



What should directors of businesses impacted by COVID-19 be thinking about?

French *sociétés par actions simplifiées*

Key considerations and actions for a director of a portfolio company affected by COVID-19

Am I a director?

As a matter of **principle**, members of *ad hoc* boards or committees of a French SAS do not qualify as *de jure* managers (*dirigeants*) and as such only need to comply with their bespoke role (eg supervision of the management) and should not incur liability if they do so diligently (exclusive of any *de facto* director/manager qualification). By way of **exception**, said members may qualify as *de jure* managers

and thereby incur the same liabilities as directors of a French *société anonyme*. Such qualification depends on a case-by-case analysis but could notably arise where the *ad hoc* corporate body is vested with powers similar to that of a board of directors of a French *société anonyme* or where *the président* does not have enough power to act independently.

Keep in mind

- Only the *président* and *directeurs généraux* and *directeurs généraux délégués* have the powers to act on behalf of the company and may carry out positive acts of management (eg urgent measures to safeguard the business)
- Boards members exercise their duties collectively



Corporate interest (*intérêt social*) under French law

In contrast to certain other jurisdictions, under French law, the interests of the company should not be confused with (and may not always be aligned with) the interests of other stakeholders (eg creditors, employees, shareholders, group)

Directors duties

As a reminder, directors' duties (owed to the company) in relation to a French company are not clearly defined but include those listed below. If there is a likelihood of insolvency, French law is notably designed to protect the business as a going concern.

- to comply with the law and the articles of association
- to act in accordance with the company's corporate interest
- to exercise independent judgement
- to exercise reasonable care, skill and diligence
- to avoid and declare conflicts of interests
- to share all relevant information with directors
- not to accept benefits from third parties

Taking appropriate advice and acting diligently minimise the risk of sanctions (which may include personal liability and disqualification)



Directors' duties: mitigating potential liability

- In difficult market conditions, directors must take steps to exercise their **duties** properly, diligently and in good faith.
- Duties and **solvency tests** differ across jurisdictions: seek advice on applicable filing obligations in France and closely monitor the financial health of the company.
- Each director must consider his/her duties on an **entity-by-entity basis**.
- Hold board/committee meetings **more frequently** than usual; if significant developments arise, frequency should be set as appropriate while taking care to give the legal representatives sufficient room to take necessary and urgent measures.
- Sponsors will derive protection from possible **de facto management** risks notably by ensuring appropriate, entity-specific, governance and by complying with the applicable governance rules (including complying with allocation of powers between the company's corporate bodies).
- Specific care should be taken when authorising the company to incur **new obligations**, to grant security interests or guarantees, or to dispose of assets.

Example of governance measures

- 1 Group Topco holds initial board meeting to consider impact and outline initial response strategy, and briefs the wider group
- 2 Subsidiary level board meetings to decide, in light of the Topco board's conclusions, to adopt the strategy as it applies to the relevant subsidiary taking into account such subsidiary's interest
- 3 Regular board/committee meetings and information to consider developments

Concurrent meetings for multiple group entities

Active review, preparing updates and financials

Quick reaction to changes in circumstances



Governance: best practice in a portfolio group

- Closely and diligently **monitor** (and where appropriate challenge) management.
- **Document** the decisions taken, referring to the reasoning and the prevailing facts, including where the decision is to continue with existing arrangements.
- **Vote** against any decision judged contrary to the company's interests, documenting the disagreement and its reasons
- Consider adapting (to the extent necessary) the existing **governance rules** to map out the decision making processes for the group while taking care to preserve the entity-specific governance as well as the allocation of responsibilities between the various corporate bodies
- Ensure integration and dissemination of measures adopted by the relevant corporate bodies so as to preserve **business continuity** and minimise disruption.



Other points to think about

- Check the company's **insurance arrangements**, in particular that directors and officers' insurance cover is in place and covers the relevant entities, and if any notification obligations are triggered by any changes in the business, eg under a material adverse change provision, while keeping in mind that such insurance may not necessarily shield directors against liability.
- Ensure that directors who are also **sponsor shareholder employees** are clear on their roles (including what information they have access to) and on their duties (eg to act in the interest of the company)
- Keep in mind that while directors are free to **resign** from their offices even in distressed situations, in some cases, a given resignation may be qualified as wrongful and therefore resignations should always be completed with care, courtesy, proper explanations should be provided and appropriate notice should be given.



Board meetings: practical considerations

- Take into account notice requirements, proposed attendees and travel restrictions in setting up meetings; if not already catered for, consider amending articles of association to **streamline the process** for holding board/committee meetings, eg providing for shorter notice periods, and clarifying that meetings may be held by telecommunication means.
- Consider any **new regulation** adopted in the context of the Covid-19 crisis to account for the current situation (eg measures to facilitate the holding of remote corporate bodies meetings, measures applicable to companies facing financial difficulties).
- Consider the **tax residence** requirements of each entity if directors are unable to travel and dial in from various locations, and if the meeting can be held on an exceptional basis.
- Directors should take **professional advice** to ensure they are fulfilling their obligations (notably to consider the initiation of preventive restructuring proceedings) and document their consideration of the advice they receive.

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