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## WHITE PAPER

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### Directors' Duties—A European Overview: Financial Distress and COVID-19

A company or group's financial distress causes significant turmoil for its owners, directors, managers, employees and often its suppliers and other creditors. For directors in particular, there are significant responsibilities and potential personal liabilities associated with the management of a company where its business is in financial distress. In this *White Paper* we provide an overview of the relevant statutory and fiduciary duties of directors where a company is within the "zone of insolvency" in certain Western European jurisdictions and certain measures that the applicable governments have introduced as a result of COVID-19. We also highlight certain potential personal liabilities for directors and set out some of the practical issues directors need to consider and suggest some of the steps they should be taking at this time in order to safeguard the interests of creditors and minimise the risk of personal liability.

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## INTRODUCTION

A company or group's financial distress causes significant turmoil for its owners, directors, managers, employees and often its suppliers and other creditors. For directors in particular, there are significant responsibilities and potential personal liabilities associated with the management of a company where its business is in financial distress. In this *White Paper* we provide an overview of the relevant statutory and fiduciary duties of directors where a company is within the "zone of insolvency" in certain Western European jurisdictions and certain measures that the applicable governments have introduced as a result of COVID-19. We also highlight certain potential personal liabilities for directors and set out some of the practical issues directors need to consider and suggest some of the steps they should be taking at this time in order to safeguard the interests of creditors and minimise the risk of personal liability.

A director's primary duty is to act in the interests of the company of which he/she is a director. For a solvent company, that translates broadly into acting in the interests of the shareholders as a whole. However, when a company enters into the "zone of insolvency," the situation is much less clear. In England and Wales, Netherlands, France and Belgium, the change in duty is significant and requires directors to act in the best interest of the company's creditors as a general body. However, in Spain, Italy and Germany, the position is more subtle, and whilst directors need to have regard to the interest of creditors, the primary duty of a director remains to act in the best interests of its shareholders.

There are other differences in relation to the timing of formal insolvency proceedings. In Germany, France, Belgium and Spain, directors are required to file for insolvency within certain prescribed time periods. In England and Wales, Netherlands, Germany, France, Italy, Belgium and Spain, directors could be subject to criminal sanction in the event that they fail to discharge their duties appropriately.

Where directors fail to discharge their duties, they could be subject to a claim for damages or at risk of personal liability for the debts of the company. In order to minimise the risk of personal liability, directors need to ensure that they are performing their duties in a manner consistent with the relevant local law requirements.

In many jurisdictions, governments have either introduced a temporary suspension of certain directors' duties and/or suspended the requirement to file for insolvency as a result of financial distress related to COVID-19.

## FAQs

Before setting out the jurisdiction by jurisdiction analysis, we have set out below some of the frequently asked questions that directors may have.

### What is the meaning of "insolvency"?

There is no universal definition of insolvency, and the meaning of this term will vary across jurisdictions. Insolvency is determined on a case-by-case basis and in practice can be a complex exercise. For instance, in the United Kingdom and in Germany, insolvency is considered on both a cash flow and/or a balance sheet basis whereas in Spain and Italy, a company is deemed insolvent if it is unable to pay its debts on a regular basis.

### Who is a director?

In England and Wales, Netherlands, Germany, France, Italy, Belgium and Spain, for the purposes of determining liability, the law does not make any distinction between executive (i.e., employed) and non-executive directors regarding their duties to the company (and creditors), and in the insolvency context, non-executive directors have the same duties and attract the same liability as executive directors. Further liability can be incurred by both those directors who have been formally appointed as well as shadow directors (i.e., those people in accordance with whose directions or instructions the directors of the company are accustomed to act).

### Do the duties of directors differ in respect of group companies?

No. England and Wales, Netherlands, Germany, France, Italy and Spain do not recognise a "group" company for the purposes of directors' duties (in Belgium, the interests of the group can be taken into account subject to certain conditions). Typically, a director is bound only to promote the success of the company in respect of which he/she has been appointed. The director cannot make decisions that benefit other "group" companies (for example, the parent) if such decisions will prejudice the creditors of the company over which they are appointed. Clearly, this can cause issues for common directors

in a “group” where directors have to avoid any conflict of interest and/or where a sponsor or other financial investor has a director on the board of its portfolio or investee company. Where a conflict of interest does arise, directors should ensure that they take legal advice as to how best to navigate any such conflict of interest at the relevant time.

#### **Are there any restrictions on the transactions a company can enter into in the event of financial distress?**

Yes. In England and Wales, Netherlands, Germany, France, Italy, Belgium and Spain, in the event of the insolvency of a company, certain transactions entered into by a company prior to its insolvency could be subject to claw-back, such as dividend payments, preferential payments to creditors, the sale of assets at an undervalue or the grant of security. Again, the relevant statutory provisions vary across jurisdictions and therefore directors should ensure that they are fully aware as to the types of transactions which could be subject to challenge. Typically, if a director has entered into a transaction which is subject to claw-back, this could result in personal liability for the director as well as potential director disqualification. In some jurisdictions, these transactions are only subject to challenge by the company itself or by the insolvency practitioner appointed. In other jurisdictions, creditors prejudiced by a relevant transaction may have a direct claim against the directors. Further information as to the types of transactions which could be subject to challenge is available upon request.

#### **What steps can a director take in order to minimise the risk of personal liability?**

Directors must keep their company's financial position in these cases under continuous review and scrutiny and remember that the proper conclusion as to what to do may change quickly as events develop.

Directors must record the conclusions they reach when making decisions and the factors which affected their thinking, and when those conclusions are drawn, because liability is judged after an insolvent failure and with the benefit of hindsight.

There are many practical steps that should be initiated such as regular board meetings, taking legal advice (sometimes on an individual basis and from separate legal counsel), ensuring appropriate financial advice is up-to-date and that management accounts are acquired and making available suitable balance sheets and cash-flow forecasts.

Particular care should be taken with regard to intra-group transactions including cash pools, repayment of shareholder loans, the payment of dividends and any financial support provided to group companies which could be subject to claw-back in the event of subsequent insolvency.

As a practical matter, directors should also ensure that they have suitable D&O insurance in place.

## JURISDICTION-BY-JURISDICTION SUMMARY OF DIRECTORS' DUTIES IN THE ZONE OF INSOLVENCY

Please find set out below a brief summary of the applicable insolvency rules relating to directors' duties for England and Wales, Netherlands, Germany, France, Italy, Belgium and Spain. The summary provides a generic overview only. Temporary measures introduced in light of the ongoing COVID-19 situation are included in red text for ease of reference.

Jurisdiction	Obligation to File for Insolvency Proceedings Within Statutory Time Period? When is a Company Insolvent?	Personal Liability for Directors and Antecedent Transactions
<b>England &amp; Wales</b>	<p><b>No</b></p> <p><b>When is a Company Insolvent?</b></p> <p>A company is insolvent when it is "unable to pay its debts." This test is satisfied when:</p> <ul style="list-style-type: none"> <li>(i) a company is unable to pay its debts as they fall due; or</li> <li>(ii) the liabilities of a company (including contingent and prospective liabilities) exceed the assets of a company.</li> </ul>	<p><b>Wrongful Trading</b></p> <p>A director may incur personal liability for wrongful trading if the company continues trading at a time when that director knew or ought reasonably to have known that the company had no reasonable prospect of avoiding an insolvent administration or liquidation and the director failed to take every step with a view to minimising the potential loss to the company's creditors.</p> <p><b>COVID-19 Measures:</b> The UK Government has put forward a proposal to suspend the wrongful trading regime for three months "during the COVID-19 pandemic" with a retrospective commencement date of 1 March 2020. The UK Government has expressly confirmed that all other obligations and duties will remain in force.</p> <p><b>Misfeasance</b></p> <p>A director may incur personal liability if the director acts in breach of any statutory or fiduciary duty.</p> <p><b>Antecedent Transactions</b></p> <p>Certain transactions entered into by the company within certain time periods could be subject to challenge in the event of subsequent insolvency. Examples include paying particular creditors with the intention of putting such creditors in a better position in the event of the company's insolvency or transferring assets at an undervalue.</p> <p>If directors act in breach of any of the above provisions, they could be personally required to contribute toward the assets of the company and/or be subject to disqualification proceedings.</p> <p><b>Other</b></p> <p><b>Fraudulent Trading:</b> A director may incur personal (civil and criminal) liability for fraudulent trading if, in the course of the administration or liquidation of the company, any business is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose.</p>

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Jurisdiction	Obligation to File for Insolvency Proceedings Within Statutory Time Period? When is a Company Insolvent?	Personal Liability for Directors and Antecedent Transactions
Netherlands	<p><b>No</b></p> <p><b>COVID-19 Measures:</b> The Dutch legislature has not announced any COVID-19-related measures that affect the duties of directors to file for insolvency proceedings.</p> <p><b>When is a Company Insolvent?</b></p> <p>There is no precise moment, event or circumstance by reference to which an obligation to make an insolvency filing arises under Dutch law. However, there are circumstances where it is in the interest of directors to file for insolvency in order to avoid liability.</p>	<p><b>Wrongful Trading</b></p> <p>Directors can incur personal liability for company liabilities that they incur when they (should) know there is no reasonable prospect of avoiding its insolvency. When this knowledge exists, directors can only incur company liabilities that do not have a negative impact on the ability of creditors to seek recovery.</p> <p><b>Misfeasance</b></p> <p><b>Improper Performance of Duties:</b> An action can be brought by the company against directors if the directors fulfilled their duties improperly, and they can be “seriously blamed” for their performance.</p> <p><b>Manifestly Improper Management:</b> Each director is jointly and severally liable to the insolvent estate for the entire estate deficit if it can be established that: (i) the board manifestly improperly performed its duties; and (ii) it is likely that this was an important cause of the insolvency. If the directors fail to publish annual accounts or maintain proper bookkeeping, manifestly improper management is assumed.</p> <p><b>COVID-19 Measures:</b> The Dutch legislature has announced a measure alleviating the evidentiary presumption that a director has performed his duties manifestly improperly if he fails to publish the annual accounts in a timely manner. This measure has retroactive effect from 16 March 2019 and is valid until 1 September 2023.</p> <p><b>Criminal Liability:</b> Directors can incur criminal liability if they commit acts which prejudice creditors’ recovery or if they do not comply with their administrative duties. Criminal prosecution of directors is highly uncommon but may lead to a fine or, in serious cases, imprisonment.</p> <p><b>Antecedent Transactions</b></p> <p><b>Voluntary Legal Acts:</b> Voluntary legal acts (i.e., not contractual or statutory obligations) performed by the company may be annulled: (i) if the legal act adversely affects the company’s creditors; and (ii) unless the legal act was performed for no consideration, both the company and the counterparty knew, or should have known, that such an adverse effect would be the result (the “knowledge test”). If the legal act was performed in the year before the insolvency and the company was not already legally bound to perform it before the start of the look-back period, the knowledge test is presumed satisfied in certain cases, such as in respect of legal acts performed between group companies.</p> <p><b>Non-Voluntary Legal Acts:</b> Non-voluntary legal acts (i.e., contractual or statutory obligations) performed by the company may be annulled if: (i) the party which benefited from the legal act knew that an insolvency petition in respect of the company had already been filed; or (ii) the legal act was the result of collusion between the company and the benefiting party, to the detriment of other creditors. It is difficult to establish collusion.</p> <p><b>Other</b></p> <p><b>Inability to Pay Taxes:</b> When it becomes clear that a company is no longer able to pay certain taxes, each director of the company is required to file with the tax authorities a statement of the company’s inability to pay (<i>melding betalingsonmacht</i>). If no such statement is filed, directors may be held personally liable for payment of those taxes.</p> <p><b>COVID-19 Measures:</b> Companies are allowed to request a three-month deferment on the payment of certain taxes. Such a request can also qualify as a statement of the company’s inability to pay.</p>

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Jurisdiction	Obligation to File for Insolvency Proceedings Within Statutory Time Period? When is a Company Insolvent?	Personal Liability for Directors and Antecedent Transactions
Germany	<p><b>Yes</b> – within a maximum period of three weeks of becoming insolvent (i.e., the occurrence of illiquidity or (legal) over-indebtedness).</p> <p><b>COVID-19 Measures:</b> The requirement to file for insolvency is currently suspended until 30 September 2020 (backdated to 1 March 2020) in cases where the critical situation of the company is caused by the COVID-19 crisis. There is a possibility that this suspension will be extended until 31 March 2021 (the “Suspension Period”).</p> <p><b>When is a Company Insolvent?</b></p> <p>A company is illiquid (cash flow test) if it does not have sufficient cash to pay its debts as they fall due.</p> <p>A company is legally over-indebted (balance sheet test) if its total liabilities exceed its total assets and the company does not have a positive going concern prognosis (i.e., there is a chance of only 50% or less that the company will be able to pay its debts in the current business year and the subsequent business year). Such prognosis is usually prepared by external advisors in the form of a comprehensive restructuring opinion (<i>Sanierungsgutachten</i>).</p>	<p><b>Wrongful Trading</b></p> <p>Failure to comply with the requirement to file for insolvency within the specified time is a criminal offence and may trigger personal liability for the managing directors (there will be no such liability where the obligation to file for insolvency is suspended).</p> <p><b>Misfeasance</b></p> <p>The managing directors are liable for any payments made after the occurrence of illiquidity of the company, unless they can prove they were made in accordance with the standard of care of a prudent director. Further, if the managing directors can prove that the payments created real value for the company, such payments are unlikely to trigger any liability. Managing directors are also liable for any payments made to direct or indirect shareholders if such payments necessarily resulted in the illiquidity of the company, unless this result would have been unforeseeable by a person acting with the care of a prudent director.</p> <p><b>COVID-19 Measures:</b> Any payment made in the ordinary course of business during the Suspension Period is deemed to be in accordance with the standard of care of a prudent director.</p> <p><b>Antecedent Transactions</b></p> <p>An insolvency administrator may seek to claw-back payments made, or assets transferred, by the company during the period of up to four years prior to the filing for insolvency (the look-back period is extended to up to 10 years in exceptional circumstances that border on fraud). Any such claw-back is a risk for the counterparty of the company (payee, transferee, etc.), but not so much for the managing directors of the company (unless the payment/transfer constitutes a criminal offence or otherwise triggers civil law liability).</p> <p><b>COVID-19 Measures:</b> It will not be considered disadvantageous to creditors for the company to: (i) make repayments by 30 September 2023 on loans advanced during the Suspension Period (including shareholder loans); and (ii) pledge collateral during the Suspension Period. These measures reduce the risk that such transactions will be clawed back from creditors and/or shareholders if the company subsequently becomes insolvent.</p> <p>Shareholder loans to the company during the Suspension Period will not be equitably subordinated in insolvency proceedings applied for by 30 September 2023 (this does not apply to the grant of collateral). This may simplify, and reduce the risks for shareholders involved in, shareholder financings.</p> <p>During the Suspension Period, any: (i) payment of due debt claims; (ii) grant of previously agreed collateral; (iii) grant of comparable collateral; (ii) reduction in payment terms; or (iv) assignment of claims in lieu of payment will only to a very limited extent be subject to claw-back, which reduces the risk to creditors (existing and new) and other third parties continuing business with the company (e.g., suppliers, landlords, leasing parties, etc.).</p> <p><b>Other</b></p> <p><b>Net Asset Value Test:</b> If the company's net assets fall below 50% of its registered share capital, the managing directors must call a shareholders' meeting without undue delay. Failure to comply is a criminal offence.</p> <p><b>Capital Maintenance Rules:</b> As a general rule, company assets that are required to maintain its registered share capital should not be distributed to shareholders. Exceptions include: (i) repaying shareholder loans; and (ii) fulfilling claims arising from transactions that are commercially equivalent to shareholder loans.</p>

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Jurisdiction	Obligation to File for Insolvency Proceedings Within Statutory Time Period? When is a Company Insolvent?	Personal Liability for Directors and Antecedent Transactions
France	<p><b>Yes</b> – within 45 days following the date upon which insolvency occurs.</p> <p><b>COVID-19 Measures:</b> Until the end of the three-month period following the end of the “state of health emergency” (i.e., 24 August 2020 on the current schedule) (the “Moratorium Period”) a company’s insolvency is to be assessed based on its financial situation as of 12 March 2020. As a result, if a company was not insolvent on 12 March 2020, or as of 12 March 2020 had been insolvent for less than 45 days, it is not required to file for insolvency proceedings during the Moratorium Period.</p> <p>At the end of the Moratorium Period, companies that are still insolvent will have to file for insolvency proceedings within 45 days.</p> <p><b>When is a Company Insolvent?</b></p> <p>A company is deemed to be cash flow insolvent (<i>en cessation des paiements</i>) when its due and payable debts exceed its available assets. A due and payable debt is a debt, including to a parent company, that: (i) is certain and liquid (i.e., not challenged); (ii) has not been paid on its due date, whether the creditor has requested payment or not; and (iii) in respect of which neither a rescheduling nor a waiver has been obtained. Available assets comprises cash and all other assets that are capable of being turned into cash in a short timeframe.</p>	<p><b>Wrongful Trading</b></p> <p>Directors who continue to trade a company in poor financial health for personal gain and drive the company into insolvency may be declared personally bankrupt.</p> <p><b>Misfeasance</b></p> <p>Directors can incur criminal liability for: (i) fraudulently increasing the company’s liabilities; and (ii) purchasing goods or services for resale at below market prices or using ruinous means to procure funds, with the intention of avoiding or delaying the commencement of insolvency proceedings.</p> <p><b>Mismanagement of Company Assets:</b> Where there is a shortfall of assets (i.e., liabilities exceed assets) in a liquidation proceeding, the court may order that the shortfall shall be borne, in whole or part, by the directors whose mismanagement contributed to such a shortfall. A judicial administrator and the creditors’ legal representatives can also claim damages from directors to remedy the prejudice created by the company ceasing to make payments. In this case, the court may impose measures to conserve the directors’ assets.</p> <p><b>Misappropriation of Corporate Assets:</b> It is a criminal offence to knowingly and fraudulently use company assets for personal gain, either directly or indirectly, via a separate legal entity in which that person has an interest.</p> <p><b>Antecedent Transactions</b></p> <p><b>Preference Payments:</b> Non-pecuniary/professional sanctions can be ordered where a director knowingly paid or caused payment after the date of insolvency to a creditor (who existed before the insolvency date) in order to defraud other creditors. Such preference payments also attract liability for “de facto” or “de jure” directors.</p> <p><b>Voidable Transactions:</b> Any payment made during the “hardening period” of a debt prior to maturity (the period during which a debt may be avoided) is subject to automatic avoidance. Disposing of an asset during the hardening period can potentially be a voidable transaction irrespective of the value/price, but undervaluation of the asset disposed of increases the risk of the transaction being avoided.</p>

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Jurisdiction	Obligation to File for Insolvency Proceedings Within Statutory Time Period? When is a Company Insolvent?	Personal Liability for Directors and Antecedent Transactions
Italy	<p><b>No</b></p> <p><b>COVID-19 Measures:</b> From 9 March 2020 to 30 June 2020, the opening of an insolvency proceeding requested by either a debtor or its creditors is suspended. Such suspension does not apply to public prosecutors provided that their request for the opening of an insolvency proceeding includes the issuance of precautionary and protective measures for the benefit of the insolvent estate.</p> <p><b>When is a Company Insolvent?</b></p> <p>Under current legislation, a company is deemed insolvent when it is unable to settle its payment obligations when due on a regular basis. If a company is insolvent according to this definition, it can be required to be declared bankrupt and become subject to bankruptcy proceedings.</p> <p>Pursuant to the New Italian Insolvency Code (to be enacted on 1 September 2021 under the current schedule), a pool of experts shall establish a list of specific economic/financial red flags (or crisis indicators) to be periodically reviewed and updated. In the event of such red flags, directors and auditors will have to promptly carry out any measures necessary to remediate the crisis in the context of an early-warning proceeding in order to avoid insolvency (and likely bankruptcy proceedings).</p>	<p><b>Wrongful Trading</b></p> <p>Directors can incur personal liability if assets become insufficient to satisfy the claims of creditors, or if directors do not manage the company's assets conservatively when its share capital falls below certain thresholds.</p> <p><b>COVID-19 Measures:</b> Until 31 December 2020, the following will not apply: (i) rules triggered by shareholders' equity falling below certain minimum thresholds and requiring, depending on the circumstances, a reduction in share capital, an injection of new equity or the winding up of the company; and (ii) provisions regarding the statutory subordination of shareholder loans to other debt and the claw-back of shareholder loans repaid in the 12 months before the company is required to be declared bankrupt.</p> <p><b>Misfeasance</b></p> <p>Fraudulent and wrongful bankruptcy, illegal incurrence of credit and preferential payments (amongst other things) are criminal offences and may trigger criminal liability for directors if the company files for insolvency.</p> <p><b>Antecedent Transactions</b></p> <p>Certain transactions with the debtor may be clawed back, unless the counterparty proves that it was not aware of the debtor's insolvency. These include: (i) "onerous transactions" entered into with the debtor in the year before the insolvency declaration (i.e., where the liabilities incurred by the debtor exceed the consideration it receives by 25% or more); (ii) payments of matured debts made by the debtor not in cash or by other customary means of payment in the year before the insolvency declaration; (iii) pledges and mortgages granted by the debtor in the year before the insolvency declaration in order to secure existing (but not matured) debts; and (iv) pledges and judicial and/or voluntary mortgages granted by the insolvent entity in the six months before the insolvency declaration in order to secure matured debts.</p> <p>Payments of matured debts, onerous transactions and priority rights (i.e., security) granted in relation to debts (even those of third parties) simultaneously arising, entered into or made within the six months prior to the insolvency declaration may be clawed back if the insolvency receiver proves (also by way of presumptions) that the counterparty was aware of the insolvent entity's insolvency.</p> <p><b>COVID-19 Measures:</b> The period from 9 March 2020 to 30 June 2020 shall not be taken into account for the purposes of calculating the terms applicable to the commencement of claw-back actions (i.e., three years from the insolvency declaration or in any case five years from the date of the transaction to be clawed back).</p> <p><b>Holding Company Liability:</b> Directors of a holding company may be liable to the creditors of another company of the group subject to the holding company's direction and coordination (<i>direzione e coordinamento</i>) and/or controlled by it if such creditors' claims have been prejudiced by the activities of the directors of such holding company. Note: Under Italian law, a group of companies is never considered as a single (i.e., stand-alone) legal entity.</p>

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Jurisdiction	Obligation to File for Insolvency Proceedings Within Statutory Time Period? When is a Company Insolvent?	Personal Liability for Directors and Antecedent Transactions
Belgium	<p><b>Yes</b> – within one month of being in a “state of insolvency.”</p> <p><b>COVID-19 Measures:</b> A Royal Decree adopted on 24 April 2020 provides for a temporary suspension of insolvencies from 24 April 2020 until 17 May 2020 inclusive (with the possibility of being extended).</p> <p>The moratorium applies only to companies that were healthy (i.e., not in default) as of 18 March 2020 but are experiencing difficulties caused by COVID-19. The courts decide whether a debtor can benefit from this suspension.</p> <p>The moratorium protects companies from: (i) all asset seizures (except preventive seizures on real estate); (ii) being declared insolvent upon request by their creditors (although they can still be declared insolvent at the request of the public prosecutor’s office, or with the agreement of the debtor itself); (iii) existing contracts being terminated due to non-payment (except employment contracts); and (iv) the obligation to file for insolvency.</p> <p><b>When is a Company Insolvent?</b></p> <p>A “state of insolvency” arises where the company is:</p> <ul style="list-style-type: none"> <li>(i) unable to pay its debts (and there is no reasonable prospect that it will be able to pay its debts in the near future); and</li> <li>(ii) unable to obtain credit (i.e., the company cannot find new sources of financing and/or its creditors refuse to grant a moratorium).</li> </ul>	<p><b>Wrongful Trading</b></p> <p>Directors can incur personal liability for continuing to trade when there is no reasonable prospect of avoiding insolvency and may be held liable for the shortfall of assets.</p> <p><b>COVID-19 Measures:</b> Despite the moratorium, debtors are still obliged to pay their debts—it is only the enforcement of debts that is temporarily suspended. Interest on debt and arrears continue to accrue and become due when the moratorium ends.</p> <p><b>Misfeasance</b></p> <p><b>Mismanagement:</b> Directors are liable for any shortcomings in their management and are jointly and severally liable to the company or third parties for any loss resulting from a breach of company law or the company’s articles of association (e.g., a failure to call a shareholders’ meeting where the company satisfies the Net Asset Value Test).</p> <p><b>Mismanagement Causing the Insolvency:</b> In an insolvency with a shortfall of assets, a director may be held personally liable for the liabilities of the company up to the amount of the shortfall if it is established that the director committed serious misconduct which contributed to the company’s insolvency.</p> <p><b>Criminal Liability:</b> Directors may be held criminally liable for (amongst other things): (i) not filing for insolvency within the statutory time limit; (ii) incurring excessive indebtedness; and (iii) preferring payment of one creditor to the detriment of others, in each case, with the intention of postponing the insolvency order.</p> <p><b>Antecedent Transactions</b></p> <p>Certain transactions or payments made during a specified period before the company’s insolvency may be declared ineffective against its creditors, including where: (i) the counterparty was (or should have been) aware of the company’s insolvency; and/or (ii) the consideration given by the debtor substantially exceeded the consideration received from the counterparty. A transaction or payment entered into with the intent to defraud creditors is not effective against them, regardless of when it took place.</p> <p><b>Other</b></p> <p><b>Net Asset Value Test:</b> When a company’s net asset value is less than half of its capital, the directors must convene a meeting of shareholders within two months to discuss whether the business can continue or the company should be dissolved.</p>

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Jurisdiction	Obligation to File for Insolvency Proceedings Within Statutory Time Period? When is a Company Insolvent?	Personal Liability for Directors and Antecedent Transactions
Spain	<p><b>Yes</b> – within two months of the date on which the directors knew or should have known of the company’s insolvency.</p> <p><b>COVID-19 Measures:</b> A company in insolvency is not bound to file for insolvency until 31 December 2020. In addition, in connection with the duty to procure the company’s winding up: (i) the company is not bound to take steps towards the winding up of the company during the period of the “state of alarm” (currently in place until 23 May 2020); and (ii) the losses incurred during 2020 will not be taken into account for the purposes of determining whether the net equity of the company is less than half of its share capital.</p> <p><b>When is a Company Insolvent?</b> A company is deemed insolvent when it is unable to settle its payment obligations when due on a regular basis.</p>	<p><b>Wrongful Trading</b></p> <p><b>Failure to File for Insolvency in Time:</b> Failure to comply with the duty to file for insolvency within the statutory timeframe can entail personal liability for directors. Directors’ liability will be assessed on a case-by-case basis taking into account the eventual damage that the delay in filing may have caused to creditors.</p> <p><b>Failure to Procure the Company’s Winding Up in Time:</b> In addition, if the net equity of a company is less than one-half of its share capital, the directors are required to convene a shareholders’ meeting to wind up the company. The directors can incur personal liability for the debts of the company if they fail to do so.</p> <p><b>COVID-19 Measures:</b> The duties to file for insolvency and to procure the company’s winding up are impacted by several provisions enacted in connection with the COVID-19 crisis—please see the note in the left column.</p> <p><b>Misfeasance</b></p> <p>Directors may be liable for any damages caused to the company, the shareholders or the creditors as a result of acts or omissions in breach of the law, the by-laws or their fiduciary duties of loyalty and diligence. However, liability arising from failure to pay debts is unlikely if the company opens formal insolvency proceedings.</p> <p>Directors may face imprisonment and fines if, while the company is insolvent or financially distressed, they <i>inter alia</i> conceal, damage or destroy the company’s assets or make unjustified transfers of funds.</p> <p>Directors may be held liable for actions or omissions amounting to gross negligence or wilful misconduct that have generated or worsened a company’s insolvency (e.g., payments made to related persons within two years of the onset of insolvency).</p> <p><b>Antecedent Transactions</b></p> <p>Transactions carried out within the two years prior to the onset of insolvency may be rescinded if they are deemed to be detrimental to the insolvency estate. Transactions carried out with the aim of defrauding creditors can be subject to challenge during the four years following the date on which creditors knew or should have known of a fraudulent transfer.</p>

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