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Covid-19:
Issues for businesses

MARCH 2020

Introduction

This note reflects the position as at 22 March 2020. This note will be updated from time to time, including further following release of further information on the CCFF, including documentation, expected on 23 March 2020. The summary provided in this note is for general information purposes and does not constitute legal advice. The situation is fast-moving and additional details or changes may be announced so it is particularly important to seek specific advice on the circumstances applicable to your business.

The spread of Covid-19 presents, first and foremost, a health emergency. The necessary steps to meet that emergency create acute but necessary challenges for businesses globally. The Covid-19 outbreak is unique in its disruption of core working processes, combined with economic crisis and individual health management for whole populations. We have been advising clients on issues arising as a result of the outbreak and in this note we have sought to capture some of the key areas.

Liquidity and cash flow will be a major concern for both sponsors and their portfolio companies in a period where they face significantly affected customer demand.

The Government has implemented certain measures to ease the liquidity pressures stemming from the Covid-19 outbreak and these, including the new programmes for debt and wage support, are amongst the points summarised below.

The situation is constantly evolving and CMS will continue to provide updates on any further announcements and developments. At the end of this article we have included a link to our *Law-Now* service, which provides up to date information and advice on the implications of the outbreak. There are also links to relevant articles published on that service in relation to the outbreak.

Liquidity and cash-flow

Government Debt Support

The UK Government has proposed two schemes to provide new funding to UK-based businesses. Further details of both these schemes will be published on 23 March 2020 and both should be available from that date.

- **Covid Commercial Financing Facility (CCFF)**:
  - **Structure**: participants issue corporate debt instruments, which will be purchased by a fund established by the Bank of England
  - **Eligibility**
    - Businesses of any size that make major contribution to UK economy (determined in a number of ways but measured by reference to employees, revenue and/or operations which are in the UK)
    - Participant must be UK incorporated but can have a foreign parent if it meets the "UK contribution" test
    - Available to businesses with a minimum credit rating or who can demonstrate equivalent financial strength
  - **Period**: Any between one week and maximum of 12 months
  - **Value:** A minimum of £1m for each issuance. No maximum specified but will be assessed on an individual basis
  - **Process**: Businesses will need to have, or set up, suitable debt documentation in place to be able to use the CCFF. One or more banks will need to be involved to act as intermediaries between the Bank of England and the business
- **Coronavirus Business Interruption Loan Scheme:**
  - **Structure**: typical forms of lending (terms loans, invoice facilities, overdrafts) available through commercial lenders and backed by the UK Government. The government will provide lenders with a guarantee of up to 80% on each loan (subject to an overall cap for each lender). Potential participants should contact their lender for further information.[1] The UK Government will make a payment to cover interest and any lender fees for most eligible businesses for the first twelve months so initial repayments will be lower. Fishery, aquaculture and agriculture businesses may not qualify for the full interest and fee payment in that period. **The Borrower always remains liable for 100% of the debt.**
  - **Eligibility**: UK based businesses with an annual turnover of up to £45m (increased on Friday 20 March from £41m), which derive 50% of their annual turnover from trading. The eligibility criteria is still to be fully established, but it is open to sole traders, corporates, limited partnerships, limited liability partnerships and freelancers. Banks, building societies, insurers, reinsurers (but not insurance brokers) and the public sector are not eligible to apply. Employer, professional, religious and political membership organisations and trade unions are also excluded.
  - **Purpose:** To assist businesses that cannot meet a lender's normal lending criteria due to the impact of the pandemic and a downturn in trading but would be considered viable in the longer term.
  - **Period**: Up to 6 years for term and asset finance facilities, 3 years for overdrafts and invoice finance facilities.

[1] https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-scheme-cbils/accredited-lenders/

- **Security:** The facility can be used for unsecured lending of up to £250,000. For facilities over this amount, the lender may only use CBILS if no other security is available to it for the lending. If your lender can offer facilities without using the scheme it will do so.
    - **Value:** For lending up to £5m.
    - **Availability:** The loan scheme will be available for an initial 6 month period.
- **Managing Staff Costs:** Many businesses are facing the dilemma of whether to lay staff off without pay, operate short time working or make staff redundant and re-recruit if they can when the current crisis has passed. The UK Government is eager to ensure that as many people stay employed as possible and has therefore made available a non-refundable grant for businesses of up to 80% of the wages of those staff who are "furloughed" (i.e. sent home without pay and not made redundant), subject to a cap of £2,500 a month. The grant will be backdated to 1 March 2020. On the face of it, the grant is only available in respect of employees who are not provided with any work from 1 March, leaving those who have been willing to operate on a short time (and reduced pay) basis disadvantaged.
- **Reimbursement of statutory sick pay (SSP):** The UK Government has introduced new legislation that allows employees to claim SSP from day 1 of a period of illness or self-isolation in accordance with Public Health England guidance due to Covid-19. Employers with less than 250 employees will be entitled to a reimbursement (rather than an upfront payment) for up to two weeks' SSP for each employee absent from work because they are ill or self-isolating as a result of Covid-19. The reimbursement will not apply to an employer's more generous sick pay terms. Where enhanced sick pay is at the discretion of the employer (rather than strictly contractual), the employer will need to give careful consideration to whether it can afford to pay employees more than SSP. Where enhanced sick pay is contractual and the employee is unfit for work, the enhanced sick pay will be payable. Where the employee is fit for work, but self-isolating on the advice from Public Health England, unless they can work from home, they are likely only to be entitled to SSP.

Tax

The UK Government has also proposed a number of schemes in relation to the UK tax regime to assist businesses with their cash-flow.

- **Business Rates Relief:** a business rates holiday for all businesses in the retail, hospitality and leisure sector for the next 12 months, irrespective of rateable value of properties.
- **Small businesses cash grants**: any business with retail, leisure and hospitality property with a rateable value of less than £51,000 for the 2020/21 period, can claim up to £25,000 by way of cash grant from the Government.
- **PAYE liabilities:** PAYE due to be paid for month 11 (March 2020) can be deferred for two months, subject to specific agreement with HMRC via the COVID-19 helpline. No guidance is available yet in relation to month 12 (April 2020).
- **"Time to Pay":** Ability to agree specific tax payment arrangements (deferrals/instalments) with HMRC, enables businesses to avoid penalties for failure to pay tax.
- **Income Tax Self-Assessment:** payments for the self-employed due on 31 July 2020 have been deferred to 31January 2021.
- **VAT:** accounting for VAT for the first quarter of 2020 has been deferred. Businesses have to account for the VAT for this quarter by the end of the financial year.

Other liquidity management options:

- **Withholding / deferring rent**: we consider that it is unlikely that tenants will be entitled to withhold rent but other options are available. Some are asking landlords if they can defer rent for the forthcoming period or seeking rent concessions in various forms. Some landlords are trying to be amenable to granting concessions, however some are contractually unable to do so. See below in relation to the risk of *Forfeiture*.
- **Closing sites:** Some businesses are looking at ways they can streamline their operations and operate fewer sites, particularly in light of a significant reduction in demand.

Each of the above matters give rise to additional consequential issues on people, assets and liabilities.

Other issues to consider

We have also been advising clients on a number of other issues that have arisen recently, including:

- **Banking covenant breaches:** in light of the circumstances, many businesses will be facing breach of the covenants in their banking arrangements. We have spoken to a number of lenders in the UK market to determine whether there is a common approach to waiver requests in respect of a predicted financial covenant breach or otherwise as a result of Covid-19. There is no common approach as yet but those we have spoken to have been generally supportive, particularly where a business would have been complying with its financial covenants in the relevant period but for the impact of Covid-19.
- **Undrawn commitments**: generally, banks are much better capitalised than they were during the global financial crisis and, moreover, they are being offered additional liquidity support from central banks. Therefore, businesses should be more confident in the stability of their lenders. Businesses may, however, be keen to over-capitalise their balance sheets in order to counter the impact of Covid-19. Businesses should note that facilities are likely to contain material adverse change (MAC) provisions allowing lenders to deny drawdown requests if an event has occurred which has had a material adverse effect on the financial condition of a business. There is considerable reputational risk for any lender looking to call a default on a MAC clause alone but each such clause is different and we recommend you seek advice on it and any other provisions in your finance documents that may be triggered by Covid-19 or the steps being taken to counter its spread.
- **Directors duties:** directors of businesses will need to continually consider their statutory duties in the context of the current circumstances, particularly where decisions are being made regarding deferring liabilities. Directors will also need to consider the potential for wrongful trading issues arising where businesses may be considered insolvent. Advice will depend on the circumstances but the existing regime allows directors to take many factors into account in determining prospects of survival and best interests of creditors (including employee creditors). Given the Government's clear strategy to preserve current employment at almost any cost, businesses should look at all the support available and take advice before taking any material insolvency steps.
- **Forfeiture:** as noted above, negotiations with landlords may become unavoidable. Landlords may be unlikely to take steps to forfeit a lease as they will not wish to have vacant properties that may attract empty rates liability. However, some may still have a need to reclaim important sites/stores by removing an unviable tenant and there is a current demand for a particular type of property. Our real estate team have been advising both landlords and tenants on managing this situation and the other real estate issues set out in this note.
- **Other force majeure/MAC issues:** we have been advising businesses on issues with their supply chain and the risk that suppliers may be unable to meet their contractual obligations as a result of force majeure provisions or equivalent. In addition, private equity sponsors may need to consider whether there are any material adverse change provisions in their fund documents allowing investors to refuse drawdown requests in any circumstances.
- **Health and Safety:** employees have been encouraged to work from home where possible. Where this is not possible, employers will need to consider their health and safety obligations to provide a safe workplace.
- **Emergency plan:** businesses should have in place predetermined action plans for communication and co-ordination, designated roles for functional representatives, protocols for communications and decision making, and emergency action plans that involve customers and suppliers. This should include identifying who is responsible for reviewing and monitoring risks and Government guidance.
- **Reputational Issues:** we have already seen businesses in particular sectors take individual decisions to change their approach within days to be in line with their competitors. There is particular risk in making decisions on "business as usual" criteria and long-term relationships with government and consumers should be carefully considered. This is particularly important in combination with the consideration of potential insolvency issues.
- **Preparation for post Covid-19:** research shows that public companies that came out of the last recession more strongly made acquisitions and divestments more rapidly than others – thorough planning for future platform and portfolio activity should be undertaken. Consideration should also be given to the terms of management incentivisation – with revisions to existing programmes and the establishment of new targets being required.

How CMS can help

We have extensive experience advising clients on material and time critical business matters. Our specialist corporate, banking, insolvency and employment lawyers are all available to guide you through the fast moving and unique landscape and to assist you with eligibility for and applications in respect of each of the matters outlined in this note. To discuss any of the issues in this note in more detail, or for further advice, please contact any of us.

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Resources

If you have not already done so, please sign up for our *Law-Now* updates at https://www.cms-lawnow.com/

There is a dedicated page on the CMS website, which offers links to country-specific pages that list *Law-Now* articles, publications and webinars relating to that jurisdiction which can be found at the below link: https://cms.law/en/int/insight/coronavirus-sars-cov-2-covid-19

Below are links to lists of articles we have already published on *Law-Now* in relation to the Covid-19 outbreak.

- **UK:** https://www.cms-lawnow.com/search?countries_sm=24a0e1dd-d98a-4da2-8daa-c78e1a2ba3fc&areaoflaw_sm=4d48ef25-82fe-491a-af40-d1d8ac4d757a&_language=*
- **Global:** https://www.cms-lawnow.com/search?areaoflaw_sm=4d48ef25-82fe-491a-af40-d1d8ac4d757a&_language=*

In addition, we would also draw your attention to this article on **pro-active tax management during Covid-19**: https://www.cms-lawnow.com/ealerts/2020/03/covid-19-pro-active-tax-management-guidance?cc_lang=en

About CMS

Your World First – the CMS approach to delivering value

We have a phrase to sum up our promise to our clients: ‘Your World First’. This phrase reflects our priorities of being client-centric, providing world vision and being performance driven.

Client-centric

You, the client, are at the heart of our business - whether you are a large or small organisation. Our emphasis is not just on being great technical lawyers, but really understanding your business and your key objectives. One way we do this is by organising CMS into sector groups that operate locally and internationally. CMS’s international sector specialists take pride in understanding your industry and engaging with your company-specific issues.

We deliver added value services based on real client needs, such as Law-Now, which provides easy-to-access, practical and timely knowledge that matters to your business. CMS expands to meet client needs, moving into countries where we can make a difference to your business.

World vision

Our sector insight means we immerse ourselves in your world and make sure we understand the global business issues you are facing. We have deep local expertise in your most significant jurisdictions as well as all the major global centres and we have established CMS in emerging markets in line with client needs. CMS professionals act as trusted partners, managing your global projects and transactions wherever you need us.

Performance-driven

We work with you to define what success means for you and your organisation and we focus on making it happen. CMS takes pride in first-class execution and project management – we deliver results, not just opinions. We will actively ask for your feedback to help us assess and improve our performance.

Delivering client service

We take the same approach to service delivery everywhere, based on a common training programme and a shared understanding of what our clients value most.

We provide you with management information to help you manage your account with us, covering areas such as invoicing, matter progress, fees, work in progress (WIP) along with bespoke reports on other factors specific to your business and your needs.

Your satisfaction with our performance drives our efforts to continuously improve our service. Through regular exchange of information and independent feedback we identify opportunities to reach higher levels of efficiency and effectiveness in service delivery and act upon them.

Facts & Figures

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43 countries

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