SQUIRE PATTON BOGGS

Local Connections. Global Influence.

Assessing Your Business Viability and Director Risk Guide

13 January 2022

Contents

Business Viability and Director Risk

The end of lockdown restrictions in July 2021, or "freedom day", provided a welcome boost to the UK recovery – but many uncertainties remain, and directors' judgements about viability remain sensitive.

This removal of COVID-19 restrictions was great news for UK businesses, the economy and consumers. Together with the consequent winding back of COVID-19 government support for the economy, these marked an important step in returning the economy to a post-pandemic normal. But it may be a while before the true impact that COVID-19 restrictions and lockdown measures have had on UK businesses becomes clear, and we can see the extent to which businesses are still viable in a post-lockdown environment.

The end of COVID-19 restrictions and government support for the economy has brought with it a wider range of uncertainty in the business environment.

The immediate first signs were positive. The ending of the furlough scheme has not led to mass redundancy, nor has there been an immediate wave of business insolvency. Unemployment has remained under control, and job vacancies are high.

However, first, the pandemic has not gone away. The UK government (for many aspects, the three devolved governments and Westminster covering England) seems determined to weather the storm of the winter wave of COVID-19, which is seeing restrictions re-introduced in a number of European countries. The key unknown here is whether the vaccine defence will protect hospitals. A continued upturn in hospital admissions could lead to some restrictions returning, though full lockdown still looks unlikely.

Second, businesses are facing acute supply chain stresses. These stem, to a certain extent, from Brexit adjustment, but probably reflect more global stress as supply chains try to catch up from pandemic disruption. Manufacturing and retail are equally affected.

Third, some businesses are facing equally acute labour shortages, with sectors such as hospitality notably affected.

Fourth, a major spike in energy prices is putting pressure on operating costs for many businesses.

Fifth, inflation is on the rise, which is likely to lead to increasing interest rates, which will add to pressure on businesses that have emerged from the pandemic with increased debt levels.

Add to these longer-term pressures in geopolitics, increased protectionist trends, an acceleration of technology-driven change and uncertainty about future working patterns, and today's boardroom faces a breadth and depth of uncertainty that we have rarely seen in our business lifetimes. Against that background, all business owners must take decisions carefully in light of directors' duties to act in the best interests of the company and its creditors as a whole.

Until 30 June 2021, the rules around wrongful trading were relaxed, but the temporary suspension of the wrongful trading rules has ended. For directors, there is now an increased risk of personal liability if the financial position of the company deteriorates. There are a number of ways that directors can reduce the risk of personal liability, and positive steps that can (and should) be taken to protect the business, which are explained in this brochure.

The brochure also includes a roadmap highlighting financial crunch points for businesses in the coming months, explains what financial support is still available, and includes a more detailed section explaining how accrued tax liabilities can be managed and the expected approach of HMRC when it comes to tax collection.

HMRC's role in supporting businesses as they seek to get back on their feet will be pivotal in ensuring businesses are viable moving forward.

In addition, the brochure includes helpful guidance on bringing employees back to work, managing redundancies and auditing HR processes, together with a detailed look at supply chain issues and how they might be managed.

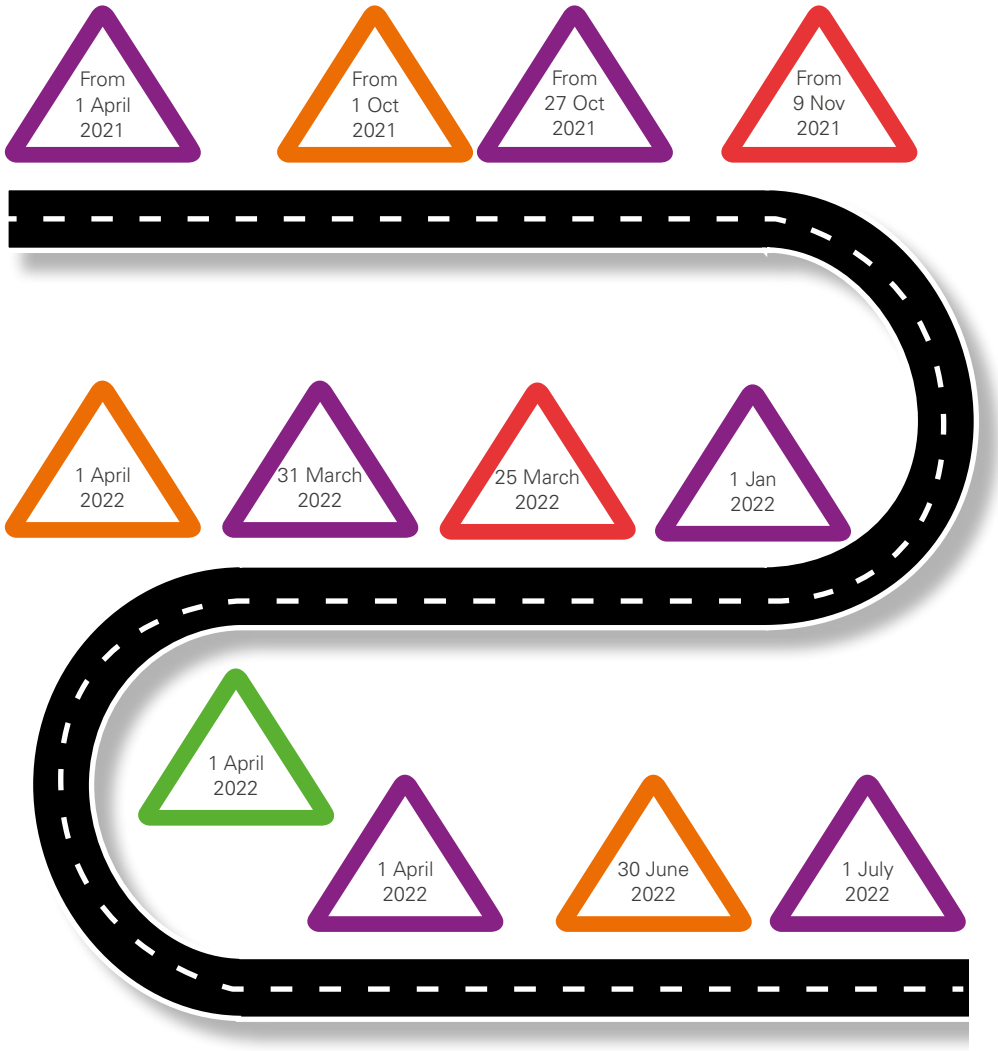
Finally, we have a team of experts, whose details are set out at the end of this brochure, who can help with decisions about employees, cash requirements and borrowings, as well as provide advice on restructuring options.

Financial Health Roadmap

UK Business Key Dates To Manage Financial Health

This financial health roadmap helps identify key dates that may impact cash flow and should be considered (alongside the specific financial needs of the business) when planning.

Click on each date for more information



Roadmap Destinations

April 2021

Capital Allowances: Super Deduction

Companies investing in qualifying new plant and machinery assets between 1 April 2021 and 31 March 2023, will be able to claim a 130% 'super-deduction' capital allowance on qualifying plant and machinery investments or a 50% 'first-year allowance' for assets qualifying for the special rate.

October 2021

Restrictions on Debt Collection and Creditor Action Lifted

From 1 October 2021 to 31 March 2022, the following conditions must be met for a winding-up petition to be presented against a debtor company:

- **Condition one**: the petition debt must (a) be for a liquidated amount, (b) have fallen due and (c) not be a debt for commercial rent that is unpaid due to a financial effect of COVID-19.
- **Condition two**: the creditor delivers written notice, seeking the debtor company's proposals for the payment of the debt.
- **Condition three**: a satisfactory proposal (in the opinion of the petitioning creditor) for the payment of debts has not been made within 21 days of providing written notice.
- **Condition four**: the petition debt is £10,000 or more.

As can be seen from condition one, there remain restrictions on petitioning for commercial rent arrears that have accrued due to the financial effect of COVID-19. This restriction is in place until 31 March 2022.

Unless arrangements have been made to pay unpaid suppliers, HMRC or landlords, aggressive creditors may now threaten or bring winding up proceedings (provided the conditions are met).

NB: other enforcement action (court action/enforcement of retention of title) is not restricted.

Cultural Rate Relief Extension

From 27 October 2021 to 31 March 2024, the rates of corporation tax cultural reliefs for theatres, orchestras, and museums and galleries will be temporarily increased. The increased rates took effect on 27 October 2021. They will taper down from 1 April 2023 and return to current levels from 1 April 2024. The relief for museums and galleries will expire on 31 March 2024.

November 2021

Draft Legislation for Commercial Rent Recovery for Landlords

Until the new Commercial Rent (Coronavirus) Bill comes into force, landlords and tenants should negotiate in accordance with the Code of Practice (as amended on 9 November 2021) to deal with rent arrears accrued during the COVID-19 pandemic. Please see our alert on the Code of Practice here.

January 2022

Stage Two of UK Border Operating Model Takes Effect

From 1 January 2022, businesses importing any goods will have to make full import and customs declarations at the point of importation and pay all relevant taxes and duties. Certain import facilitations are available. Safety and security import declarations are not required until 1 July 2022 (but traders can opt to submit them).

Capital Allowances: Annual Investment Allowance Extended

The temporary £1,000,000 level of the Annual Investment Allowance (AIA) has been extended for qualifying expenditure on plant and machinery incurred during the period from 1 January 2022 to 31 March 2023. The AIA is a 100% capital allowance (i.e. tax deduction) for qualifying capital expenditure on plant and machinery up to a specified annual limit.

March 2022

Recovery Action for Non-Payment of Rent Can Commence

On 25 March 2022, the temporary restrictions on landlords taking forfeiture proceedings end, as do the temporary restrictions on pursuing Commercial Rent Arrears Recovery (CRAR) to recover unpaid rent (which currently requires 554 days' outstanding rent). However it is the government's intention to introduce a mandatory arbitration scheme before these restrictions lift, which will restrict a landlord from pursuing forfeiture or CRAR proceedings in respect of COVID-19 rent arrears due under a business tenancy for a further 6 months. Unpaid rent falling due after 18 July 2021 (or 7 August 2021 in Wales) will not be subject to those restrictions. See further details on the arbitration process below.

Arbitration Process to Negotiate Rent Repayment Can Commence

From on or around 25 March 2022 (subject to the Commercial Rent (Coronavirus) Bill coming into force), for business tenancies under Part II of the Landlord and Tenant Act, landlords and tenants are able to apply for a legally binding arbitration process (until on or around 25 September 2022) to resolve any disputes regarding unpaid arrears of rent, service charges, insurance, VAT and interest on sums accrued during the period 21 March 2020 to 18 July 2021 when restrictions were in place that affected that particular business. This process will involve an arbitrator considering the viability of the tenant's business, the effect any relief would have on the business and the landlord, and the appropriate repayment relief.

Business Rates

- **Expanded Business Rates Retail Discount Relief Ends**

  The Business Rates Retail Discount for retail properties, expanded to included leisure and hospitality sectors, was extended to apply until 31 March 2022. From 1 July 2021, the discount rate has been 66% with relief capped at £105,000 per business, or £2 million per business where the property was required (or would have been required) to close on 5 January 2021. The Expanded Business Rates Retail Discount ends on 31 March 2022.

April 2022

Restrictions on Winding-up Petitions Ends

From 1 April 2022, the temporary restrictions on presenting a winding-up petition for unpaid rent and the requirement to comply with the conditions to present non-rent winding-up petitions will end.

Unless arrangements have been made to pay unpaid suppliers, HMRC or landlords, aggressive creditors may now threaten or bring winding-up proceedings (without meeting the conditions).

National Living Wage and National Minimum Wage Increases Commence

From 1 April 2022, there will be a 6.6% increase in the National Living Wage, raising the amount to £9.50 per hour (from the current amount of £8.91 per hour) for workers aged 23 and over. In addition, the rates of the National Minimum Wage will also increase as follows:

- by 9.8% to £9.18 per hour (from £8.36 per hour) for 21 to 22 year olds;
- by 4.1% to £6.83 per hour (from £6.56 per hour) for 18 to 20 year olds;
- by 4.1% to £4.81 per hour (from £4.62 per hour) for 16 to 17 year olds; and
- by 11.9% to £4.81 per hour (from £4.30 per hour) for apprentices.

Business Rates – 2022–23

- **Business Rates Multiplier Frozen**

  The 'business rates multipliers' will be frozen from 1 April 2022 until 31 March 2023 (at their current levels of 49.9p for small businesses and 51.2p standard). Businesses can estimate their business rates by multiplying the rateable value of their premises by the applicable multiplier.

June 2022

Recovery Loan Scheme Extension Ends

The recovery loan scheme ends on 30 June 2022. From 1 January 2022, loans will only be available to small and medium sized enterprises, the maximum finance available will be £2 million per business and will be guaranteed up to 70% by the government (reduced from 80%).

July 2022

Full Application of UK Border Operating Model Takes Effect

From 1 July 2022, businesses importing any goods will have to make full import and customs, and safety and security, declarations at the point of importation and pay all relevant taxes and duties. Certain import facilitations are available.

Other Cost Considerations

Redundancy Costs

- Although we have not seen mass redundancies since the furlough scheme ended, a business contemplating making redundancies will need to factor in the costs of doing so in cash flow forecasts. For more information about employment considerations see the Employment Considerations section.

Deferred Payments or Forbearance

- If a business has agreed to defer repayment, adjusted payment terms or agreed a period of forbearance with its creditors, the terms of deferral, repayment or forbearance should be reviewed, re-negotiated if appropriate and factored into future cash flow requirements – including any agreement with the company's lenders, suppliers, landlord or time to pay agreements with HMRC.

Business Rates

- **New Temporary Business Rates Relief for Retail, Hospitality and Leisure Commences**

  Eligible businesses operating in the retail, hospitality and leisure sectors will be entitled to 50% relief from business rates in the financial year 2022-23. Businesses operating from eligible properties will receive 50% relief, capped at £110,000 per business.

- **Business Rates Transitional Relief Extended**

  Current rates of transitional relief for small and medium properties have been extended to 31 March 2023. Transitional relief restricts how much business rates can change as a result of a revaluation of rateable premises. Relief means changes are phased in gradually. Relief rates for bill increases are set at 15% for small properties (up to a rateable value of £20,000 in or £28,000 in Greater London) and 25% for medium properties (up to a rateable value of £100,000). The rate of transitional relief for large properties (with a rateable value over £100,000) is currently 6%.

Employment Considerations

Employers continue to face a range of difficult employment law issues, including how to bring more staff back to the office, ensuring the workplace remains safe if COVID-19 rises and how to deal with significant staff shortages in certain sectors.

Increasing Wage Costs

In certain sectors, companies are struggling with staff shortages, with vacancies at a record high. Many employers are having to improve pay, benefits and conditions in order to recruit the right talent, even in traditionally low-paid and relatively unskilled roles. While that plays to the government's post-Brexit high-wage, high-skills narrative to some extent, higher wage costs for unskilled jobs too will inevitably filter through into higher prices for consumers and must be factored into financial forecasts. Recent legal decisions around the proper calculation of the National Minimum Wage are likely to have the same effect.

Redundancies

The good news is that previous concerns about possible large-scale redundancies when the Coronavirus Job Retention Scheme ended on 30 September 2021 have so far proved unfounded. Recent data published by the Insolvency Service shows a continued decline in the number of notified collective redundancies, with figures currently at a seven-year low. It is important to remember that if redundancies are necessary, there are selection and consultation processes that should be followed and the associated costs will need to be factored into cash flow.

Key points to consider in a collective redundancy exercise are outlined in the box below. If redundancies are contemplated, it is important that directors take legal advice to ensure that they are managed correctly, and that in doing so they are complying with their duties as directors.

Possible Redundancies

- If a business is at risk, directors should consider at an early stage whether redundancies may be necessary in order to save the business and, if so, whether collective consultation is required under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).
- Under section 188 TULR(C)A, there is an obligation on the company to inform and consult appropriate representatives of affected employees when 20 or more redundancies are proposed to take effect at one establishment within a period of 90 days or less. The appropriate representatives of affected employees are either trade union representatives or, where no trade union is recognised, employee representatives elected for the purposes of consultation.
- Directors should consider what steps need to be taken to effect collective consultation. Consultation must begin "in good time" and must, in any event, begin "at least" 45 days before the first of the dismissals takes effect where 100 or more redundancies are proposed at one establishment within a 90-day period, or at least 30 days before the first of the dismissals takes effect where 20 to 99 redundancies are proposed.
- There is no requirement to consult collectively where an employer proposes to make fewer than 20 employees redundant at one establishment within a 90-day period, but it is still required to follow a fair procedure (including individual consultation) if it wishes to avoid unfair dismissal claims.
- Under section 193 TULR(C)A, an employer proposing collective redundancies is obliged to notify the Secretary of State in writing of its proposal before giving any notice to terminate an employee's contract of employment on that ground – this notice must be given at least 45 days before the first of the dismissals takes effect in the case of 100 or more redundancies or 30 days for 20 to 99 employees. A copy of the "Advance Notification of Redundancies" form, the HR1, can be obtained here. A failure to comply with this requirement is a criminal offence punishable by a fine. Therefore, it is imperative it is not overlooked. Until a few years ago, we were not aware of any situations where the Secretary of State had taken action for failing to comply with these provisions, but criminal proceedings were commenced in connection with the collapse of the parcel delivery firm City Link Limited in 2015. While the directors were eventually acquitted on the narrow facts of that case, there remains a real risk that directors of companies proposing to make collective redundancies could be prosecuted if they fail to notify the Secretary of State.
- Directors should ensure they keep full and accurate minutes of the board's proposals.
- Companies should also remember that the definition of redundancy for collective consultation purposes is wider than that for unfair dismissal purposes. Collective consultation may, therefore, be triggered in a wider range of circumstances than employers first think – for example, where they are seeking to make changes across the workforce to terms and conditions of employment, but they are unable to agree the changes, so they end up terminating existing contracts and offering continued employment on new terms and conditions.

See also our blog on practical considerations for employers to consider when making redundancies.

Bringing Employees Back to Work

Many employees are still working from home, at least for part of the week. In some cases, this is because of a permanent shift to hybrid working. Our blog series on "What Next for UK Employers" focuses on the issues employers are grappling with as they transition to hybrid working and a return to the workplace.

See also our Quick Guide on Bringing Employees Back to Work, which highlights whether employees can be brought back to work and how they should be paid and treated if they refuse.

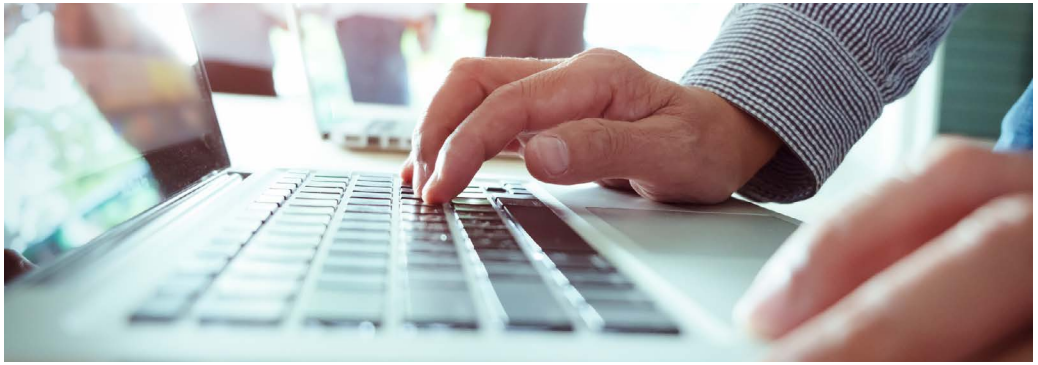
Global HR Audit Tool

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

Directors' Duties and Related Matters, in the Context of COVID-19

Scope and Purpose of This Note

This note summarises the duties that directors of companies incorporated in England and Wales are subject to.



Commentary

Directors' Duties

- Directors have statutory duties that they owe to the company. Each director owes these duties individually. In the exercise of those duties, generally and while the company trades solvently, the directors must act in the way they consider in good faith would be most likely to promote the success of the company for the benefit of its members as a whole. Their statutory duties require that directors also take into account wider factors, such as the environment, employees, the standard of their business conduct, business relationships with suppliers and customers, and any other relevant circumstances.
- If the company becomes insolvent, while these statutory duties are still owed legally to the company, they become subject to other interests to which the directors should have regard, such as those of the creditors of the company. However, the interests of the shareholders are still relevant.
- A breach of any of the statutory duties is actionable by the company, and any right of action could be exercised by an appointed insolvency practitioner should the company later enter a formal insolvency process.
- The law makes no distinction between executive and non-executive directors or shadow directors. All members of the board have the same duties to the company. A director must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may be reasonably expected of a person carrying out the functions carried out by a director in relation to the company and the general knowledge, skill and experience of that director.
- While the interests of shareholders remain relevant during any period in which the company is or may be insolvent, the directors should not be influenced by any power any individual shareholder has to remove or replace the directors (or any of them) and must act in what they consider to be in the best interests of the company's creditors as a whole.

Trading Insolvently/Wrongful Trading

- A company is likely to be insolvent if:
  - It cannot meet all its present and due payment obligations (i.e. it is unable to pay its debts when they fall due), in which case it is likely to be insolvent on a cash flow basis.
  - The value of its assets is less than the amount of its liabilities (taking into account its contingent and prospective liabilities), in which circumstances it is likely to be insolvent on a balance sheet basis.
- Directors should be aware that while there is no statutory prohibition against trading while insolvent, there could be some degree of risk of the directors being required to contribute personally to the assets of the company if they continue to do so.
- If the directors continue to trade in circumstances where they knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, then they may be liable for wrongful trading under section 214 of the Insolvency Act 1986 (IA 1986).
- In such circumstances, the directors could be personally liable for any losses suffered by creditors caused by continued trading unless they take every step possible with a view to minimising those losses that they ought to take.
- The key consideration for directors is, therefore: "Is there a reasonable prospect of avoiding insolvent liquidation?" If there is, the directors will not be liable for "wrongful trading" so long as they hold that belief reasonably, having regard to information available to them and the standards of skill and care expected of them.
- The directors should, among other things, consider whether:
  - The company is presently operating within existing facilities while managing the position with creditors generally
  - The company can meet its obligations to repay monies borrowed under one of the government schemes (Coronavirus Business Interruption Loan Scheme, Coronavirus Large Business Interruption Loan Scheme, COVID Commercial Financing Facility or the Bounce Back Loan Scheme).
  - The company should utilise one or more options under the Pay As You Grow Scheme to repay a Bounce Back Loan (if taken)
  - The company is eligible for grants, any rates relief or discounts being made available by the government
  - The company is eligible to apply for the Recovery Loan Scheme that is available until 30 June 2022
  - The company's financiers have withdrawn any facilities previously made available to it such as overdraft facilities) or have indicated that they will be unable to provide ongoing support
  - The impact on the company's cash flow will be material if the company deferred payment of any VAT for the period from 20 March to 30 June 2020 or the impact on cash flow of any other payments that the business has agreed to defer (note that the company will also have the option to repay that deferred VAT liability in 11 monthly instalments between March 2021 and March 2022)[1]
  - The company is able to take advantage of the extended three year period for which trading losses (made by the company in accounting periods ending between 1 April 2020 and 31 March 2022) can be carried back against previous profits[2]
  - The company is able to apply for a "time to pay" (TTP) arrangement with HMRC to spread its current tax liabilities over a period of three to 12 months[3]
  - Its shareholders have been made aware of any additional working capital requirements and have indicated a willingness to extend facilities to the company
  - There is a realistic prospect that the company can be sold as a going concern at a value sufficient to ensure all creditors will be paid in full, with a return to shareholders, and have instructed advisors to market the business
- The directors should be aware that there may be a risk of challenge to their view if any assumptions that they were making relating to these points prove to be materially inaccurate. If the company subsequently enters into an insolvency process, then the period of trading prior to that formal insolvency process will be reviewed by an insolvency practitioner with the benefit of hindsight. To mitigate against this risk, the following matters should becarefully and regularly reviewed during this period of uncertainty to ensure that so far as possible:
  - Any new credit, supplies and services are necessary and *bona fide* for the purpose of continuing the business
  - Any transactions out of the ordinary course of trade are the subject of particular scrutiny and avoided wherever possible.
  - The company is able to meet payroll for employees.
  - No creditors are specifically preferred (see below) or transactions entered into at an undervalue (see below) unless in good faith and that are critical to ensure the survival of the business and the prospects of achieving a turnaround and/or solvent disposal/restructuring.
  - The directors work to develop expeditiously a credible business plan for the immediate term with as realistic and prudent assumptions as it is possible to make, incorporating reasonably achievable options for a recovery for creditors and (if possible) a return to shareholders.
  - The directors consider what contingency strategies could be put in place to protect the interests of creditors should the new business plan prove unsuccessful (see below).
  - The directors consider the net deficiency position of the company's assets immediately and analyse whether it is believed continued trading will either reduce or increase that deficiency. The directors should keep this under regular review with a comparative analysis of the net deficiency compared against what would be the position if continued trading had not occurred and regularly forecasted for a week in advance. This will provide supporting evidence that losses to the company were constantly under review and corrective action to reduce losses was taken at an early stage. The analysis must show that any continued trading is intended to reduce the net deficiency of the company, but also that it is designed appropriately so as to minimise the risk of loss to individual creditors. This exercise should be further reinforced by circulating the net deficiency analysis to an insolvency practitionereach week for advice in respect of continued trading.
- The board should keep full and accurate minutes of its reviews, decisions (including any dissenting views of individual directors), the reasons for those decisions and the information (particularly financial information that should be attached to the minutes) upon which such decisions are based.

1 Further detail can be found at www.gov.uk/guidance/deferral-of-vat-payments-due-to-coronavirus-covid-19
2 Further detail can be found at www.gov.uk/government/publications/temporary-extension-to-carry-back-of-trading-losses-for-corporation-tax-and-income-tax/temporary-extension-to-carry-back-of-trading-losses-for-corporation-tax-and-income-tax
3 Further detail can be found at www.gov.uk/government/organisations/hm-revenue-customs/contact/coronavirus-covid-19-helpline

Personal Liability

Liability for Tax Debts

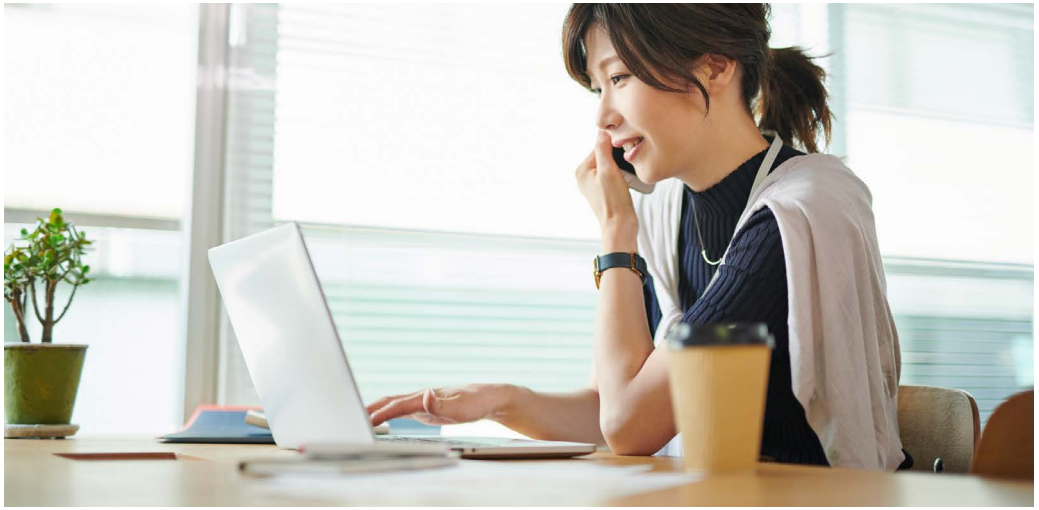
- Directors should be aware that the Finance Act 2020 introduced legislation with the aim of deterring individuals from placing a company into insolvency as a means to evade a company's unpaid tax liabilities. The legislation allows HMRC to issue a notice making directors (including former directors) and shadow directors jointly and severally liable for unpaid tax owed to HMRC by the company.
- The circumstances in which HMRC can issue such a notice are complex but are designed to combat tax avoidance, tax evasion and cases of repeated insolvency and those where the company has been charged a penalty for facilitating tax avoidance or evasion.

Personal Guarantees

- Directors should be aware that any who have given personal guarantees may be personally liable for the company's debts under them.

Dividend Payments

- A dividend may be unlawful to the extent that the dividend is in excess of available distributable profits.
- A dividend may be challengeable as a transaction at an undervalue even if the company has distributable profits if the company subsequently enters insolvency.
- A director who authorises payment of an unlawful dividend may be personally liable to repay or restore funds in respect of losses caused to the company, even if the director is not a shareholder, if they have acted in breach of their duties.



Possible Redundancies

- The directors should consider, at an early stage, whether redundancies to the company's workforce may be necessary in order to save the business, and if so, whether consultation is required pursuant to TULRCA.
- Under section 188 of TULRCA, there is an obligation on the company to inform and consult appropriate representatives of affected employees when 20 or more redundancies are proposed to take effect in a period of 90 days or less. The appropriate representatives of affected employees are either trade union representatives or, where no trade union is recognised, employee representatives elected for the purposes of consultation. The directors should consider what steps will need to be taken to effect collective consultation. Consultation must last for a minimum of 30 days where 20-99 redundancies are proposed (or at least 45 days if 100 or more redundancies are proposed) prior to any dismissals taking effect.
- For completeness, where an employer proposes to dismiss fewer than 20 employees within a 90-day period, there is no requirement to consult collectively with representatives of affected employees. However, an employer is still required to follow a fair procedure if it wishes to avoid unfair dismissals.
- Under section 193 of TULRCA, there is an obligation on the company to notify the Secretary of State (currently via the Department for Business, Enterprise and Industrial Strategy (BEIS)) in writing using Form HR1 in a collective redundancy situation. Again, notification is to be received by BEIS at least 45 days before the first dismissal takes effect where the company is proposing to dismiss 100 or more employees, reduced to at least 30 days for between 20 and 99 employees.
- The directors should keep full and accurate minutes of the board's proposals, and in respect of decisions taken to make any employees redundant, ensure that consideration has been given to the company's obligations to consult collectively and to notify the Secretary of State. In the case of the collapse of parcel delivery firm City Link Limited, a prosecution was initially brought against the directors for not notifying the Secretary of State. While the City Link directors were eventually acquitted on the narrow facts of that case, there is a real risk that directors who are proposing to make redundancies could be prosecuted for failing to notify in the event of any delay in doing so. The directors may even wish to notify the Secretary of State as a protective measure. While it remains to be seen how strictly this requirement will be enforced in the current circumstances, directors should continue to comply with the notification provisions to avoid risk of prosecution.

Contingency Strategy

Directors should immediately consider what steps they should be taking in order to protect the business. A number of businesses in these circumstances will be at risk of trading while insolvent (and may be in real difficulty in assessing the company's financial position, given the impact caused to cash flows, trading and the value of assets). The directors will need to take every step to minimise losses to creditors. This does not necessarily mean an immediate cessation of trading, but a number of businesses are likely to need to restructure to address the changes in supply and demand and we would recommend taking urgent further advice on the options available.

Challengeable Transactions

- **General**

  Certain transactions that take place at a time when a company is insolvent, or becomes insolvent as a result of the transaction, are open to challenge by an appointed insolvency practitioner if the company subsequently enters a formal insolvency procedure.

  Directors, to the extent responsible for such transactions, can be held personally liable for any loss suffered by the company as a result of the transaction, both under IA 1986 and as potential misfeasance.

  Directors should be aware of the grounds for such challenges and, in considering any relevant transactions, determine whether it is appropriate for such transactions to proceed. Any such decisions should be carefully minuted.

- **Transactions at an Undervalue (s 238 IA 1986)**

  A transaction will be at an undervalue if it is a gift by the company, or the company receives no consideration, or the value of the consideration received by the company (in money or money's worth) is significantly less than the value of the consideration given by the company in the transaction.

  If assets are disposed of directors should keep records of the basis on which the disposed asset was valued and why.

  Any such transactions taking place within two years of formal insolvency will be open to challenge, ifthey took place at a time the company was insolvent or became insolvent as a result of the transaction (which is presumed if the transaction was with a connected party).

  However, the transaction will not be subject to challenge if:

  – It was done in good faith for the purpose of carrying on the business

  – The directors had reasonable grounds for believing that it would benefit the company

  Therefore, in considering any asset disposal to raise liquidity (for example) at less than market value, the directors should address specifically whether it is justifiable on the grounds set out above. We recommend specific advice is taken in relation to any relevant transaction, and the decision is carefully minuted at the time.

- **Preferences (s 239 IA 1986)**

  A preference is a transaction with a creditor (or a surety or guarantor of any of the company's liabilities) under which the creditor is placed in a better position than it would have been in if the transaction had not occurred and the company proceeds into insolvent liquidation.

  A preference is open to challenge if the company proceeds into formal insolvency within six months of the transaction in question if the creditor is not a connected party, and within two years if the creditor is connected. This is provided the company was insolvent at the time, or became insolvent as a result of the transaction (which is presumed if the creditor is connected).

  However, in effecting the preference, the company must have been influenced by a desire to give the creditor the preferential position. This is presumed for transactions with connected creditors, but can be rebutted.

  In circumstances where decisions have to be made on a daily basis during cash flow difficulties as to which creditors to pay, preference issues are highly relevant. In this regard, the directors should consider the following:

  – Is the payment necessary for the continued operation of the business and, therefore, necessary to preserve the prospects of a going concern survival and payment in full to creditors, i.e. is it business critical? This may include payment to key suppliers of goods and/or services where such supplies are critical and cannot easily be resourced elsewhere at the speed and price required. Consideration should be given as to whether payment over time for historical debt can be agreed as a condition of continued supply.

  – Is the payment necessary to avert action being taken by the creditor, which may prejudice the survival of the business? If payment is made under threat of winding up proceedings, or legal proceedings that the company cannot defend or afford to defend, or to avoid distraint on goods, it is unlikely to be considered a preference. Evidence of this threat and the company's response should be documented.

- **Directors' Remuneration, Expenses and Employees**

  – As connected creditors of the company, particularly careful attention should be paid to discharging outstanding expenses claims and arrears of remuneration to directors. If the company is continuing to trade on the basis that the directors hold a reasonable belief that the company will avoid insolvent liquidation and pay all creditors in full, it would be questionable if, at the same time, significant arrears of expenses and remuneration are discharged when other creditors are not being paid.

  – Employees, on the other hand, will be a necessary part of continuing to operate the business. As directors under a contract of employment are employees and a critical requirement to ensure the company is managed through this phase, ongoing payments of remuneration and expenses (and general payroll) may be appropriate to ensure continued services to the company. This is subject to any requirement identified in the business plan to effect employee cost reductions, in particular those resulting from the furloughing of employees, to take advantage of the government underwriting 80% of the employment costs of those furloughed employees. Payment of arrears of remuneration and expenses claims may be justifiable in the circumstances, if not to do so would cause genuine financial hardship for the director personally, such that the director could not continue with their responsibilities without seeking an alternative source of income. If such circumstances exist, any such director should consider taking independent advice on their personal position if the directors as a whole consider such payment cannot be made presently within the resources available.

- **Unpaid National Insurance Contributions (NIC)**
  - If a company does not pay the correct amount of NIC, HMRC has the power under s121C of the Social Security Administration Act 1992 to issue Personal Liability Notices to recover the unpaid NIC plus interest and penalties from the directors or any other officers personally. Before issuing a notice, HMRC must be satisfied on the balance of probabilities that the failure to pay was due to fraud or neglect, judged by an objective test.
  - HMRC will consider issuing a notice where, in the face of persistent failure to pay NIC, a company made significant and/or regular payments to other creditors, connected persons or companies, or in the form of directors' salaries.
- **Offences Under the IA 1986**

The directors should be aware that since 1 October 2015, the right to bring claims for certain offences under the IA 1986, including Fraudulent Trading and Wrongful Trading, has been extended to an administrator and/or can now be assigned by an appointed insolvency practitioner (i.e. either a liquidator or administrator). For the sake of completeness, we set out below a summary of the other main offences that will be investigated by the appointed insolvency practitioner if the company proceeds into formal insolvency:

Fraudulent Trading: (s213 IA 1986)

- It is an offence to knowingly carry on the business of a company with intent to defraud creditors and any person who does so may be ordered by the court to make such contributions to the company's assets as it thinks fit.

Misfeasance or Breach of Fiduciary Duty: (s212 IA 1986)

- It is an offence for a director of a company to have misapplied or retained or become accountable for any money or other property of the company or been guilty of an misfeasance or breach of fiduciary duty in relation to the company, allowing the court to order the director to repay, restore or account for the money or property together with interest or contribute to the company's assets by way of compensation.

Restrictions on the Use of Company Names: (s 216 IA 1986)

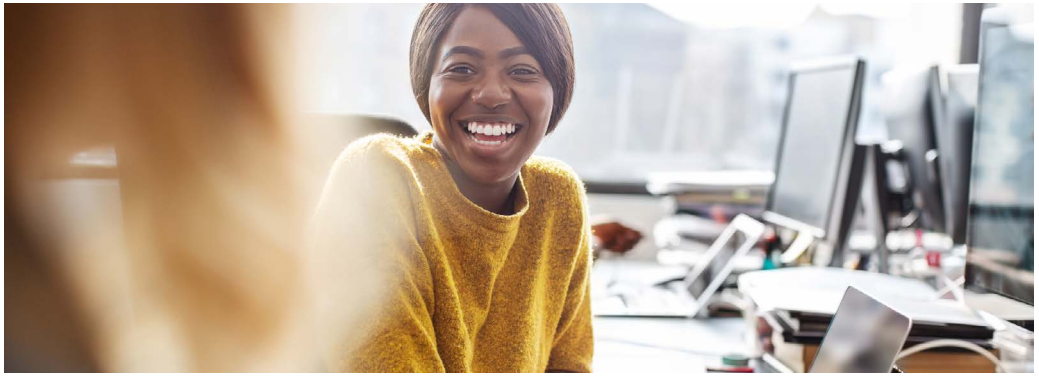
- In the event that the directors wish to consider a management buyout from insolvency practitioners, they should be aware that it is an offence for a director or shadow director of a liquidated company to be involved either directly or indirectly with a new company with a similar name for a period of five years beginning with the day on which the old company went into liquidation. If a director breaches this provision, the penalties include imprisonment, a fine or both, together with personal liability for the debts of the new company.
- However, there are specific circumstances in which the above section will not apply and we can advise you further if required.

Directors Disqualification

- Where a company proceeds into formal insolvency, the appointed insolvency practitioner has a duty to report to the Secretary of State on the conduct of each of the directors and former directors of the company. The Secretary of State must then decide whether to bring proceedings against the directors to disqualify any of them from acting as a director or in the promotion, formation or management of any company on the grounds of unfitness, for between two to 15 years.
- The directors should, therefore, be aware that should it not prove possible ultimately to effect a solvent turnaround and/or disposal, their conduct as directors (particularly at this time and going forward) will be subject to security.
- It is, therefore, critically important for this reason, and to deal with risks in relation to all the matters raised in this note, that the directors regularly (i.e. at least weekly, and preferably every few days during the pandemic) review the ongoing financial position and progress of the business plan, any relevant transactions for which particular consideration should be given, and its continuing belief in the appropriateness of continuing trading (or continuing to "mothball", as applicable).
- All such reviews should be carefully minuted, to include the information available to the directors, matters discussed, all views expressed and considered, any decisions reached and the rationale for such decisions having regard to the points and recommendations made in this note. The directors should also keep a notebook of daily discussions and matters, so that there is always a contemporaneous note to support their actions in the conduct of the business during this time.

Deposits and Trust Accounts

- There is no case law or statutory authority that states, in the company's present circumstances, the directors are under a duty to protect deposit creditors by the operation of a trust account to "ring-fence" deposit monies.
- By contrast, there is case law authority that highlights the risk of a preference in creating a trust for such creditors and using company funds to place monies into a trust account for this purpose. Further, within the context of director disqualification, the courts have held that where directors are pursuing a reasonable prospect of avoiding an insolvent liquidation and a full return to all creditors, there is no legal obligation to depart from normal trading practice so as specifically to protect deposits and pre-payments by a trust account.
- Where there is uncertainty regarding the current position, we do not believe the directors could be criticised for seeking to protect deposits received going forward by the operation of a properly constituted trust account, but would make the following comments:
  - At the time of receipt of the deposit, it must be paid on an express trust obligation (or on terms that evidence a trust) such that the deposit is properly held on trust. This would require clear terms and conditions with such customers to this effect (which we would be happy to assist with) and making sure operational practices are in place to ensure those terms apply. Even if deposits have been received, and placed in a separate account, there would remain a preference risk if the account is not properly constituted as a trust account to avoid the fund being regarded as an asset of the company.
  - Placing deposits on trust would reduce the working capital available to the company with which to pursue a recovery strategy that protects all creditors and a return for shareholders, thereby shortening the time available to achieve this.
  - If, in light of these comments, the directors elect not to proceed with arrangements for placing deposits on trust, we would nevertheless recommend that an account be set up or kept open (as applicable) for that purpose should it prove necessary in due course. In the meantime, the directors should take care not to actively encourage higher levels of deposits than would ordinarily be experienced to avoid any criticism in that regard.
- Should the company be at risk of trading while insolvent, we believe the courts are likely to consider placing deposits on trust as a step that "ought to be taken" to minimise losses to creditors.



Defined Benefit Pension Schemes

The UK Pensions Regulator (TPR) has far reaching powers, which are particularly evident when there is a restructuring of a sponsoring employer of a defined benefit (for example, final salary) pension scheme. In certain circumstances, directors could also incur liability. We have summarised below the key powers that could potentially impact a corporate recovery process. Directors should take appropriate professional advice before looking to restructure an employer with a defined benefit pension scheme.

- **Anti-avoidance Powers**

  Certain acts or omissions can result in TPR exercising its power to require a person that is connected or associated with an employer of a defined benefit pension scheme to make a payment into the pension scheme, where TPR considers that it is reasonable to do so. This power could capture other group companies and also directors in a personal capacity and is a measure that should be taken into account when restructuring a business. Failure to comply with a contribution notice could incur a criminal penalty of an unlimited fine, or a financial penalty of up to £1 million. Where a scheme employer is under resourced, TPR also has the power, in certain circumstances, to require another group company to provide support to the pension scheme, for example by way of guarantee or security.

- **Sanctions for "avoidance of an employer debt" or "conduct risking accrued scheme benefits"**

  Controversially, anybody involved with the running of a defined benefit pension scheme or the operation of an employer (e.g. company director) could be caught by two new offences of "avoidance of an employer debt" and "conduct risking accrued scheme benefits" if they do not have a reasonable excuse for their actions. These offences were introduced by the Pension Schemes Act 2021 and are not limited to those who are connected or associated with a scheme employer, in the way that a contribution notice is.

  The offence of conduct risking accrued scheme benefits includes any act or failure to act that detrimentally affects in a material way the likelihood of accrued scheme benefits being received where the person knew or ought to have known that such a course of action would be likely to have that effect. While the offence of avoidance of an employer debt could be said to be fault based, the offence of conduct risking accrued scheme benefits is not fault based. There does not have to be any intention to risk accrued pension scheme benefits in order for a person to be caught by this offence. The penalty for being found guilty of either of these offences is up to seven years in prison or an unlimited fine. Alternatively, TPR could issue a financial penalty of up to £1 million.

- **Notifiable Events**

  Certain transactions constitute "notifiable events" that must be notified to TPR after the event occurs. From April 2022, there will be new "super" notifiable events, in respect of which separate requirements will apply, such as a requirement to notify TPR and the trustees of a defined benefit pension scheme at certain points before completion of a transaction. There will also be a requirement to state the likely impact of the transaction on the pension scheme and whether compensation has been offered to the pension scheme trustees to take account of that likely impact. Failure to comply could incur a financial penalty of up to £1 million.

- **New Financial Penalties Regime**

  The Pension Schemes Act 2021 introduced a new financial penalties regime for certain acts/failures to act, including failure to make a notifiable event submission, and/or providing TPR or pension scheme trustees with false or misleading information. Directors as well as corporates can be caught by these sanctions, which could result in a fine of up to £1 million.

Managing HMRC

On 30 June 2021, HMRC published a policy paper setting out its approach to debt enforcement post-COVID-19. The paper states that HMRC has restarted its debt collection work and will be getting in touch with customers who appear to have outstanding tax liabilities. However, the paper also assures taxpayers that HMRC will "take an understanding and supportive approach":

"Our message to customers is simple: if you can pay your taxes then you should do so – but if you're struggling, we want to work with you to agree a plan based on your financial position."

HMRC will initially contact relevant businesses by phone, post or text message to better understand their position and, if necessary, agree a way to proceed. Businesses contacted in this way should respond to these communications as soon, and as fully, as possible to assist HMRC to identify whether the business is one that needs support and how best that support can be provided. Failure to respond or engage heightens a risk of HMRC concluding that the business is unable, or simply refusing, to pay.

HMRC have said that they will work with businesses to work out the best way of paying the tax debt as quickly as possible, and in a manner that is affordable for them. This may include:

1. Time to pay arrangements (see further below)
2. Short-term deferrals (i.e. nothing would need to be paid for a set period of time, and no further action to collect the tax debt would be taken until that time has lapsed)
3. Discussion regarding other support available (e.g. bounce back loans)

Early engagement with HMRC will be crucial. If businesses refuse to respond to initial contact, HMRC will escalate matters and may conduct a site visit at the business' address in an effort to ensure the business is aware of the debt, assess any support required and agree a suitable way to proceed to ensure the tax liability is settled.

Where businesses have failed to contact HMRC or refused to acknowledge or engage with HMRC's attempts to contact them, HMRC may start the process of collecting the debt using their extensive enforcement powers. These powers include taking control of goods, summary warrants and court action (including insolvency proceedings). HMRC has reconfirmed that insolvency proceedings will only be used as a last resort and generally only where businesses have been found to be fraudulent, deliberately non-compliant, or where they are continuing to accrue debt with no realistic prospect of being able to settle their existing debts.

While HMRC will take a "cautious approach" to collecting debts, it is clear that businesses should proactively and candidly engage with HMRC (and should do so as soon as possible) to protect themselves against avoidable recovery proceedings being initiated.

What Is TTP?

HMRC expects all UK taxpayers to pay the tax they owe, in full and on time, whenever they are able to do so. However, in circumstances where a taxpayer is unable to meet its liability, HMRC is able to exercise a discretion to allow the taxpayer to pay tax after the due date, over an agreed period, and without incurring late payment penalties. This is known as "Time to Pay" (TTP). The primary purpose of TTP is to assist HMRC to collect taxes due efficiently and effectively. It is worth emphasising that there is no right for taxpayers to be granted TTP.

It is important to establish that HMRC is bound to operate TTP in a particular way and in accordance with its published guidance.

TTP arrangements help HMRC collect tax effectively. They recognise that in certain circumstances, outside of the control of businesses, a tax deadline can lead to commercial difficulties. TTP is intended to allow viable businesses, which genuinely cannot pay tax on the date it is due, to pay it over a realistic period of time. Most arrangements will last for a period of months and will involve regular monthly payments. They rarely exceed 12 months and will only do so in exceptional circumstances.

Who Is Eligible for TTP?

There are no fixed rules. The same principles should be applied to all taxpayers, with each case being considered on its merits and the level of risk to the Exchequer (that is, of non-payment of tax). As a result, any TTP arrangement should be agreed "on a case-by-case basis and … tailored to individual circumstances and liabilities".

Generally, larger tax liabilities, requests for longer TTP periods and a questionable compliance record are likely to attract greater due diligence, information requests and investigation by HMRC. The business' previous compliance record is likely to be especially important in relation to the success or otherwise of obtaining TTP.

Where a business has a good record, and has made tax payments on time, HMRC is more likely to consider a request for TTP to be genuine. In contrast, a poor record, previous late payments and repeat applications will result in closer scrutiny. Even in COVID-19 situations, HMRC is likely to view previous payment problems as symptomatic of deeper problems and will be less likely to agree TTP.

Making a successful application for TTP depends on the business being able to show it is:

- In genuine difficulty
- Unable to pay its tax on the due date
- Able to pay if HMRC allowed more time – this necessitates not only proving that it has (or will have) the means to meet the scheduled TTP payments, but also that it can meet any other tax liabilities that will (or may) become due during the TTP period

HMRC will seek to make the TTP period as short as possible. Importantly, in light of improving post-COVID-19 trading conditions, where a business' ability to pay improves during the TTP period, it has an obligation to contact HMRC to increase its payments and clear the debt more quickly.

Briefly put, the business must be ready to engage and be fully prepared to explain and evidence the situation in which it finds itself. It should be willing to enter into reasonable negotiations with HMRC in relation to the terms and conditions of the TTP arrangement, including in relation to the amount covered and the overall time period involved.

Business Viability – Cannot Pay or Will Not Pay?

TTP is only available to viable businesses. Before agreeing to TTP, HMRC will try to understand why a business cannot pay (in COVID-19 situations, this will be pretty straightforward) and, just as importantly, what it is doing to address this in the future. HMRC will assess whether the business' plans (whether to reduce costs or increase sales) are realistic in the context of the size of the tax debt relative to the business' turnover. This will be the benchmark against which any TTP agreement will be monitored.

Critically, the TTP arrangement must be reasonable. Neither the business nor HMRC will want to enter a TTP arrangement that commits the business to a repayment schedule that it cannot afford such that it results in further default. Equally important, to HMRC at least, is that the business does not request a period that is longer than absolutely necessary to clear the debt.In deciding whether a business is eligible for a TTP arrangement, HMRC will draw a distinction between:

- **Eligible "cannot pay" businesses** – That is, those that want to make the payment but currently do not have the means to do so, or, although they do, making that payment could force them out of business (because other liabilities could not be met). HMRC will expect businesses to have explored accessing new or increased borrowing facilities before approaching HMRC for a TTP arrangement. It should be noted that wanting to pay, however genuinely held, is not enough: a business that cannot pay, or cannot satisfy HMRC that it has a realistic plan to ensure it can afford its future liabilities, will be refused TTP.
- **Ineligible "will not pay" businesses** – That is, those that can, but will not, pay the tax. HMRC will refuse TTP and is likely to take swift enforcement action in such cases.

HMRC will be looking to the business to prove that it is eligible for TTP. Therefore, when preparing to apply, the business should be ready to provide HMRC with as much information as is relevant to support the submission. This will ideally include providing:

- **Detailed financial information** – this should include recent management accounts and (even more importantly) future budgets and cash flow expectations.
- **Details of the steps the business has taken to seek support from other stakeholders** – this might include outlining discussions the business has had concerning new or additional financial support from existing or new lenders, current shareholders, management and any other forms of support (e.g. extending credit or relaxing payment terms) from other creditors and suppliers.

Early engagement, followed by regular and transparent communications, with HMRC by the business are also imperative, especially in situations where the facts and particular circumstances are not entirely straightforward. As might be expected, many businesses affected by COVID-19 are contacting HMRC to discuss their tax affairs and to seek a TTP arrangement. This has created delay in the system, which will be exacerbated by complex situations that HMRC wants to examine more closely.

Monitoring, Review and Enforcement

Even if a TTP arrangement is in place, businesses should be aware that HMRC will actively monitor and review the agreement to ensure compliance. HMRC will be looking to confirm that:

- The agreed payments are being made as agreed on time
- Other tax liabilities are being met
- Tax administration and compliance obligations are being satisfied (i.e. computations and returns are being submitted)

At the same time, HMRC is likely to be using the data it collects to identify any change in the business' ability to pay the tax due.

Nonetheless, once it agrees to it, HMRC is bound by a TTP agreement and businesses should take a degree of comfort from the fact that, provided they continue to abide by the terms and conditions of TTP, HMRC cannot seek to unilaterally accelerate recovery of the tax debt.

That said, HMRC will assert its right to withdraw from (i.e. cancel) a TTP arrangement in the following specific circumstances:

- New facts come to light that mean TTP is no longer appropriate or available in the circumstances, or mean recovery of the tax due is at increased risk
- The business has misled or lied to HMRC
- The business defaults on the terms or conditions of the arrangement

In cases where HMRC believes a business is in breach of a TTP agreement, its first course of action will be to contact the business by issuing a reminder letter. In cases where an instalment payment has been missed, the reminder letter will set out the amount of tax that is now overdue, demand immediate payment and explain that failing to comply will mean the TTP arrangement will be cancelled.

If the business fails to respond, HMRC will issue a cancellation letter. At that point, the TTP arrangement falls away and HMRC will demand full payment of all tax amounts overdue. The chance of agreeing a new TTP arrangement at that point is remote and, if the tax is not paid, HMRC will initiate enforcement proceedings utilising all and any of the (growing number of) powers at its disposal.

It is worth noting that the restrictions on winding-up petitions (introduced as a direct result of the pressures on business arising from COVID-19) remain in place until 30 September 2021. The moratorium is being observed by HMRC and so provides a layer of protection against any immediate HMRC action. However, when the restrictions lift businesses are best advised to ensure that they proactively manage their tax affairs, ensuring they are up-to-date with payments and submissions, processes are efficient and effective, and everything is well documented.

Time to Pay?

TTP is a valuable formal procedure that will protect viable, compliant businesses facing genuine difficulties in meeting their tax liabilities on time. The protection a TTP arrangement affords can provide a business with critical time to plan for recovery without tax liabilities weighing on its cash flow.

However, it is also important to appreciate that TTP merely defers the point at which the tax is payable; the liability does not go away and will instead simply fall due under the TTP schedule. In addition, new tax liabilities and compliance obligations will continue to arise.

Entering into a formal arrangement with HMRC for the payment of overdue tax provides certainty, but also brings additional compliance obligations and opens the business to greater scrutiny from HMRC. A TTP arrangement should not be sought lightly and, once it is obtained and agreed, a business must make every effort to comply with its terms and conditions. It is crucially important that businesses do not overpromise under TTP, continue to monitor their own compliance and promptly communicate any change in circumstance that could affect the agreement (positively or negatively) to HMRC.

HMRC examines requests for TTP carefully and will be monitoring a business' compliance with an agreement equally carefully. It is worth remembering that the primary purpose of HMRC is to collect taxes due and protect the Exchequer. In appropriate cases, HMRC uses TTP as a tool to help it achieve that aim. However, where there is a breach of a TTP agreement, HMRC will not shy away from exercising its enforcement powers to recover the tax owed. In addition, as the extraordinary challenges presented by COVID-19 start to recede, one might expect HMRC to adopt an increasingly aggressive stance on enforcement and revenue recovery.

Summary of Government Financial Support to Businesses

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

Financing Facility Support United Kingdom

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	Availability
Recovery Loan Scheme ('RLS')	• This replaced the previous COVID-19 loan schemes when they closed. • The loans are available through a network of accredited lenders. • Ensures businesses of any size can continue to access loans and other finance up to £10 million per business. • The finance can be used for any legitimate business purpose, including growth and investment. • The government guarantees 80% of the finance to the lender, to ensure they continue to have the confidence to lend to businesses. • Types of finance available: – Term loans and overdrafts between £25,001 and £10 million per business. – Invoice finance and asset finance between £1,000 and £10 million per business. • Finance terms are up to six years for term loans and asset finance facilities. For overdrafts and invoice facilities, up to three years. • No personal guarantees will be taken on facilities up to £250,000, and a borrower's principal private residence cannot be taken as security.	• Trading in the UK. • Is viable, or would be viable were it not for the pandemic. • Has been impacted by the COVID-19 pandemic. • Is not in collective insolvency proceedings. • Businesses that have received support under the previous COVID-19 guaranteed loan schemes will still be eligible to access finance under the scheme, if they meet the other criteria.	• Please see column to the left. • Businesses which cannot apply: – Banks, building societies, insurers and reinsurers (but not insurance brokers); – Public-sector bodies; – State-funded primary and secondary schools	• Businesses can find the list of accredited lenders and details of how to apply on the British Business Bank website.	• The scheme launched on 6 April and has been extended to June 2022

Other Financial Support

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Employment measures:					
Statutory Sick Pay Rebate Scheme (SSP Rebate Scheme)	• Reintroduction of the SSP Rebate Scheme as a temporary measure to support employers facing heightened levels of sickness absence due to Covid-19. • Eligible employers will be able to claim the costs for up to two weeks' statutory sick pay (SSP) per eligible employee off work due to COVID-19. The two-week limit will be reset, so eligible employers will be able to claim regardless of whether they claimed under the previous scheme for the eligible employee	• Employers must: – be UK based; – be SMEs (i.e. employers with fewer than 250 employees); – have a PAYE payroll system as of 30 November 2021; and – have already paid the eligible employees' Covid-19 SSP.	• Employers must have fewer than 250 employees determined by the number of people employed as of 30 November 2021. • The scheme covers period of sickness on or from 21 December 2021. • More guidance is expected to be published later in January 2022.	• Employers will be able to make a claim through HMRC here. • Records of all SSP will need to be kept for 3 years after the date of payment of the claim, including: the reason why an employee could not work, details of each period when the employee was off sick including start and end dates, details of the SSP qualifying days when the employee could not work, and the National Insurance numbers of all employees SSP has been paid to.	• The scheme will be reintroduced from mid-January 2022.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Tax measures:					
Temporary Extension To Carry Back Of Trading Losses	• Temporary extension to carry back trading losses for Corporation Tax for incorporated businesses (and Income Tax for unincorporated businesses). • Subject to certain caps, businesses will be able to carry trading losses arising during company accounting periods ending in the period 1 April 2020 to 31 March 2022 (and, for unincorporated businesses, during tax years 2020-21 and 2021-22) back for relief against profits of earlier years to get a repayment of tax paid. The normal restriction on the carry back of trading losses will be extended from the current one year entitlement to a period of three years. Losses will need to be carried back and utilized against later years first.	• All companies (unincorporated businesses) making losses from carrying on trades (or professions or vocations) during the relevant two year period.	• No formal criteria other than making trading losses during the relevant two year period. However, certain caps apply to the amount of relief available. • The amount of trading losses that can be carried back to the preceding year remains unlimited. However, after carrying losses back to the immediately preceding year, a maximum of £2 million of unused losses will be available for carry back under the extension against profits of the same trade to the earlier two years. The £2 million limit applies separately to the unused losses of each 12 month period during the extension. In corporate group scenarios, the £2 million cap will be subject to a group-level limit that, in certain circumstances, will require the cap to be apportioned between group companies.	• There is no special application process. Businesses should claim the extended loss carry back in the course of completing their normal business tax computations and returns. • However, claims below a *de minimis* limit of £200,000 may be made outside a return. This means that any stand-alone (or group) company with losses capable of providing relief up to a maximum of £200,000 of losses, may make a claim in respect of a relevant accounting period without having to wait to submit its company tax return. For the avoidance of doubt, any stand-alone (or group) company wishing to make a claim exceeding £200,000 must make the claim in their company tax return.	• The extension applies to trading losses made by companies in accounting periods ending between 1 April 2020 and 31 March 2022 (and by unincorporated businesses in tax years 2020 to 2021 and 2021 to 2022).

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Temporary Reduced Rate of VAT for Hospitality, Holiday Accommodation and Attractions	• On 8 July 2020, the government announced that it would introduce a temporary 5% reduced rate of VAT for certain supplies of hospitality, hotel and holiday accommodation, and admissions to certain attractions. • At Budget 2021, the government extended the temporary reduced rate until 30 September 2021. • The temporary reduced rate applied to supplies that were made between 15 July 2020 and 30 September 2021. • From 1 October 2021, a new temporary rate of 12.5% applied and will run until 31 March 2022. • From 1 April 2022, affected supplies will revert to the standard (20%) rate of VAT.	• The following supplies will benefit from the temporary reduced rates of VAT: – Food and non-alcoholic beverages sold for on-premises consumption, for example, in restaurants, cafes and pubs – Hot takeaway food and hot takeaway non-alcoholic beverages – Sleeping accommodation in hotels or similar establishments, holiday accommodation, pitch fees for caravans and tents, and associated facilities – Admissions to the following attractions that are not already eligible for the cultural VAT exemption such as: - theatres - circuses - fairs - amusement parks - concerts - museums - zoos - cinemas - exhibitions - similar cultural events and facilities	• Being an organisation that make supplies of hospitality, hotel and holiday accommodation or provides admission to certain attractions.	• No formal application. • Operation through Normal VAT returns and compliance. • Affected businesses should exercise care when accounting for supplies that straddle the periods with different rates. • Special rules may apply to businesses that use any one of the Flat Rate Scheme; Tour Operators Margin Scheme (TOMS); or, a bespoke retail scheme.	• The temporary 5% reduced rate of VAT applied until 30 September 2021. • The temporary 12.5% reduced rate of VAT now applies until 31 March 2022.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Support for Businesses Paying Tax	• Support made available for businesses and self-employed people in financial distress with their outstanding tax liabilities. • Support is provided through HMRC's Time to Pay service. • This allows businesses and individuals to enter an agreement to pay outstanding tax liabilities in instalments, over a period of time, with the possibility of delaying the first payment for up to three months.	• All arrangements are to be agreed on a case-by-case basis. • Arrangements will be tailored to individual circumstances and liabilities.	• Businesses and self-employed people in financial distress with outstanding tax liabilities.	• Calls can be to HMRC's dedicated COVID-19 helpline on 0800 024 1222 (Monday to Friday 8am to 4pm).	• Calls can be made as of now.
Expanded Business Rates Retail Discount (Retail, hospitality and leisure sectors)	• A business rates discount relief for retail, hospitality and leisure businesses for 2021/22 tax years. • For 2021/22, the discount for eligible businesses is/were: – From 1 April 2021 to 30 June 2021, 100% (without any cash cap); and – - From 1 July 2021 to 31 March 2022, 66% (capped at £2 million per business where the business occupies a property that was required on 5 January 2021, or, in all other cases, capped at £105,000 per business).	• Retail, hospitality and leisure businesses. • Properties that will benefit from the relief will be occupied properties wholly/mainly used as: shops, restaurants, cafes, drinking establishments, cinemas, live music venues, properties for assembly and leisure, hotels, guest and boarding premises, and self-catering accommodation.	• Eligibility for the relief is related to occupation of a rateable property by an eligible business. • Business must be based in England. • Similar schemes are available in Scotland, Wales and Northern Ireland.	• No action to be taken. Local councils will apply the discount automatically. • A business rates calculator is available here to calculate the charge saved.	• The Business Rate Relief is currently available in accordance with local schemes operated by local authorities.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Business Rates Relief Fund	• **Note**: This is not yet available • A nationwide fund of £1.5 billion to be introduced for businesses outside the retail, hospitality and leisure sectors that have been adversely affected by COVID-19. • The pot will be allocated to local authorities based on the stock of properties in the area whose sectors have been affected by COVID-19. • The government will also introduce legislation to prevent COVID-19 related "material change of circumstance" (MCC) appeals to reduce business rates. As a result, market-wide economic changes to property values (including from COVID-19) will only be considered at general rates revaluations.	• All rates paying businesses in England, outside of the retail, hospitality and leisure sectors, that have been adversely affected by COVID-19.	• Relief will be targeted at sectors that have suffered most economically. It will not be based on falls in property values. • Businesses must be based in England. • Similar schemes are available in Scotland, Wales and Northern Ireland.	• Businesses will need to apply to their local authority. • Local authorities will then use their knowledge of local businesses and the local economy to make awards.	• The Business Rate Relief Fund is not yet available, but will be available once the MCC legislation has passed and local authorities have set up local relief schemes. • No decisions on the exact distribution have been made yet.

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Grants:					
Omicron Hospitality and Leisure Grant Scheme (OHLG)	• A grant scheme to support businesses in England experiencing difficulties as a result of the Omicron variant, and the additional impact of staff absences and reduced customer demand.	• Must be a solvent business and ratepayer in the hospitality and leisure sector in – e.g. a pub; hotel; restaurant; bar; cinema; or amusement park. • Businesses that are in administration, insolvent or where a striking off notice has been made, are not eligible for funding.	• Businesses eligible for grants are those that offer in-person services, where the main service and activity takes place in a fixed rate-paying premises, in the hospitality, leisure and accommodation sectors. Non-in person businesses might be eligible for ARG assistance (please see below). • Eligibility will be determined with reference to the rateable value (RV) of the eligible premises. Businesses with: – RV of £0 to £15,000 will be eligible for a £2,700 grant – RV between £15,000 and £51,000 will be eligible for a £4,000 grant – RV over £51,000 will be eligible for a £6,000 grant • Businesses must be based in England, although scheme is likely to be replicated by the Devolved Administration in Scotland, Wales and Northern Ireland under the Barnet formula.	• Applications are made through the business's local councils.	• Applications can be made now • Contact your local authority's website to find out what is available and how to apply

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
Additional Restrictions Grant scheme (ARG)	• The Additional Restrictions Grant (ARG) provides local councils with grant funding to support businesses that are severely impacted by restrictions, and that may or may not be in the business rates system or eligible under the OHLG scheme. • Local councils can determine which businesses to support and determine the amount of funding from the ARG scheme. • The new domestic subsidy allowance for the COVID-19 business support grant took effect on 4 March 2021. • This scheme is covered by three subsidy allowances: – Small Amounts of Financial Assistance Allowance- you're allowed up to £335,000 (subject to exchange rates) over any period of three years – COVID-19 Business Grant Allowance- you are allowed up to £1.6 million – COVID-19 Business Grant Special Allowance, If a company has reached its limits under the Small Amounts of Financial Assistance Allowance and COVID-19 Business Grant Allowance, a business may be able to access a further allowance of funding under these scheme rules of up to £9 million, provided certain conditions are met • Grants under these three allowances can be combined for a potential total allowance of up to £10,935,000 (subject to exchange rates). • The government announced on 21 December 2021 that the ARG fund will be topped up by £102 million – ARG top-up will be prioritised for those Local Authorities who have distributed their existing allocation	• Local councils are encouraged to support: – Businesses from all sectors that may have been severely impacted by restrictions but were not eligible for the Restart Grant scheme (now closed), including those that do not pay business rates. – Businesses from sectors that had to remain closed or have been severely impacted by the extended restrictions, even if those businesses were in receipt of Restart Grants. This may include the travel and tourism sector, wedding industries, nightclubs, theatres, events industries, wholesalers, English language schools, breweries, freelance and mobile businesses including caterers, events, hair, beauty and wedding related businesses • The grants are discretionary. Local Authorities will determine which businesses are eligible for grants from this additional funding. • Local Authorities will also have discretion on how, and how much, funding will be provided. However, the fund is intended to support business who are impacted by Covid-19 but may not be eligible for the hospitality and leisure grant.	• Businesses that cannot get funding include those that: – Are in administration, insolvent, or have been struck off the Companies House register. – Have exceeded the permitted subsidy limit	• Applications are made through the business's local councils.	• Applications can be made now • Contact your local authority's website to find out what is available and how to apply • Final application and payment dates will be confirmed in guidance published by BEIS

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	When will the finance be available?
	– COVID-19 Business Grant Allowance- you're allowed up to £1.6m – COVID-19 Business Grant Special Allowance- if a company has reached its limits under the Small Amounts of Financial Assistance Allowance and COVID-19 Business Grant Allowance, a business may be able to access a further allowance of funding under these scheme rules of up to £9m, provided certain conditions are met • Grants under these 3 allowances can be combined for a potential total allowance of up to £10,935,000 (subject to exchange rates).	• Businesses from sectors that had to remain closed or have been severely impacted by the extended restrictions, even if those businesses were in receipt of Restart Grants. This may include the travel and tourism sector, wedding industries, nightclubs, theatres, events industries, wholesalers, English language schools, breweries, freelance and mobile businesses including caterers, events, hair, beauty and wedding related businesses • The grants are discretionary. Local Authorities will determine which businesses are eligible for grants from this additional funding. • Local Authorities will also have discretion on how, and how much, funding will be provided.			
Other measures:					
Insurance	• Insurance claims for pandemic related losses.	• Businesses with insurance cover for pandemics and/or government-ordered closure.	• Businesses will need to check the terms and conditions of their specific policies.	• Businesses will need to contact their insurance providers.	• Claims can be made as of now.

Assessing Viability and Business Risk

Key Points for UK Businesses to Consider

The purpose of this quick guide is to help organisations focus on key issues that impact viability and sustainability

Cash Flow and Financing

Directors should prepare new cash flow forecasts for best and worst case scenarios (i.e. further restrictions impacting the business and economy), considering any expected changes to supply and demand, any changes to operational costs and factoring in any deferrals of historic liabilities, and any new debt which has been taken on. Forecasts and projections should be continually reviewed and updated to reflect changes in the market, and lessons learnt.

Cash Flow Pressures

Repayment of borrowing

- Aggressive debt recovery
- Use of government schemes (e.g. CBILS, CLBILS, Future Fund, etc.?)
- Other additional borrowing from existing lenders
- When and how will payments be met?
- Is there a need to restructure debt?

Rent

- Rent holiday/reduction agreed?
- Ability to meet future (and missed) rent payments
- Restructure future rent turnover or similar arrangements
- Dealing with rent arrears – negotiation or arbitration

Deferred payments

- Paying deferred VAT payments/rent/suppliers
- Meeting tax payments under time to pay agreements

Restrictions

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

Forbearance

- Repaying existing lenders – forbearance may end and payments need to resume
- Availability of government support
- Impact of temporary rules governing the presentation of winding up petitions relaxing (and lifting after 31 March 2022) and on forfeiture lifting after 25 March 2022

Suppliers

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

Employees

- Is a redundancy programme going to be necessary? If so, when does any consultation need to start?
- Payroll funding following end of government support and changes to employee requirements as a consequence of changes to the business

Debtors

- Have debtor days slipped during COVID-19?
- What action can/should be taken to address any potential bad debt issues?
- Reduced credit terms/payment on delivery/increased prices/ credit insurance

Supply and Demand

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

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

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

Termination of existing contracts
- *Force majeure*
- Material adverse change
- Termination rights

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

Supply → **Company** → **Demand**

Shape of demand
- Has demand returned? Increased?

End-user/customer
- Decrease in consumer confidence
- Cash-strapped customers

Changes to product and offering
- Changes to consumer habits (e.g. e-commerce and importance of home delivery)
- Increase in appetite for online suppliers and delivery services

Pricing and payment terms
- Review pricing structure, are pre-COVID-19 margins still achievable?
- Consider credit terms and customer insolvency risk
- Is credit insurance still available?
- Is invoice discounting an option to improve working capital?

Government/Other Restrictions
- Impact of restrictions e.g. self-isolation and reduced operating capacity

Employee Considerations

Business requirement/need
- Does the business need the same number of employees in light of any changes to supply/demand/business model? Are redundancies necessary?
- Re-allocation of resource according to business plan

Availability/costs
- Impact on employees (fear of infection, childcare responsibilities or self-isolation etc.)
- Will there be any permanent changes to working patterns/ habits that impact operational costs? (i.e. increase in homeworking and decrease in office space)
- Psychological support – assisting employees to adapt

Long-term changes to contracts and remuneration
- Flexible remuneration plans
- Agree reductions in salary and bonuses

Self isolation rules
- Impact of employees quarantining when visiting other countries (costs, time, flexible working arrangements, use of sick leave or unpaid leave etc)
- Policy for COVID-19 within the household and impact on staff availability
- Cross-train employees to perform essential functions when others are absent
- Encourage vaccination

Operational Costs

Licences

- Renewals/periodic fees payable to ensure licence continuation
- Inability and capacity of named individuals/licence holders/trained individuals to carry out role (e.g. long-term absences, sickness, self isolation)
- Licence amendments to reflect changed trading arrangements (e.g. changes to hours or activities)

Increased health and safety costs and compliance with social distancing

- Strategies for managing COVID-19 risk and any government restrictions – screens, changing shift patterns, use of different parts of premises, monitoring symptoms, etc
- Travel to work and transport
- Sanitisation and cleaning programmes

Changes in operational practices and procedure

- Changes to real estate footprint to accommodate changes to employee and working practices (e.g. reduced office space or larger warehouses)
- Investment in technological capabilities to accommodate changes
- Greater automation of processes (or parts of processes)

Opportunities and Lessons Learnt from COVID-19

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

- Home deliveries and e-commerce
- Consumer analytics and choice
- Permanent changes to working practice
- Streamlining business operations and efficiency
- Ability to operate from smaller footprints
- Use of technology and automation

Managing Supply Chain Issues and Risk

There is an almost infinite variety of issues that can arise within the supply chain, from minor irritants that make business just that bit more difficult to transact than is necessary, to catastrophic failures. We have selected a few of the more high-profile current issues for consideration.

Brexit, COVID-19 and Resulting Supply Chain Challenges

The effects of Brexit and the COVID-19 pandemic on the supply chain continue to be felt by businesses, driving product/service shortages, transport problems and unpredictable cost increases. In particular, parties should carefully consider (among other things):

- Supply chain mapping (if not already completed)- to identify risk areas, particularly further down the supply chain.
- Brexit and/or COVID-19, managing related provisions in contracts- whether as general terms or to address specific identified issues (e.g. tariffs, delays, materials/staffing shortages, travel restrictions and costs).
- Addressing the impact of currency fluctuations on pricing/costs and how associated risks will be mitigated and/or shared.
- Increased risk of significant changes in inflation rates (and variations in these between countries) and the extent to which these may be passed down the supply chain.
- Who will bear the cost of any new duties/tariffs that may be imposed and any associated additional administrative and logistical costs? Delivery terms (e.g. EXW, c.f., DDP) may, therefore, take on added importance.
- Changes in VAT registration and other tax requirements, including reporting and collection obligations.
- Changes in customs practices that may result in product/component delays, shortages and/or increased costs.
- Changes to product certification and registration requirements, considering whether Brexit has affected the validity of those issued and required in the UK for use in the EEA (and vice versa).
- Whether qualifying with HM Revenue & Customs (HMRC) as an Authorised Economic Operator, establishing a "trusted trader" relationship or for transitional simplified procedures would reduce border inspections and delays.
- Compliance with provisions that require staff to visit sites in particular territories.
- Use of descriptions of territories that may substantially change (e.g. the EEA or the UK itself).
- Increased risk of supply chain insolvencies, cost increases, skills and asset shortages (including warehouse space, access to certifying bodies and specialist service providers).

Reducing the Risk of Insolvency in the Supply Chain

The current volatile financial and political landscape, combined with extensive reliance on outsourced supplies of critical systems and lean manufacturing processes, means that managing the risk of suppliers (and any of their suppliers) becoming insolvent has become even more important. Points to consider when seeking to reduce this risk include:

- Dual source wherever possible. Identify and monitor particularly carefully any areas where dual sourcing is not possible and plan how you would deal with the loss of any single-source supplier.
- Identify practical issues that could make it difficult to move to a new supplier (e.g. tooling held at the supplier's premises, certifications tied to a particular production line, reliance on proprietary supplier intellectual property) and put in place contractual protections or contingencies to deal with these.
- Ensure that exit plans have all been agreed and tested well before any potential contract termination event occurs.
- Ensure contracts are signed with the group company against whom financial due diligence has been performed and seek parent company guarantees where appropriate.
- Monitor and audit the supplier's financial health throughout the life of the contract. Include rights to obtain necessary information/access from the supplier, as well as obligations on the supplier to do the same with their suppliers and to report to you (and check that they do this). Be vigilant for any early warning signs, such as late or missed deliveries or requests for money on account (where that is not usual practice).
- Consider including rights to terminate and/or increased monitoring for material adverse change in the supplier's finances.[1]
- Consider the use of escrow for key software programmes and risk assess any hosted or cloud-based solutions where escrow may not provide effective protection.
- Ensure that the insolvency provisions in contracts are up to date, appropriate for the jurisdiction and take effect early enough in the insolvency process.
- Review the contract, be aware of any retention of title provisions and assess their likely effectiveness.

1 Note, however, that in some circumstances the operation of ipso facto rules in insolvency prohibit a supplier from terminating a contract even if the contract might allow this.

Mitigating the Impact of Global Trade Disputes

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

- Mapping the whole of the supply chain to identify high-risk areas and put in place measures to address any identified risks and develop contingency plans for worst-case scenarios (including dual/multi-sourcing).
- Actively monitoring potential future trade policy developments in key territories. The last few years have seen tariff threats between trade blocks, including on steel and aluminium. More recently, the US has responded to the UK increasing taxes on US tech firms by threatening to raise tariffs by up to 25% on a number of UK exports. Proactive monitoring enables you to:
  - Lobby for changes before the scope of tariffs has been determined, either directly or through industry bodies
  - Assess likely consequences for the supply chain and plan accordingly, including amending long-term contracts and making alternative sourcing arrangements, where appropriate
- Identify any levels of the supply chain that may suffer from trade blacklists and plan how each element could be removed in short order if required. In recent times, the US has added dozens of companies to its trade blacklist, including many Chinese chipmakers, Huawei, and Israeli NSO Group whose Pegasus spyware made headlines in 2021. Accordingly, businesses need to have a clear understanding of the sources of all components and plans to address their loss where appropriate.
- Reviewing existing agreements to assess risks and scope for passing these down the supply chain or terminating arrangements that are/become uneconomical or unlawful.
- Identifying and applying for available exemptions. For example, by the end of 2018, the US had granted almost 1,000 waivers from tariffs on Chinese goods. More recently, China has extended existing tariff exemptions from 17 September 2021 until 16 April 2022 on a list of 81 US products ranging from electric vehicle batteries to timber to shrimp.
- Looking for opportunities that may be presented by trade being diverted to third countries as a result of tariff impositions (while remembering that these opportunities may be temporary). For example, it has been estimated that the EU will be able to attract up to US$90 billion of trade related to value chains as a result of US-China tariffs.

Ensure Compliance With Data Protection Laws

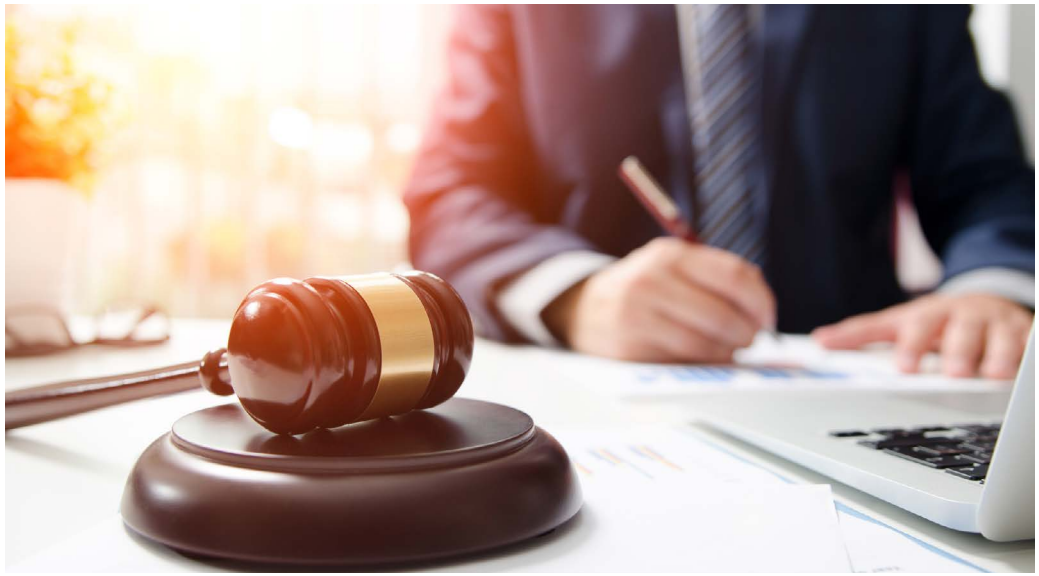
The introduction of the General Data Protection Regulation (GDPR) brought new obligations for businesses, with significant fines for non-compliance being levied (e.g. Amazon- €746 million, H&M- €35 million). It has been followed by the California Consumer Privacy Act (CCPA), China's Personal Information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

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

Consider the Impact of Ransomware and Other IT Security Issues

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

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



Compliance With Anticorruption and Anti-bribery Laws

Anticorruption and anti-bribery laws gained heightened publicity following the US Foreign Corrupt Practices Act and the UK Bribery Act, both extending potential liability up and down the supply chain. Parties should:

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

Environmental, Social and Governance

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

We are also seeing more and more ESG-centred legislation targeted both at companies and their supply chains, such as the UK Modern Slavery Act 2015, UK Equality Act 2010, California Supply Chain Transparency Act 2010 and US Dodd-Frank Act 2010. This is only likely to increase, particularly following the conclusion of COP26. Legal teams can help support businesses' compliance efforts by:

- Designing ESG policies so that they have a particular focus on ESG issues most relevant to a businesses' industry or sector.
- Updating ESG policies regularly so they extend to cover key legislative changes promptly, and take account of policy and legislative changes that are on the horizon where appropriate. For instance, an independent review of the Modern Slavery Act 2015 (laid in Parliament on 22 May 2019) urged quick action from government, who has since recognised the value in the comments made on supply chain issues. This may result in new additions to the legislation in future.
- Help businesses stay on top of advances in the environmental law and policy (waste, water, air pollution, net zero targets, etc.) of countries in which they operate and possible implications. For instance, the new UK Environment Act 2021 has recently been finalised and includes a framework for new supply chain due diligence requirements relating to 'forest risk commodities'.
- Incorporating into supply agreements a commitment from suppliers to comply with (and ensure that their own key suppliers comply with) the business' ESG policies and/or targets, or equivalent policies or targets approved by the business. It may also be prudent to include obligations to comply with (and provide the business with evidence to demonstrate compliance with) specific legislative requirements.
- Including ESG audit and reporting requirements in contracts and ensuring that these are exercised by the business and that the business has the right, if necessary, to terminate the contract for non-compliance (particularly where there has been some reputational damage).
- Checking that the business maintains adequate records to enable it to demonstrate compliance and the steps that it has taken to seek to achieve this.
- Utilising the data gathered internally and within a business' supply chain on ESG to inform future goal-setting.
- Ensuring that ESG commitments made by the business are not overly ambitious. Consumer and shareholder groups have already started to investigate the possibility of pursuing companies for failure to comply with published ESG statements.

Ensuring Product Quality and Avoiding Expensive Product Recalls

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

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

Considerations for Supply Chain Disputes

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

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

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

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