

CORPORATE AND COMMERCIAL

# COVID-19: Practical Considerations: Company Directors and Insolvency Reforms

31 March 2020

Guidance for companies and company directors in Northern Ireland.



## OVERVIEW

The adverse trading position caused by the COVID-19 situation is significantly impacting the majority of companies and is also bringing the duties of directors – particularly those relating to directors' actions when a company is in difficulty or insolvent – into sharp relief.

In light of these pressures on companies and their directors, on 28 March 2020, the government announced changes to insolvency law to give businesses more time and space to navigate these uncertain times and to alleviate a major concern facing company directors. Key highlights from the announcement are as follows:

## WRONGFUL TRADING

A temporary suspension of current wrongful trading provisions to give company directors greater confidence to use their best endeavours to trade during the COVID-19 situation without the threat of personal liability should the company eventually fall into insolvency. This is to be applied retrospectively from 1 March 2020. Other existing laws in relation to fraudulent trading and director disqualification will continue in full force and effect.

## NEW RESTRUCTURING TOOLS

The addition of new restructuring tools to the UK's Insolvency Framework to include:

- a moratorium for companies giving them breathing space from creditors enforcing their debts for a period of time whilst they seek a rescue or restructure;
- protection of their supplies to enable them to continue trading during the moratorium; and;
- a new restructuring plan, binding creditors to that plan.

Whilst detail on the new restructuring tools are yet to be fully finalised, it is envisaged that the new legislation will closely track the insolvency regime reforms outlined by the government in August 2018.

The 2018 reforms proposed, inter alia:

- 1) a new flexible restructuring plan with the ability to bind dissenting classes of creditors who vote against it;
- 2) an initial 28 day moratorium (with the possibility of further extensions) open to certain companies in a "state of prospective insolvency" to give companies time and space to explore rescue options/reach agreement with their creditors; and
- 3) prevention of suppliers relying on ipso facto clauses which allow termination of contracts solely based on the contractual counterparty's insolvency or financial condition.

This document is a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

**TIMING**

The announcement stated that legislation to introduce these changes will be introduced to Parliament “at the earliest opportunity”. It is likely that the measures will require legislation across both Westminster and Stormont, and we will provide further information as it becomes available.

**PRUDENT STEPS FOR DIRECTORS**

The decisions directors take during the ongoing COVID-19 situation should be considered in line with the underlying legislative framework, albeit with the ability to utilise these new temporary provisions where appropriate to allow companies to trade through what is a serious, but not permanent, operating situation. The March 28 measures

notwithstanding, company directors should consider:

- a) communicating regularly with one another, with appropriate records of the decisions made and reasons for those decisions;
- b) where the company is in financial difficulty, obtaining professional advice and taking consideration of formal and informal insolvency arrangements such as CVA, administration & standstill agreements;
- c) engaging proactively with creditors to keep them informed of the company’s position and reach agreements where possible to deal with debts and supply chain matters;
- d) establishing appropriate mechanisms to ensure that they have at all times up-to-date financial information including budgets, cash flows and a detailed business plan – decisions should be based on up-to-date and robust management information;
- e) maximising available headroom within existing credit facilities and raising additional finance from debt and equity providers; and
- f) reviewing terms of finance documentation to assess whether they are at risk of breaching covenants – if breach is likely, engage with the lender early to discuss potential covenant waivers, resets or debt restructuring.

**KEY CONTACTS**



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