

The coronavirus outbreak is affecting several areas of business and is equally putting pressure on the governance of companies. Directors are required to make all kinds of considerations and decisions. While the shareholders at the general meeting only have the specific competencies conferred on them by law and the articles of association, the administrative body is competent for all other matters and thus constitutes the company's main decision-making body. In these challenging times, directors should not be relying on the idea that the CEO or management will do what is necessary, but must take essential decisions and measures at their own initiative instead. We will highlight below some of their tasks in the context of the current crisis.

1. Risks

Directors should identify the risks that the spread of the disease potentially entails for both the company itself and all its stakeholders, and take appropriate measures to manage and mitigate such risks. This is necessary to develop safety and prevention policies, not only with respect to employees, customers and business partners, but also in relation to increased cyber attacks and opportunistic actions.

2. Communication

It is important that directors provide management, staff, shareholders, customers, suppliers, official bodies and supervisors with sufficient information regarding the crisis, the state of the company's affairs and the measures taken. Although, as stated above, the general meeting is only competent for the matters provided for by law, it is strongly recommended to involve shareholders and possibly other stakeholders in new strategies and other important matters.

3. Decision-making

It is usually no longer possible to hold in-person board and shareholder meetings, which necessitates the search for alternatives. For more information, we refer to our [e-zine of 26 March](#) on this subject.

4. Corporate strategy and continuity

Directors must take into account possible shifts in the (future) financial stability, availability of resources, cash flows, solvency and the general continuity of the company. Where necessary, the short- and long-term strategy, financing and dividend policy of the company will have to be reviewed in the light of likely significant decline in business activity, possible discontinuation of funding and disruptions in the supply chain. Moreover, any planned share buy-back schemes are recommended to be put on hold.

4.1 Contracts and transactions

The current corona crisis may have a substantial impact on existing commercial and financial agreements, the performance of which may be delayed, suspended or even unilaterally terminated, inter alia by the presence of 'force majeure' clauses that might be triggered. In addition to decisions on ongoing contracts, planned M&A transactions may need to be reconsidered or put on hold, business opportunities created due to the changed circumstances to be reviewed and future commercial and transaction documents to be provided with the necessary contractual mechanisms and clauses to cover the risks associated with COVID-19.

These are all matters that the administrative body of a company has to take into account properly, both in the short and long term. For more information on the potential impact of

COVID-19 on commercial agreements and M&A transactions, we kindly invite you to have a look our previous e-zines of [2 March](#) and of [16 March](#).

4.2 Dividends and profit distribution to directors

As before, the new Belgian Code on Companies and Associations (the BCCA) provides that a company's net assets may not fall below certain thresholds by distributing profit to shareholders or directors. What is new is that the BCCA also imposes a liquidity test on the directors of private limited companies (besloten vennootschappen or sociétés à responsabilité limitée) and cooperative companies (coöperatieve vennootschappen or sociétés cooperatives): the decision to make a distribution may only be executed after the administrative body has established that the company will continue to be able to pay its due debts over a period of at least twelve months.

In the event of failure to comply with these statutory rules, the directors risk joint and several liability and even criminal liability for all damage arising from this, even if they only executed a distribution resolution taken by the general shareholders' meeting.

4.3 Business continuity

It is crucial that directors reflect on the future profitability, solvency and continuity of the company in financially delicate times like these, especially if the company was already struggling with financial difficulties before the COVID-19 outbreak. The new BCCA explicitly provides that the directors are obliged to deliberate on the measures to be taken in order to ensure the continuity of the economic activity for a minimum period of twelve months if it would be jeopardized by important and concordant facts.

4.4 Wrongful trading

If the company's financial situation were to continue to deteriorate, it is possible that it would end up in judicial reorganization or bankruptcy proceedings. In the event of bankruptcy, directors should bear in mind their increased liability risks. After all, by virtue of the Belgian Code of Economic Law, they can be held personally or even jointly and severally liable for wrongful trading prior to the bankruptcy. This indicates the wrongful continuation of a seemingly insolvent enterprise while one has or should have knowledge of the state of affairs and one does not behave like a normal, prudent and careful director. Their liability may amount to all or part of the debts of the company up to the amount of the deficit towards the bankruptcy estate.

Conclusion

The COVID-19 outbreak has all kinds of corporate governance implications. These range from challenges in the field of communication, internal decision-making and risk management to a potentially required (re)consideration of the corporate strategy, continuity and dividend policy of companies. Directors must be well aware of these implications so that they can respond appropriately.

Source : Lawfirm Lydian : <https://www.lydian.be/en/news/role-and-duties-directors-context-covid-19-outbreak-some-insights>