take on obligations that the company will not be able to fulfil. We strongly advise that a management team engages legal and financial advisors when dealing with a distressed financial situation.

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# COVID-19 response: Finland

## Changes to insolvency laws

### Presumption of insolvency temporarily removed

On 28 March 2020, the Finnish Government announced a proposal in order to make one temporary amendment to the Bankruptcy Act as follows:

*The prerequisite for bankruptcy is insolvency. In the Finnish Bankruptcy Act, the debtor company is presumed to be insolvent if it has not paid its debt within one week of receiving the request for payment. With the amendment to the law, this presumption will be temporarily removed. Insolvency must be long-term insolvency in order to file for bankruptcy by creditor's petition.*

On 16 April 2020, the Finnish Government has introduced this bill of restricting the creditor's right to file for bankruptcy. The amendment is intended to enter into force as soon as possible and remain in force until 31 October 2020.

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# COVID-19 response: France

## Changes to insolvency laws

### Suspension of the duty to file for insolvency

The state of insolvency occurs when the debtor is unable to pay its debts as they fall due with its available assets, even if the value of the whole of the company's assets outweigh its liabilities. As result, a company which cannot pay all its debts as they fall due is insolvent.

If the directors fail to file for insolvency within 45 days of the company's state of insolvency, they can be found personally liable for the company losses and/or they can be condemned for personal bankruptcy and prohibition from managing a company (*Cf. Supra*.).

However, French legislation has been amended in the context of the COVID-19 crisis and insolvency filing duty is suspended from 12 March to 24 August 2020. Thus, a director of a debtor who became insolvent after 12 March, does not the obligation to file for an insolvency proceeding (it will have to file for insolvency from 24 August 2020 if it is still insolvent). While it does not have the obligation, the debtor may file if it wishes to.

This measure reduces the immediate threat of legal action being taken against businesses which were viable "but for COVID-19", which would lead them to be wound up. In this context, please note that a judicial liquidation is subject to the

i. company's state of insolvency (*Cf. Supra*.) associated with

ii. an inability in turnaround of the business. In other words, failure to pay on itself will not automatically lead to the company's winding-up.

In all cases, we would suggest that directors maintain a dialogue with all stakeholders, including creditors, to keep them apprised of the company's position and all decisions (even if made under pressure and taken quickly) should be documented.

Applying for a pre-insolvency proceedings could also be a suitable remedy in case of unavoidable difficulties (*Cf. Supra*.).

### Other changes to insolvency laws

Several other measures have been taken to amend the French insolvency law in the context of the current COVID-19 crisis. These include:

1. extension of the duration of conciliation proceedings (pre-insolvency procedure) ending between 24 March and 23 August 2020 by a maximum of 5 months;
2. extension of 3 months of all deadlines provided by the French Commercial Code for ongoing insolvency proceedings;
3. the possibility to extend safeguard and reorganization plans currently being carried out for two years. In addition, in order to facilitate the adoption of safeguard and reorganization plans, it will be possible to reduce the period for individual consultation of creditors on the adoption of these plans (15 days instead of 30);
4. expansion and acceleration of information which Statutory Auditors can communicate to Commercial Courts;
5. for all conciliation proceedings pending between 21 May and 31 December 2020 should a creditor not respond or refuse the suspension of maturity of its claim within the delay set by the conciliator, the debtor can file an application before the President of the competent court in order to (i) suspend any action aiming at payment of monies or termination of a contract for non-payment of monies and (ii) suspend any enforcement measure in relation to said claim. These suspensions will be imposed during the course of the proceedings;
6. facilitation of business transfers via (i) possibility of requesting an exemption from incompatibilities in terms of assignment by the debtor on simple request of the latter or the trustee (it is no longer the Public Prosecutor's Office but the latter participates in the debates) to the Court which will give a specially motivated judgment (ii) the reduction of the time limit for convening co-contractors and holders of transferable securities from 8 to 15 days;
7. the possibility of applying for the opening of an accelerated or accelerated financial safeguard procedure (specific insolvency proceedings) for any business which so requests,

notwithstanding the required thresholds for recourse to such a procedure. This measure applies to all proceedings opened between the ordinance of 20 May 2020 and the ordinance transposition of the Preventive Restructuring European Directive and no later than 17 July 2021;

8. The facilitation of sales plans via (i) the possibility of requesting a waiver of incompatibilities in the matter of assignment by the debtor upon simple request of the debtor or the trustee (it is no longer the Public Prosecutor but the latter participates in the debates) to the Court which will render a specially motivated judgment and (ii) the reduction of the deadline for convening co-contractors and holders of transferable securities from 15 to 8 days;

9. The creation of a post-money privilege for the contributors of funds (excluding contributions made by the partners or shareholders within the framework of a capital increase) in observation period or for the execution of a plan. This privilege will allow preferential payment. This measure applies to all proceedings opened between the ordinance of 20 May 2020 and the ordinance transposition of the Preventive Restructuring European Directive and no later than 17 July 2021;

10. Extension of the scope of accelerated liquidation. This measure applies to all proceedings opened between the ordinance of 20 May 2020 and the ordinance transposition of the Preventive Restructuring European Directive and no later than 17 July 2021;

11. Accelerated clearance of debtors' corporate records from past safeguard and recovery plans (the delay is reduced to 1 year). This measure applies to all proceedings opened between the ordinance of 20 May 2020 and the ordinance transposition of the Preventive Restructuring European Directive and no later than 17 July 2021.

## Directors' liability in the current COVID-19 crisis

The French regime revolves around directors acting "reasonably" in the prevailing circumstances. In the current climate, directors may ultimately be afforded more latitude. However, there are a number of steps directors may take in order to try and protect themselves from future challenge/scrutiny. These are:

1. consider whether are any ways of minimizing losses;

2. seek professional advice from financial advisors and lawyers;

3. request new financing, which is facilitated thanks to the measures implemented by the French State (guarantees of banks loans and credits) (please see here for more information);

4. request exceptional delays of payments to creditors;

5. put in place temporary lay-off for employees (payment of 70% of the wages are then covered by the Government); and

6. in case of unavoidable difficulties, apply for the opening of a Pre-insolvency proceedings (ad hoc mandate or conciliation) which are confidential and consist of an attempt to reach a settlement with the creditors. Those proceedings are initiated on the sole initiative of the debtor who files a petition with the President of the court which appoints a mandataire ad hoc or a conciliator depending on the request (who is generally a professional trustee). Under these procedures, an agreement can be reached with the creditors. While in a normal context the opening of such kind of proceeding is very effective to protect directors' liability (the absence of opening of such proceeding has even been considered a mismanagement by certain courts), it is probably different in the current situation where the access to courts is restricted. Hence directors' liability shall be retained for not having recourse to hose proceedings.

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# COVID-19 response: Germany

## Changes to insolvency laws

### Suspension of insolvency filing duties

Suspension of insolvency filing duties until 30 September 2020 (which may be extended).

Suspension does not apply if (i) insolvency is not due to the COVID-19 crisis and (ii) there is no prospect of overcoming an existing cash flow insolvency *(Zahlungsunfähigkeit)*.

Presumption of eligibility for suspension (i.e. that insolvency is due to COVID-19 and that there are prospects of overcoming an existing cash flow insolvency) if the company was not cash flow insolvent on 31 December 2019.

**When?**
Adopted on 27 March 2020 with retrospective effect from 1 March 2020.

### Limitation of directors' liability for payments after insolvency occurred

No liability for payments after insolvency:

1. To the extent insolvency filing duty is suspended per the above (until 30 September 2020; which may be extended); and
2. To the extent payments are made in the proper course of business, in particular payments serving for the continuity and resumption of the business as well as for reorganization measures.

**When?**
Adopted on 27 March 2020 with retrospective effect from 1 March 2020.

### Limitation of right of creditors to apply for insolvency proceedings

Additional requirement for creditor's application between 28 March 2020 and 28 June 2020: if the debtor's insolvency occurred on or before 1 March 2020.

**When?**
Adopted on 27 March with retrospective effect from 1 March 2020.

### Limitation of lenders' liability and avoidance risks – loans, trade credits, deferred payments and services

Limitation of lenders' liability and avoidance risks in relation to loans provided in the suspension period, i.e. until 31 September 2020 (which may be extended).

This includes not only loans but also trade credits and other forms of deferred payments and services.

The provision applies also to the repayment of shareholder loans. However, it does not apply to security granted for shareholder loans; security for shareholder loans is not privileged.

AVOIDANCE RISKS
Until 30 September 2023 repayment of newly granted loans and the granting of security during the suspension period will not be regarded as a disadvantage for the creditors and will therefore be privileged from avoidance risks.

LENDERS' LIABILITY
The granting, extension and novation of loans as well as the granting of security during the suspension period is not to be regarded as contra bonos mores (sittenwidrig) and (at least generally) privileged from lenders' liability.

**When?**
Adopted on 27 March 2020 with retrospective effect from 1 March 2020.

### Suspension of equitable subordination

Suspension of equitable subordination regarding the repayment of shareholder loans provided in the suspension period, i.e. until 30 September 2020 (which may be extended).

The repayment claim of a shareholder loan provided in the suspension period is not subject to equitable subordination in insolvency proceedings which have been applied for on or before 30 September 2023.

**When?**
Adopted on 27 March 2020 with retrospective effect from 1 March 2020.

## Limitation of avoidance actions

Limitation of avoidance actions in relation to transactions performed in the suspension period which (i) are granting or facilitating satisfaction or security to third parties and which the third party was eligible to claim in that kind and at that time.

Such transactions also includes performance in lieu of or on account of performance (*Leistung an Erfüllungs statt oder erfüllungshalber*), payments by a third party on the instruction of the debtor, the provision of security other than the one originally agreed if not of higher value, the shortening of payment terms and the relaxation of payment terms.

To the extent performed in the suspension period, such transactions are not subject to avoidance in a later insolvency proceedings of the debtor. However, this privilege does not apply if the third party was aware that the debtor's restructuring and financing efforts were not suitable to cure an existing cash flow insolvency.

**When?**
Adopted on 27 March 2020 to enter into force on 1 April 2020.

## Deferral of payments/services for micro enterprises

The draft law provides for the possibility for micro enterprises to temporarily refuse to provide payments/services until 30 June 2020 (which may be extended) in relation to significant contracts which were entered into before 8 March 2020 if (i) the inability to provide payments/services is due to the consequences of the COVID-19 crisis and (ii) the performance would jeopardize a fair standard of living of the consumer, respectively the economic foundations of the business.

This is intended in particular to prevent those affected from being cut off from basic services if they are no longer able to meet their payment obligations as a result of the crisis.

**When?**
Adopted on 27 March 2020 to enter into force on 1 April 2020.

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# COVID-19 response: Hungary

## Changes to insolvency laws

### Changes to judicial enforcement law relevant to insolvency

Certain provisions of the Act 53 of 1994 on Judicial Enforcement have been suspended or amended until the end of the State of Danger, as set out below:

1. courts may suspend judicial enforcement proceedings upon request of the debtor in cases where the debtor claims that the reason for non-performance is related to the consequences of COVID-19; and
2. in cases where the debtor requests payment in instalments, such claim shall be accepted even if the creditor does not consent.

### Calling shareholders meetings

There is no explicit duty to file in Hungary. However, directors are obliged to call a shareholders' meeting if the company's equity or liquidity decreased critically or it is threatened by insolvency; in that case the shareholders' meeting has to address the situation or, as a last resort, resolve to dissolve the company without succession.

Government Decree No. 102/2020. (IV. 10.) has somewhat relaxed the above provisions and provided that in certain cases the shareholders' meeting may be postponed until no later than 90 days after the expiry of the State of Danger.

**In force**: since 11 April 2020.

**Duration**: Indefinite – the general rule is that during the period of the State of Danger, the changes remain in place.

### Directors' liability – no change due to COVID-19 yet

Generally, directors' liability includes the following:

1. **liability vis-à-vis the creditors of the company**: a special provision states that liability for any damage caused by the directors intentionally lies both with the directors and the company jointly and severally;
2. **liability for "wrongful trading"**: the creditors may claim damages vis-à-vis the directors (in the last three years) directly, if the directors have failed to consider the interest of the creditors during the period of imminent insolvency (this may be enforced if formal liquidation proceeding has been opened against the company);
3. **liability vis-à-vis the company**: directors are liable for losses caused to the company itself; and
4. **criminal liability**: on the basis of the Hungarian Criminal Code, criminal liability of the directors may be established for fraudulent insolvency, i.e. the intentional diminution of the company's assets (e.g. concealing, damaging, fictitious transactions, etc.).

For the time being, no changes have been introduced to the Hungarian insolvency law relating to the liability of directors.

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# COVID-19 response: Ireland

## Changes to insolvency laws

### No changes to Irish insolvency laws – the impact on directors

The solvency of an Irish company under Irish law is determined by the ability of the company to pay its debts as they fall due. When considering the ability of the company to pay its debts, directors should consider any current, contingent and prospective liabilities and whether the company will be able to meet these obligations. Unlike some other jurisdictions (e.g. the UK), Irish law does not provide for an express balance-sheet solvency test (i.e. whether assets exceed liabilities). Nevertheless, directors do need to carefully consider the balance sheet position of the company when making any judgement as to whether the company is able to pay its debt as they fall due.

As at 5 June 2020, there have been no changes to insolvency laws in Ireland – for example, to alleviate the risks for directors in relation to trading during the COVID-19 crisis. Once a new Government is formed in Ireland, it is possible that further emergency legislation will be passed. In the meantime, questions arise for companies in financial difficulty and their directors as to whether State assistance and/or additional borrowings can/ should be availed of or whether the company should cease to trade and be wound-up. Inevitably, the particular circumstances will dictate; however, an overriding principle is that directors who have acted honestly and responsibly throughout the financial difficulties of the company should be protected from liability. The directors need to determine that there are reasonable grounds to believe that any actions taken will preserve the business and enable the company to trade through its difficulties.

In normal circumstances, the eight statutory fiduciary duties of the director of an Irish company under the Companies Act 2014 (section 228(1) are owed to the company (i.e. its members as a whole)). When such a director has to consider whether a company can trade through financial difficulties, such as those arising from the COVID-19 crisis, those fiduciary duties, while still owed to the company, must also take into consideration the interests of creditors of the company. Typically, this means considering the impact material decisions (such as on-going trading, incurring additional indebtedness, granting security or discharging creditors) might have on creditors. When a company is, or is on the verge of becoming, insolvent but not yet in a formal insolvency process, the directors owe a duty to the company's creditors not to conduct business in such a way as to prejudice their interests. The exact trigger point for any shift in focus will depend upon the particular facts, but assessing the balance sheet, the cash flow forecasts and the risk of running out of cash will be determinative factors.

#### DIRECTORS' FIDUCIARY DUTIES

In considering the effect of the COVID-19 crisis on the company, the directors should continue to adhere to their statutory fiduciary duties, which are as follows:

1. the duty to act in good faith in what the director's consider to be interests of the company;
2. to act honestly and responsibly in relation to the conduct of the affairs of the company;
3. to act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
4. not to use the company's property, information or opportunities for their own or anyone else's benefit unless permitted by the company's constitution or approved by a resolution of the company in general meeting;
5. subject to certain prescribed exceptions, not to agree to restrict the exercise of their independent judgment;
6. to avoid any conflict between their duties to the company and the director's other (including personal) interests, unless the director is released from his or her duty to the company in relation to the matter concerned;
7. to exercise the care, skill and diligence – which would be exercised in the same circumstances by a reasonable person having both (a) the knowledge and experience that may reasonably be expected of a person in the same position as the director and (b) the knowledge and experience which the director has; and
8. to have regard to the interest of the company's employees and its shareholders. Having "regard to the interest" is a relatively low threshold and only the company may enforce this duty, not the employees or shareholders.

## PRACTICAL MEASURES

Practical measures that should be taken by directors to assist in discharging their duties in the current environment include:

- continuously monitor the financial position of the company;
- hold regular board meetings and ensure comprehensive minutes are produced and the reasoning behind the decisions made;
- financial information – ensure that up-to-date, robust financial information is prepared so that directors can make informed decisions in real time. Consider availability of existing facilities and the possibility of making any amendments. Compliance with financial covenants in any existing facilities should be examined. Consider availing of any Government supports that may assist;
- seek professional advice early and on a regular basis from both financial advisors and lawyers;
- consider whether there are any ways of minimising losses (e.g. temporarily closing non-core operations);
- ensure that the company's books and records are current and accurate – a director can be held personally liable for the debts of the company where he/she failed to maintain proper books of account and it contributed to the company's insolvency;
- customers and suppliers – engage with trading partners and keep lines of communication open; and
- key creditors (e.g. banks, Revenue and landlords), engage early and present a clear plan for the company to weather the crisis.

Under the Act, directors may be made personally liable for the debts of an insolvent company if they have knowingly carried on business in a reckless manner (known as reckless trading) or if they have knowingly carried on business with intend to defraud creditors (known as fraudulent trading).

Again, the importance of the practical steps outlined above, and the need to act honestly and responsibly throughout, is critical. There are various Government supports available to Irish businesses at present to provide working capital. In addition, businesses and their directors can consider a range of out-of-court debt restructuring options. A scheme of arrangement or a formal restructuring process like examinership might also be an option for certain types of business. However, where it is clear that a company cannot trade out of its difficulties, and it does not have a prospect of survival, the directors should take steps to put the company into liquidation.

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# COVID-19 response: Italy

## Changes to insolvency laws

### Temporary changes to insolvency laws

No specific amendments to the Italian Insolvency Law (i.e. Royal Decree no. 267 of 16 March 1942) have occurred so far.

However, law decree no. 23 of 8 April 2020, as subsequently converted into law by law no. 40 of 5 June 2020, ("Law Decree"), effective as from 9 April 2020, introduced:

1. provisions as to the timing and duration of certain pending proceedings commenced pursuant to Italian insolvency laws. Namely:

   a. Terms for the completion and fulfilment of composition with creditors' proposals (*concordati preventivi*), restructuring agreements (*accordi di ristrutturazione*), crisis settlement agreements (*accordi di composizione della crisi)* and/or repayment plans for costumers (*piani del consumatore)* are automatically extended by six-months period.

   b. Debtors who have already applied to the court for a composition with creditors may apply in order to be granted with (a) a term up to 90 days for the deposit of a new composition with creditors' proposal and (b) a term up to 6 months in case they intend to amend only the timing for the completion and fulfilment of the proposal already submitted.

   c. Debtors who have been granted with a term in order to draft a composition with creditors proposal or a debt restructuring agreement proposal before 31 December 2021, are entitled, within the same term, to withdraw from said procedures, declaring and providing evidence that they have prepared and filed with the competent Companies' Register (*registro delle imprese*) a recovery plan (*piano di risanamento*) pursuant to article 67, third paragraph, letter d) of the Italian Insolvency Law.

   d. As to petitions for declaration of insolvency of companies filed between 9 March 2020 and 30 June 2020, relevant court proceedings may not be brought, except in the following cases:

      - where the petition is filed by a public prosecutor;
      - where the petition is filed by the debtor itself, provided that the insolvency was not caused by the COVID-19 crisis;
      - where the petition is filed upon (i) declaration of inadmissibility of the composition with creditors proposal pursuant to article 162, second paragraph, of the Italian Insolvency Law; (ii) revocation of the admission to the composition with creditors procedure pursuant to article 173, second and third paragraph of the Italian Insolvency Law; or (iii) rejection by the court of the composition plan with creditors pursuant to article 180, seventh paragraph, of the Italian Insolvency Law.

2. provisions aimed at mitigating certain general duties (and therefore relevant liabilities) of directors when facing a financial distress situation. Namely:

   a. Starting from 8 April 2020 and until 31 December 2020, provisions under articles 2446, 2447, 2482-*bis*, parr. 4, 5 and 6, 2482-ter and 2484, par. 1, no. 4 of the Italian civil code do not apply in relation to the losses of capital occurred during the financial year ending before 8 April 2020. The abovementioned provisions provide that in case the corporate capital falls below the minimum amount required under Italian law as a consequence of losses, directors shall as soon as possible call the shareholders'/quota-holders' meeting in order to decide whether to cover the losses and adequately capitalize the company or to put the company into liquidation.

   b. In drafting the financial statements as at 31 December 2020, the assessment of balance sheet items from a business continuity perspective pursuant to article 2423-bis, no. 1 of the Italian civil code may be carried out provided that the business continuity existed at the end of the previous financial year. In other words, the directors will be entitled to draft the financial statements as at 31.12.2020 assuming the continuity of the company's business, provided that such continuity existed as at 31.12.2019.

   c. To loans made available by shareholders/quota-holders in favour of companies after the entry into force of the Law Decree articles 2467 and 2497-*quinquies* of the Italian civil code (providing that, under certain circumstances, the repayment of shareholders' loans are subordinated to the previous fulfilment of any other obligations towards the other creditors) do not apply.

The provisions indicated above are temporary, as they apply only to the period expressly envisaged by the Law Decree.

Finally, it has to be outlined that pursuant to article 5 of the Law Decree the entry into force of the new Insolvency Law which was due to come into force in August 2020 has been postponed until September 2021.

## Directors' duties and liabilities

In relation to directors' liabilities of a company facing a crisis, given that no specific amendments to the Italian Bankruptcy Law has been provided so far, general principles and rules apply.

Company directors have a primary duty to act in the best interests of the company by carrying out all activities aimed at pursuing the company's corporate objective (oggetto sociale). When a company is, or is on the verge of becoming, insolvent but not yet in a formal insolvency process, this duty shifts so that the directors must act in the best interests of the creditors as a whole. The exact trigger point for this shift will depend upon the particular facts, but assessing the balance sheet, the cash flow forecasts and the risk of running out of cash will be determinative factors.

Under the Italian Insolvency Law, in certain circumstances, a director can be found personally liable for company losses, where a court finds that at some time before the liquidation commenced, the director knew or ought to have concluded that there was no reasonable prospect of the company avoiding bankruptcy proceedings and thereafter, the director failed to take every step with a view to minimising the potential loss to the company's creditors which he ought to have taken – wrongful trading. However, the director will be excused if the court is satisfied that from the relevant time, that director took every step with a view to minimising the potential loss to the company's creditors which he/she ought to have taken.

The Italian regime revolves around directors acting with due care and in an informed way in the prevailing circumstances. However, it is strongly advisable for the directors to take certain practical steps, once they have detected a situation of financial distress and/or a crisis in order to try and protect themselves from future challenge/scrutiny. Among these, are:

1. hold regular board meetings, especially given how fast matters are moving/developing, and ensure decisions are accurately recorded, with reference to all factors considered/taken into account. It is also advisable that all the decisions relating to significant transactions carried out in a situation of financial distress are approved or ratified, to the extent possible, by the board of directors, regardless of whether they fall within the powers of the executive directors;
2. monitor constantly the liquidity situation of the company, as well as the situation of the corporate capital and, in general, the company's net worth (*patrimonio netto*);
3. in making the payments, make sure that all creditors of the company are treated equally (*par condicio creditorum*) and should therefore adopt criteria that are not arbitrary;
4. consider whether there are any ways of minimising losses (i.e. temporarily closing down non-core operations); and
5. seek professional advice from financial advisors and lawyers, also with a view to prepare a revised business plan and a restructuring proposal.

Finally, Article 91 of the law decree no. 18 of 17 March 2020 added an article to the previous law decree 23 February 2020, no. 6, providing that the compliance with the containment measures provided thereunder (in a nutshell, lockdown and restriction to activities) is always considered and evaluated in order to exclude the liabilities of the defaulting party pursuant to articles 1218 and 1223 of the Italian civil code, also in relation to the application of certain forfeiture terms (*decadenze*) or penalties relating to delays or non-fulfilments. In turn:

a. Article 1218 of the Italian civil code provides that the party which does not exactly fulfil its obligation (*prestazione dovuta*) is held liable and shall compensate for damages incurred by the other party, unless the defaulting party proves that the non-fulfilment or the delay has been caused by an impossibility of the performance not attributable to it (*non imputabile*).

b. Article 1223 of the Italian civil code provides that the compensation for damages for non-fulfilment or delay shall include both the loss (*perdita*) and the loss of profit (*mancato guadagno*) of the non-defaulting party, provided that these losses are immediate and direct consequence of the non-fulfilment or delay.

Having said the above, it has to be noted that according to the preliminary opinions of scholars who commented on such provision, Article 91 of the Decree does not really add anything new to our law but only confirms a general principle of Italian contractual law and makes it clear that the compliance with the containment measures may represent an "impossibility of the performance not attributable" under article 1218 of the Italian civil code.

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# COVID-19 response: Luxembourg

## Changes to insolvency laws

### Suspension of duty to declare insolvency

Under Luxembourg law, any commercial company and any trader which is in a situation of both:

i. cessation of payments (*cessation de paiement*), meaning that the company has ceased to pay its debts when due; and

ii. loss of creditworthiness (*ébranlement du crédit*), meaning that no more credit can be obtained from banks, suppliers or creditors,

is required to file for bankruptcy (*faillite sur aveu*), within one month of the date on which the (cumulative) conditions for bankruptcy are met.

This one-month period has been suspended for the duration of the state of crisis by the Grand-Ducal Regulation of 25 March 2020.

This suspension has been considered as insufficient and, for this reason, a Bill of Law n° 7552 ("Bill of Law") has been tabled to extend the suspension by another two months after the end of the current state of crisis (which is currently scheduled for 24 June 2020).

The Bill of Law also foresees the inadmissibility of bankruptcy petitions introduced by creditors (*faillites sur assignation*) during the state of crisis and the two-month period that will follow. It is specified that this inadmissibility should only benefit companies being in financial difficulties as a result of the COVID-19 crisis.

Note however that procedures of automatic bankruptcy (*faillite d'office*) at the initiative of the Public Prosecutor, as well as judicial liquidation (*liquidation judiciaire*) of commercial companies pursuing activities contrary to criminal law or seriously infringing the provisions of the Commercial Code or the laws governing commercial companies, including the right of establishment, may still be initiated.

#### WHEN?

The suspension of the one-month limit is effective as of 2 April 2020 and will remain effective until the end of the current state of crisis (which has been extended until 24 June 2020). If the Bill of Law n° 7552 is adopted, the two-month extension will apply, with effect as from the end of the current state of crisis.

### Directors' liability in the light of the COVID-19 crisis

Directors can be held personally liable if they commit a management error and/or contravene the mandatory provisions of Luxembourg law or any provisions of the articles of association of the company they manage. They must take any decision with a view to the company's long-term benefit and must ensure that the decisions they take are in the corporate interest of the company.

Particular attention should be paid during the COVID-19 crisis, and several shorter-term perspective decisions may need to be taken (e.g. refinancing of the company, application for available state aid, negotiation of payment terms, disposal of assets to settle liabilities, etc.) in order to keep the company afloat in the near future. Given that the board needs to take sufficiently preventive actions to avoid a possible bankruptcy, the frequency of board meetings might need to be increased.

It should be noted that the mere fact of a company becoming bankrupt does not constitute a criminal offence or a fault by the directors, but the liability of the directors may be engaged in specific circumstances (e.g. in case of failure to file for bankruptcy within the limit provided for by law, gross negligence which has contributed to the bankruptcy, fraud, etc.).

Directors must keep in mind capital impairment rules, applicable to several forms of companies (e.g. Public limited liability companies). Where the net equity of a company concerned by these rules falls below the half (or a quarter) of its share capital as a result of losses, the board of directors of that company is required prepare a special report and to convene the general meeting of shareholders within a period not exceeding two months following the time at which the loss was or should have been ascertained. Directors may be held personally and severally liable for all or part of the loss increase in the event of a breach of these capital impairment rules.

There are no specific liabilities that lenders need to be aware of during the COVID-19 crisis. Nevertheless, lenders should note the points mentioned above, together with the suspension of other procedural deadlines applicable in civil and commercial matters.

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# COVID-19 response: Netherlands

## Changes to insolvency laws

### No changes to insolvency laws to date – the impact on directors' liability

No changes to insolvency laws have been announced in connection with the COVID-19 crisis.

Directors should act in the best 'corporate interest' of the company, which simply put means they owe their duties to the company and its stakeholders. In solvent situations, this means the interests of the shareholders and the group to which the company belongs, the employees and society at large (i.e. safety and the environment). When insolvency approaches, the director of the company must, at some point in time, start to prioritise the interests of its creditors, especially in comparison to the company's shareholders' and group's interests. Each director can incur personal civil law and criminal law liability if he does not properly fulfil his duties, as a result of which he will be held liable for damages incurred by the company or in some cases by its creditors.

If the directors' mismanagement is an important cause of the company's bankruptcy, each of the directors may be jointly and severally liable for the entire deficit of the bankruptcy estate (i.e. the net liabilities). Note that failure to keep proper books and records, or the failure to timely file financial annual accounts will undisputedly constitute mismanagement by the company's directors. Such mismanagement is then legally presumed to be an important cause of the bankruptcy, and if the latter is not rebutted by the director by proving an external cause for the insolvency, the director can be held liable for these net liabilities. It is still uncertain whether the court will see the COVID-19 crisis as such an external cause, although there is limited case law in which the courts have ruled that the 2008 financial crisis may, under strict circumstances, amount to an external cause, which may potentially serve as precedent for the current crisis. The starting point under Dutch law is that directors' liability is joint and several between all directors of the company. Directors' liability also doesn't stop at the director if such director is a legal entity, in which case the director of such legal entity becomes jointly and severally liable as well, until a natural person director is reached.

Even criminal liability could be incurred in the following cases: failure to publish the annual accounts of the company on time; consenting or co-operating in any transaction by the company that is in violation of the law or of the company's articles of association, if detrimental to the company; upon bankruptcy, engaging in a preference transaction to the detriment of one or more creditors; failing to properly keep the books and records of the company or failing to make the books and records of the company available to the bankruptcy trustee.

There is no specific statutory obligation for directors to file for bankruptcy or seek a suspension of payments. However, in certain circumstances, directors may be personally liable towards creditors of the company if they decided to have the company enter into obligations that the director knew (or ought to have known) the company could not fulfil. Other than this personal liability of directors, in certain circumstances, there are no consequences if a company carries on business while insolvent, save for a Dutch public limited liability company ('N.V.'), which is obligated to call a shareholders' meeting if it has negative equity. In practice, however, directors may decide to file for a suspension of payments or bankruptcy to mitigate the risk of incurring personal liability.

Also, please note that failure to report the company's inability to pay its taxes to the tax authority on time may lead to the joint and several liability of each director for the unpaid taxes and social security contributions. There are currently COVID-19 related options available to defer tax payments if the company cannot pay these due to de current crisis.

In the current climate, directors may ultimately be afforded more lenience by bankruptcy trustee and/or the courts. However, there are a number of steps directors may take in order to try and protect themselves from future challenge/scrutiny. These are:

1. hold regular board meetings especially given how fast matters are moving/developing and ensure decisions are documented with reference to all factors considered/taken into account;
2. ensure that all directors have full information from the business (i.e. all accounts and financial statements, key contracts, pipeline);
3. consider whether there are any ways of minimising losses (i.e. temporarily closing down non-core operations);
4. avoid making selective payments, unless there is a very specific, objective business reason why a specific creditor should be paid while others are not;

5. avoid entering into new obligations (of which the director know or ought to know) the company cannot fulfil;

6. inform counter-parties in recurring obligations of the financial difficulties the company is in with a view to minimise losses of such contractual counter party; and

7. seek professional advice from financial and legal advisors.

## 'WHOA' – Dutch alternative for the UK Scheme of Arrangement and/or U.S. Chapter 11

A legislative proposal has been prepared, which introduces a procedure for a pre-insolvency restructuring plan (*Wet Homologatie Onderhands Akkoord* or "**WHOA**") that offers an efficient process to effect a compulsory restructuring plan/composition between the company and all or certain of its (secured and/or unsecured) creditors and/or shareholders. It aims to serve as a Dutch law flexible alternative to i.e. the UK Scheme of Arrangement and U.S. Chapter 11 procedures, and includes a cross-class cramdown feature which means that under circumstances, opposing creditor classes can still be legally bound to the restructuring plan/composition.

### WHEN?

Legal professionals and politicians have appealed for an accelerated legislative process due to the COVID-19 crisis. This has resulted in the WHOA having been unanimously voted for in favour by the Dutch House of Representatives (*Tweede Kamer der Staten-Generaal*) on 26 May 2020. The WHOA now sits with the Dutch Senate (*Eerste Kamer der Staten-Generaal*) for final adoption. At the moment it is however not yet clear when the WHOA legislation will come into effect.

## Temporary Act on Moratorium of Payments 2020

On the 4th of June 2020, a draft of the 'Temporary Act on Moratorium of Payments 2020' (*Tijdelijke Betalingsuitstelwet 2020*) has been put up for internet consultation, a preliminary phase in the legislative procedure where citizens are invited to respond to draft legislation before a draft proposal is submitted to parliament.

The proposed Temporary Act on Moratorium of Payments 2020 aims to provide protection to businesses in distress pursuant to COVID-19 related (government) imposed restrictive measures, in case they are confronted with a bankruptcy filing or executionary measures by one or more creditors. In short, if the debtor can summarily prove plausible causality between its financial distress and COVID-19 related restrictive measures, the court may delay bankruptcy procedures by (initially) 2 months or impose a moratorium of payments.

### WHEN?

It is expected the proposed act will be put before parliament in an expedited process. The internet consultation only lasts 7 days and ends on 11 June 2020, which is rather short. However, as the act is still in a very preliminary phase, there is no specific date or timeline known yet as to the entry into force of the proposed act (if it is voted for in favour by the House of Representatives and Senate).

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# COVID-19 response: Poland

## Changes to insolvency laws

### Suspension of directors' obligation to file for bankruptcy

The impact of COVID-19 is causing significant distress to many companies in Poland. When a company is showing signs of financial distress, it is crucial to determine if it is insolvent by using the cash flow and balance sheet insolvency tests.

A company's directors (management board members) are obliged to file for bankruptcy if either the illiquidity test or over-indebtedness test is met (satisfied). The balance sheet test (over-indebtedness test) is met when the company is over-indebted for 24 months (when the excess of liabilities over assets has persisted for a continuous period of 24 months). After that period, the directors have 30 days to file for bankruptcy or for the opening of restructuring proceedings.

The cash flow insolvency test (illiquidity test) is met when the company is unable to pay its obligations when they become due. As soon as this situation arises, the directors have 30 days to file for bankruptcy or for the opening of restructuring proceedings.

If a company is insolvent, its directors must file for bankruptcy within 30 days. If they fail to file on time, they may suffer civil consequences (i.e. be ordered to pay damages), economic consequences (i.e. be banned from conducting business activity), tax liability and even criminal liability. Directors are released from the aforementioned liability if they file a bankruptcy petition on time or if they file an application for the opening of restructuring proceedings and the court initiates the proceedings within 30 days of the occurrence of the statutory prerequisites (state of insolvency).

Due to the specific COVID-19 bill which entered into force on 18 April 2020 and amended, among others, the Bankruptcy Law, the statutory time limit (the aforementioned 30 days) to file for bankruptcy is suspended and does not run until the day on which the epidemic emergency (epidemiological threat) or the state of epidemic is officially revoked. However, only debtors who became insolvent during the epidemic emergency (epidemiological treat) or the state of epidemic and whose insolvency was caused by COVID-19 can benefit from this suspension. Others are obliged to file for bankruptcy within the statutory time limit regardless the epidemic.

Poland declared the epidemic emergency (epidemiological threat) due to the risk of SARS-CoV-2 (COVID-19) on 14 March 2020. The state of epidemic has been declared on 20 March. This was another step aimed at containing COVID-19 epidemic in Poland (although, legally most provisions of the epidemic state are the same as in the case of epidemiological threat – details can be found here).

### Presumption of insolvency temporarily removed

In addition, the amended Bankruptcy Law includes a presumption that if a debtor became insolvent during the epidemic emergency (epidemiological threat) or the state of epidemic, the debtors' insolvency has been caused by COVID-19. The amended Bankruptcy Law entered into force on 18 April 2020.

### New simplified restructuring procedure

The new Simplified Restructuring Procedure has been introduced by the Shield 4.0 bill (which is still in the legislative process, passed by the Sejm and has now moved to the Senate/the upper house).

The draft Act called "Shield 4.0" introduces a simplified restructuring procedure which is largely based on the existing provisions governing the approval of the arrangement, i.e. one of the four restructuring procedures regulated under the Restructuring Law. Each of these four procedures provides a different degree of debtor protection and presents a different degree of formalisation. The arrangement approval procedure is the least formalised, so should be the simplified restructuring procedure, while at the same time providing greater protection for the debtor against creditors than the arrangement approval procedure.

The simplified restructuring procedure may be opened (once) by an enterprise that is insolvent or threatened with insolvency. Such proceedings would have to be opened by 30 June 2021, which is asserted to be the anticipated period through which businesses would be affected by the COVID-19 crisis. However, the proceedings can be opened even when the financial problems of the debtor or its insolvency were not caused by the COVID-19 crisis. 30 June 2021 is also the

deadline for the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council 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, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). The full implementation of such Directive will require more comprehensive amendments to the Polish Restructuring Law than the proposed Shield 4.0.

The proceedings are opened by a notice in an official magazine (*Monitor Sądowy i Gospodarczy*). In a simplified restructuring procedure (similarly to the procedure for the approval of the arrangement), the insolvent enterprise or enterprise threatened with insolvency, with the participation of a restructuring advisor with whom such enterprise signed an agreement to supervise the course of the procedure (the so-called supervisor of the arrangement), prepares a draft arrangement with creditors containing arrangement proposals e.g. debt reduction, debt rescheduling, or change of payment dates. The enterprise presents the arrangement proposals to the creditors and, with the support of the supervisor of the arrangement, collects their votes on the voting cards. The agreement is adopted if a majority of the creditors who are entitled to vote on the agreement and who together have at least two-thirds of the total amount of the claims vote in favour of the arrangement.

For the most part, therefore, the proceedings take place outside the court. The court approves the arrangement adopted by the creditors, or discontinues the proceedings if the request for approval of the arrangement has not been submitted to the court within 4 months of publication of the notice in the *Monitor Sądowy i Gospodarczy*. The court, at the request of the creditor, debtor or supervisor of the arrangement, controls the content of the notice and can revoke the automatic stay of the enforcement if such stay is detrimental to the creditors.

As at the date of opening of the simplified restructuring proceedings, all the enforcement proceedings against the enterprise initiated so far are subject to an automatic 4-month moratorium (stay). Such stay takes place simply upon the debtor's announcement, without any judicial action – the current restructuring law has no such automatic provision. It is also not possible to initiate new enforcement proceedings. What is important is that the suspension of enforcement will also apply to secured claims, which so far was available only in the formalised rehabilitation proceedings. Moreover, secured claims can be included in the arrangement under the simplified restructuring procedure without the creditors' consent, so long as the new payment terms ensure that such creditors will receive 100% of their receivables (on the proposed dates).

Moreover, from the date of opening of the simplified restructuring proceedings a landlord cannot terminate a lease agreement, where the debtor conducts its business operations, unless the basis for such termination is the failure by the debtor to perform obligations which are not covered by the arrangement or other circumstance set forth in the agreement, if they arose after the opening of the proceedings. The same rule applies to loan agreements with respect to funds made available to a borrower prior to the opening of the proceedings, leasing agreements, property insurance agreements, bank account agreements, guarantee agreements and contracts covering the licenses granted to the debtor, as well as guarantees or letters of credit. The moratorium on the enforcement actions and other restrictions listed above can be lifted by the court upon the motion of a debtor, a restructuring advisor or a creditor in case where such moratorium is detrimental to the creditors.

From the date of opening of the proceedings to the date of discontinuance or completion of the proceedings, the debtor may perform ordinary management actions. The consent of the supervisor of the arrangement is required to perform actions exceeding the scope of ordinary management. An act exceeding the scope of ordinary administration performed without the required consent is invalid.

The simplified restructuring proceedings provides substantial and easily accessible protection for the debtor against creditors' actions. However, a debtor that chooses this restructuring route will not receive some of the aid measures envisaged by the Anti-Crisis Shield or the Financial Shield. The Regulations on the Financial Shield published by the Polish Development Fund stipulate that support under the Financial Shield programme may only be applied for by entrepreneurs with regard to whom, as of the date of submitting the application for co-financing (in the case of large entrepreneurs - also as of the date of signing a relevant financing agreement), no restructuring proceedings were opened. Entrepreneurs using the simplified restructuring procedure will therefore not meet the conditions for receiving co-financing under the Financial Shield programme.

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# COVID-19 response: Slovakia

## Changes to insolvency laws

### Extension for filing for bankruptcy

Debtors are obliged to file for bankruptcy in cases of over-indebtedness within an extended period of 60 days (extended from 30 days). The period of 60 days is only applicable to cases of over-indebtedness which occurred from 12 March 2020 until 30 April 2020.

### Entrepreneurs temporary protection

As of 12 May 2020, a temporary protection of entrepreneurs was introduced. Entrepreneurs with a registered seat or place of business in Slovakia may apply for temporary protection if they were authorized to carry out business prior to 12 March 2020. However, temporary protection shall not apply to: banks, electronic money institutions, insurance companies, reinsurance companies, health insurance companies, asset management companies, securities dealers, stock exchanges, central securities depositories, collective investment undertakings, payment system operators, pension fund management companies, supplementary pension management companies, payment institutions and creditors with authorisation to provide consumer credits without limitation of scope. The temporary protection will be granted by the competent courts. In addition to certain general formalities, applications for granting temporary protection also have to contain special requisites – an applicant is obliged to declare in the application that it fulfils certain conditions for granting temporary protection. If the application fulfils the statutory conditions, the court will grant temporary protection to the entrepreneur without undue delay by issuing a confirmation on granting temporary protection.

The legislation stipulates several effects of the temporary protection. With respect to insolvency, these are as follows:

- proceedings regarding creditor's motions for the declaration of bankruptcy on the property of entrepreneurs under temporary protections filed after 12 March 2020 shall be suspended; this applies also to motions of creditors filed during the temporary protection. Bankruptcy proceedings, in which bankruptcy was not declared and which commenced on the basis of a creditor's motion filed after 12 March 2020 shall be also suspended; and
- during the temporary protection, entrepreneurs under temporary protection are not obliged to file motion for declaration of bankruptcy on their property; this applies also to persons who are obliged to file motions for the declaration of bankruptcy on their behalf.

Other effects of the temporary protection relate e.g. to enforcement proceedings, pledge enforcements, set off of claims, unilateral termination of contracts or denial of performance from contracts, lapse of periods for exercising a right, including periods for exercising claims from opposable transactions, etc.

TEMPORARY PROTECTION TERMINATES:

- On 1 October 2020 (however, the Government may prolong this period until 31 December 2020 at the latest);
- If the entrepreneur under temporary protection applies for its termination (in this case, it is not possible to re-apply for temporary protection);
- By a decision of the court on termination of the temporary protection (in this case, it is not possible to re-apply for temporary protection).

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# COVID-19 response: Spain

## Changes to insolvency laws

### Extension of time limits provided for in the Companies Act

1. If, before the State of Alarm period, the term of duration of the company expires, the company will not be automatically dissolved until two months have elapsed since the end of the State of Alarm.
2. If, before or during the period of State of Alarm, a cause for dissolution arises, the legal period the administrative body is entitled to for convening the shareholders meeting with the aim of passing any agreement towards the dissolution of the company, will be suspended until the end of State of Alarm.
3. If a cause for dissolution arises during the term of the State of Alarm, the administrative body will not be held liable for any corporate debt during this period.

Please note the State of Alarm was declared on 14 March 2020 and extended on 27 March 2020, on 10 April 2020 and on 24 April, 8 May 2020 and 22 May 2020 until 7 June 2020.

### Declaration of insolvency

1. A stay on the duty for filing for insolvency (even if the debtor filed for the pre-insolvency mechanism provided in Article 5b is of the Spanish Insolvency Act) until 31 December 2020.
2. Until 31 December 2020, the insolvency courts will not admit any filings for necessary insolvency proceedings which have been submitted by creditors/third parties during such period.
3. Until 31 December 2020, the debtor's filing for insolvency proceedings will be admitted by the court with priority.
4. If, before 30 September 2020, the debtor communicated to the insolvency court the start of negotiations to reach a refinancing agreement, an out-of-court payment agreement or to obtain accessions to an advance agreement proposal, it will be subject to the general regime established by law.
5. For insolvencies declared within two years of the declaration of the state of alarm, the following will be classed as 'ordinary claims':
   a. those derived from cash receipts from loans, credits or other businesses of a similar nature that would have been granted to the debtor by persons considered by law to be 'specially related' to the debtor; and
   b. claims in which persons considered by law to be 'specially related' to the debtor have been subrogated as a result of payments of ordinary or privileged claims made on behalf of the debtor as from the declaration of the state of alarm.
6. In insolvency proceedings in which the insolvency directors have not presented the provisional report yet, and in all those proceedings declared within two years of the declaration of the state of alarm, in the incidents of challenge to the inventory of assets and rights and the list of creditors:
   a. The only generally admissible forms of evidence shall be documentary and expert evidence, without the need for a hearing. These means of evidence must necessarily accompany the incidental claim and the replies submitted.
   b. Failure by the defendants to respond to the complaint will be considered trespassing unless they are public law creditors.

### Insolvency agreement (*Convenio*)

1. During the period of one year from the declaration of the state of alarm, the debtor may submit a proposal for the modification of the insolvency agreement (convenio) that is in its compliance period.
2. The insolvency court will transfer to the debtor any applications for the declaration of non-compliance with the insolvency agreement which have been presented by creditors during the six months following the declaration of the state of alarm, but will not admit them for processing until three months have passed since the end of that period.
3. During this three-month period, the debtor may submit a proposal to modify the insolvency agreement, which will be processed in preference to the application for a declaration of non-compliance.
4. The measures will also apply to out-of-court payment agreements.

## Opening of the liquidation phase

A stay of one year from the declaration of the state of alarm on the debtor's duty to request the opening of the liquidation phase in the event that it becomes unable to comply with its committed payments or contracted obligations after the approval of the insolvency agreement, provided that the debtor presents a proposal to modify the insolvency agreement and this is admitted to process within said period.

During this period, the insolvency court will not issue an order to open the liquidation phase, even if the creditor proves the existence of any of the facts that could support the declaration of insolvency.

In the event of a breach of the insolvency agreement within the period of two years following the declaration of the state of alarm, claims arising from commitments to finance or provide guarantees by third parties which are contained in the proposal for an agreement or the proposal to amend the agreement already approved by the judge, shall be considered as claims against the estate *(creditos contra la masa)*.

## Approval of the liquidation plan

At the end of the state of alarm, if the liquidation plan has not been presented to the judicial office, the Legal Counsel of the Administration of Justice will order it immediately; and if the fifteen days for making observations and/or proposals for modification of the liquidation plan have already passed, the judge will immediately issue a ruling approving such liquidation plan, introducing the modifications he considers, or agreeing to the liquidation in accordance with the supplementary legal rules.

## Refinancing agreement

During the year following the declaration of the state of alarm, a debtor who has already homologated a refinancing agreement may notify the insolvency court of the start of negotiations to modify that refinancing agreement, or to sign a new one, even if a period of one year has not passed since the previous application for approval.

During the six months following the declaration of the state of alarm, the judge will notify the debtor of the requests for declaration of non-compliance with the refinancing agreement presented by creditors, but will not admit them for processing until one month following the end of the aforementioned six month period has elapsed.

During this one-month period, the debtor may notify the insolvency court of the start of negotiations to reach an agreement to amend the already approved refinancing agreement, or to sign a new one, even if a one-year period from the previous application for approval has not elapsed.

If, after three months from the notification of the commencement of negotiations by the debtor, no agreement has been reached with the creditors, the insolvency court will deal with the requests for default submitted by creditors.

## Preferential matters

The following matters are to be dealt with preferentially until one year has elapsed since the declaration of the state of alarm:

1. labour matters insolvency pleadings (*incidentes concursales*);
2. disposal of production units or global sale of an assets;
3. proposals for agreements and amendments to agreements during the compliance period, and incidents of opposition to the judicial approval of agreements;
4. insolvency pleadings regarding claw-back actions;
5. applications for approval of refinancing agreements, or modifications of the one currently in place; and
6. adoption of precautionary measures and any others that contribute to the maintenance and conservation of goods and rights.

## Disposal of the insolvency estate

In insolvency proceedings that are declared within the year following the declaration of the state of alarm and those that are pending on that date, the auctions of goods, rights and productive units during a liquidation shall be out of court, regardless of what is provided for in the liquidation plan.

Except in relation to the above, a disposal in any phase of the insolvency of the company, as a whole or of one or several productive units, may be carried out by judicial or extrajudicial auction, or any other method of execution authorized by the judge pursuant to the Bankruptcy Law.

Where the judge had authorized the direct enforcement of goods and rights subject to special privilege or in settlement of or for payment of said goods, the disposal will be made under the terms of that authorization.

## Out-of-court payment agreements

During the year following the declaration of the state of alarm, out-of-court payment agreements shall be deemed to have been attempted by the debtor without success, if it is proven that there have been two failures to accept the mediator designated, for the purposes of initiating the next stage of the insolvency process.

## Suspension of the obligation to reduce capital by losses

For the purposes of determining the occurrence of a cause for dissolution, the results of the fiscal year ending in 2020 will not be used. If losses were seen in the result of the 2020 fiscal year, which would reduce the net worth to an amount of half the share capital, the hearing must be called to proceed with the dissolution of the company, unless the capital is increased or reduced sufficiently.

The above is without prejudice to the duty to request the declaration of insolvency in accordance to the above.

## Directors' liability following insolvency

Under regular circumstances, directors in Spain would be under a mandatory obligation to file an insolvency petition to initiate.

compulsory insolvency proceedings within two months of the date on which the company becomes aware, or should have become aware that it is insolvent. Nevertheless, due to the State of Alarm measures (i.e. extension of time limits provided for in insolvency laws), directors would not be under such obligation until the State of Alarm ends.

Without prejudice to the above, a director will be generally liable if it performs acts that are contrary to the law, the company's bylaws or their duties as directors. Additionally, in relation to the general corporate liabilities of a director, a company's creditor would be able to exercise subsequently the action to claim for such general liability, in the event the company or its shareholders did not exercise it and the company's net equity ("*patrimonio neto*") is not sufficient for the payment of their debts.

Furthermore, directors, general proxies, liquidators (or any of them, "*de facto or de iure*"), as well as any individual who acted in such a position during the two years prior to the insolvency may be held liable in the context of an insolvency procedure, if the insolvency is considered fraudulent ("*concurso culpable*"). An insolvency is considered fraudulent if the directors committed gross negligence or wilful misconduct during the two years prior to insolvency. Spanish law lists certain actions which render or may render the insolvency fraudulent, which in summary are material actions that contravene Spanish law (e.g. double accounting, embezzlement, not filing for insolvency when insolvency should have been filed, lack of diligence in drawing up annual accounts, etc.). In such case, the director could be personally declared as responsible for the debts of the company and be required to pay the difference between the company's assets and the liabilities (to enable the creditors to be paid). In addition, directors can be disqualified from holding managerial positions for a period ranging from between two and fifteen years.

Finally, directors may also be liable:

a. to creditors or shareholders where the directors' actions have been directly damaging to their interests; and/or

b. to face criminal charges if they have forged accounts, fraudulently disposed of company assets for their own or a third party's benefit, or obstructed the actions of supervisory agencies.

## Temporary employment regulation proceedings (ERTEs)

Insolvent companies may also file temporary employment regulation proceedings (ERTEs) on the basis of *force majeure* or for organisational, technical, economic and production reasons due to the COVID-19 crisis:

1. Petitions or communications must be made by the insolvent company with the authorization of the insolvency receiver, or by the insolvency receiver directly, depending whether the debtor is in possession or not.
2. Likewise, the insolvency receiver will be a party to the consultation period. If no agreement is reached during this period, the decision to apply the ERTE must have the authorization of the insolvency receiver, or be decided by the insolvency receiver directly, depending whether the debtor is in possession or not.
3. In any case, the insolvency court must be informed immediately of the petition, resolution and measures applied, by telematic means.
4. In the event that the labour authority does not find the existence of force majeure, the company may challenge such resolution before the labour jurisdiction.
5. The insolvency court will hear the challenges to the resolution for fraud, deceit, coercion or abuse of law, or if the workers challenge the company's decision or the labour authority's decision regarding the ERTE where they have intended to obtain benefits unduly . Such challenges will follow the procedure applicable to insolvency incidents in labour matters, and the ruling will be appealable.

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# COVID-19 response: Sweden

## Changes to insolvency laws

### No changes to insolvency laws

No changes have been made to Swedish insolvency laws due to the COVID-19 crisis. The formal insolvency procedures in Sweden allow a company under financial distress to either file for bankruptcy or company reorganisation.

Under the Swedish Bankruptcy Act, a debtor is deemed insolvent when it is unable to pay all its debts as they fall due; provided that the inability is not merely temporary. A debtor may thus be illiquid whilst not necessarily insolvent and the debtor's financing may be considered in the insolvency test. Under the Swedish Company Reorganisation Act, a company may be granted reorganisation protection if the debtor is illiquid and not able to settle all its debts whilst having a viable core business that could be profitable again.

As a general rule, the directors of a Swedish limited liability company are not personally liable for the company's debts.

However, the directors have an obligation under the Swedish Companies Act to take measures in order to restore the company's equity and, eventually, file for liquidation if the company's equity is not restored. When there is reason to believe that the company's equity is less than one half of the registered share capital, the board must immediately prepare and cause the company's auditors to examine a balance sheet for liquidation purposes (Sw. *kontrollbalansräkning*). The directors may be held personally liable for any debt incurred by the company during the period where the directors have failed to act as set out in the Swedish Companies Act.

The directors may also be held personally liable for unpaid taxes if the company goes into bankruptcy with due and unpaid taxes. In addition, a director may face criminal charges if the director, while acting on behalf of the insolvent company, intentionally incurs debt or obligations which the company will not be able settle.

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# COVID-19 response: UK

## Changes to insolvency laws

The Corporate Insolvency and Governance Bill has been introduced to parliament and provides for temporary measures to assist businesses navigating the COVID-19 crisis (a suspension of wrongful trading and restrictions on the use of winding-up processes) as well as permanent reforms to UK insolvency law to enhance its rescue culture (introduction of a standalone moratorium, a new restructuring plan process and provisions preventing the enforcement of insolvency-based termination clauses in contracts for the supply of goods and services).

The Bill also makes temporary changes to rules concerning shareholder meetings and filing requirements to give companies greater flexibility.

The Bill is currently making its way through the parliamentary process and is expected to become law around the end of June.

### Temporary measures

#### SUSPENSION OF WRONGFUL TRADING

Legislation on wrongful trading provides that directors can become personally liable in a subsequent insolvency process of a company if they fail to take every step to minimise potential losses to creditors once there is no reasonable prospect of avoiding insolvency. Generally, directors will not become personally liable for company debts unless their action has contributed to a worsening of the company's financial position.

In March the Government announced that the wrongful trading regime would be suspended with retrospective effect from 1 March 2020. The Bill does not however completely suspend or "switch off" the existing wrongful trading provisions as was anticipated. Rather the Bill states that when considering the personal contribution a director is required to make, the court is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors that occurs during the period beginning 1 March 2020 and ending on 30 June 2020 (or one month after the enactment of the Bill, if later). This period is capable of extension.

This temporary change to the wrongful trading regime does not entirely eliminate the risk of personal liability for directors. The rules on fraudulent trading and director disqualification remain in place and there remains a possibility that directors could be found personally liable for wrongful trading in extreme cases.

Directors should therefore still act with due care and diligence and, where possible, minimize loss to creditors.

These changes apply to most companies, but there is a list of excluded entities.

For further analysis please see our article Room for manoeuvre for directors of UK companies? Corporate Insolvency and Governance Bill to temporarily modify wrongful trading liability

#### RESTRICTIONS ON THE USE OF WINDING-UP PROCESSES

In April 2020, the UK government announced its intention to temporarily restrict the use of winding-up processes. These restrictions are to be introduced by the Bill, and are therefore not yet law, but they will have retrospective effect, and the courts have already prevented creditors from presenting winding-up petitions citing the upcoming changes in the law.

The Bill prevents any statutory demands made against companies in the period between 1 March 2020 and 30 June 2020 (or one month after the enactment of the Bill, if later) from being used as the basis of a winding-up petition at any point on or after 27 April 2020.

The Bill also states that a creditor may not present a winding-up petition during the period 27 April 2020 to 30 June 2020 (or one month after the Bill comes into force, if later), unless the creditor has reasonable grounds for believing that either (i) COVID-19 has not had a financial effect on the debtor company or (ii) the company would have been unable to pay its debts regardless of COVID-19. Similarly, a court will not make a winding-up order on the basis of a petition presented in that period unless the court is satisfied that the company would have been unable to pay its debts regardless of COVID-19.

The Bill does not create a blanket ban on presenting winding-up petitions. However, while the temporary provisions are effective, creditors are well advised not to present a petition unless they are satisfied that one of the two exceptions applies.

It was initially envisaged that the purpose of this measure would be to protect commercial tenants from aggressive rent collection by landlords. However, this temporary restriction on the use of statutory demands and winding-up petitions is not sector specific and applies to any company that can be the subject of a winding-up petition and to any debt owed – not just rent or other lease liabilities.

Our further analysis of these changes can be found here.

## Permanent changes to UK insolvency law

### MORATORIUM

The Bill introduces a new 20 business day moratorium (capable of being extended) for most insolvent or near insolvent companies to allow them formal breathing space from creditor enforcement action in order to formulate and pursue a rescue plan.

An insolvency practitioner, called the monitor, will be appointed to supervise the moratorium, and must be, and remain, of the view that a rescue of the company will be possible. The directors remain in control of the company.

Generally, companies are eligible to use the moratorium if:

1. the directors state that the company is, or is likely to become, unable to pay its debts; and
2. the monitor is of the view that it is likely a moratorium would result in the rescue of the company as a going concern. This requirement is temporarily relaxed so the monitor must only be of the view that a rescue would be possible were it not for any worsening of the financial position of the company for reasons relating to COVID-19.

There are exclusions from eligibility if the company has been in moratorium, CVA or administration in the previous 12 months (these are temporarily suspended due to the COVID-19 situation) and for certain types of company, including insurance companies, banks, electronic money institutions, investment banks and firms and parties to capital market arrangements.

During the moratorium, the company has a payment holiday for most pre-moratorium debts. However, the company must continue to pay certain pre-moratorium debts (called pre-moratorium debts without a payment holiday) as well as moratorium debts (essentially new liabilities arising during the moratorium) while the moratorium is in place. The pre-moratorium debts without a payment holiday are amounts payable in respect of:

1. the monitor's remuneration or expenses (for the period of the moratorium);
2. good and services supplied during the moratorium;
3. wages, salaries and redundancy payments;
4. rent in respect of a period during the moratorium; and
5. debts and liabilities under a contract or instrument involving financial services - including lending contracts.

Given that sums due under lending contracts must be paid during the term of the moratorium, it is questionable how much "breathing space" companies will have under the moratorium without an accompanying waiver/standstill arrangement with lenders.

The moratorium is broadly similar to the administration moratorium in the way that it restricts creditor action, it includes restrictions (among others) on insolvency proceedings, enforcement of security, and forfeiture. Crystallisation of a floating charge is also restricted.

The moratorium will terminate early if:

1. the moratorium is no longer likely to result in a rescue of the company as a going concern.
2. rescue has been achieved.
3. the directors have failed to provide information and the monitor is unable to properly carry out its functions.
4. the monitor thinks that the company is unable to pay any moratorium debts or pre-moratorium debts without a payment holiday that have fallen due.
5. the company enters an insolvency procedure.

Otherwise the moratorium will end at the expiry of its term.

If moratorium debts or pre-moratorium debts without a payment holiday are not paid they will be given priority in an insolvency occurring within 12 weeks of the end of the moratorium.

More detail on the moratorium can be found here.

### NEW RESTRUCTURING PLAN

This is an additional tool for companies to utilise and will be added to the Companies Act 2006. The restructuring plan was modelled on the scheme of arrangement but a distinguishing feature is that it provides for cross class cram down bringing the UK into line with the approach in US chapter 11 as well as in other jurisdictions.

Companies which have or are likely to encounter, financial difficulties that are affecting (or will or may affect) their ability to carry on business as a going concern may use the process to implement a compromise or arrangement between company and its creditors or members with the aim of dealing with the company's financial difficulties.

The restructuring plan has been created to be extremely flexible and will be able to cover financial and operational restructurings eg amend and extend transactions, debt for equity swaps, management changes, asset disposals and resizing debt.

The restructuring plan does not include an inbuilt moratorium but a company could invoke the new moratorium to protect against creditor action while a restructuring plan is being pursued.

Every creditor or shareholder whose rights are affected by the plan must be permitted to vote. However, classes of creditors/shareholders can be excluded from voting where the court is satisfied that none of the members of that class has a **genuine economic interest** in the company.

Stakeholders will vote on the company's proposed plan in separate classes and the constitution of classes is likely to resemble those for schemes of arrangement. For a class of stakeholders to approve the plan, at least 75% in value of those voting must vote in favour but unlike with schemes of arrangement there is no numerosity requirement.

The key feature of the restructuring plan is the cross-class cram-down meaning that it may be approved by the court even where one or more classes do not vote in its favour. A creditor may be bound if:

1. at least one class of creditors who would receive a payment, or have a genuine economic interest in the company, vote in favour;
2. the dissenting creditors would not be any worse off under the plan than they would have been in the event of the "relevant alternative" ie whatever the court considers would be most likely to occur in relation to the company should the plan be rejected (which may not necessarily be the immediate liquidation of the debtor company, although this would probably be the correct comparator in many cases, given the eligibility criteria); and
3. the court is prepared to sanction the plan.

More detail on the restructuring plan can be found here.

### ESSENTIAL SUPPLIES

Often when a company enters into an insolvency or restructuring procedure, suppliers stop or threaten to stop supplying the company.

The Bill includes provisions preventing a supplier from terminating a contract or supply, or doing any other thing, because the customer has entered an insolvency process (this includes the new restructuring plan and the new moratorium). Suppliers will also be banned from insisting on payment of sums falling due prior to the insolvency as a condition of continued supply. It is hoped that this will help continuity of business, minimise trading interruptions and consequently preserve business value and returns to stakeholders.

The new provisions will apply to most suppliers. However, a supplier can be relieved of the requirement to supply if it causes hardship to is business.

There are temporary exclusions for small suppliers and permanent exclusions for certain financial institutions.

More detail on these changes can be found here.

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# Dictionary of insolvency terms in EU Member States

For further details of insolvency terms as used in EU Member States, please refer to the below dictionary:

https://www.dlapiper.com/en/us/focus/dictionary-european-insolvency-terms/introduction/