LOYENS & LOEFF

NOVEMBER 2020

Corona: directors' duties and restructuring options in the BeNeLuCh

LOYENS & LOEFF

Corona: directors' duties and restructuring options in the BeNeLuCh

I Introduction

The rapid spread of the coronavirus (COVID-19) pandemic is leading to far-reaching health and safety measures all around the world. For people at home, but also for businesses, this creates a situation of great uncertainty. Certain governments have taken (extensive) measures to help businesses and its employees. This leads to an entire new and unprecedented market situation and results in sometimes unprecedented legal issues which require swift but thorough assessment, both from a national and cross-border perspective.

With an integrated, cross-border approach and activity in four home markets, our Restructuring & Insolvency team is very well suited to assist you with such assessment from both a national and cross-border perspective. Our Restructuring & Insolvency team supports bondholders, lenders, investors, debtors, shareholders, creditors, distressed companies, their management and principal stakeholders by providing assistance and tailor-made advice in challenging times.

To provide companies and its directors with some general guidelines in these times of uncertainty, our international Restructuring and Insolvency team has prepared an overview in which we touch on (i) the points of attention and liability risks of directors (ii) the room for companies to (temporarily) hold off their creditors, (iii) the measures of different governments to support companies that are affected by the coronavirus and (iv) formal insolvency proceedings.

The goal of the below is to provide you with some initial grip on the issues at stake for companies in a difficult financial position. If you wish to receive further background or have other points of attention you wish to discuss, do not hesitate to reach out to one of our team members: we are here to help.

II Overview

1. What are important points of attention for the board during the coronacrisis?			
General: Board members and de facto directors bear essential responsibilities at all times. In general, directors have a large degree of freedom for policy making and determining what is in the best interest of the company and its stakeholders. However, once a company is in financial distress, particular duties of the directors arise and require especially closer monitoring of the company's financials. If the financial situation of the company deteriorates and meets certain triggers, the board members might be obliged to pursue certain actions or even file for bankruptcy in certain jurisdictions.			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
The managing directors of a Dutch company are responsible for the policy of the company, conducting its day-to-day management and representing the company in dealing with third parties. The managing directors have to perform their duties in accordance with Dutch law, the articles of association of the company – thereby taking into account in particular the company's object clause –, any applicable regulations and Dutch rules of public order. In general, directors have a large degree of freedom for policy making and determining what is in the best interest of the company and its stakeholders. In times of financial distress, directors must attach more importance to the interest of creditors. Since the (long term) consequences of the coronavirus are not yet reflected in the corporate planning assumptions, the board should adjust the planning immediately. The board has to ensure that, even taking the currently expected consequences of the coronavirus into account, the company is expected to continue to be able to make payments as these fall due. While the coronacrisis continues, the board has to monitor its financial situation even more carefully. In general, we would also advise board members to document all decisions and considerations on a frequent (if needed, daily) basis.	Under Luxembourg law, a board of directors would need, in light of the current coronacrisis, to (i) assess the impact of the crisis on their particular company and underlying assets, and (ii) monitor that impact on an ongoing basis. The above entails, for instance: - To asses whether an immediate discussion is needed regarding financial and operational risks of the company, and whether external advice should be sought. - Schedule more frequent board meetings to monitor the evolution of the crisis, its effects, and adapt the strategy of the company or its subsidiaries, as the case may be. - Assess the company or counterparties' possible desire to find ways to terminate or renegotiate contracts. On 23 September 2020, the Luxembourg government extended some coronacrisis corporate measures, including the possibility for all boards of Luxembourg companies to hold meetings and/or resolutions exclusively in digital form, even if contrary to the company's bylaws. This will most likely be extended until June 2021. Other relevant points to consider for Luxembourg boards: - The board's discussions should be properly recorded and the fiduciary duties of board members (who are acting under Luxembourg law in the interest of the company itself and not, per se, its shareholders) may come into sharp scrutiny in the coming weeks/ months. - External auditors will likely demand a statement with respect to the coronavirus in the annual accounts.	The board of directors is responsible for the administration of the affairs of the company. The "administration of the affairs of the company" must be understood in its broadest sense to include the determination of the general strategy of the company and all decisions and actions carried out to realise the purpose of the company. A director's task is to protect the corporate interest of the company, considering also the interests of shareholders and other stakeholders (employees, creditors, suppliers and customers). Within those limits, and subject to compliance with the articles of association of the company and any applicable mandatory regulations, the board has extensive discretionary powers with respect to management decisions. The board of directors must be convened as often as the interest of the company requires it. Given the highly disruptive impact of the coronavirus outbreak, the board shall need to be convened to take mitigating measures in the interest of all stakeholders, including the close monitoring of the liquidity of the company. In certain circumstances, the board must take specific measures. If, following losses suffered, the company's net assets have fallen below half of the share capital, the board must prepare a special report and must convene a general meeting of shareholders to resolve on special measures to be taken (if any) or to decide on whether or not to dissolve the company. Moreover, if the net assets have fallen below 25% of the share capital, the company can be dissolved upon approval of 25% of shareholder votes.	The board of directors is obliged to act in the best interest of the company and to preserve its existence. It is required to assess and revise the company's strategy if business-relevant circumstances change as it is the case for many companies as a result of the developments in connection with the coronavirus. The board is obliged to protect the employees' health and introduce the necessary and appropriate measures. In case of an outbreak of an epidemic or pandemic, there are increased duties of information, loyalty and care in order to maintain the business. The board must at all times be aware of the company's economic situation as well as its financial planning and is in charge of financial control and the provision of sufficient liquidity. Hence, the board must whenever necessary take appropriate measures to avoid liquidity shortages. However, if the financial situation of the company deteriorates significantly and crucial ratios are reached, the board members are obliged to pursue certain actions: If the latest annual balance sheet shows that half of the share capital and the legal reserves are no longer covered, the board of directors must without delay convene a general meeting of shareholders and propose financial restructuring measures. If the financial situation deteriorates further, the board can be obliged to notify the court. Please find further information below under "9. When am I obliged to file for bankruptcy?"

2. What are my potential liabilities as a board member?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
Dutch law distinguishes between internal directors' liability (towards the company) and external directors' liability (towards third parties). Under Dutch law, the directors of a company are in principle only personally liable for improper performance of their duties in the event of serious negligence (*ernstig verwijt*); liability can only arise if a director had acted in a way no (other) director under the same circumstances would reasonably have acted. A specific ground for liability arises when a director continues trading while the company is technically insolvent. In times of financial distress, directors should also exercise caution when making selective payments. In case of a bankruptcy, directors can be held liable for the shortfall of the bankruptcy estate if the management board (i) has evidently improperly performed its duties and (ii) the improper management was an important cause of the bankruptcy. As a general rule, directors are only liable if no reasonably thinking director would under the same circumstances have managed the company in a similar way. Special importance is attached to the duty of bookkeeping and the duty to timely publish the annual accounts. If one of these obligations has been breached, certain presumptions apply, which substantially increase the risk of personal liability of a director.	Under Luxembourg law, the directors of a company may generally be liable for (i) the non-execution of their mandate, (ii) any misconduct in the management of the company's affairs, and (iii) any damages caused by their fault or negligence (torts). In the event of insolvency, directors' civil or criminal liability may also be at stake. (For further details please see section 9 below).	In terms of civil liability, directors may incur (i) contractual liability, (ii) liability for violations of the articles of association and the Belgian Code of Companies and Associations (**BCAC**), (iii) liability in case of insolvency (iv) tort liability and (v) criminal liability. In particular, in an insolvency scenario, a director may be liable for: - the absence or the delay in filing for bankruptcy; - its gross and manifest negligence having contributed to bankruptcy (for instance, conducting a commercial activity without having the required financial means); - wrongful trading (In the event of bankruptcy of a company and shortfall of its assets); and - failure to pay the company tax prepayments or VAT. Directors committing a criminal offence in the execution of their function could personally be held criminally liable (notably in the event of infringement of book-keeping rules or failure to file for bankruptcy when the conditions are met). Moreover, in case of financial distress, directors must be very cautious with selective payments and with any transaction not at arms' length which could be voided in case of subsequent bankruptcy. Of note is that the new BCAC introduces a cap on the potential liability of directors. The cap varies depending on the size of the company and applies as an aggregate for all directors, managing directors and members of an executive committee concerned and for claims based on the same fact(s) (regardless of the number of plaintiffs). The liability cap applies both vis-à-vis the company and third parties, and irrespective of the ground or basis of the liability claim (contractual or non-contractual). The cap applies only to non-recurring minor errors. Excluded from the cap are liabilities resulting from : - recurring minor errors, gross misconduct or fraudulent intent; - the specific "guarantee liabilities" as set out in the BCAC (e.g. the liability for the shares for which no valid subscription has been made or the liability for the actual payment of the shares for which they are considered to be the subscribers); or - the joint and several liability resulting from unpaid withholding taxes; unpaid VAT; or unpaid social security contributions in case of bankruptcy of the company.	Members of the board are personally liable for damages arising from a breach of their duties, especially for damages caused by not informing the court of an over-indebtedness of the company in time or if the board does not comprehensively and objectively assess the company's situation or does not pursue appropriate financial restructuring measures. Furthermore, members of the board may be held personally liable for outstanding social insurance contributions. Potential criminal liability of board members can arise in particular on the grounds of (i) mismanagement (in particular delayed filing for bankruptcy), (ii) reduction of assets to detriment of creditors, or (iii) undue preference of creditors.

3. What options does the company have to get some headspace?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
If no stand still agreements or forbearance agreements can be successfully negotiated with creditors, a debtor can file for a suspension of payments (*surseance van betaling*). In a suspension of payments, the debtor is given temporary relief against pressing creditors in order to achieve, by way of reorganisation, continuation of its business and/or, ultimately, (partial) satisfaction of creditors by way of a composition. A provisional suspension of payments is usually granted immediately upon the filing of a request. At the time a suspension of payments is granted, the court will also appoint a member of the local bar as moratorium trustee (bewindvoerder), and usually also a supervisory judge. Furthermore, the creditors of the company are invited to file their claim with the moratorium trustee. The court will also set a date on which a hearing of creditors will take place. At this hearing a definite suspension of payments will be granted unless there are grounds for refusal of such a definite suspension of payments. A suspension may be granted for a maximum period of 18 months and may be extended without limit at the request of the debtor for successive 18 months periods. The most important consequences of a suspension of payments are that the debtor can no longer be forced to make payments that are due and that (in the event of a definite suspension of payments) attachments made by creditors on the assets of the debtor are automatically lifted. Secured and preferred creditors may still exercise their rights.	Luxembourg provides with three formal rescue procedures in order to restructure the liabilities of distressed companies, which are all heavily court-lead: - **Suspension of payments** (*sursis de paiement*) which allows a commercial company who faces temporary liquidity difficulties to apply for a suspension of payments until its financial liabilities can be met. This procedure is mainly used in respect of regulated entities. - **Controlled management** (*gestion contrôlée*) which entitles a commercial company to either reorganise and restructure its debts and business or to realise its assets in the best interest of creditors. - **Composition with creditors** (*concordat préventif de faillite*) allows a debtor facing financial difficulties to negotiate a settlement or a rescheduling of its debts with its creditors, which must be approved by the court to avoid bankruptcy proceedings. Each of these formal rescue procedures can be challenged by the creditors. These procedures are not much used in practice due to their lack of flexibility, cost and/or publicity that each one of them entail.	The consequences of the coronavirus outbreak could lead to a company's continuity being threatened in the short or medium term. If no stand still agreements or subordination agreements can be agreed with creditors, debtors (but also a creditor or the judge) can apply for judicial reorganisation (*gerechtelijke reorganisatie/réorganisation judiciaire*). A judicial reorganisation procedure grants a company in distress protection against existing creditors, offering a number of options: (i) amicable settlement, (ii) a collective reorganisation plan, or (iii) a transfer of (part of) the company's activities to one or more third parties. In the context of judicial reorganisation proceedings, the enterprise court can suspend payments up to 6 months (extendable to up to 12 months and, in extraordinary circumstances, for an additional 6 months). During this suspension period, any enforcement measures against the company's assets for debts incurred before the judgment opening the judicial reorganisation are suspended (subject to certain exceptions). In addition, conservatory attachments to secure pre-existing debts will no longer be possible (without prejudice to the right of the debtor to establish statutory conventional security during the suspension period), existing agreements cannot be terminated due to filing/opening of the procedure, the company may have the right not to perform its obligations in certain circumstances and penalty clauses will be ineffective until the execution of the reorganisation plan. New debts arisen during the suspension period are however not subject to the suspension. A company in judicial reorganisation can, in principle, not be declared bankrupt, unless it can be established that the company is obviously not in a position to guarantee the continuity of (part of) its activities.	The Federal Council had introduced certain measures to prevent bankruptcies, such as a COVID-19-moratorium, for the time period from 20 April until 19 October 2020. As of 20 October, no special provisions apply anymore. If a company would like to negotiate a composition agreement with creditors (see below 4.) or would like to benefit from additional relief, the company may apply for a moratorium (*Nachlassstundung*). Inter alia, ongoing civil or administrative procedures and limitation periods are stayed and no further interest accrues on outstanding unsecured liabilities. An administrator will be appointed who will supervise the debtor and assess the rehabilitation prospects of the company. If the board is forced to inform the court of an over-indebtedness of the company (see below 9.), it may discharge this duty by applying for a moratorium. The court may further, upon request, defer the opening of bankruptcy if creditors were not in a worse situation through a deferral than they would be in if bankruptcy proceedings were opened immediately, and if there is reasonable prospect for a financial rehabilitation of the company.

4. What options do I have to urge my creditors into an agreement to avoid bankruptcy?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
Outside insolvency proceedings, there currently is no legal framework to bind creditors to a composition without the cooperation of all creditors. We note that the Act on Court Sanctioning Private Composition to avoid Bankruptcy (the Wet *Homologatie onderhands akkoord ter voorkoming van faillissement*, the **WHOA** or the Dutch Scheme) will enter into force on 1 January 2021, which introduces such possibility. The WHOA provides for an effective restructuring tool likely to become widely used both in local and in cross border restructurings (which is a welcome extra tool in light of the coronacrisis). Please see our memorandum on our website: "WHOA Dutch scheme of arrangement". Over the last few months, there are measures being taken by the Dutch government to offer companies some breathing space, e.g. deferral of taxes and rental payments and reduction of employee working hours (see following questions). Banks have indicated that they will grant SME's (with loans up to EUR 2.5 mln) a six month deferral of interest and amortisation payments. For larger loans, agreements will need to be entered into with banks. Within a suspension of payments or bankruptcy it is possible to offer a composition plan and cram down ordinary creditors. Under the WHOA it is possible to offer a composition plan and cram down secured and ordinary creditors.	There is no legal framework addressing this issue. Luxembourg does not expressly provide for an informal out-of-court restructuring framework and has, in this respect, not followed the European trend to implement more effective and flexible recovery proceedings based on UK schemes of arrangement, (pre-pack) administrations and/or US Chapter 11 proceedings.	Outside insolvency proceedings, there is currently no legal framework to bind creditors to a composition without the cooperation of all creditors. Within the formal insolvency proceeding of judicial reorganisation it is possible to enter into a collective reorganisation plan with majority creditors whereby minority creditors can be made subject to the plan (even if they benefit from security and certain liens, subject to certain limitations). Certain measures have been taken by the government following the coronavirus outbreak to offer companies some breathing space, e.g. deferral of taxes and changes to the temporary unemployment regime (as set out below).	There is no legal framework to bind creditors to a composition without the cooperation of all creditors outside of insolvency proceedings. If no amicable agreement allowing the rehabilitation of the debtor can be reached with the creditors during a regular moratorium (*Nachlassstundung*), Swiss law provides for the possibility to cram down unsecured and non-privileged creditors in a composition proceeding (*Nachlassverfahren*) if (i) the relevant majorities are reached, (ii) the claims of privileged creditors are covered, (iii) shareholders make an appropriate contribution and (iv) the proposal is appropriate to the financial situation of the company. However, if the request for approval of a composition agreement fails, the court will open bankruptcy proceedings over the debtor.

5. What additional options did the government provide to reduce the working hours of my employees during the coronacrisis?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
On 9 October 2020 the Third temporary aid scheme to maintain employment (**NOW 3**) was published. Like under the NOW 1 and 2, employers continue to pay the employees' salary for 100%, while receiving a substantial compensation (**aid**) towards the wage costs (capped). The NOW 3 provides, from 1 October 2020, for a subsidy scheme with three tranches (tranches 3, 4 and 5) of three months each. In these three tranches, aid will be gradually phased out. In order to qualify for the NOW 3, there must be a loss of turnover of at least 20% (tranche 3) and 30% (tranche 4 and 5) respectively. The maximum compensation percentage differs per tranche: 80% in tranche 3, 70% in tranche 4 and 60% in tranche 5. For all tranches, if the loss of turnover is less, the aid will also be proportionally less. The employer who receives aid, must fulfil several obligations. Failure to comply may have consequences for the grant, or the amount of aid to be received. For each tranche, an employer may decide whether or not to apply. Even if an employer has not made use of the previous NOW schemes, an application can be made for (one or more tranches of) the NOW 3. An application for tranche 3 can be submitted as from 16 November 2020. For the sake of completeness, we would point out that, since the NOW came into force, it has no longer been possible to apply for a reduction in working time. Please be referred to our Q&A NOW 3 in which the principal elements of the NOW 3.0 are discussed.	During the state of emergency (18 March 2020 - 24 June 2020) a short-time working/partial unemployment (*chômage partiel*) was in place. As of 25 June 2020, companies continuing to experience negative effects from the coronacrisis may still benefit from partial unemployment until the end of 2020, in particular: - **Industrial companies** - under the condition that they undertake not to lay off employees for economic reasons; - **Companies in the restaurant, tourism and event management sectors** - no limitation to the number of employees who can be covered by partial unemployment. If proven to be necessary for economic reasons, these companies will be able to lay off up to 25% of their workforce before 31 December 2020. In the event of subsequent recruitment, employers must prioritize hiring their formerly dismissed employees; and - **All other companies** - under the condition that they do not lay off employees for economic reasons. The number of employees covered by partial unemployment may not exceed 20% of their workforce for the months of September and October and 15% of their workforce for the months of November and December. Businesses which fail to respect the above thresholds must introduce: (i) a motivated recovery plan in the case of small businesses with fewer than 15 employees; or (ii) a job protection plan in accordance with the provisions of the Labour Code in the case of businesses with more than 15 employees. Companies from vulnerable sectors that are dismissing more than 25% of their workforce, and all other companies that are contemplating laying off employees, will have to submit an "ordinary" request for partial unemployment, which can only be granted if such companies establish restructuring plans.	**Temporary unemployment due to force majeure – COVID-19 procedure (1 October 2020 – 31 March 2021)** The system of temporary unemployment due to force majeure because of COVID-19 will be reopened to all companies. It allows employers to suspend employment agreements partially or fully while employees receive unemployment allocations. To manage the large influx of requests and to further support to employers and employees, the National Unemployment Office has (i) widened the original scope of temporary unemployment, (ii) made a 'light'-version of the applicable procedures, and (iii) increased the unemployment allocations for the employees. Temporary unemployment due to force majeure COVID-19 also includes temporary unemployment due to childcare and due to quarantine. The worker in temporary unemployment will receive a benefit equal to 70% of his or her gross monthly salary (capped at 2,754.76 EUR). On top of this, the employee will also receive allowance of 5.63 euro per day of temporary unemployment. This measure will apply until 31 March 2021 and there will be a possibility to extend it. **Temporary reduction of working time (1 March 2020 – 31 December 2020)** Companies recognized as being in restructuring or facing difficulties can temporarily reduce the working time of employees by 1/4 or 1/5th, possibly in combination with the introduction of a 4-day working week.	Companies that, adequately caused by the occurrence of the coronavirus, have less business activities and hence require less working hours of their employees, may be eligible to temporarily reduce (even to zero if necessary) the contractually agreed work time without affecting the contractual relationship with their employees. Eligibility criteria have been widened and application has been facilitated as a measure to mitigate the consequences of the coronavirus. The unemployment insurance covers 80% of the loss of earnings of the employee resulting from the short time work. This compensation, which will be paid for up to 12 months in a time period of two years, has been extended to up to 18 months as of 1 July 2020.

6. What measures did the government take which may help companies overcome a sudden liquidity shortage caused by the coronavirus?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
Companies that are affected by the coronavirus may request before 1 January 2021 an extension until 1 July 2021 to pay taxes. The tax authorities will stay enforcement in this regard. The government will guarantee a larger amount of bridge loans that companies require due to the coronavirus. On 24 November 2020 a new Act was adopted ("Tijdelijke wet COVID-19 SZW en JenV"). Pursuant to that Act, a debtor/company can request the court to temporarily suspend a petition for its bankruptcy filed by a creditor of that debtor and temporarily suspend other actions for redress, and to grant a debtor a temporary deferral of payment, provided that the debtor can demonstrate (in short) that its current (financial) position is solely or mainly a result of the outbreak of the COVID-19 virus and, due to COVID-19, it has not been able to continue its business as usual and is therefore temporarily unable to continue to pay its debts.	a) **Fiscal measures** Companies could benefit from the following tax reliefs: - Cancellation of any tax advance payable for the first two quarters of 2020; and - Four months extension to pay taxes due after 29 February 2020. In addition: - The formal deadline for filing income tax returns was postponed until June 30, 2020. - No administrative penalty for exceeding a deadline for filing VAT returns and subscription tax returns for Q1 and Q2 2020. Subsidies paid in the context of Covid-19 measures are exempt from tax. There were also limited tax measures (essentially increased in deduction caps) for certain type of charges paid for housekeeping, childcare and care for elder people. Finally, the days spent by cross-border workers (residing in France, Germany or Luxembourg) working in their home country instead of Luxembourg as a result of the Covid-19 restrictions since mid-March 2020 will not trigger any changes to the allocation of taxing rights between Luxembourg and the other jurisdiction under the relevant tax treaty.	a) **Fiscal measures** Various measures in relation to the deferral of tax payments have been taken. Some other tax measures, such as the tax loss carry back, the reconstitution reserve and a partial exemption of payroll taxes, also intend to enhance the liquidity of companies. For a complete overview and more detailed analysis, we refer to our website: "Coronavirus | Belgian measures for businesses – Tax related measures". Companies facing difficulties to pay the employer's social security contributions due to the coronavirus can apply for a payment plan allowing deferred instalments for the payments covering the first and second quarter of 2020. On top of that, companies can spread their VAT payments and will be exempted from the usual fines until and including June 2020. The same applies for the payments of the withholding tax on professional income and the corporate income tax. The usual payment term for corporate income tax, personal income tax and legal entities tax are automatically extended with a period of two months for all taxes assessed as of 12 March 2020. b) **Other measures** Non-financial businesses, SMEs, self-employed persons and non-profit organisations could fill a request for a postponement of payment of certain business loans until 20 September 2020. Postponement of payment is (currently) possible until 31 December 2020 at the latest. Recently the federal government decided it will, in consultation with the financial sector, extend the existing payment deferral regime. In order to facilitate new credit for companies a state guarantee is established for all new loans and credit lines with a maximum maturity of 12 months (or 36 months for SME's) granted by banks to viable non-financial businesses and the self-employed. Recently, the federal government decided to extend this guarantee until 30 June 2021.	Companies the businesses of which are affected by the consequences of the corona virus may apply for a temporary interest-free deferral of social security contributions or if applicable for an adjustment of their regular instalments if the total of wages paid decreased. Taxpayers may request a deferral of the tax payment (notably with respect to corporate income taxes and VAT) or payments in instalments if they face illiquidity. The interest rate for late payments has been temporarily lowered to 0% for VAT, customs, special tax on consumption and excise duties, incentive taxes from 21 March 2020 to 31 December 2020 and for direct federal taxes from1 March 2020 to 31 December 2020. Most cantons do not include interest for late payment or compensatory interest in a deferral. Taxpayers generally have to file a written request but tax authorities are expected to be less strict given the current circumstances. For VAT purposes, the Swiss Federal Tax Administration has introduced the possibility to file a request for early refund of VAT credits. Separately, taxpayers may also request revised preliminary tax invoices with a lower tax amount or an amount of nil.

Netherlands	Luxembourg	Belgium	Switzerland
	b) **Economic aid measures** *Repayable financial aid to compensate for temporary financial difficulties caused by the COVID-19 crisis*: Subject to certain conditions, the Luxembourg State grants aid in the form of repayable advances to support businesses, including natural persons carrying out their activities as their main activity and in self-employment, experiencing temporary financial difficulties as a result of the COVID-19 crisis. The validity time limit has been extended. Aid applications must be submitted no later than 1 December 2020. The maximum amount of aid has been increased to EUR 800,000 per single undertaking.	The Flemish Region has adjusted its existing scheme to offer crisis guarantee to allow companies unable to pay their debts to find financing for their working capital from the bank. The Brussels-Capital Region has also taken measures to guarantee bank loans of companies, in particular those active in the tourism, cultural, event or hospitality sectors.	

7. What other support can companies receive from the governments?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
Measures taken by the government so far mainly relate to deferral of taxes (see above) and employees. Discussions are ongoing and we will monitor the developments.	The Luxembourg government has, since the onset of the pandemic crisis put in place a generous program to assist businesses facing financial and liquidity difficulties caused by the coronacrisis, including: *Bank guarantee provided by the Luxembourg Chamber of Commerce*: Companies meeting the conditions will be able to benefit from a guarantee of up to 50% of the value of the credit, for a maximum of EUR 250,000. *Investment aid aimed at stimulating business investments in the COVID-19 period*: The Governing is granting, under certain conditions, investment aid to encourage companies in financial difficulty, following a significant drop in turnover, to carry out investments that would have been cancelled or postponed as a result of the economic crisis caused by the COVID-19 pandemic (applications open until 1 December 2020). *State guarantee scheme for new bank loans for a maximum period of 6 years*: The State will guarantee bank loans granted to businesses up to 2.5 billion euros. Businesses will now be able to apply to their bank for a loan of up to 25% of their turnover, with a state guarantee of up to 85%. The loans will be guaranteed at 15% by the participating banks (available until 31 December 2020). *"Special anti-crisis financing"*: The SNCI (Société Nationale de Crédit et d'Investissement) has put in place a special financing available to companies operating with a business license. The financing is done indirectly via the company's usual bank: the SNCI finances up to 60% of the required amount, provided that the bank finances the remaining 40%. The amount financed can vary between EUR 12,500 and EUR 10 million (available until 31 December 2020).	Several measures have been taken by the government to support companies and their employees: - **Reduction of social security contributions**: Companies recognized as being in restructuring or facing difficulties can temporarily reduce the working time of employees by 1/4 or 1/5th. Companies will then receive a reduction in social security contributions provided that they pay their employees a minimum compensation for their loss of salary. - **Exemption of social security contributions**: All companies that are obliged to close will be able to make use of the exemption from social security contributions for the third quarter of 2020. This also applies to suppliers of these companies insofar as they can demonstrate a loss of turnover of at least 65%. There is a ceiling per company for the total amount of this exemption. - **Vacation allowance**: the government will intervene in the financing of vacation allowance for temporarily unemployed workers. - **End-of-year bonus**: the Government will pay a supplement on top of the end-of-year bonus to employees who have been temporarily unemployed for at least 52 days in 2020. - **Work from home allowance**: possible for employees who are required to work from home. - Certain sectors are supported by additional measures. E.g. Temporary unemployed workers can enter into successive fixed-term contracts with employers in health care or education. E.g. the quotum of voluntary overtime is increased in certain sectors. - Entitlement to premium for undertakings that have to close their business and/or are financially impacted by the crisis; - Entitlement to replacement income for self-employed persons (*droit passerelle/ overbruggingsrecht/bridging right*).	With support from the Swiss Confederation, recognised guarantee organisations can provide guarantees for bank loans. This option was being extended and facilitated as a measure to mitigate the consequences of the coronavirus. The Federal Government made it easier for SME to raise external funds in the amount of maximum CHF 20 mln or 10% of its total revenue per company. The application deadline ended on 31 July 2020, the measures regarding repayment etc. have, however, been extended. Depending on the residence of your company, there might be further cantonal measures available to your company.

8. When can creditors file for bankruptcy?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
A company or its creditors may file for a bankruptcy (*faillissement*) if the company has ceased paying its debts, i.e. the company has at least two creditors, one of the debts is due and payable and the company has stopped making payments. The court will appoint a bankruptcy trustee whose main task is to liquidate the debtor's assets and distribute the proceeds thereof to its creditors. There is no balance sheet insolvency test in the Netherlands.	Pursuant to article 442 of the Luxembourg Code of Commerce, creditors may file for bankruptcy a commercial entity before a Luxembourg court. Such commercial entity may be declared bankrupt by the relevant court when the following two criteria are met: i. the company has ceased payments and is unable to meet its commitments (*cessation des paiements*) that is, the company cannot, or does not, fully pay its due, certain and liquid debts as they fall due; and ii. the company has lost its creditworthiness (*ébranlement de crédit*) that is, the company is unable to obtain credit (i.e. new money, waivers, maturity extension, grace periods, standstills etc.) from any source.	Under Belgian law, an enterprise that faces a persistent cessation of payments and has lost the confidence of its creditors, is in a state of bankruptcy. Both conditions must be met. Cessation of payments occurs when a company can no longer repay its due and payable debts. It is not necessary that the company has halted all payments, it is sufficient that some important debts remain unpaid, such as social security or tax liabilities. The cessation must be persistent. To the extent the situation of the company can still be redressed or the company has still access to sufficient credit, the company is not in a state of bankruptcy. Third parties with the necessary legal interest, such as the public prosecutor, the creditors, the tax authorities can initiate bankruptcy proceedings by means of a writ of summons served upon the company. The Federal government has decided to re-implement a moratorium as a result of which businesses forced to close during the second lock down (which officially started on 2 November 2020) cannot be declared bankrupt if the fulfilment of bankruptcy conditions has resulted from the COVID-19 pandemic. More specific details are not yet known at the time of writing, as the legislative procedure is still ongoing.	Creditors may file for bankruptcy either (i) after pursuing a formal debt enforcement proceeding or (ii) upon request of a creditor without preceding debt collection proceedings, in particular, if the debtor is registered with a commercial register in Switzerland and has ceased its payments. Cessation of payment occurs when the debtor does not settle undisputed and due claims, piles up debt collections against it and systematically objects to debt enforcement requests or stops paying even small amounts.

9. When am I obliged to file for bankruptcy?			
Netherlands	**Luxembourg**	**Belgium**	**Switzerland**
Under Dutch law, there is no strict rule in this regard. However, to avoid personal liability, the board should be careful in continuing the business of the company after it has become evident (or should have become evident) that the company in fact entered into a state of insolvency. It should be evident that the continuation of the business of the company is no longer “responsible”.	The timeframe to file for bankruptcy has been amended and extended in considerations of the pandemic context. Prior to the coronacrisis, the directors of an insolvent company had to file for bankruptcy within one month of the date on which the company had ceased to pay its debts, provided that it had also lost its creditworthiness (cumulative insolvency criteria). The loss of creditworthiness criteria is a very important addition to the more standard insolvency test of cessation of payments as it allows a company not to be considered insolvent as long as it is, for instance, in restructuring talks with its creditors. Not filing for bankruptcy within the statutory timeframe constitutes serious misconduct, which can lead the court to recognize the directors’ civil or criminal liability and order the directors to bear all or part of the liabilities of the company. Following the coronacrisis and, pursuant to the law of 20 June 2020, the obligation to file for bankruptcy within one month has been suspended for six months after the end of the state of crisis (which ended on 24 June 2020). Furthermore, a recent draft law suggests that this measure (i.e. suspension of the obligation to file for bankruptcy within one month) will likely be extended until 30 June 2021.	A company which meets the bankruptcy conditions must file a petition in bankruptcy, together with certain accounting and other documents, within one month as of the date of cessation of payments. The obligation to file is, however, suspended in case the company has filed for judicial reorganisation. Failure to file timely may not only entail the personal liability of the directors for any increase in the level of indebtedness resulting from the delay in filing the petition, but also constitute a criminal offence if the directors had the intention to postpone bankruptcy. The Federal government has decided to re-install a moratorium during which business who are forced to close during the second lock down (which officially started on 2 November 2020) cannot be declared bankrupt if the conditions for bankruptcy have been caused by the coronavirus crisis. Once the law enters into force, also the obligation to file a petition in bankruptcy, will be suspended for companies who fall under the scope of application.	If an (interim) balance sheet shows that the company’s debt is not covered by its assets, whether the assets are appraised at going concern or liquidation values, the board of directors must notify the court unless certain company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit. Upon such notification and subject to an application for a moratorium (see above 3.), the court will open bankruptcy proceedings unless there is prospect of a rehabilitation and the board of directors or a creditor of the debtor applies for a deferral of the opening of bankruptcy proceedings (see above under 3.).

Contact

Netherlands

Vincent Vroom
Partner / attorney at law
T +31 20 578 59 84
M +31 6 51 26 63 19
E vincent.vroom@loyensloeff.com

Joris Dunki Jacobs
Attorney at law
T +31 20 578 50 54
M +31 6 10 89 46 42
E joris.dunki.jacobs@loyensloeff.com

Belgium

Marc Vermylen
Partner / attorney at law
T +32 2 743 43 15
M +32 475 52 31 66
E marc.vermylen@loyensloeff.com

Vanessa Marquette
Partner / attorney at law
T +32 2 773 23 25
M +32 473 50 01 47
E vanessa.marquette@loyensloeff.com

Switzerland

Judith Raijmakers
Partner / attorney at law
T +41 43 434 67 24
M +41 79 870 91 03
E judith.raijmakers@loyensloeff.com

Robin Moser
Partner / attorney at law
T +41 43 434 67 42
M +41 78 806 40 91
E robin.moser@loyensloeff.com

Luxembourg

Anne-Marie Nicolas
Partner / attorney at law
T +352 466 230 314
M +352 691 963 130
E anne-marie.nicolas@loyensloeff.com

Louis-Guillaume Roldan
Attorney at law
T +352 466 230 475
M +352 691 963 209
E louis-guillaume.roldan@loyensloeff.com