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Understanding directors' legal responsibilities, assessing restructuring options and continuous stakeholder engagement

Crucial steps to successfully managing the COVID-19 journey

Economic outlook

Ireland has come a long way since the property crash of 2009. At the start of 2020 the economic growth forecast was 3.5% and unemployment was at an all-time low of approx. 5.2% – the country thought its most difficult times were behind it.

Nobody anticipated COVID-19, and Governments and the wider business community were not prepared for the economic impact. Many countries may be heading for a very sudden and unique recession. An already challenging global economic outlook will see unprecedented disruption as the economic impacts of the pandemic take hold.

The current outlook is very different to that of January 2020.

- The International Monetary Fund has projected that the global economy will contract by 3% in 2020. In 2008 and 2009 the global economy contracted by approx. 1%.
- Irish GDP is projected to contract by nearly 8% in 2020 .
- Irish unemployment in April 2020 was above 28% (Covid-19 adjusted monthly unemployment rate).
- The Exchequer recorded a deficit of €7.4 billion for the year-to-date April 2020, more than double the deficit of €3.2 billion recorded in the same period of last year.
- At the beginning of April over 50,000 businesses had signed up to the government's Wage Subsidy Scheme.
- Over 22,000 payment breaks granted by the banks to SMEs.
- Sebastian Barnes, the chair of the Irish Fiscal Advisory Council, recently said that the State is facing the "most dramatic" recession in its history.

Taking all of this into consideration, how do you as directors successfully navigate your businesses through this period of uncertainty. Not all businesses will survive and there are many that were already challenged at the start of the pandemic. We have outlined the pertinent points for you as directors to consider in order to make decisions which are in the best economic interest of your business. Key to this is ensuring the continued support of stakeholders, whilst embracing the economic challenges faced.

Directors' duties

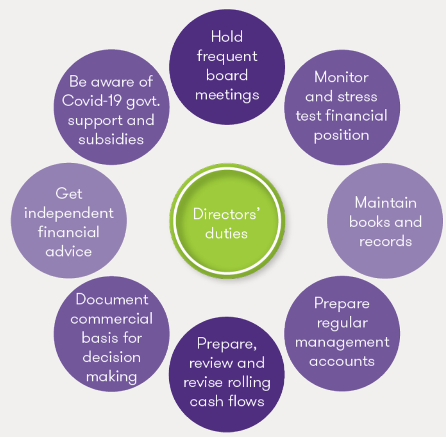
The duties of a director are set out in section 228 of the Companies Act 2014 "the Act" (a-h) and it is extremely important that, as a director, you are aware of the types of sanctions you may be personally subjected to and how to mitigate against these sanctions.

To date, the Government has not provided any assurance to directors of companies that continue to trade that the sanctions under the Act will be eased in light of COVID-19. Therefore, all decisions need to be commercially justified and documented to ensure you can demonstrate actions taken are in the best interest of the company and its creditors.

Primary requirement is to engage with stakeholders

Directors are entitled to continue to trade and incur credit as long as they honestly believe on reasonable grounds that there will be a successful outcome.

However, this is predicated on appropriate corporate governance structures being in place. Accordingly, directors should ensure they:



If you as a director believe:

- that your business is unable to pay its debts as and when they fall due, i.e. that the business is insolvent;
- you have exhausted all possible restructuring options; and
- that the business has no reasonable prospect of continuing to trade.

Then the only other alternative is to take steps to liquidate the company.

On the appointment of a liquidator, the liquidator will have a duty to investigate the conduct of the directors before they were appointed. The liquidator is likely to assess the basis upon which the directors considered that it was reasonable to 'continue to trade' (i.e. not to liquidate) once it became clear that the company was in financial difficulty.

The company law sanctions against directors of an insolvent company are designed to penalise directors who recklessly incur credit or liabilities where there is no objective basis to believe that the company can continue to operate as a going concern.

The solvency test

As a director considering the financial viability of your company you must conduct two tests:

1. Cash Flow Test – Can the Company pay its debts as they fall due?
2. Balance Sheet Test – Can the Company discharge all its liabilities after realising its assets?

If a company fails either of the above tests it can be considered insolvent and as a director, you need to constantly review the decision to continue to trade. You will need to document the rationale for same or face personal risk for continuing to incur credit and liabilities when there was no reasonable prospect of survival.

Personal guarantees

As a director you need to be aware of any personal guarantees you sign for credit facilities on behalf of the business, particularly when companies end up in a restructuring/insolvency scenario. Personal guarantees are not automatically set aside through the corporate or personal insolvency event unless there is prior agreement with the creditor. If a personal guarantee is called upon then availing of expert advice is essential to assist you negotiate a fair settlement.

Continuing to trade: Stakeholder engagement and restructuring options

In circumstances where a company is facing trading difficulties, directors must examine the affairs and prospects of the company with a view to identifying the best options for the company and its creditors. These options can include, consensual restructure, standstill, new lending or investment, parent company or group support and formal rescue and insolvency procedures.

Above are three likely scenarios for a business in financial difficulty. These scenarios and outcomes provide solutions to the corporate issues faced by directors. However, in addition to this, you must be conscious of your own personal financial position, particularly personal guarantees and any potential exposures that might arise from them.

Conclusion

In times of uncertainty, directors need to have a clear understanding of their duties under the Act and their responsibilities as directors of their business. Directors need to be very mindful of the decisions they make and how these decisions impact their stakeholders and them personally.

In the midst of a global pandemic, as a director, the onus is entrusted on you to safeguard your business and ensure the interests of its stakeholders, members and employees are at the forefront of decisions made and actions taken. Critical to this is:

- knowing and understanding your obligations under the Act;
- engaging early and transparently with all stakeholders; and
- putting in place a strategy that you believe is in the best interest of your company and documenting the commercial basis for that strategy.

How Grant Thornton can help

Our experts will assist you in successfully navigating the challenges associated with COVID-19 by putting in place the necessary governance safeguards to underpin your proposed financial strategy.

Grant Thornton is Ireland's leading provider of Restructuring and Corporate Recovery solutions with over 100 dedicated staff across seven offices. Our extensive experience will assist you to stabilise your company, prepare a robust Insolvency Test assessment and engage positively with your stakeholders.

For companies that are, unfortunately, not commercially viable, we are here to support you by ensuring that all of the necessary steps are taken to liquidate the company and safeguard the assets for the benefit of the creditors.

Contact

If you would like to discuss restructuring and corporate recovery options, please contact a member of our team.

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