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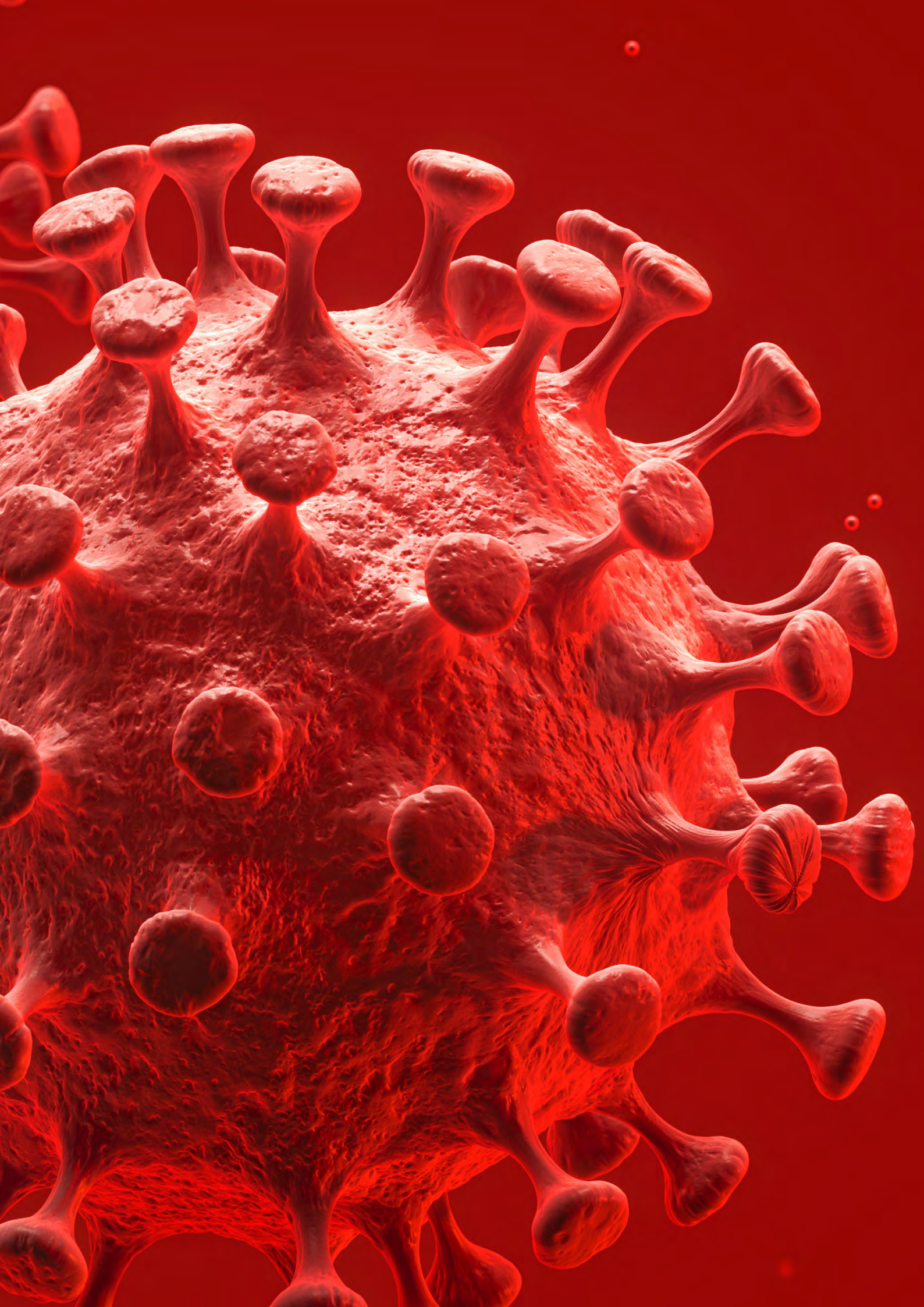
COVID-19:

Liquidity, Debt and Employment Measures Supporting Businesses and Individuals

May 2020



Contents

Liquidity and Working Capital Support

Debt Support

Tax Measures

Support for Employers and Workers

Liquidity and Working Capital Support

Index links:

This section reflects the position as at 19 May 2020.

Introduction

The Covid Corporate Financing Facility (CCFF) is intended to assist larger businesses with liquidity and working capital issues. The CCFF was originally described in a Market Notice issued on 18 March 2020. A further Market Notice was issued on 19 May 2020 reflecting changes since the original launch of the CCFF. In headline terms, the CCFF involves funding for larger businesses through the purchase by a Government company (the Fund) of commercial paper (CP) issued by the relevant business.

CP is explained in more detail below. In broad terms, CP is simply a debt instrument, similar to bonds or loan notes in that it represents a promise by the issuer to repay an amount in the future. CP is usually issued on standard market form documents and has a maturity date of less than 12 months with fairly simple terms and limited default provisions.

While many of those looking at the CCFF may have issued CP before, it is open to businesses that have not done so and may not have participated in the money markets before. Companies using the scheme needed to be in sound financial strength before the COVID-19 shock and evidence of an investment grade credit rating, or broadly equivalent financial strength, will be required. Although companies with a credit rating may be able to access the CCFF more quickly, it is not be necessary to have an existing credit rating.

The scheme formally launched on 23 March 2020. As at 20 May 2020:

— 134 businesses had been approved for CCFF issuance

— 63 of them had borrowed under the CCFF

— a further 108 businesses had applied and been approved in principle

— although confidentiality restrictions mean that no definitive list is available, companies confirming that they are eligible for the CCFF include easyJet, National Express, Whitbread and Wizz Air

— approximately GBP 20.5bn of lending was outstanding

The scheme has faced criticism given that many businesses will be unable to meet the eligibility requirements including, in particular, the requirement to be of investment grade financial strength. Although the Market Notice dated 19 May 2020 consolidates the various further details that had been made available since the scheme was launched, the main characteristics of the scheme, including the eligibility requirements, have not changed materially since the original announcement in March.

This section covers the main issues around the CCFF, including:

— an overview of CP generally

— eligibility for the CCFF

— the terms of CP eligible under the CCFF

— documentation needed to be able to issue CP

— steps that a business should be taking to be in a position to use the CCFF

Commercial Paper

CP is a form of debt instrument, with the same essential characteristics as a bond or loan note, with maturity of less than a year. As with other types of debt instruments such as medium-term notes (MTNs), CP is typically issued pursuant to a programme. CP is usually cleared through the main international clearing systems (Euroclear and Clearstream) – and CP under the CCFF needs to be issued this way – but is not usually listed on a stock exchange.

One or more "dealers" (generally investment banks) are involved in setting up and running the programme. Dealers act as the "interface" between the issuer and the CP purchaser. Where CP is purchased by the Fund under the CCFF immediately upon its issue in the primary market, the purchase must be carried out through dealers. They are also involved in documenting a CP programme.

Companies wanting to use the CCFF who do not already have a CP programme in place will need to speak to one or more of their relationship banks quickly to check that they would be able to help.

Eligibility for the CCFF

The minimum size of an individual issue of CP eligible for purchase by the Fund is GBP 1m nominal. To be able to use the CCFF, a business:

— does not need to have issued CP previously, but will need to establish a CP programme if it does not already have one

— must make a material contribution to the UK economy

— must be a non-financial company (banks, building societies, insurance companies and other financial institutions regulated by the Bank of England or the Financial Conduct Authority are not eligible)

— must not be a public body or a "public undertaking" (which is likely to include most companies majority public-owned in the UK or by an EU member state)

— must have been in sound financial health prior to the COVID-19 shock

— must use a UK-incorporated issuer (which can be a finance subsidiary, in which case a guarantee will be needed from the "primary entity" in the group) but can be foreign-owned with a "genuine business" in the UK

From 19 May 2020, issuers participating in the CCFF may be required to commit to "restraint on their capital distributions and on senior pay" if they issue CP maturing on or after 19 May 2021. The template undertaking letter provided by the Bank contains an undertaking that all distributions to shareholders (including dividends and share buybacks). "Pay restraint" means involve no pay rises or cash bonuses to senior management, including the board. The restrictions remain in place from when the business enters into any CCFF transaction maturing on or after 19 May 2021 and remain for so long as any such CP is outstanding.

Looking at some questions businesses are likely to have about eligibility:

— when assessing "material contribution to economic activity in the UK", relevant factors will include employment in the UK, whether the business headquarters are in the UK and the extent of UK revenues, customer base and operating sites

— unlike other support schemes, such as CBILS and CLBILS, there are no minimum or maximum turnover limits, though we would generally expect companies with turnover of less than about GBP 100m to find it difficult to satisfy the "material contribution" and "sound financial health" requirements

— CP issued by regulated entities including banks, building societies and insurance companies is not eligible, or if issued by leveraged investment vehicles or by companies in "groups which are predominantly active in business subject to financial sector regulation"

— although public entities are generally ineligible, housing associations with a V1 viability grade from the Regulator for Social Housing are eligible and the Government has confirmed that higher education bodies are, in principle, eligible

— the easiest way to evidence sound financial health is through a pre-COVID-19 shock credit rating. This means a short-term credit rating on 1 March 2020 of at least A-3/P-3/F-3/R3 from at least one of S&P, Moody's, Fitch and DBRS Morningstar, the major rating agencies. If a company does not have a short-term rating:

– if it has a long-term rating, the Bank will "read across" that rating to the equivalent short-term rating. The equivalent long-term ratings are BBB-/Baa3/BBB-/BBB low

– if it has no rating, the Bank will consider whether it is able to assess whether it is of equivalent financial strength. There are two main options. The first option is that the Bank will rely on internal ratings of a business from banks. This can be evidenced either through a credit file of large UK corporates provided to the Bank by Credit Benchmark or the ratings from the company's own banks. Generally, three banks need to consider the company to be investment grade, or two where they regard the company as strongly investment grade. The second option is for companies to contact one of the major rating agencies to seek an assessment of credit quality. The time and cost of such a ratings process will vary, although we understand that some rating agencies may charge considerably lower fees than for a "normal" ratings process. On the Issuer Eligibility Form, the Bank of England asks issuers who do not have a rating whether they have started the process of getting one. If not, they ask for evidence of financial condition before 1 March 2020, suggesting that the Bank may be willing to carry out its own credit assessment independent of the rating agencies, perhaps where companies have particularly urgent liquidity needs.

Terms

Purchases can take place in the "primary market" by issuing directly to the Fund (technically via the dealers for the relevant CP programme, discussed further below) or in the "secondary market" from eligible counterparties who already hold CP. The Bank intends to close the CCFF to new purchases on 23 March 2021, but CP can be issued up to and including 22 March 2021 with a maturity beyond that date. New issuers will not be accepted after 31 December 2020.

To be purchased under the CCFF, CP needs to have a maturity of one week to 12 months, though for regulatory reasons discussed below, the maximum maturity will be 364 days. Drawings can be rolled while the CCFF is open, subject to eligibility. On 19 May 2020, the Bank announced that businesses can repay drawings under the CCFF early if they choose to do so. This will take effect as a standing offer by the Bank to sell CP back to the issuer in advance of its original maturity date, typically for a fee. The CP must not have "non-standard" features. The Issuer Eligibility Form asks for confirmation that CP under the programme is "not complex", including that the CP is not subordinated and does not contain features such as extendibility. As such, we think it unlikely that anything "structured", including CP with security or involving intra-group arrangements and covenants other than in connection with a guarantee, will not be considered eligible. Although the CP itself is unlikely to be secured, the Bank of England might consider taking the benefit of existing security so that is not, in effect, subordinated to any other lenders a business may have.

Pricing is intended to achieve rough equivalency with market pricing pre-crisis. In technical terms, the Fund will purchase CP at a spread above a reference rate, based on the current sterling overnight index swap (OIS) curve. Spreads will be set with a view to achieving pricing close to the market spreads prevailing before the COVID-19 shock. Indicative spreads published by the Bank of England range from 20-60 basis points, depending on the credit strength of the relevant business. As a result, the CCFF is likely to represent relatively cheap funding for businesses who are able to use it.

Confidentiality and Undertakings

Issuers need to sign an undertaking and confidentiality undertaking when applying to issue CP to the Fund under the CCFF. In this document, the company:

- gives confirmations that no insolvency events have occurred (or that they have occurred only as a result of COVID-19 and have been disclosed to the Bank)
- makes various representations and undertakings, including about the accuracy of financial statements and projections, its ability to enter into CCFF documentation and its ongoing eligibility for the CCFF
- agrees to give a guarantee from the "primary entity" in its group and, where that primary entity is incorporated outside England & Wales, a legal opinion
- undertakes to pay the Bank's costs and expenses (including legal expenses) in connection with the CCFF (though the size of such expenses and whether the Bank will enforce this provision remain unclear)
- agrees to notify the Bank if, subject to certain exceptions, it grants security for any debt, unless the CP purchased by the Fund benefits from the same security
- agrees to the operating procedures of the CCFF and to any unilateral changes to the procedures or documentation that the Bank may make
- agrees, along with the Bank, to keep information confidential, including the fact that the issuer is participating in the CCFF (though we expect this undertaking to change, as discussed below)

Every Thursday at 3pm, the Bank publishes the aggregate amount of CP purchased under the CCFF up to Wednesday that week, along with other details including the number of eligible businesses. Originally, neither the names of businesses using the CCFF not the amounts of their borrowing were published. On 19 May 2020, the Bank announced that, from 4 June 2020, it would be publishing names of businesses with outstanding borrowing under the CCFF and the amount of that borrowing. Listed businesses have duties to disclose price-sensitive information to the market. Many companies with access to the CCFF considered the need for additional liquidity, and the availability of that liquidity, as being information that needed to be disclosed to the market. This change is likely to be a response to discussions that took place between businesses and Bank on this topic and it will also increase transparency around a significant piece of the government support for business.

Documentation

The documentation for a CP programme tends to be in relatively standard form, usually closely following the standard market forms published by ICMA. CP documents are generally not heavily negotiated, compared to the documents for a loan facility or longer-term debt instruments. The programme documentation generally includes:

— a dealer agreement governing the relationship between the issuer and its dealer(s). The terms of each CP issuance are agreed at the time of the issue and there are no commitment fees. Dealers are typically compensated by a commission on each CP issue or a fee based on the amount of CP outstanding. Fees for a CP programme created for the CCFF may be lower than for a "normal" CP programme because issuers should not need the dealers to source investors given that the Fund will be the purchaser

— an information memorandum containing details about the programme and the issuer. We would expect an information memorandum to incorporate by reference (if not physically include) the most recent audited financial statements and any available interim statements. A CP issuer is unlikely to need to produce extra financial statements as a result of a having a CP programme under the CCFF. The Bank of England has published a short-form "information sheet" containing a summary of the CP programme and the issuer (and guarantor, if applicable). We would typically expect that this information sheet would replace the longer information memorandum for CP programmes under the CCFF

— a guarantee, if applicable (for instance, if a finance subsidiary is the issuer, as is common and as is anticipated by the CCFF). The Issuer Eligibility Form asks whether the CP benefits from a guarantee "or similar arrangements" that have been provided to other creditors of the issuer. The form of guarantee that will be expected in connection with the CCFF is available on the Bank of England's website

— an issue and paying agency agreement governing the relationship between the issuer and the bank acting as agent to carry out certain mechanical tasks in connection with issuing the CP, holding the notes as depositary for the clearing systems and making payments on the CP (and the agent would usually be expected to be from the same bank group as the dealers, so the dealers would be expected to help with this)

— the legal documentation representing the CP itself, usually being one or more global notes. CP essentially represents a promise to repay the principal amount (the face value or "par") of the CP at maturity; there are generally no, or limited, events of default, negative pledge or other covenants (and we note that the information released by the Bank of England, including the Issuer Eligibility Form, requires there to be no complex features). The notes normally contain a tax gross-up clause. For those familiar with other kind of debt issues like MTN programmes, there is no trustee or noteholder meeting provisions

— a deed of covenant, under which holders of CP are given direct rights of enforcement against the CP issuer or guarantor if the CP issuer defaults on payment

— legal opinions as to capacity and enforceability addressed to the dealers. Dealers may be willing to waive this requirement. Where a guarantee is provided by a company other than the CP issuer and the guarantor is not incorporated in England & Wales, a legal opinion will be needed. The form of this is provided on the Bank of England website

As expected, the Bank anticipates that CP programmes under the CCFF will closely follow the template suggested by ICMA that is familiar in the market. The ICMA templates were previously available only to members of ICMA, but they have made them available generally in light of the CCFF.

The Issuer Eligibility Form asks for confirmation that the CP programme is "substantially in the form of the ICMA recommended template" and for details of any material deviations from them. Existing CP programmes that may be eligible under the CCFF would is likely already to be based on this template.

Documentation (continued)

From a legal and regulatory perspective, issuing CP:

— does not need a detailed prospectus but may need a straightforward information memorandum. CP falls outside the scope of the Prospectus Regulation (which still applies in the UK during the EU withdrawal implementation period) because of its short maturity. This means that no prospectus is required under this legislation. By convention, a more straightforward information memorandum is prepared for a CP programme. Where CP is issued solely to the Fund, the shorter "information sheet" is likely to be sufficient

— would generally not require an issuer to be authorised by the FCA. So long as certain requirements are met, which we would expect to be standard requirements and features of CP programmes under the CCFF, issue of CP would not generally breach deposit-taking or financial promotion rules

— would, as with most issues of debt instruments, often be undertaken by a PLC, rather than a (non-public) limited company. This is not an absolute rule and companies proposing to use the CCFF would need to consider and take advice on this point

— can generally avoid withholding tax if interest-bearing (which is generally not the case as CP is typically offered at a discount). This is because interest paid on debt with a maturity of less than a year would not generally be expected to be "yearly interest" for the rules on withholding tax

From a timing perspective, we would usually expect the process of setting up a programme to take around 4-6 weeks. However, assuming that one or more banks have agreed to act as dealers, with appropriate focus and subject to any initial bottle-necks if several issuers want to access the CCFF immediately now that it has launched, it would be possible in theory to agree the documentation and set up the programme within a few days. Once the programme has been established, individual issues of CP can be carried out very quickly – potentially within hours of a decision to issue.

The Bank has said that if they confirm eligibility before 4pm on a working day, companies will be able to sell CP to the Fund via a dealer the next working day. Purchase decisions will be made by the Bank every working day between 10am and 11am.

Steps to Take

Companies planning to access the CCFF should:

— speak to your bank(s) to ensure that they are able to help with the establishment of a CP programme, provision of dealers and a paying agent and, if applicable, assist with the ratings confirmations (including in what timeframe and for what fees). We would recommend you contact your existing relationship managers in the first instance. UK Finance have also released details of banks who have indicated that they will be able to act as dealers

— consider the eligibility criteria and make contact with the Bank of England to discuss eligibility either directly on CCFFeligibleissuers@bankofengland.gsi.gov.uk or through your banks (and we note that the Bank of England generally encourages businesses to direct queries to their banks in the first instance)

— familiarise yourself generally with details of the CCFF, including the information available on the Bank of England website, such as the main CCFF application form and the guidance that accompanies it, issuer eligibility form, issuer undertaking and confidentiality agreement, form of guarantee and form of legal opinion that may be required

— ensuring financial statements and other key information about the business are available, particularly if the company does not already have a short-term rating

— checking the terms of other documentation, particularly loan agreements, intercreditor and security arrangements and other financing documents, to ensure that the issue of CP, which is a form of debt, is permitted (and, if so, considering seeking appropriate amendments or waivers)

— consider any constitutional restrictions or requirements applicable to the relevant issuer/guarantor companies, including whether any amendments may be needed to the articles of the company and what board or other authorisations may be required

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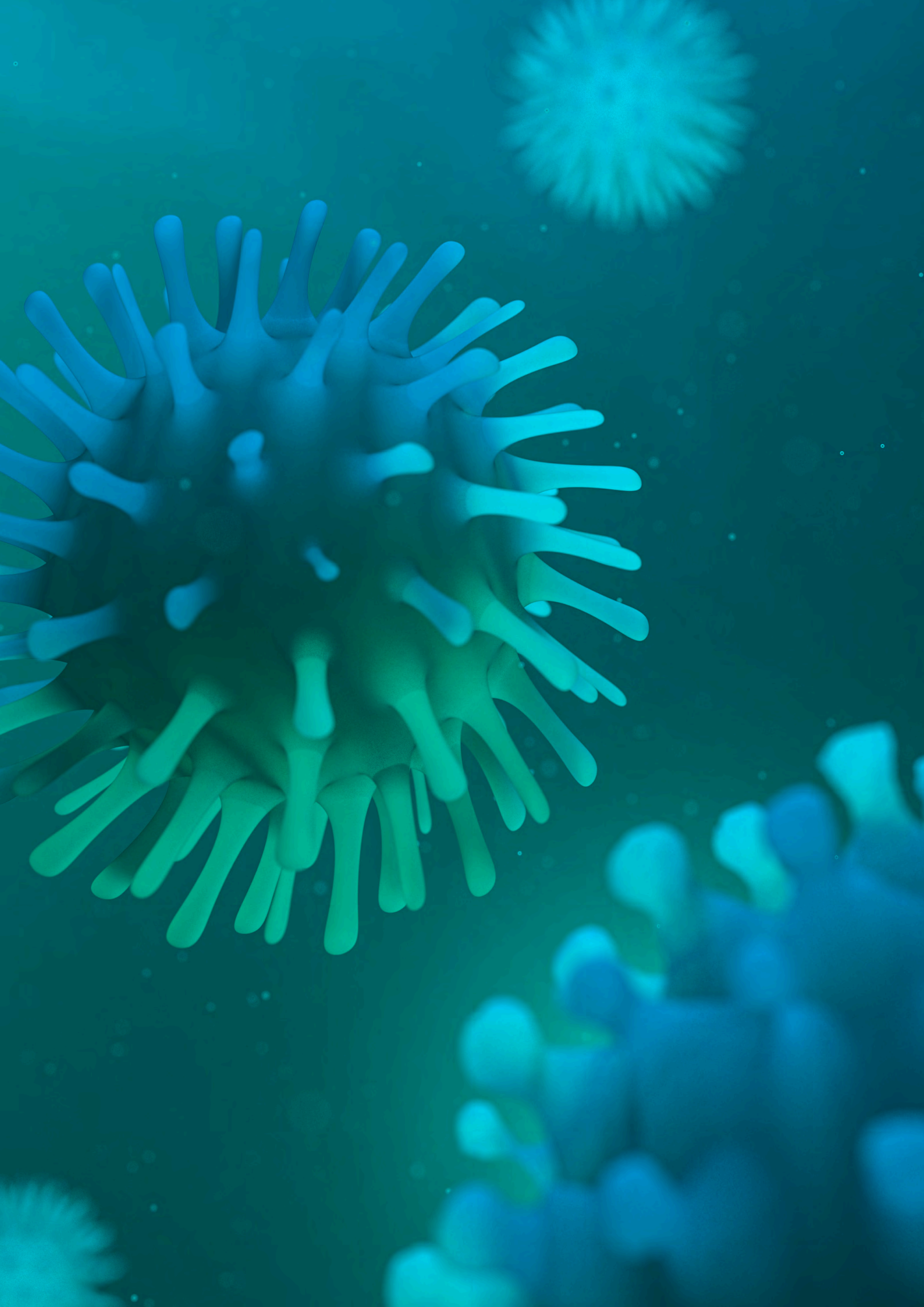

Debt Support

Index links:

This section reflects the position as at 26 May 2020.

Coronavirus Large Business Interruption Loan Scheme ("CLBILS")

This scheme was launched on Monday April 20th through accredited lenders. Further amendments were made to the CLBILS scheme on 26 May 2020, the main change being an increase in the lending limit to GBP 200m for larger businesses. There are differences in the accredited lenders providing facilities up to GBP 50m and those providing facilities for up to GBP 200m. In addition, different eligibility criteria apply to loans over GBP 50m and also to businesses which are private equity or venture capital backed.

Loan type

These are likely to be term loans, overdrafts, invoice finance and asset finance. Facilities will all be made through commercial lenders and are 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). *Unlike the CBILs scheme, the Borrower will be required to meet all payments of interest and fees for the facility which will vary across lenders. The Borrower always remains liable for 100% of the debt.*

Eligibility

UK based businesses in all sectors with an annual turnover of over GBP 45m where 50% or more of turnover is generated from trading activity. Larger eligible borrowers can borrow up to GBP 200m. For all loans, each borrower must confirm it has been impacted by COVID-19 and also have a borrowing proposal which, were it not impacted by COVID-19, would be considered viable by the relevant lender in circumstances where the lender considers the provision of the loan will enable the borrower to trade out of short to medium term difficulty. The scheme is open to sole traders, corporates, limited partnerships, limited liability partnerships or other legal entities carrying out a business activity in the UK. Banks, building societies, insurers, reinsurers (but not insurance brokers) and the public sector including state funded further education establishments, primary and secondary schools are not eligible to apply.

Note: The borrower must not be an undertaking in difficulty as at 31 December 2019. There are different tests for borrowers which have less than 250 employees and those which do. In addition, the business must not have utilised the BBLs, CBILS or CCFF Facility provided by the Government. Borrowers receiving other forms of government support such as the Coronavirus Job Retention Scheme, business rates reliefs or grants may also apply for the CLBILs loan scheme.

Loans over £50m

Additional eligibility criteria applies for facilities over GBP 50m. These include restrictions on:

- salary increases and bonuses to senior management unless these were agreed prior to applying for the facility, or where these are in line with similar payments made in the preceding 12 months and in each case where these will not have a materially negative impact on the borrower's ability to repay the facility. These restrictions do not apply immediately to new members of the senior management team joining after the facility is in place;
- making or declaring dividends or other distributions in respect of its share capital or equivalent for a partnership;
- repaying dividends or share premium reserves
- paying advisory or management fees to any shareholder of the borrower or a member of its group
- redeeming or repurchasing share capital or similar.
- There are carve outs in relation to these additional restrictions including the payment of dividends or distributions declared prior to taking out the CLBILS facility and borrowers should check the specifics with their advisors.

Turnover

The new guidance clarifies the treatment of sole borrowers and those which are treated as part of a group because they have linked enterprises or have partners which are linked enterprises, or any partners have linked enterprises or any enterprises are linked to the borrower's linked companies. (Note: Private equity or venture capital backed businesses are treated differently as noted below.) The rules on linked and partner enterprises derive from the EU and broadly a borrower is linked to an enterprise when that enterprise holds a majority of the shareholders voting rights or otherwise controls or has a dominant influence over the borrower.

Private Equity/ Venture Capital backed Borrowers

A borrower with a private equity or venture capital backer (ie, an investor(s) whose business strategy is to raise funds from private or institutional investors to make medium to long term equity investments in a business which is not publicly quoted) will be treated as a separate, sole entity for the purposes of assessing turnover and will not be consolidated as a linked group.

Period

For a period from 3 months to 3 years. The scheme is available until 20 October 2020.

How much can be borrowed?

There are restrictions on the amount which can be borrowed: a) not more than double the annual wages bill for the UK based part of the business for 2019; b) not more than 25% of the 2019 total turnover; or c) with self-certification by the Borrower, a larger amount if needed to cover liquidity needs for the next 12 months provided that can be justified.

Security

The facility can be used for unsecured lending of up to GBP 250,000. Personal guarantees will not be required for lending up to that amount. For lending over that amount these may be required in addition to other forms of security but any personal guarantees will be limited to 20% of the outstanding loan after recoveries from repayments and the proceeds of other security.

Ranking

In general, lending under the scheme may not be subordinated to any other senior lending, including secured and super senior lending, subject to some limited carve outs for asset finance and invoice finance facilities or smaller facilities of less than 10% in value of the available security. These rules may well lead to practical difficulties for borrowers with syndicated or other bilateral facilities where some or all existing lenders are not accredited banks under the scheme. Borrowers will not be able to enter into new facilities whilst the CLBIL loan is in place where these would rank senior to the CLBILs facility. There are also separate rules in place in respect of a CLBILs loan for residential development in terms of the ranking of security for that loan.

Materials to support loan application

These will vary from lender to lender. Borrowers need to provide evidence that the loan can be repaid within the period of the loan. The lender will require management accounts, cash flow forecasts, a business plan, historic accounts and details of assets available for security.

Coronavirus Business Interruption Loan Scheme ("CBILs")

Structure
Typical forms of lending (terms loans, invoice facilities, overdrafts) although most lenders seem to be providing only term facilities at present. These are 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. 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 GBP 45m, which derive 50% of their annual turnover from trading. 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. Lenders are tending to aggregate portfolio companies where more than 50% of the shares are owned by one party and where the Board is controlled by that same shareholder. To qualify the borrower needs to demonstrate that it was not in difficulty as at 31 December 2019 – if it had losses greater than 50% of the value of its share capital as at 31 December 2019 then it will not qualify. In addition, the loan amount cannot be for more than 200% of the annual wages bill for 2019 and cannot amount to more than 25% of 2019 turnover. It is not a suitable product for early stage VC backed entities.

Purpose
To assist businesses which are impacted due to the pandemic and a downturn in trading but would otherwise be considered viable in the longer term and able to trade out of the downturn. *The criteria that the lender would have to provide a more standard funding package rather than using CBILs if the borrower met normal lending criteria has been removed*.

Period
Up to 6 years for term and asset finance facilities, 3 years for overdrafts and invoice finance facilities.

Security
The facility can be used for unsecured lending of up to GBP 250,000. Personal guarantees will not be required for lending up to that amount. For lending over that amount these may be required in addition to other forms of security but any personal guarantees will be limited to 20% of outstanding loan after recoveries from business and other security.

Value
For lending up to GBP 5m.

Availability
The loan scheme will be available for an initial 6 month period.

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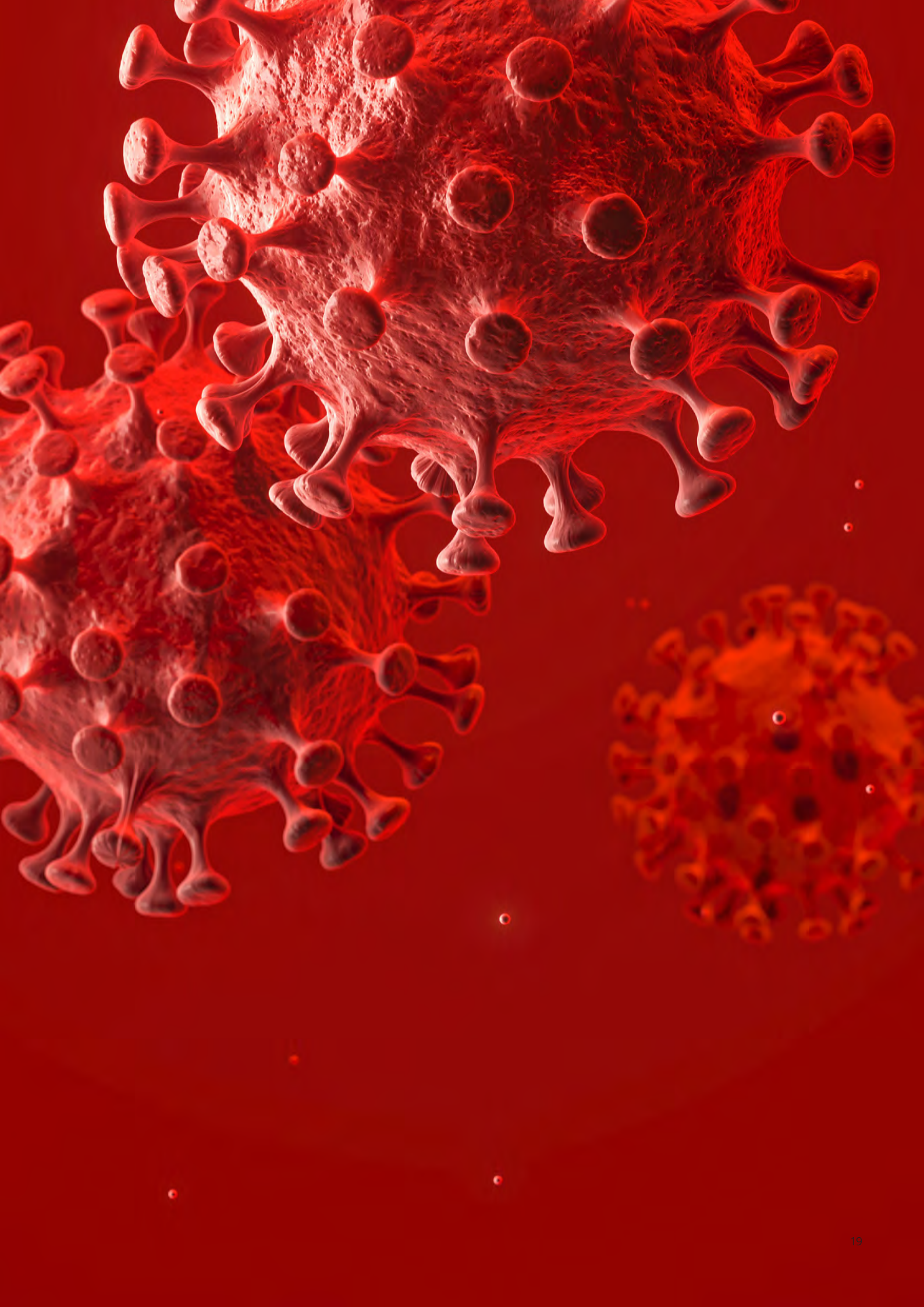

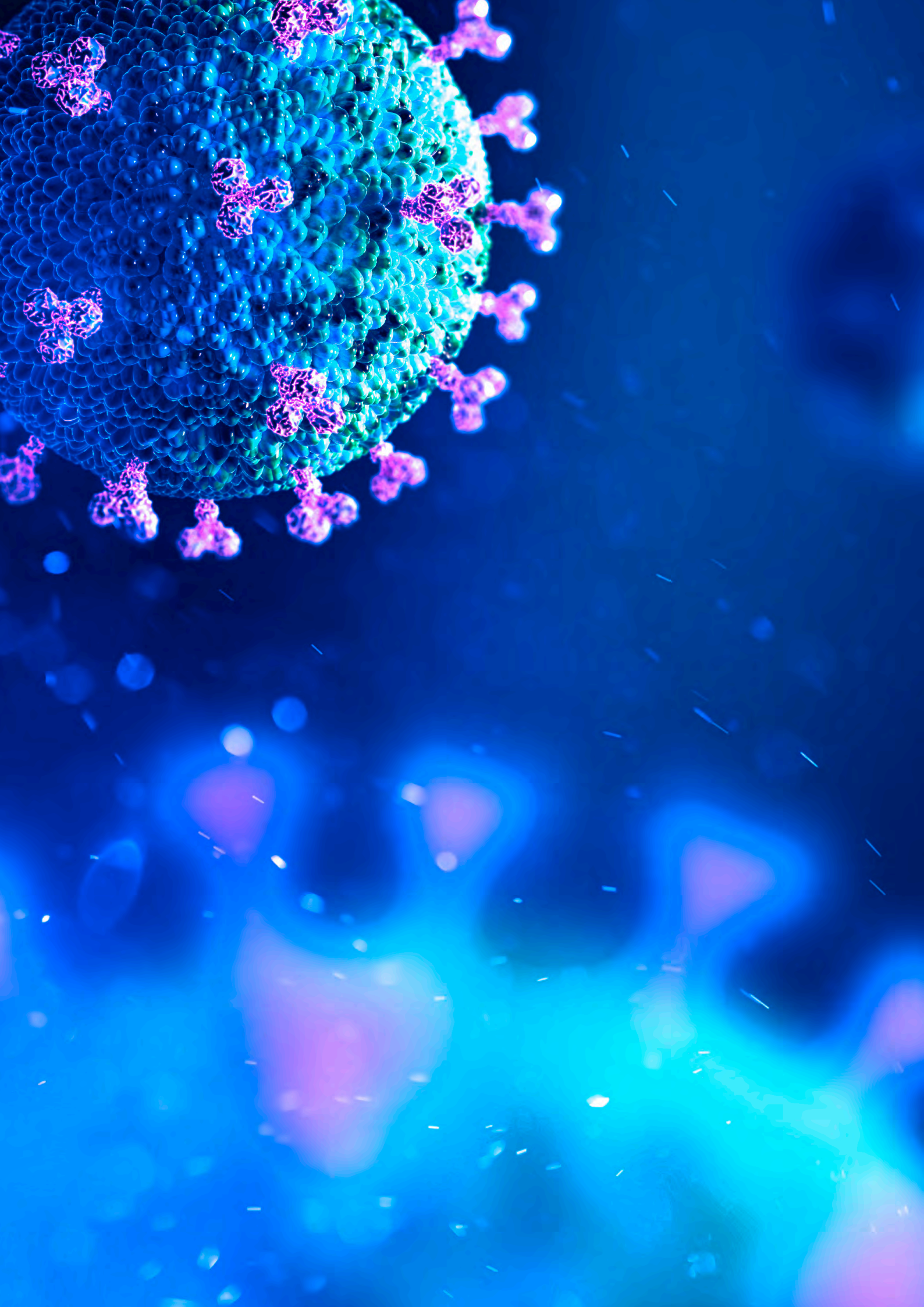

Tax Measures

Index links:

This section reflects the position as at 12pm on 20 April 2020.

Compliance

— No relaxation of tax filing deadlines has been announced

— Businesses should try to meet their tax compliance obligations to avoid penalties

— Where it is not going to be possible for a business to meet its tax compliance obligations, it may consider applying for relief from penalties under the Time to Pay regime (which applies to corporation tax, VAT and PAYE).

Corporation Tax

Payments

— Businesses may be able to revise the amount of their first corporation tax instalment payment due in May 2020, in light of their updated business forecasts for FY20.

— Receipt of reimbursement of wage costs under the Job Retention Scheme will be subject to tax on receipt.

Corporate Residence and Permanent Establishment

— COVID-19 travel restrictions may prejudice the tax residence of corporates, as non-resident directors are unable to attend board meetings in the relevant country.

— For more detail on the OECD and HMRC's response and our suggestions of mitigating steps that can be taken in order to preserve tax residence, please click here.

VAT

— VAT to be accounted to HMRC by businesses in the first quarter of 2020 will be automatically deferred. Businesses have until 31 March 2021 to account for this VAT.

— VAT payable in respect of the second VAT quarter of 2020 (i.e. ending June 2020) has not yet been deferred.

— To improve cashflow, businesses should avoid issuing a VAT invoice until necessary as invoicing before supplying can bring forward the tax point.

— If businesses pay VAT by direct debit and they wish to defer accounting for VAT they will need to cancel their direct debit prior to the withdrawal date for the relevant VAT period.

Income Tax

Employees

HMRC has verbally confirmed to CMS that PAYE due to be paid for month 11 (i.e. March 2020) can be deferred for two months, subject to making specific agreement with HMRC. No guidance is currently available for month 12 (i.e. April 2020). Although there is no published guidance, we understand that HMRC can now agree up to 3-month deferrals with taxpayers, dependent on the taxpayer's circumstances.

Self-employed

IR35 – The introduction of the extension to the private sector of IR35 has been deferred until 6 April 2021.

Self-assessment – Income tax self-assessment payments due on 31 July 2020 will be deferred until 31 January 2021. All self-employed individuals are eligible for this automatic offer. No penalties or interest for late payment will be charged in respect of the deferral period.

Property

— Business Rates Retail Discount of 100% applies for 2020/21 to properties used for the majority of retail, leisure and hospitality businesses.

— No rateable value cap applies to the relief.

— The relief will apply from the council tax bill in **April 2020**.

— Government guidance published on 18 March 2020 included a non-exhaustive list of businesses that can benefit including:

  – shops, restaurants and cafés, including post offices, opticians,
  – petrol stations and art galleries
  – cinemas and live music venues
  – museums, nightclubs, sport and leisure facilities, stately homes, theatres and gyms
  – public halls and clubhouses
  – hotels, guest and board houses, holiday homes and caravan parks and sites

— Businesses that will not benefit include providers of financial, medical and professional services, other services such as letting agents, post office sorting offices and casinos and gambling clubs.

— The eligibility for the discount will be assessed and calculated on a daily basis. To assess the business rate charge that will no longer be payable, please use the business rates calculator.

— There are additional implications of COVID-19 to consider from a tenant's perspective.

Payment Arrangements

— *Time to Pay:* a debt repayment arrangement in respect of outstanding tax liabilities. Such plans are agreed on a case-by-case basis with HMRC. These are tailored to individual circumstances and liabilities. Businesses should approach HMRC with a realistic and manageable proposal of what they are able to afford to pay. We understand that HMRC has agreed around 17,000 Time to Pay arrangements to date, so if businesses would benefit from such an arrangement it is definitely worth contacting HMRC and we can assist you with this process.

— *Deferral plans:* HMRC may agree to tax payments being deferred on a monthly basis.

— HMRC has a dedicated Debt Management Payment and Banking team for these types of arrangements.

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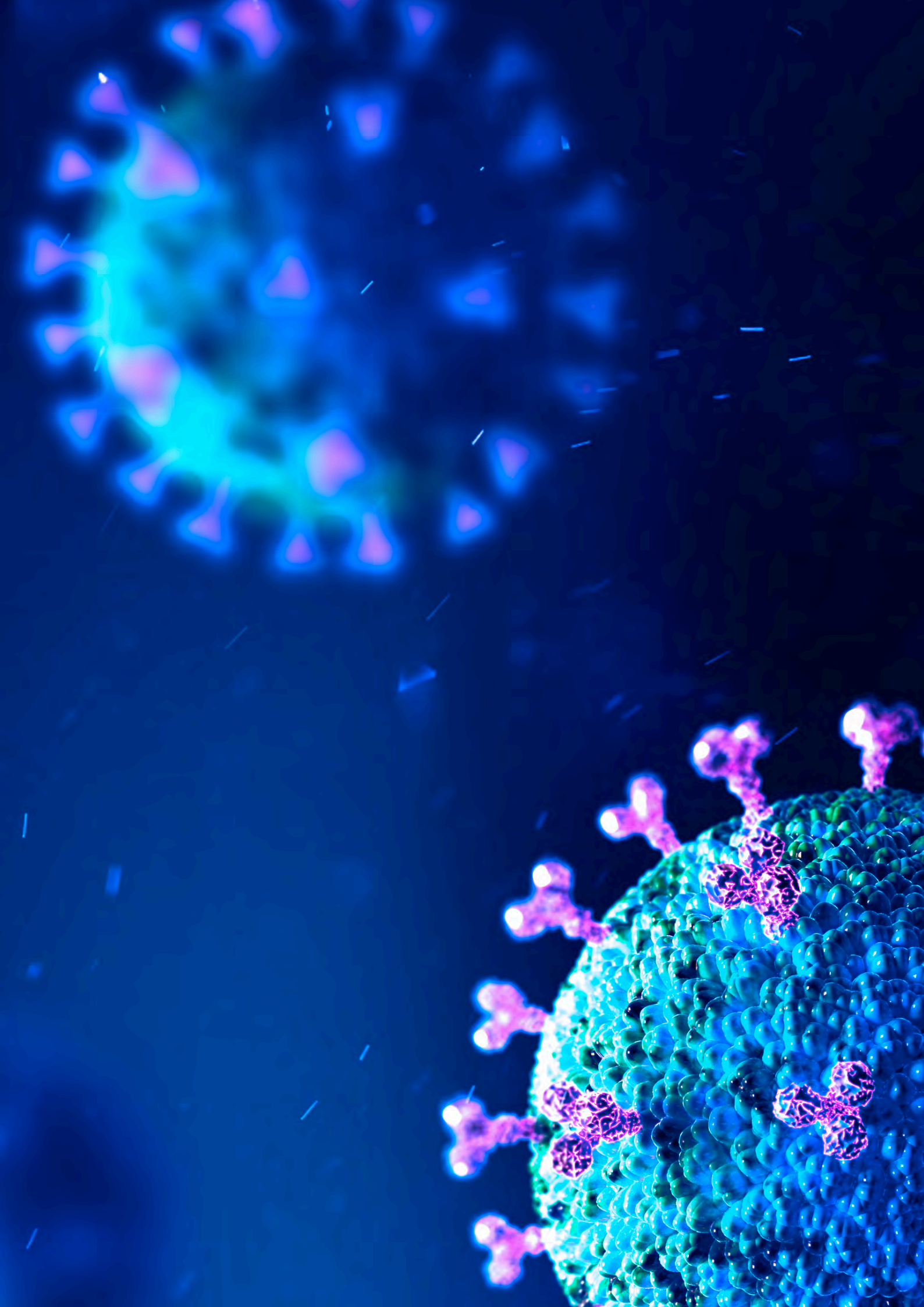

Support for Employers and Workers

Index links:

This section reflects the position as at 14 May 2020.

Coronavirus Job Retention Scheme ("CJRS")

On 20 March 2020, the Government announced the CJRS, through which it will fund grants to employers to cover 80% of employees' wages, capped at GBP 2,500 per month, where they are "furloughed". This new concept of "furlough" essentially means employees are not required to work for their employer but continue to be employed.

The CJRS was originally to run from 1 March to 31 May 2020 but has now been extended to 31 October 2020.

The version of the CJRS as described in this document will remain in place until **31 July 2020**. From 1 August until 31 October 2020 the CJRS will remain but changes will be made. We do not yet have detail on what those changes will be however we expect that:

— From August 2020 the CJRS will have greater flexibility to help employees come back to work. It appears that those already on furlough will be able to return to work part-time; and

— Employees on furlough will still receive the same level of financial support (i.e. 80% of pay or GBP 2,500 less tax (whichever is lower)) but that employers will be expected to share the cost of the CJRS with the UK government.

More detail on how the CJRS will change from August 2020 is expected by the end of May 2020.

The detail behind the CJRS is largely contained in HMRC guidance. On 15 April 2020 the Government also published a Treasury Direction (the "Direction") under the Coronavirus Act 2020, which sets out the legal framework for the CJRS – and regrettably departs from the guidance in a number of respects.

There are now a number of different HMRC guidance documents covering the CJRS:

— "Check if you can make a claim for your employees' wages through the CJRS" (the "employer guidance"). We are now on the eighth iteration of this guidance.

— "Work out 80% of your employees' wages through the CJRS (the "calculation guidance").

— A "step by step guide for employers" (the "step by step guide").

— "Check if your employer can use the CJRS" (the "employee guidance").

— An online calculator.

Which employers can access the CJRS?

— All employers are eligible to access the CJRS (private, voluntary sector and public), providing they operated a PAYE scheme on 19 March 2020 and the employees were notified to HMRC on a RTI (real time information) submission on or before that date (previously the relevant date was 28 February). However, there is an expectation that public sector employers will not take advantage of the CJRS, since many public sector organisations are providing essential services during the pandemic, and nor will employers in receipt of public funding for staff costs.

— Before accessing the CJRS employers should consider whether there are any regulatory implications of doing so (for example in the financial services sector). Businesses may also wish to consider whether their approach is consistent with other financial decisions such as in relation to dividends, bonuses and executive pay.

— Administrators can also access the CJRS if there is a reasonable likelihood of rehiring (or retaining) the workers, which "*could be as a result of an administration and pursuit of a business sale*". Both the employer guidance and the Direction highlight that employers must pay their employees the amount received through the grant and if they are not able to do that, they must repay it to HMRC. It is not clear whether this is intended to 'red-circle' payments made under the CJRS and essentially override the provisions of the Insolvency Act 1986 in relation to the ranking of debts and distribution of assets in the period prior to the adoption of employment contracts by an administrator.

— The Direction provides that the purpose of the CJRS is "*to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease*", and claims which are contrary to this purpose or otherwise "abusive" may not be made (and presumably any payments made pursuant to such claims could be clawed back). The CJRS is not therefore limited to those employees who would otherwise be made redundant (even though the employer guidance continues to state that an employer can furlough employees where it "cannot maintain [its] current workforce"). It is arguable that it is limited to employment costs incurred because of the coronavirus emergency, thereby excluding employees who the employer was planning to make

redundant in any event – although that would seem contrary to the Government's apparent aim to protect as many workers as possible.

— The Direction also expressly makes provision for new employers that had no qualifying PAYE scheme on or before 19 March 2020 (for example a NewCo established after 19 March 2020), as well as those which did, to be able to make a claim under the CJRS as though they were the original employer (provided the original employer would otherwise have qualified to make a claim).

Who can an employer claim for?

Provided they were on the employer's payroll on or before the 19 March 2020 and were notified to HMRC on an RTI submission on or before that date:

— Apprentices, part-time employees, temporary and casual workers, workers on zero hours contracts and fixed term employees;

— Foreign nationals, as grants under the CJRS are not counted as 'access to public funds' (and particular reporting duties that usually apply to sponsors, as well as the requirement for sponsorship to be withdrawn if a sponsored migrant is absent from work without pay for more than 4 weeks in a calendar year, have also been temporarily suspended);

— Directors, office holders and salaried partners of an LLP (this should be recorded formally as a decision of the company or LLP);

— Agency workers (via the agency);

— Employees of contractors with public sector engagements, where those employees would be deemed employees under the IR35 regime;

— Employees on maternity/paternity/adoption/shared parental leave;

— Employees who are shielding, or who are caring for employees who are shielding;

— Employees with caring responsibilities if they need to stay at home to look after their children; — Employees on unpaid leave (although if an employee went on unpaid leave on or before 28 February, they cannot be furloughed until the date on which it was previously agreed they would return from that leave); and

— Employees who have transferred into the business after 19 March, if they have been the subject of a business transfer (and presumably, although not expressly, a service provision change) under TUPE, their continuity of employment has been preserved under s218(2) of the Employment Rights Act 1996, or the PAYE business succession rules apply to the change in ownership.

Employees who were made redundant or who "stopped working" on or after 28 February 2020, including employees on fixed-term contracts which expired after 28 February, are also covered by the CJRS, even if the employer does not re-employ them until after 19 March, provided they were notified to HMRC on an RTI submission by the applicable date – the employer guidance sets out details of how to deal with such employees.

Employers are under no obligation to re-employ former employees, and will need to consider issues such as when their employment should be backdated to, whether continuity of service will be preserved and, if so, whether the employee will have unfair dismissal rights when the period of furlough is over.

Fixed-term contracts can be renewed or extended during the furlough period and it doesn't seem to matter that the employee might not otherwise be required – although again there is no obligation to do so.

Employees on sick leave or self-isolating

Employees who are on sick leave or self-isolating are entitled to statutory sick pay ("SSP"). However there remains an inconsistency between the Direction and the employer guidance in respect of when employees in receipt of SSP can be furloughed, which has not been resolved despite three subsequent revisions to the guidance following the publication of the Direction on 15 April.

The employer guidance provides that, whilst "*short term illnesses/self-isolation should not be a consideration in deciding whether to furlough an employee*", employers are free to furlough employees who are absent due to illness or self-isolating and in receipt of sick pay for business reasons, and such employees should receive furlough pay not sick pay (provided it is higher than SSP). However, the Direction says that if an employee is entitled to SSP at the time the employer's instruction to cease all work has been given, the employee cannot be furloughed until their original entitlement to SSP has ended (which could be up to 28 weeks later). HMRC has now updated its statutory payments manual to provide that employees do not qualify for SSP if they are on furlough.

Coronavirus Job Retention Scheme ("CJRS") (continued)

How do employers designate employees as furloughed?

The employer guidance has consistently stated that employers need to seek their employees' agreement to be furloughed, and must write to their employees to confirm that they have been furloughed (and keep a written record of this for 5 years) in order to be eligible under the CJRS.

The Direction defines a furloughed employee as an employee who has been instructed by their employer to cease all work for at least 21 days as a result of the coronavirus. However, the Direction goes on to state that *"An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment*". This has caused much alarm, as it suggests that employers which simply instructed their employees to cease work without seeking their agreement will not be able to claim under the CJRS. However, this seems completely contrary to the purpose of the CJRS and the principle that claims under it can be back-dated to 1 March 2020.

The point seems to have been addressed in the latest version of the employer guidance, which now states "*To be eligible for the grant employers must confirm in writing to their employee confirming (sic) that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response.*".

The employer guidance also now states that collective agreements reached between the employer and a trade union are acceptable for these purposes (although of course that trade union will need to have collective bargaining rights).

The furlough agreement (or letter) ought as a minimum to state that the employee cannot carry out any work for the organisation while on furlough and set out how long they are being put on furlough for, what pay and benefits they will receive while furloughed (particularly employer pension contributions), and whether they can work for another organisation during this period.

Where selection procedures are required in order to determine which employees should be furloughed, employers should be alive to the same type of discrimination risks which might be relevant in a redundancy selection process. Another factor to consider is the rules around collective redundancy consultation if furlough cannot be agreed. This is a complex area of law and advice should be taken.

The employer guidance confirms that an employee can be furloughed multiple times, provided each separate instance of furlough is for a minimum period of three consecutive weeks, so it is possible to rotate employees in and out of furlough. We understand this to mean that employers can swap individual employees and groups of employees in and out of furlough.

What can an employer claim for?

The calculation guidance states "*You can make your claim in anticipation of an imminent payroll run, at the point you run your payroll or after you have run your payroll. Claims can be backdated from 1 March 2020 where employees have already been furloughed from that date. A claim cannot start any earlier than the date the employee was first furloughed.*" This seems to confirm that claims can be backdated to when employees were told (in writing) to stop work.

There are different calculation methods depending on whether the employee has regular hours, or their pay varies.

Regular hours

For full-time and part-time employees with regular hours on a salary, the calculation guidance states that employers will receive a grant from HMRC to cover the lower of 80% of the employee's salary in their last pay period prior to 19 March 2020 or GBP 2,500 per month (gross) – unless the employee was on unpaid leave (including family leave) at the time, in which case the reference amount is their "paid leave" entitlement.

If, based on earlier guidance, employers have calculated their claim based on the employee's salary as at 28 February 2020 (and this differs from their salary in their last pay period prior to 19 March 2020), they can choose to still use this calculation for their first claim.

Variable pay

Where an employee's pay varies, the employer can claim for 80% of the higher of:

- the same month's earnings from the previous year; or
- their average monthly earnings from the 2019-2020 tax year (or, if the employee has been employed for less than a year, their average monthly earnings since they started work)

subject to the GBP 2,500 per month cap.

What is included in pay?

Employers can claim for any "regular payments" they are "obliged" to pay their employees plus the associated employer's National Insurance contributions and minimum auto enrolment employer pension contributions.

The calculation guidance states the amount employers should use when calculating 80% of their employees' wages is "*regular payments you are obliged to make, including: regular wages you pay to employees; non-discretionary overtime; non-discretionary fees; non-discretionary commission payments; piece rate payments*". It should not include "*payments made at the discretion of the employer or a client – where the employer or client was under no contractual obligation to pay, including: any tips, including those distributed through troncs; discretionary bonuses; discretionary commission payments; non-cash payments; non-monetary benefits like benefits in kind (such as a company car) and salary sacrifice schemes (including pension contributions) that reduce an employees' taxable pay*". Employees may be able to waive their right to receive benefits (other than the minimum pension auto enrolment contributions) under the terms of a furlough agreement though. In relation to salary sacrifice, HMRC has confirmed that COVID-19 counts as a "life event" entitling an employee to switch freely out of a salary sacrifice scheme. The grant claimed under the CJRS must be paid "in the form of money" and cannot be netted off to pay for the provision of benefits or a salary sacrifice scheme.

The Direction uses different, more complex, and in places unclear language to describe what is and is not covered by the CJRS, but is generally consistent with the principle established in the guidance that only regular payments which employers are contractually obliged to make to their employees are covered.

Training time

If employees (including apprentices) are required to undertake any training for their employer while furloughed, they must be paid at the least the applicable National Living Wage/ National Minimum Wage rate (and the employer will need to pick up any shortfall).

Topping up furlough pay

Otherwise, employers can choose to top up the amounts payable under the CJRS, but they do not have to do so, and any additional payments are not recoverable.

Tax/NICs and other charges

Income tax and National Insurance contributions are deductible from furlough payments.

The calculation guidance clarifies that the apprenticeship levy and student loans continue to be payable as normal, and grants from the CJRS do not cover these.

Coronavirus Job Retention Scheme ("CJRS") (continued)

What can an employee do during furlough?

Employees cannot perform any work for their employer or any "linked or associated organisation" whilst furloughed, where that work involves providing services or generating revenue, although they can (and indeed are encouraged to) undertake volunteer work and training. The latest version of the employer guidance confirms that during the furlough period "*employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers.*" Executive directors can only carry out statutory duties relating to the filing of company accounts or the provision of information. The CJRS therefore does not currently cover "short-time" (reduced hours) working.

An employer can agree to find a furloughed employee new work or volunteering opportunities whilst on furlough if this is in line with public health guidance. This is likely to be employer/industry specific.

An employee with two jobs can be furloughed by one employer and remain working for the other. A furloughed employee can also take up new employment with a different employer, provided it is "contractually allowed". Presumably this means an employer which can insist on exclusive service may or may not choose to enforce that contractual right. That decision may turn on whether or not the employer is topping up the employee's pay, and it may wish to impose restrictions for example on working for competitors. The new employer is responsible for notifying the Government that the person is already furloughed.

Accessing the CJRS

Employers can now apply through an online portal, which became operational on 20 April 2020, with payments starting by 30 April. As noted above, payments can be backdated to 1 March 2020 where applicable. Employers are able to make one claim under the CJRS every three weeks. Employers should carry out the calculation submitting a single claim for a grant to cover the full sum.

The calculation guidance sets out detailed guidance (with examples) on how to calculate employees' wages for the purposes of making a claim and the employer National Insurance contributions and pension contributions that can be claimed. It also outlines the different rules that apply depending on whether fewer or more than 100 staff are being furloughed.

Audit and clawback

In order to deter fraudulent or inflated grant applications, HMRC has confirmed that audits will take place in the future. The employer guidance says that "*Payments may be withheld or need to be repaid in full to HMRC if the claim is based on dishonest or inaccurate information or found to be fraudulent. Dishonest or deliberately fraudulent claims put our essential public services and the protection of livelihoods at risk during these challenging times. HMRC has put in place an online portal for employees and the public to report suspected fraud in the Coronavirus Job Retention Scheme.*".

The employee guidance now expressly encourages employees to report fraudulent claims/any concerns that their employer is abusing the CJRS.

Redundancies and furlough

There is no restriction on employees being made redundant during or after a period of furlough, provided this does not interrupt the minimum three-week furlough period. However, the usual rules in respect of individual and collective redundancy processes continue to apply – and there will be additional complexities, not least the practicalities of carrying out consultation remotely, when employees have been furloughed. Again, this is a complex area of law and advice should be sought.

The calculation guidance is clear that the grant cannot be used to cover a redundancy payment, and employers will continue to be monitored after the CJRS has closed.

How should businesses treat furlough for tax purposes?

Payments received by a business under the CJRS are made to offset deductible revenue costs. CJRS payments are designated as income for Income Tax and Corporation Tax purposes in accordance with normal principles. Businesses can deduct employment costs as normal when calculating taxable profits.

Holiday and furlough

The calculation guidance now confirms that employees can take holiday during furlough, although they must be paid in full for holiday days as required by the Working Time Regulations. The guidance states, "*Employers will be obliged to pay additional amounts over the grant, though will have the flexibility to restrict when leave can be taken if there is a business need*". It is not expressly stated but it must surely be the case that employers can also require employees to take holiday during furlough if they wish in accordance with the Regulations. The guidance also confirms that if an employee usually works bank holidays then the employer "can agree that this is included in the grant payment" and top up their pay or give the employee a day of holiday in lieu. Slightly worryingly, it does also say "*During this unprecedented time, we are keeping the policy on holiday pay during furlough under review*".

Changes to the rules on the carry-over of holidays

The previous position

Under the Working Time Regulations 1998 (the "Regulations"), at least four weeks' holiday (the basic entitlement under the EU Working Time Directive) must be taken in the holiday year in which it accrues and cannot be carried forward to the next holiday year. The additional statutory leave element that applies in the UK (i.e. the extra 1.6 weeks) can be carried forward until the next holiday year if this is provided for in a "relevant agreement", for example an employment contract. Any further contractual entitlement may be carried over as agreed between the employer and worker.

Temporary changes to the Regulations

In light of recent events, the Government announced that the rules on carrying over annual leave are to be relaxed to support key industries during COVID-19. In practice, amendments to the Regulations that are now already in effect mean that there is now an exception to the general prohibition on carrying forward any of the basic four-week holiday entitlement; the amendments are not limited to certain industries. The exception applies where, at the end of a holiday year, it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society).

In such a case, up to four weeks' untaken holiday may be carried forward and taken in the following two holiday years.

The Regulations provide for a payment in lieu of any untaken holiday where a worker's employment terminates; this has also been amended to provide for a payment in lieu of any leave that is carried forward under the exception and that remains untaken on the date of termination.

What carry over situations will be covered by the new Regulations?

From the Government announcement, it seems clear that these Regulations and the extended carry over right are intended to address the situation where, due to staff sickness absences, an employer is unable to accept employee holiday requests from the remaining workforce during a busy period and to avoid the employee losing that holiday without falling foul of the Regulations. To quote the Government press release:

"*This will mean staff can continue working in the national effort against the coronavirus without losing out on annual leave entitlement.*"

"*The changes will also ensure all employers affected by COVID-19 have the flexibility to allow workers to carry over leave at a time when granting annual leave could leave them short-staffed in some of Britain's key industries, such as food and healthcare.*"

The purpose does not therefore appear to be to allow employees to carry over holiday where they would prefer to take it at a time they are free to travel. It should still be reasonably practicable to take holiday from work even if there are restrictions on travel and available activities, as the purpose of holiday is a break from work, rather than necessarily travel.

If employees who are currently working want to cancel their holiday because of the lock down, can an employer refuse this?

Employers can refuse a request by an employee to cancel pre-booked holidays. The legislation provides that both the employer and employee must give notice when holiday is to be taken. This notice must be at least twice the period of leave that is to be taken (for example 10 calendar days for a period of five day's holiday).

An employer can also refuse an employee's request by serving a counter-notice, which must be given at least as many calendar days before the date on which the leave is due to start as the number of days which the employer is refusing.

Which businesses are allowed to be open?

At the start of lockdown the UK Government as well as the devolved Governments ordered certain businesses to shut down (such as restaurants, cinemas, etc.). For businesses in England that were permitted to remain open, their employees were expected to work from home where possible. If that was not possible, employees could travel to/from work, although in reality many businesses did close. However, the advice regarding business closures varied in particular between the Scottish and Westminster Governments, with Scotland adopting a more restrictive position. Following the Prime Minister's public address on 10 May 2020 and the publication of the Westminster Government's plan to ease lockdown the following day, the position has once again changed in England. Scotland remains "in lockdown" at the date of writing.

England

The first significant change in the Westminster Government's 3-step plan to reopen the economy began on 13 May 2020, when it actively encouraged those who could not work from home to return to work if possible. Certain sectors of the economy, such as construction and manufacturing, could reopen. Cleaners, nannies and childminders were also able to return to work. In addition, estate agents could reopen in an attempt to stimulate the housing market.

Step 2, which cannot be taken any earlier than 1 June 2020, envisages the phased reopening of non-essential retail, but not hospitality or personal care, in addition to the phased reopening of schools, with sporting and cultural events taking place behind closed doors.

Step 3, which cannot be taken any earlier than 4 July 2020, will see the reopening of some remaining businesses. This may include some hospitality businesses, cinemas, leisure businesses and hairdressers.

See below for further information on health and safety matters in England.

Scotland

This is a devolved matter and the First Minister of Scotland continues to advise a stricter approach than in the rest of the UK.

The Scottish Government Guidance (Coronavirus (COVID-19: business and social distancing guidance) explains that businesses are advised to close unless they fall into any one of the following categories:

— they are essential to the health and welfare of the country during this crisis (the Scottish Government has also produced specific guidance on what constitutes essential construction work); or

— they are supporting (or being repurposed to support) essential services; or

— the wider public health, health and safety or other considerations apply and require a facility or service to continue to operate or a specific period for a safe shutdown process to be completed; and

— apart from in exceptional circumstances critical to lives and safety, they are capable of working in a

— way which is fully consistent with established social distancing advice.

This Guidance was updated on 21 April 2020 to formalise the provisions on social distancing at work into legislation.

The new legislation means that, in respect of Scottish premises, employers have a legal obligation to take all reasonable measures to ensure that:

— a distance of two metres is maintained between any persons on its premises;

— they only admit people to their premises in sufficiently small numbers to make it possible to maintain that distance; and

— a distance of two metres is maintained between anyone waiting to enter the premises.

(In contrast in England the provisions on social distancing are just guidance, not law).

Businesses that do not take all reasonable measures to enforce these rules could be fined and issued with a fixed penalty notice or ultimately prosecuted. Essential services are the fundamental services that underpin daily life and ensure the country continues to function. There are 13 designated sectors – Energy; Communications – Telecommunications, Public Broadcast, Postal Services, Internet; Government; Transport; Finance; Civil Nuclear; Defence; Chemicals; Space; Government; Health; Food; Water and Waste; Emergency Services – although it should be noted that not everything and everybody within such a sector is 'critical'.

Which businesses are allowed to be open? (Continued)

Even where businesses are in this category and judge themselves to be exempt from closure of business premises, the Scottish Government has said it is imperative that they keep open only those premises or parts of premises that are truly critical or essential to the national COVID-19 effort. They should also comply with public health guidelines on social distancing.

Do employees need a letter to confirm they are required to come to work?

There is currently no requirement for employers to provide employees with evidence that they are required to attend the workplace. However, we are aware that the police have questioned people as to why they are outside their homes and as such employers might wish to issue a letter to staff who require to continue to travel for work purposes. This will become more relevant if restrictions are placed on public transport usage in urban areas in order to maintain social distancing, although is perhaps generally less relevant in England now employees are being actively encouraged to return to work.

Who is a key worker and why is this still important?

The issue of who is a key worker is currently still relevant in relation to schooling as, until schools reopen fully, children of key workers can still attend. It also affects who can be tested for COVID-19, since key workers and their families can be tested. Key worker status does not determine whether a member of staff can travel to/from work – as mentioned above, people can travel to work if they cannot work from home. Again, the position as to who is a key worker is different in Scotland and England.

England

The Westminster Government Guidance for Schools states that key workers include those in: health and social care, education and childcare, key public services, local and national Government, food and other necessary goods, local and national government, transport, utilities, communication and financial services.

However, this is limited to staff who are essential in ensuring that those services continue. It does not apply to all staff who work in those sectors. The Westminster Government guidance is here.

Scotland

The Scottish Government defines key workers as those who are "in posts which ensure that essential services can be delivered and cover tasks within the local community which support the vulnerable and aid community resilience".

It is ultimately up to each local authority to determine who is a key worker. The Scottish Government has set out three categories which broadly includes health and care workers, wider public sector workers and those performing essential tasks.

Further information can be found here.

Statutory sick pay and isolation notes

The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 (the "SSP Regulations 2020") came into force on 13 March 2020. The SSP Regulations 2020 amend the existing Statutory Sick Pay regime by extending the availability of SSP to any person who is:

"*(i) isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England, NHS National Services Scotland or Public Health Wales and effective on 12th March 2020; and*

(ii) by reason of that isolation is unable to work."

As a result of these changes, relevant employees who are self-isolating in accordance with Government public health guidance are deemed to be incapable for work and eligible for SSP.

The SSP Regulations 2020 were subsequently amended:

— to refer to public health guidance published on 16 March. This amendment ensured that the list of people who are deemed to be incapable of work included family members of those who are self-isolating; and

— to extend eligibility for SSP to highly vulnerable individuals who need to shield. As described below, furlough is also now an option for this group.

The SSP Regulations 2020 will remain under review and will cease to have effect at the end of the period of eight months beginning on 13 March 2020.

SSP will be available from day one (rather than day four) in these particular circumstances.

Reclaiming SSP

The Coronavirus Act 2020 also contained measures to enable employers with fewer than 250 employees on 8 February 2020 to reclaim SSP for the first two weeks of COVID-19 related absence.

On 3 April, HMRC published details of the Coronavirus Statutory Sick Pay Rebate Scheme, although the online service is not operational at the time of writing. Employers will be able to reclaim for periods of sickness starting on or after 13 March 2020.

Employees who are "highly vulnerable "

The Government has stated that certain categories of individual classified as "highly vulnerable" should "shield" and stay at home for 12 weeks. This includes employees with specific types of cancer, severe asthma and other listed conditions.

On 4 April, the Government announced additional measures for this group, and in particular confirmed that those who are unable to work due to shielding or need to stay at home with someone who is shielding are eligible to be furloughed.

Employees who are "vulnerable"

Another category of employees are classified as being "vulnerable" and should take strict social distancing measures. ACAS explains that "Employers must be especially careful and take extra steps for anyone in their workforce who is in a vulnerable group." These are individuals who are over 70, who are pregnant, who have a long-term health condition, or who care for someone with a health condition that may put them at greater risk.

Again, the advice for employers is to ask individuals to work remotely where possible. If the employee cannot do this, they are not entitled to SSP. Where the employee is pregnant and cannot work from home and there is no suitable alternative available, then existing statutory provisions require employers to suspend a pregnant employee on full pay. In other cases, employers will need to make a decision about pay during this period.

Although there is express no mention in the HMRC Guidance that furlough is available for employees who are vulnerable, it seems logical that the HMRC may also accept the vulnerable category as being eligible. As with any cases where a judgement call is made, we recommend the rationale for inclusion is clearly documented.

Statutory sick pay and isolation notes (Continued)

Isolation notes

The Government has launched "isolation notes" to provide employees with evidence for employers that they have been advised to self-isolate due to coronavirus and cannot therefore work.

For the first seven days, employees can self-certify; after that an isolation note can be used as evidence of their absence from work to claim any SSP and additional company sick pay entitlement.

The notes can be accessed through the NHS website and NHS 111 online.

The Government has advised that if an employee does not have an email address, they can have the note sent to a trusted family member or friend, or directly to their employer. The service can also be used to generate an isolation note on behalf of someone else.

Emergency volunteering under the Coronavirus Act 2020

The right to take volunteer leave

New provisions in the Coronavirus Act 2020 (the "Act") set out a new statutory right for most workers and employees to take emergency volunteer leave ("EVL") to act as an emergency volunteer in health or social care, to alleviate the pressure on these essential services as a result of COVID-19. Although the Act is in force, the regulations implementing EVL have yet to come into force.

Who will be able to apply?

Any employee or worker, provided they do not fall under one of the exceptions listed below.

How long can they volunteer for?

Volunteering can be taken in blocks of two, three or four consecutive weeks. Only one period of EVL can be taken within a 16-week period. The Act envisages a 16-week volunteering period commencing on the day the legislation comes into force. However additional volunteering periods may be introduced by the Secretary of State for Health and Social Care.

What notice will they need to give their employers?

Employers must provide three working days' notice in writing of their intention to take EVL. In addition to the notice period, the workers will also:

— obtain certification by an appropriate authority (a local authority, the NHS Commissioning Board or the Department of Health) to act as an emergency volunteer; and

— provide an emergency volunteering certificate.

Can an employer refuse a request?

There is no provision for employers to refuse a request from a worker to take emergency volunteering leave (for example because of operational need).

What employees are exempt from the Regulations?

However, the following workers will be exempt from the entitlement to do so:

— Workers employed or engaged by businesses with fewer than 10 staff;

— Crown employees;

— Parliamentary staff as defined in sections 194 and 195 of the Employment Rights Act 1996 (ERA 1996) and employees of the devolved assemblies in Wales, Scotland and Northern Ireland;

— Employees in the police service, within the meaning of section 200(2) of the ERA 1996;

— Other employees defined in subsequent regulations.

Payment from the Government

Volunteers will be entitled to statutory unpaid leave, but a UK-wide compensation fund will be established to compensate volunteers for loss of earnings, travel and subsistence. Further details regarding claiming compensation will be published by the Secretary of State. It is not yet clear whether the compensation offered by the Government will replace volunteers' full pay or whether it will be subject to a cap. Some employers are waiting to see what level of compensation is offered before determining whether to pay this leave or offer a top up of leave.

Rights during EVL

Workers remain entitled to the benefit of all terms and conditions of employment which would have applied if they had not been absent, except for those relating to remuneration. They also remain bound by their obligations under those terms and conditions.

Right to return

Emergency leave volunteers will have a statutory right to return to their original job, on terms and conditions no less favourable than those which would have applied had they not been absent.

Pension contributions

Paragraph 7 of Schedule 6 of the Act adds an implied emergency volunteering rule to any workplace pension or benefit scheme, under which the period of absence will be deemed not to have any effect on the worker's pension or benefit entitlements. Employer pension contributions will need to be based on the employee's normal pay, and employee pension contributions will be based on the amount of the employee's actual pay during EVL.

Detriment/unfair dismissal

A section will be added to the Employment Rights Act 1996 which will protect workers from detriment on the grounds that they sought to take, or made use of the benefits of, EVL, or that the employer believed that the worker was likely to take EVL. Automatic unfair dismissal protection will also be extended to cover employees dismissed for taking or seeking to take EVL (or where the employer believed that the employee was likely to take EVL).

Health and safety requirements and data protection

Strategy and planning

From a compliance perspective, all employers have a legal duty to protect the health and safety of their workforce. Employers should take steps, so far as is reasonably practicable, to reduce the risks arising from COVID-19. The key question is what amounts to reasonable practicability in the context of this pandemic. The obvious first step is to comply with the Government Guidance which is discussed below.

But, whilst the underlying legal obligations on employers remain the same, this crisis redefines what safety means in the workplace. Businesses will want to reassure employees of the measures that have been put in place to keep them and their colleagues safe.

England - Workplace guidance

On 11 May 2020, the Westminster Government published eight guides that are intended to help employers, employees and the self-employed understand how to work safely during the pandemic in businesses which are permitted to be open. They extend from outdoor environments and construction sites to factories and offices.

In the first instance, the Government expects a high level of engagement between employers and trade unions and/or workers directly, especially in relation to the health and safety measures that will be implemented. Each one of the eight guides emphasise that "*Employers have a duty to consult their people on health and safety. You can do this by listening and talking to them about the work and how you will manage risks from COVID-19… You must consult with the health and safety representative selected by a recognised trade union or, if there isn't one, a representative chosen by workers. As an employer, you cannot decide who the representative will be*". This is reinforced in the ACAS Guidance which stresses that the first step employers should take in planning for the "new normal" is to talk to their employees.

The guides set out practical considerations for businesses centred around five key points which the Government has said should be implemented as soon as it is practical. In summary, the five key points around which all the guides are based are as follows:

1. All reasonable steps should be taken by employers to help staff work from home if they can. If they cannot work from home, the Government has clearly said they should return to work. Staff should speak to their employer about when their workplace will open.
2. Employers should carry out a COVID-19 risk assessment, in consultation with workers or trade unions to establish what workplace guidelines to put in place. If possible, employers should publish the results of their risk assessments on their website and the Government expects all businesses with over 50 employees to do so.
3. Two metre social distancing should be maintained wherever possible by measures such as re-designing workspaces, staggering start times, creating one way walk-throughs, opening more entrances and exits or changing seating layouts in break rooms.
4. Transmission risk should be managed where people cannot be two metres apart with employers looking into erecting barriers in shared spaces, introducing shift patterns or creating fixed teams to minimise the number of people in contact with one another, or facing each other.
5. Cleaning processes should be reinforced with workplaces cleaned more frequently, particularly high-contact objects like door handles and keyboards. Handwashing facilities or hand sanitisers should also be provided by employers at entry and exit points.

These publications are in the form of guides rather than regulation, and are expressly stated to be non-statutory. They do not replace or supersede the existing employment law and other legal obligations to which employers continue to be subject, including under the Equalities Act. As a result, employers must still comply with their contractual obligations when varying terms and conditions, consult collectively where appropriate and consider discrimination risks when designing and implementing the "new normal". Further commentary on this can be found here.

The Government is clear in the guides, and the Prime Minister has been at pains to emphasise, that workers should not be forced back into an unsafe workplace – but at the same time the guides recognise that the obligation on employers is only to do everything reasonably practicable to ensure safe working, recognising they cannot completely eliminate the risk of COVID-19. The Government directs employees to raise concerns which are not dealt with internally with their local authority and the Health and Safety Executive

("HSE"), and has increased the budget of the HSE by GBP 14m to support employers and deal with complaints that are made. By way of indication, the HSE has already received more than 4,500 COVID-19 related complaints. Given that the guides leave much to the discretion of employers and employees may not agree that the safety measures taken are sufficient, there are likely to be some difficult discussions ahead and an increase in employment claims based on the protection afforded to whistle blowers including those who complain about health and safety matters.

Scotland and Wales – Workplace guidance

The Scottish Government has already released guidance entitled "COVID-19 – A Framework for Decision Making" which emphasises that any transition back to work will need to include social distancing and increased hygiene. That guidance states that further guidance will be issued to businesses in advance of re-opening.

In the interim, health guidance for Scottish workplaces is currently contained in Health Protection Scotland Core COVID-19 Information and Guidance for General (Non-Healthcare) Settings. This explains that for work designated as essential and where the two-metre rule cannot be followed at all times in a workplace a risk assessment should be conducted. That assessment should explore ways of reducing the risk, such as minimising the periods of time spent at less than two metres, changing working practices such as staggering working hours and introducing environmental changes such as physical barriers.

Wales has also introduced a Regulation and Guidance mandating that any workplace that remains open must take all reasonable measures to ensure that a distance of 2 metres is maintained on the premises and for those waiting to enter the premises.

Guidance on PPE in the workplace

The guides set out the Westminster Government's new position on face coverings, a subject which continues to attract much comment. They provide that face coverings (rather than facemasks) "should" be worn in enclosed public spaces where social distancing is not possible or where individuals are more likely to come into contact with people they do not normally meet. However, the guides state that face coverings may only be "marginally beneficial" in the workplace and are no replacement for other ways of managing risk, so the Government would not expect to see employers in England relying on face coverings as risk management for the purposes of their health and safety risk assessments. They emphasise that wearing face coverings is optional rather than required by law, including in the workplace, and if employees choose to wear one they must wear them properly, and employers should support that choice by providing guidance on their use.

Similarly, the Scottish Government issued guidance recommending that individuals wear face coverings in public, but this is also advisory and is not a legal requirement. While no mention is made of the need to wear face coverings in workplaces it does refer to enclosed spaces, saying "*there may be some benefit in wearing a facial covering when you leave the house and enter enclosed spaces, especially where physical distancing is more difficult and where there is a risk of close contact with multiple people you do not usually meet.*"

Remote working considerations

In response to the COVID-19 situation, the HSE has issued updated display screen equipment guidance to employers in relation to their health and safety duties to employees who are temporarily working from home. The HSE states that as there is no increased risk from display screen equipment for those working at home temporarily, employers do not need to do home workstation assessments for those working temporarily at home. There is no definition of temporarily whereas this will appear to relate to the current COVID-19 situation.

The HSE's relaxation of the rules only applies to the obligation to carry out workstation assessments for those working temporarily from home. Under the Management of Health and Safety at Work Regulations 1992 employers still have an obligation to manage the risks of lone workers: "*This means you must provide supervision, education and training, as well as implementing enough control measures to protect the homeworker.*" Click here to read more.

The ACAS Coronavirus advice for employers covers homeworking and health and safety, noting that its very unlikely during the pandemic that carrying out a risk assessment for home workers will be possible.

The ACAS Guidance is very similar to the HSE Guidance on homeworking and explains:

"an employer should still check that:

— each employee feels the work they're being asked to do at home can be done safely

— employees have the right equipment to work safely

— managers keep in regular contact with their employees, including making sure they do not feel isolated

— reasonable adjustments are made for an employee who has a disability"

Businesses that are considering more permanent changes to their workplace arrangements, such as longer term home-working, are nevertheless subject to the previous guidance and should carry out workstation assessments in accordance with the usual rules.

On 31 March 2020 the Government published Guidance for the public on the mental health and wellbeing aspects of Coronavirus COVID-19 (click here to read it). It contains useful information which employers may find helpful in relation to the wellbeing and support requirements of their employees.

Data protection

The ICO has recently issued guidance for employers on workplace testing and other data privacy considerations in response to COVID-19 (click here to read it). Collecting and using information about employees who have been tested for COIVID-19, testing of employees (whether taking temperatures or otherwise) and monitoring employees' health will constitute processing 'special category data', which means that there are additional considerations under the GDPR and the Data Protection Act 2018. However, the latest guidance highlights that data protection law does not prevent employers from taking necessary steps to keep staff and the public safe and that, as long as there is a good reason for doing so, employers are able to process health data concerning COVID-19. If a company chooses to process personal health data in many of these ways, it should consider whether it needs to conduct a data protection impact assessment before the processing takes place. This may well be required where testing or other monitoring is taking place. If an employer is considering using temperature checks or thermal cameras onsite, the Surveillance Camera Commissioner and the Information Commissioner's office have worked together to update the SCC DPIA template, which is specific to surveillance systems.

The ICO has also issued Guidance explaining that employers should be considering security measures for staff who are still home working because of COVID-19. Employees working from home should be advised of the need to take data security carefully during home working, not saving documents to personal computers and ensuring hard copy paperwork is retained and securely destroyed and not put in the bin at home. They should also be aware that the risk of scams and phishing e-mails has increased as hackers seek to take advantage of people working from home, and to be vigilant to cyber-attacks.

Self-employed

The Government has announced a package of support for the self-employed who have been adversely affected by coronavirus. This includes:

— a new Self-Employed Income Support Scheme ("**SEISS**") for those who have experienced business interruption, which it claims is "equal to" the rights of furloughed employees;

— access to the Business Interruption Loans Scheme to cover immediate payment needs;

— deferral of Self-Assessment Income Tax and VAT payments; and

— grants for businesses that pay little or no business rates.

Details of SEISS

Eligible self-employed individuals or members of partnerships will be able to claim a taxable grant worth 80% of their monthly trading profits (based on their average trading profits) up to a maximum of GBP 7,500 altogether. The SEISS will be available initially for three months from 1 March 2020 although, like the CJRS, the scheme may be extended.

The grant should be available by early June 2020 and paid directly into the individual's bank account in a single instalment. Unlike with the CJRS, individuals considered eligible will be contacted by HMRC, likely by mid-May 2020, and invited to claim using a GOV.UK online service, which is yet to be set up. As the money is a grant, it does not need to be repaid at any time, but the amount received will be subject to deductions for income tax and National Insurance Contributions.

On 30 April the government published a Treasury Direction (the "**Direction**") providing a legal framework for the SEISS. Following this HMRC updated its Guidance which has been drafted to assist individuals with making a claim. In order to qualify under the SEISS, the Direction states that a person must:

(a) carry on a trade the business of which has been adversely affected by reason of circumstances arising as a result of coronavirus or coronavirus disease;

(b) have delivered a tax return for a relevant tax year on or before 23 April 2020;

(c) have carried on a trade in the tax years 2018-19 and 2019-20;

(d) intend to continue to carry on a trade in the tax year 2020-21;

(e) if a non-UK resident or if they have made a claim for remittance basis to apply, certify that the person's trading profits are equal to or more than the person's relevant income for any relevant tax year or years;

(f) be an individual; and

(g) meet the 'profits' condition.

There is detailed guidance about the profits condition referred to above, although it is clear that SEISS is intended for those who are majority or entirely self-employed as trading profits must be at least equal to an individual's non-trading income and no more than GBP 50,000. There is also detailed guidance about how HMRC will determine eligibility and how much grant a person may receive, as different circumstances can affect eligibility for the SEISS or the amount of grant. Further guidance can be found here. Unlike the CJRS, if individuals receive the grant they can continue to work.

However, concerns have been raised about the practical effectiveness of the SEISS, including:

— The delay for individuals receiving any monies under the scheme given that payments are not expected to be made until early June 2020. Whilst individuals are able to apply for Universal Credit in the interim, and recent statistics show a significant increase in claims, there are reports of delays in payments and any grant received will be treated as part of an individual's self-employment income and may affect the amount of Universal Credit they receive.

— Those who cannot access the scheme because of the eligibility requirements, such as:

  - that an individual must have submitted a tax return in January 2020 (or if late filing by 23 April 2020), which means those who became self-employed more recently are not covered;
  - the threshold for trading profits (of no more than GBP 50,000) which means those earning just above this threshold miss out;
  - those who are self-employed, but also have income from alternative sources such as employment or a pension, may not be eligible depending on the amount of their non-trading income; and
  - those individuals who were self-employed in the relevant tax year(s) but made a loss during that period so they will not be entitled to any money.

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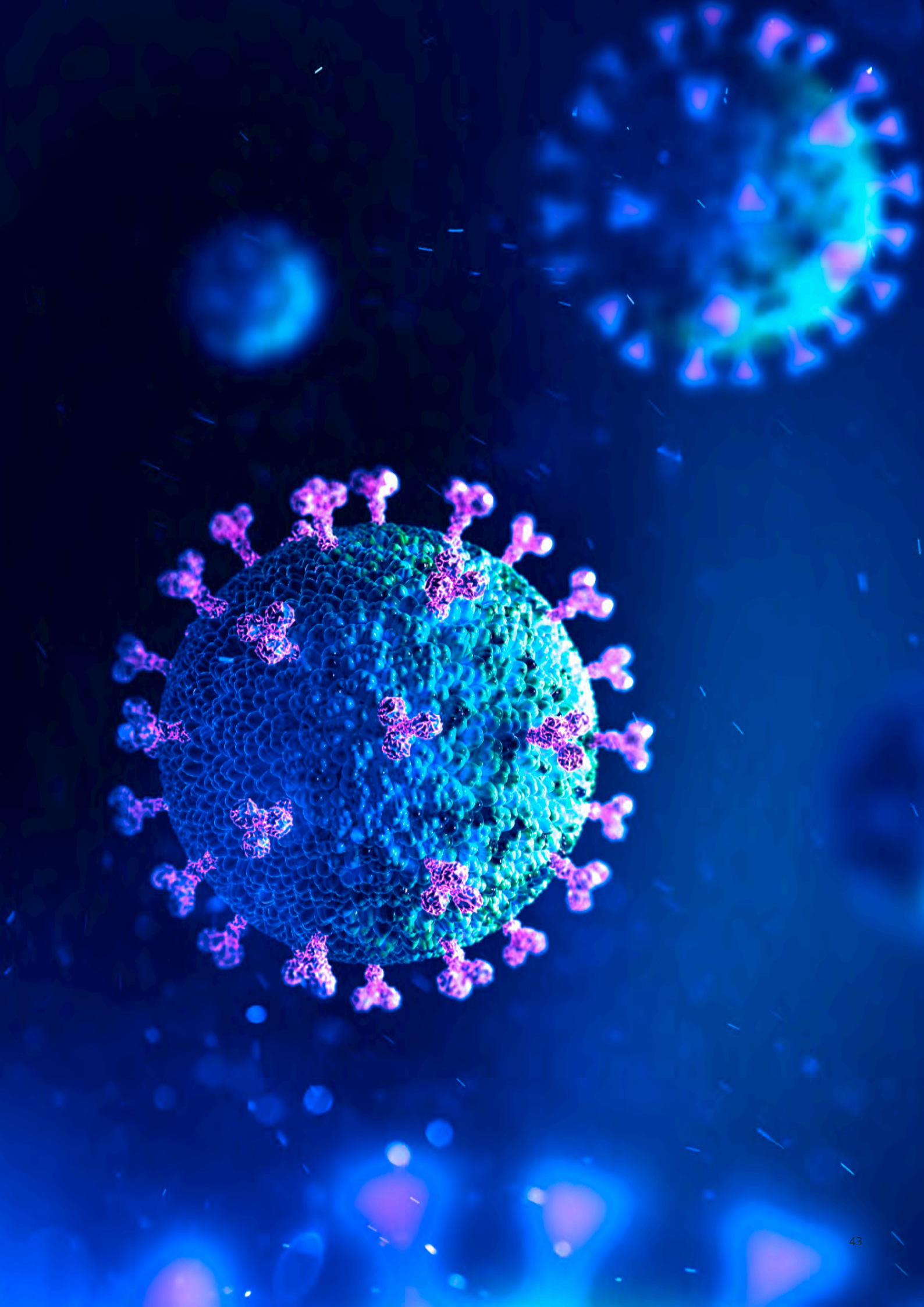

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