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Covid-19

A French guide to significant
commercial and legal issues

April 2020

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Covid-19

A French guide to significant commercial and legal issues

The rapid spread of coronavirus disease 2019 (Covid-19) is a public health challenge that has affected more than a million individuals globally. It has required governments, and particularly healthcare systems, to respond swiftly and in a coordinated way to ensure that they are properly mitigating and responding to the evolving situation to ensure the wellbeing of their citizens.

This is above all a human and social crisis, necessitating some significant changes in the way everyone goes about their daily lives. As efforts to manage the spread radiate across the world, the impact to businesses and economies has become increasingly significant.

Organisations are assessing (as we are ourselves), on a continuous basis, how to address the threat posed by Covid-19 to their workforce, customers, suppliers and wider stakeholders. Financial markets are experiencing considerable turbulence. The situation has the potential to generate both a supply-side and a demand-side shock.

Every organisation will have individual and sectoral considerations relevant to their particular circumstances, and each organisation will likely approach this evolving situation through their business continuity plan.

However, these plans may not foresee a situation of this complexity, magnitude and duration.

This guide offers some practical guidance around how organisations might approach the threat of Covid-19 from a governance and risk perspective, together with some answers to some of the legal questions which we have been receiving over the last few weeks.

Topics covered in this guide include:

- > Operational resilience;
- > Government support measures;
- > Labour law measures and Data Protection considerations;
- > Managing commercial relationships;
- > Corporate law: boards, shareholders' meetings and financial statements;
- > Impact on regulated firms in the financial services sector;
- > Financing issues, including capital markets and loan financings and cash flow issues; and
- > Crisis management.

We hope you find this guide useful as you manage your organisation's ongoing response to Covid19.

Please send any questions or suggestions you may have to your regular Linklaters contact or any of our colleagues mentioned in this guide.



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1

Operational Resilience

Operational Resilience

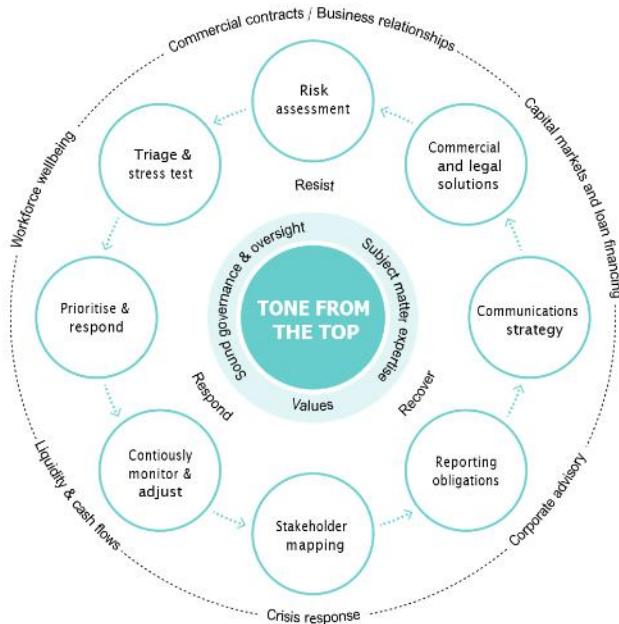
Suggested framework



As Covid-19 continues to spread across the region, the likelihood of your organisation being directly impacted by the outbreak (e.g. an infected customer, employee, etc.) also increases. Each organisation should ensure it has in place a robust organisational resilience plan which addresses the following issues.

1. Governance and Values

- a. Which team will lead the initiative? How often will it meet? Who has authority to make immediate decisions? Do you have terms of reference? What is your back up plan if team leaders become ill?
- b. Will your values or your public position on social purpose influence your response(s)?



2. Identify and assess the risks

- a. What are the steps being taken to assess the impact or potential impact of Covid-19?
- b. What are the organisation's immediate priorities?
- c. Will your business face significant operational, workforce, financial, reputational or other challenges? Do you need to stress test a number of scenarios?
- d. What expertise/advice is required to assess the impact or potential impact of the situation?

3. Response and ongoing risk management

- a. How will you tackle any risks identified?
- b. Do you need to triage any risks identified and prioritise?
- c. Are there any aspects of business as usual you need to adjust to address the changing risk profile (e.g. extra safety precautions)?
- d. Have you planned for contingencies? Do you have fall-back plans in place for reasonably foreseeable scenarios?
- e. How will you continuously monitor risks and adjust to the changing situation?
- f. How will you continue to assess against your values any proposed responses?
- g. Remember that you will never have perfect information.

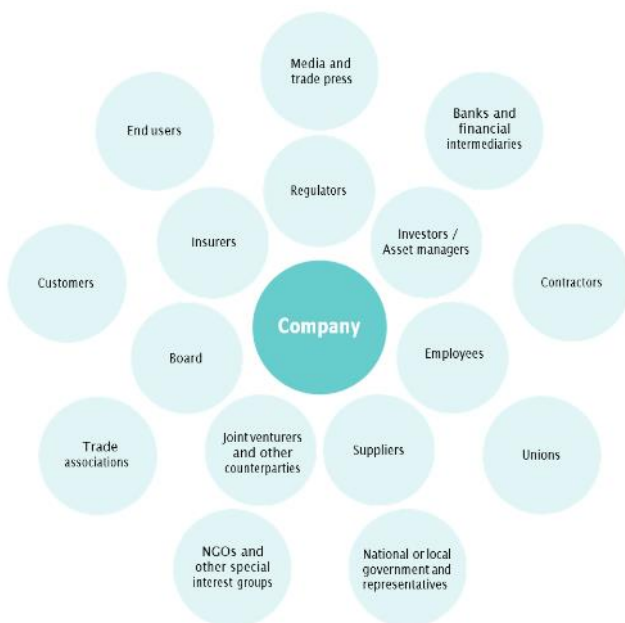
Operational Resilience

Suggested framework



4. Communicating with stakeholders

- a. Who are the key stakeholders – both internal and external – that you need to communicate with?
- b. How often will you communicate with your employees and wider stakeholders and how?
- c. How will you ensure consistent communications across all channels (internally and externally)?
- d. Are your key messages consistent with your values?



2

Government support measures

Government support measures



In the context of the Covid-19 global pandemic, Linklaters is keeping you informed of the emergency measures taken by the various governments to provide the best support to companies affected by the crisis. In France, measures have been announced by President Macron and the French government since 12 March 2020. As of 7 April 2020, these measures, which are likely to evolve and be adjusted at any time, can be summarised as follows:

1 Measures regarding the non-payment of tax and social contributions¹

1.1 Measures regarding the deferral of social contributions' payment

Companies are entitled to request deferral of the payment of social contributions (both portion due by the employer and the employee) for up to 3 months, without penalty (applicable since the 15 March payment deadline):

- With respect to the 5 April payment deadline:
 - Re. companies with more than 50 employees and facing serious cash flow difficulties:

- If the payment was not made via the monthly certificate (*déclaration sociale nominative* or “**DSN**”), blockage of payment by wire transfer or adjustment of the amount to be paid according to their financial capacity;
- For the other companies, modulation of the social contribution payment in the DSN;
- Deferral or rescheduling of supplemental pension contributions possible, to be requested to the relevant pension institutions;

- The amount to be paid by self-employed workers will be automatically deferred and spread over the rest of the year.
- With respect to the 5 April payment deadline, the Ministry for Action and Public Accounts has confirmed that companies will be able to defer again their contributions by modulating their payments.
- With respect to the 20 April payment deadline relating to self-employed workers, the Ministry for Action and Public Accounts has specified that it would be automatically deferred.

¹ The Minister for the Economy and Finance announced that large companies (with at least 5,000 employees or with consolidated revenues of at least 1.5 billion euros in France over the last financial year) benefiting from such measures should undertake not to pay dividends or redeem shares in 2020 if they were not decided before 27 March 2020 (save exceptions). This commitment will be formalised by ticking a dedicated box in the application for direct tax deferral to be filed on the website impots.gouv.fr, and in the message to be sent to URSSAF in the case of deferral of social contribution payments. Any breach will result in the early repayment of social contributions or deferred tax instalments, with common penalties. Source: Q&A of the Ministry of the Economy and Finance "Commitment of large companies benefiting from cash support measures" dated 2 April 2020.

1.2 Measures regarding the deferral and/or rebates of direct taxes

1.2.1 Payment deferral

- 3-month deferral (without penalty) of the direct taxes' payment, upon simple request with no need for justification to the relevant tax authorities (generally the *Service des Impôts des Entreprises* ("SIE"));
- If the March instalment has already been paid, it is possible to object to the wire transfer or request its repayment from the SIE;
- Scope of affected taxes:
 - Corporate income tax (*impôt sur les sociétés*) ("CIT") provisional payment ("CIT") and social contribution on CIT;
 - Wages taxes (*taxe sur les salaires*) (due in theory on 15 March 2020 by e-payment);
 - It may also be requested the suspension of the agreement providing for a monthly payment of the corporate property tax (*Cotisation Foncière des Entreprises*) ("CPT"), if any, resulting in the deferral of the next instalments up until the day of the balance payment, without penalty.

1.2.2 Rebates

- The request to the SIE must be justified (i.e. evidence of the impossibility to pay, even as part of a debt deferral or rescheduling plan that may be requested to the tax administration) and is subject to a case by case appraisal;
- Scope of affected taxes: CIT, Company's value-added contribution

(*Cotisation sur la Valeur Ajoutée des Entreprises*), CPT.

Neither deferral or rebate of VAT and assimilated taxes, nor repayment of withholding tax (*prélèvement à la source*) and tax on insurance agreements (*taxe sur les conventions d'assurances*) is envisioned at this stage.

1.2.3 Accelerated repayment of tax credits

An accelerated repayment of tax credits (corporate income taxes refundable in 2020, such as research tax credit (*Crédit Impôt Recherche*) and tax credit for competitiveness and employment (*Crédit d'Impôt pour la Compétitivité et l'Emploi*), and VAT credits) can be requested.

With respect to the accelerated repayment of corporate income tax credits, it is now possible to request the repayment of the balance of the available receivable, after deduction, where applicable, of the corporate income tax due for financial year 2019, without waiting for the filing of the tax form relating to such financial year.

With respect to the accelerated repayment of VAT credits, the company must make its application by electronic means, directly from its professional online account.

2 Short-time work measures (*activité partielle*, formerly known as *chômage partiel*)²

Short-time work measures are twofold:

- Either the shut-down of the business or part of the business (services, teams, etc);
- Or the reduction of the number of hours worked by the employees.

When employees are in short-time work, their employment agreements are suspended but not terminated.

Instead of wage, the employees receive a compensation paid by their employer, amounting to at least:

- One SMIC (which corresponds to the French minimum wage) for those employees who earn such a wage; and
- 70% of the previous gross remuneration (corresponding to 84% of the net wage) for the employees whose wage is more than a SMIC.

The compensation paid by the employer is exempt from social contributions, but subject to personal income tax and specific taxes whose purpose is to fund the social security financial needs (CSG) and to absorb social security indebtedness (CRDS).

The decree No. 2020-325 dated 25 March 2020 on short-time work provides for a compensation paid by the employer to employees in connection with short-time work would be covered for an amount corresponding to:

- One SMIC for those employees who earn such a wage; and

- 70% of the gross remuneration, up to a threshold of 4.5 SMIC per employee for those employees earning more than a SMIC.

The employer is free to pay compensation in excess of the afore-mentioned thresholds. However, in the event of compensation over 70% of the previous gross remuneration, the share exceeding this percentage will not be reimbursed and will be at the employer's own cost.

Repayment of the sums to the employer is carried out on a monthly basis by the relevant State administration.

The request for short-time work can be made by the employer for an initial period of 12 months maximum.

The company shall file a request with the administration, which must be reasoned and justified by actual economic issues, in particular caused by the drop in activity in relation to the pandemic, the prohibition of public events further to an administrative decision or the absence of employees essential to the company's operations.

The employer has 30 days (with retroactive effect) to file the application for short-time work in the event of exceptional circumstances, as is the case with the current health crisis. The implementation of short-time work measures is therefore allowed even before sending the application to the administration.

The relevant State administration reviews the application within two days. Failure to reply by this deadline is deemed to constitute implicit acceptance of the application for short-time work.

² The Minister for the Economy and Finance has indicated that large enterprises benefiting from such a measure are strongly encouraged not to pay dividends.

The social and economic committee (*Comité Social et Economique*) (“**CSE**”) must be consulted on the implementation of any short-time work measure in companies with more than 50 employees, and its opinion shall in principle be attached to the application sent to the administration. However, a decree of 25 March 2020 indicates that, by exception, this CSE opinion may be sent to the administration within 2 months of the application when the request for short-time work is based on an exceptional circumstance (such as the Covid-19 epidemic).

For more details on part time work, please refer to part 3 of the present guide (**Labour law measures**).

3 Measures regarding financing of businesses

3.1 Measures to be implemented through Bpifrance (a State-owned investment bank) (“**BPI**”)

The Government has announced a set of measures to be implemented through BPI, whether State-driven or issued by BPI itself, whose purpose is to protect companies affected by the Covid-19 pandemic in order to address the economic issues directly linked to this crisis’ consequences. These measures are essentially twofold: granting of (i) guarantees (either by the State or by BPI) and (ii) direct lending/financing by BPI (essentially unsecured and unguaranteed credit lines granted to SMEs and mid-sized companies and reverse factoring).

The State guarantee scheme (“*Prêt garanti par l’Etat*”, or “**PGE**”) is the larger scheme (with an initial funding of EUR 300 billion), tailored to guarantee the loans granted by any commercial bank to a French registered company (other than a real estate company, a credit institution and a financing company) that is suffering from the Covid-19 crisis (to the exception of (i) companies in difficulty as at 31 December 2019 within the meaning of the EC Regulation (EU) No. 651/2014 of 17 June 2014 and (ii) companies subject to French insolvency proceedings as at 24 March 2020).

The guaranteed loan, which must be a 12-month bullet loan with an option at the borrower’s discretion at the end of the first year to amortize it for a period of up to 5 years, cannot be secured nor guaranteed otherwise (except for large companies). It is limited to 25% of the turnover of the borrower (to be assessed on an entity by entity basis or a global basis, where applicable)³. No margin shall be applied by the lender to this guaranteed loan.

The guarantee, which is a “final loss” type of guarantee, would cover between 70% and 90% of the amount so lent (depending on the size of the company).

Unless decided prior to 27 March 2020, large companies benefitting from a PGE shall undertake not to pay dividends or buyback their shares (save exceptions⁴) in 2020.

³ An alternative criterion based on employees’ costs could apply to innovative companies or those incorporated since 1st January 2019.

⁴ E.g. if the share buyback is a statutory requirement, if the payment of intra-group dividends purports to financially support a French company (in particular to enable it to meet its contractual obligations towards its creditors).

As regards the 2 BPI guarantees ((i) Coronavirus guarantee scheme for confirmed credit lines entitled “*Fonds de garantie Ligne de crédit confirmé Coronavirus*” and (ii) Coronavirus guarantee scheme to reinforce cash position entitled “*Fonds de garantie Renforcement de trésorerie Coronavirus*”), they are intended to guarantee loans/credit lines to be granted by commercial banks to French SMEs and mid-sized companies (with essentially the same exception for companies in difficulty as the PGE) that are suffering from the Covid-19 crisis.

The first scheme is designed to guarantee confirmed short-term financings of 12 to 18 months maximum, while the other scheme targets loans whose duration is between 2 and 7 years.

Each guarantee covers up to 90% of the lent amount, which cannot represent more than EUR 5 million for SMEs and EUR 30 million for mid-sized companies; it being noted that the aggregate amount of the financial instruments eligible to each BPI guarantee shall not exceed 25% of the 2019 turnover achieved in France by the borrower.

Contrary to the PGE, the BPI guaranteed loan/credit line can benefit from other security interests or guarantees.

One common restriction to all guarantee schemes though is that the aggregate exposure of the lender once the guaranteed loan is granted cannot be less than its existing exposure (and shall even be increased for the PGE).

Further details can be requested directly to your dedicated Restructuring & Insolvency team (see contact details below).

3.2 Bank support to companies

Several measures, in conjunction with exceptional public support measures for businesses, have been announced with the aim of supporting businesses that could face issues resulting from the development of the Covid-19 pandemic and that may temporarily affect their businesses:

- Deferral of loan repayments for companies for up to six months, with the support of the State, terms of which are being discussed;
- Cancellation of penalties and additional costs of the extension of maturity of companies' loans;
- Implementation of fast-track credit review procedures within a short timeframe (5 days target), with special attention to emergency situations.

The French banking federation (*Fédération Bancaire Française*) has already announced its support to these government measures.

4 Temporary adaptation of pre-insolvency and insolvency proceedings to the current unprecedented situation

Several ordinances have amended insolvency and pre-insolvency proceedings, including in particular ordinance No. 2020-341 dated 27 March 2020 that temporarily adapts pre-insolvency proceedings (*mandat ad hoc*, conciliation) as well as insolvency proceedings (safeguard, judicial reorganization and judicial liquidation proceedings) (the “**Ordinance**”), these Book VI amendments being applicable to ongoing proceedings.

4.1 Regarding the assessment of cash-flow insolvency (*état de cessation des paiements*)⁵

Until three months after the end of the state of health emergency (*état d'urgence sanitaire*) (i.e., as it stands, until 24 August 2020)⁶, cash-flow insolvency⁷ shall be assessed in light of the situation of the company **as at 12 March 2020**.

This freeze of the situation as at 12 March 2020 is enacted for the sole benefits of the debtor. Therefore:

- The debtor – and only the debtor - will still have the possibility to request the opening of judicial reorganization or liquidation proceedings based on a cash-flow insolvency situation, (even occurring after 12 March 2020), in particular in order to enable the activation of the French wages guarantee fund ("**AGS**");
- The debtor may also benefit from preventive proceedings to deal with companies' difficulties (and in particular conciliation or safeguard proceedings) as specified in the Report to the President⁸, even if, after 12 March 2020 and until 24 August 2020, the situation worsens to such extent that it becomes cash-flow insolvent;

- Any debtor will be able to request the opening of conciliation proceedings in the course of the aforementioned protection period, provided it was not cash-flow insolvent for more than 45 days as at 12 March 2020⁹;
- The debtor's legal representative shall not be exposed to personal liability for late filing of the cash-flow insolvency, in the event that such cash-flow insolvency occurs between 12 March and 24 August 2020 (except in the case of fraud). After this date, ordinary statutory provisions will resume.
- Conversely, creditors will not be entitled to file a motion in view of the opening of judicial reorganization or judicial liquidation proceedings if the debtor was not cash-flow insolvent as at 12 March 2020.

It is however specified that the carry-back by the Court of the cash-flow insolvency date (with the potential application of claw-back rules (*nullités de la période suspecte*)) remains possible, as well as its postponement to a later date in the event of fraud.

⁵ Although this is not clearly stated in the Ordinance, our view is that this measure should not apply to credit institutions and financing companies.

⁶ The state health emergency is expected to end on 24 May 2020, pursuant to Article 4 of Law No. 2020-290 of 23 March 2020. Its duration is, as it stands, of 2 months.

⁷ The cash-flow insolvency is defined as the debtor's inability to meet its outstanding liabilities with its available (liquid) assets, taking into account any credit line not fully drawn down, provided that it can be drawn down, and any moratorium validly granted; it is the criterion triggering the debtor's obligation to apply for the opening of reorganization or judicial liquidation proceedings, where applicable.

⁸ Report to the President of the Republic relating to Ordinance No. 2020-341 of 27 March 2020 adapting the rules relating to the difficulties faced by businesses and farms to the health emergency state and amending certain provisions of criminal procedure.

⁹ According to the interpretation of the ordinance by the Commercial Court of Paris, i.e. not being cash-flow insolvent before 28 January 2020. Source: its press release dated 5 April 2020.

4.2 Regarding conciliation proceedings

Until 24 August 2020 (i.e. state of health emergency + 3 months), the duration of the conciliation proceedings¹⁰ is automatically extended by an equivalent period (i.e. 5 months as it stands¹¹).¹²

The three-month waiting period between two conciliation proceedings no longer applies, in order to allow negotiations to resume without delay in the event of failure of the first round of negotiations¹³.

4.3 Regarding safeguard and reorganization plans¹⁴

Up to 3 months after the end of the state of health emergency (i.e. as it stands 24 August 2020), the President of the Court may extend the ongoing safeguard and reorganization plans for a maximum of 5 months (state of health emergency + 3 months)¹⁵, or even one year upon request of the public prosecutor (*Ministère public*). In the following 6 months (i.e. as it stands until 24 February 2021¹⁶), the Court¹⁷ may further extend ongoing safeguard and reorganization plans for a maximum period of one year.

It should be specified that these extensions do not require compliance with the procedure for the substantial modification of the plan (*modification substantielle du plan*) referred to in article L. 626-36 of the French commercial code (which otherwise remains applicable)¹⁸.

4.4 Regarding the adjustment of procedural periods

The ordinance draws the consequences of the impossibility of complying with certain procedural deadlines provided for in Book VI of the French commercial Code.

In particular, until one month after the end of the state of health emergency (i.e. as it stands 24 June 2020), the duration of some procedural periods is automatically extended¹⁹ for the same period (state of health emergency + 1 month)²⁰.

Would notably fall within the scope of this provision those periods relating to the observation period, the plan, the continuation of the operations (*maintien de l'activité*) and simplified judicial liquidation proceedings²¹.

¹⁰ Usually for a maximum of four months, with a potential extension, provided that the entire duration of the procedure does not exceed five months.

¹¹ In accordance with the clarification provided by the Circular of 30 March 2020 presenting Articles 1, 2, 3 and 5 of the Ordinance. The Commercial Court of Paris had a different interpretation in its press release dated 5 April 2020, i.e. that the extension of ongoing conciliations would be 3 months starting from the end of the state health emergency period, and the duration of those opened during this period would be 5 months (maximum statutory duration) + 3 months.

¹² This provision applies both to ongoing conciliation proceedings and those opened during the period of the health emergency state, according to the above-mentioned Circular.

¹³ Without preventing the President of the Court from terminating the conciliation proceedings if an agreement cannot be reached.

¹⁴ Plans adopted without creditors' committees.

¹⁵ Upon request of the parties to the proceedings.

¹⁶ According to the report to the President, this period would correspond to the foreseeable duration of the turmoil that the crisis may cause in the companies' cash flow.

¹⁷ Upon request from the public prosecutor or the court-appointed trustee for plan execution.

¹⁸ Also, these extensions are in addition to the more general provisions of Ordinance No. 2020-306 of 25 March 2020 relating to the deferral of deadlines falling during the period of the state of health emergency.

¹⁹ Without the need for a hearing or judgment.

²⁰ Furthermore, up to three months after the end of the state of health emergency, the President of the Court may also decide to extend the time limits imposed on the parties to the proceedings by the same amount of time. This would include, for example, the time limit imposed on the liquidator to sell the assets in the framework of judicial liquidation proceedings.

²¹ In addition, the hearing scheduled two months after the commencement of reorganization proceedings to ensure that the debtor has sufficient capacity to carry on its business does not have to be held during this period.

It should be recalled that Ordinance No. 2020-306 dated 25 March 2020 relating to the deferral of deadlines falling during the period of the state of health emergency plus one month is also applicable to the treatment of business difficulties. Thus, if the time-limit for filing a claim expires within this protection period, it will start to run again in its entirety from the end of the said protection period²².

4.5 Regarding the AGS

The intervention of the state wage fund is made more flexible throughout the period of the state of health emergency extended for 1 month (i.e. as it stands until 24 June 2020) in order to speed up its coverage despite the impossibility for parties to the proceedings to meet the deadlines statutorily imposed²³.

4.6 Regarding the means of communication (until one month after the end of the state of health emergency, i.e. 24 June 2020)

As a general rule, communications with the clerk's office and the court-appointed bodies including for any filing to the court, are made by any means.

In particular, the debtor is invited to request his non-attendance before the commercial Court, in favour of a written presentation of its means and claims²⁴, while hearings may be held by videoconference²⁵.

5 Miscellaneous

Pursuant to one of the numerous ordinances dated 25 March 2020 enacted to implement the emergency measures²⁶, where their purpose is to sanction breach of an obligation within a set period of time, acceleration or termination clauses provided in contracts (including loan agreements) shall be deemed not to have commenced or taken effect if that period has expired between 12 March 2020 and one month after the end of the health emergency period declared by the law No 2020-290 dated 23 March 2020 (i.e. 24 June 2020 at this stage). These clauses will become effective again one month after this date (i.e. 24 July 2020 at this stage) if the debtor has not performed its obligation in the meantime;

- Support from the State and the Credit Mediator (public body with no coercive power) to negotiate a rescheduling of bank debt;
- Support from the Companies' Mediator (public body with no coercive power) in case of dispute with the company's suppliers/clients;
- Recognition from the French State that Covid-19 is a "force majeure" situation in public contracts;
- Measures specific to very small companies:
 - Deferral and rescheduling without sanction of the gas, water and electricity invoices, and absence of sanction in case of non-payment of the rents in the conditions set out in Ordinance No. 2020-316 dated 25 March 2020;

²² See the afore-mentioned Circular dated 30 March 2020.

²³ Until 24 August 2020, transmission by the creditors' representative of the statement of salary claims to the AGS in order to trigger payment without waiting for the prior approval of the employees representative and the supervisory judge; until 24 June 2020 (i.e. duration of the state of health emergency + 1 month), automatic extension of the periods during which the termination of employment contract giving rise to payment by the AGS occurs, in the event of safeguard proceedings, judicial reorganization or judicial liquidation.

²⁴ In its filing, it may attach a request for authorisation to formulate its claims in writing, in accordance with Article 446-1 paragraph 2 of the French code of civil Procedure.

²⁵ Ordinance No. 2020-304 dated 25 March 2020 also applicable to commercial Courts.

²⁶ Ordinance No 2020-306 dated 25 March 2020 relating to the deferral of deadlines falling during the period of the state of health emergency.

- Payment of a monthly indemnification of EUR 1,500 in March 2020, increased to EUR 2,000 in April 2020, financed by a solidarity fund of EUR 1 billion, as provided for by decree No. 2020-371 dated 30 March 2020.

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3

Labour Law Measures and Data Protection Considerations

Employment: French government Labour law measures



In the context of Covid-19 epidemic, the French government has enacted a large number of employment-related measures.

1. How to implement a teleworking arrangement?

This form of work organisation usually requires the consent of both the employee and the employer.

However, the French Labour Code provides that the risk of an epidemic is a valid justification for implementing teleworking arrangements without the employee's consent.

The implementation of teleworking in the context of Covid-19 therefore does not require any particular formalism.

2. How to deal with health and safety matters when employees cannot work from home?

The French Labour Code requires the employer to take all necessary measures to ensure the safety and health protection of its employees.

In the context of the Covid-19 crisis, the employer must therefore (i) evaluate the risks in the company, (ii) take appropriate measures to ensure the protection of the employee's health, and (iii) keep the staff informed.

Specific measures apply for employees in frequent contact with the public, such as:

- > Distance of one meter between each individual;
- > Regular cleaning of surfaces;
- > Avoiding any non-essential meetings.

The employer must provide employees with the necessary work equipment, appropriate to the work to be carried out or suitably adapted for this purpose, in order to preserve their health. For example, wearing a mask is recommended for employees in close and regular contact with the public. There is however no need for the employer to provide medicine.

As part of its health and safety obligation, the employer must update the Occupational Risk Assessment Document ("*DUER*"). This document must be constantly adapted to changing circumstances and must therefore provide for adequate prevention and protection measures against Covid-19. Job positions that are the more at risk must be identified. The situation of external providers working in the company's premises must be reviewed.

It is also useful to keep the business continuity plan ("*Plan de Continuité de l'activité*" or "*PCA*") updated, if any. Such plan lists the preventive measures taken while ensuring the continuance of the company's essential activities.

3. Can employees use their right to withdraw (*droit de retrait*) in the context of Covid-19?

An employee is allowed to withdraw from a work situation if he/she has reasonable grounds to believe it implies a serious and imminent danger to his/her life or health.

Serious and imminent danger is defined by French case law as any danger likely to trigger an accident or illness that would result, or appear to result, in death or a lasting temporary or permanent incapacity within a short period of time.

To the extent that employers comply with the provisions of the French Labour Code and Government recommendations aiming to protect employees' health and safety, the right to withdraw should not be justified in the context of the Covid-19 epidemic

When the withdrawal is justified, the employee's salary must be continued, and the employee is safe from sanctions. If the withdrawal is unjustified, the employer may make a deduction from the employee's salary for the period when the employee did not work. In the event of a dispute, it falls onto the employee to refer the matter to the Labour Court.

4. How to implement short-time work (*activité partielle*)?

What is short-time work?

Short-time work is a state-funded program aimed to prevent layoffs on economic grounds. All companies whose activity is reduced due to Covid-19 including, but not limited to, businesses mandated to shut down (restaurants, cafés, shopping centres, shops, etc.), are eligible for short-time work scheme.

Short-time work can take two forms:

- > closure of the business or part of it, e.g. a production unit, a workshop, a service, or a team in charge of carrying out a project;
- > decrease in the number of hours worked by employees.

Most employees are eligible for short-time work, including part-time employees, home-based employees and employees subject to a day-per-year or an hour-per-year scheme.

An ordinance dated 27 March 2020 now allows short-time work for foreign companies without any formal branch in France and employing at least one employee carrying out his/her activity in France.

What is the employee's situation in case of short-time work?

During the hours not worked and indemnified by the short-time work allowance, employees must neither be at their place of work, nor teleworking.

Employees' consent is not required to implement short-time work. Specific rules apply for protected employees (e.g. employee representatives).

What compensation do employees receive during short-time work?

Employees must receive a monthly allowance paid by the employer for hours not worked due to the short-time scheme.

This allowance is at least equal to:

- > 70% of the hourly gross remuneration (equivalent to approx. 84% of the net remuneration);
- > In any case, the allowance cannot be less than the hourly minimum wages (i.e. EUR 8.03, equivalent to EUR 1,539.42 gross per month for a full-time employee).

The employer may unilaterally decide to compensate his employees above 70% of gross salary. A company collective agreement or an industry-wide collective agreement may also require increased allowances from the employer (e.g. maintaining 100% of the salary).

Short-time work allowances paid by the employer are exempted from social security contributions and only subject to CSG-CRDS at the rate of 6.7% on 98.25% of the amount, and to personal income tax.

What compensation does the employer receive in return?

The company receives from the Government an allowance corresponding to 70% of the employee's gross hourly remuneration, up to 4.5 times the minimum wages (i.e. a maximum hourly allowance as of EUR 31.98 gross for a full-time employee). In any case, such allowance cannot be less than the minimum wages.

Due to this funding, made on a monthly basis, if the allowance paid by the company does not exceed 70% of the gross salary (up to 4.5 times the minimum wages), the cost of short-time work for companies is equal to zero.

However, if the compensation paid by the company exceeds 70% (at the employer's initiative or pursuant to a collective agreement), or if the employee's remuneration exceeds 4.5 times the minimum wages, the employer bears the financial cost of the difference.

How to implement short-time work?

A request must be submitted to the French labour administration on a dedicated online portal. To facilitate the process for companies, the French labour administration gives companies 30 days to file their request, with retroactive effect.

The French labour administration has two days to examine the request. Failure to reply within this period implies implicit acceptance of the request for short-time work.

The short-time work authorisation is granted for a period of up to 12 months, which may be renewable.

Must employee representatives be consulted?

The employer must consult the works council (social and economic committee - "CSE"), if any, before implementing short-time work. The opinion of the CSE must be sent to the French administration together with the company's request for short time work. However, this has been accommodated: the opinion of the CSE may be sent up to two months after the filing of the request for short-time work (decree of 25 March 2020).

5. Can companies force employees to use their paid leaves or other rest days?

The French Labour Code allows companies, in case of exceptional circumstances, to postpone the dates of accrued paid holidays (congés payés) that have been already scheduled by employees. But the company cannot, in principle, force employees to use accrued paid holidays which have not been scheduled yet by employees.

However, an ordinance (25 March 2020) allows employers to unilaterally impose or modify the dates of certain days of rest, within the limit of 10 days, as an exemption to the Labour Code and collective agreements.

Eligible days of rest are:

- > those granted by collective agreement, such as agreements relating to the reduction of working time (RTT);

- > those resulting from a a day-per-year or an hour-per-year scheme;
- > those saved by employees on the time savings account (CET): in this case, the employer compels the employee to use these savings by taking days off.

When using this exemption, the employer must comply with a notice period of at least one civil day; the imposed or modified period of rest days may not extend beyond 31 December 2020.

Employers can also impose the dates of up to 6 days of accrued paid leave through a company collective agreement or an industry-wide collective agreement.

6. What about redundancies?

On Monday 16 March 2020, the French Labour Minister made it clear that no lay-offs would be accepted during this unprecedented health crisis. "*During the current period, it is zero redundancies*," she insisted to the leaders of employers' and trade union organisations.

Although there is no legal prohibition to economic dismissals during the crisis, the implementation of collective dismissals, involving 10 or more employees in a row, will be particularly scrutinised by relevant labour administrations (DIRECCTE). A recent governmental instruction indicates that "*given the current health crisis and the uncertainties on its duration, it is strongly recommended that companies postpone the announcement and take into account the risks with respect to the regularity of the information / consultation resulting from difficulties to conduct a respectful social dialogue [...]. We will be extremely vigilant on the files which could come out in the coming weeks*".

In some cases, companies which used short-time work over the last 36 months may be subject to restrictions to proceed with economic termination during a certain period of time.

Please note that in any case it is unlikely that Covid-19 could qualify as a case of force majeure considering a very restrictive interpretation of this concept under French case law.

7. How to deal with employees who are quarantined or who look after a child whose school is closed?

(a) An employee is quarantined. What does it imply?

Quarantine measures apply to contaminated persons or who have been in contact with contaminated persons. Both may be granted a sick leave.

During such sick leave, the employee's compensation is identical to the 'regular' sick leave: daily social security sick pay (but with no waiting period) plus the employer's top up prescribed either by French Labour Code (so that the total compensation reaches 90% of the regular salary) or an applicable collective bargaining agreement (often more favourable). The employee exposed and subject to a measure of isolation, eviction from work or stay-at-home may benefit from this sick pay scheme for a maximum period of 20 days.

(b) How to handle an employee who must care at home for his/her child under the age of 16 because of school closures?

Since 16 March 2020, all education structures in France (schools, secondary schools, high schools and universities) are closed by governmental order.

If teleworking is impossible and no other work arrangement can be found, the employee can benefit from a derogatory paid sick leave.

To do so, the employee must provide the employer with an affidavit stating he/she is the only parent requesting such sick leave to look after the child(ren) at home.

The employer must declare the sick leave on the Social Security's website.

During this period, the employee will receive the daily social security sick pay plus the employer's top up mentioned above. The compensation will be paid for the entire duration of the closing of the school.

(c) What is the occupational doctor's role?

The occupational doctor is normally not empowered to prescribe sick leaves. Considering the exceptional circumstances, an ordinance dated 1 April 2020 provides that he/she can now prescribe and renew a sick leave in case of infection or suspicion of infection and carry out Covid-19 detection tests on employees.

8. How to manage relations with staff representatives: is it possible to use videoconferencing/conference calls for the organisation of CSE meetings?

In principle, the use of videoconferencing must be provided for by agreement between the employer and the CSE and failing that, the use of videoconferencing is limited to 3 meetings per calendar year.

In the context of the Covid-19 epidemic, new specific exemptions (ordinance of 1 April 2020) allow that every meeting is held via videoconferencing or teleconference, after prior information of the CSE members. If both options are not possible, the use of instant messaging is allowed for every CSE meeting.

Last Update: 14/04/20

Data Protection considerations

With more diagnoses of Covid-19 occurring daily in France, employers should prepare for how they will respond to an outbreak. Here we identify the key legal issues and the practical steps employers can take.

The French data protection authority (the “CNIL”) reminded that employers are responsible for the health and safety of their employees. In this respect, they must implement actions to prevent occupational risks, information and training actions, and finally set up an appropriate organisation and means. It has thus published guidelines reminding employers what they can and cannot do with regard to the processing of the personal data of their employees, as well as what the latter should do in cases of suspicion of a contact with the virus.

1. What cannot be done by employers

The CNIL reminded that employers cannot take measures that could infringe on the privacy of the persons concerned, in particular by collecting health data that would go beyond the management of suspected exposure to the virus.

For example, employers must refrain from collecting, in a systematic and generalized manner, or through individual inquiries and requests, information relating to the search for possible symptoms presented by an employee/agent and his/her relatives. For instance, it is not possible to implement:

- > mandatory body temperature readings of each employee/agent/visitor to be sent daily to his or her superiors; or
- > the collection of medical records or questionnaires from all employees/agents.

2. What can be done by employers

In this context, the employer may:

- > raise awareness and invite its employees to provide individual feedback of information concerning them in relation to possible exposure, to the employer or the competent health authorities;
- > facilitate their transmission by setting up, if necessary, dedicated channels;
- > promote remote working methods and encourage the use of occupational medicine.

In the event of a report, an employer may record:

- > the date and identity of the person suspected of having been exposed;
- > the organizational measures it has taken (containment, teleworking, orientation and contact with the occupational physician, etc.).

The employer may communicate to the health authorities, on request, the information relating to the nature of the exposure necessary for any health or medical care of the exposed person.

3. What should be done by employees

Employees must implement all means to preserve the health and safety of others as well as themselves.

They must inform their employer in the event of suspected contact with the virus.

Finally, health data may be collected by the health authorities, who are qualified to take the measures appropriate to the situation. The evaluation and collection of information on coronavirus symptoms and information on the recent movements of certain persons is the responsibility of these public authorities.

Ultimately, the CNIL highlights that health situation requires all actors to be particularly vigilant, the CNIL invites individuals and professionals to follow the recommendations of the health authorities.

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4

Managing commercial relationships

Managing commercial relationships



Due to the global outbreak of Covid-19, many businesses are confronted with serious commercial consequences, such as delays in the delivery of goods and services and may look for ways to mitigate the impact on contractual performance.

What is force majeure?

Force majeure is an event that the law recognizes as preventing performance of a contractual obligation. It is defined by Article 1218 of the French Civil Code, under which three cumulative criteria must be met:

- > The event **must be beyond the control** of the party invoking *force majeure*.
- > The event must **not have been reasonably foreseeable at the time of the conclusion of the contract**.
- > The event must **prevent the performance of his/her obligation by the party invoking force majeure**. The fact that an obligation has become more onerous or difficult to perform will generally not be sufficient to qualify as a *force majeure* event.

What are the outcomes of force majeure?

Two outcomes are possible if a party successfully demonstrates that it was prevented from performing its contractual obligation by reason of a *force majeure* event:

- > if the prevention is temporary, performance of the obligation will only be suspended, unless the resulting delay is such as to justify the termination of the contract;
- > if the prevention is permanent, the contract will be terminated and the parties will be discharged from their obligations.

Article 1231(1) of the French Civil Code further specifies that a party will not be liable for damages if the non-performance or late performance of his/her obligation is due to *force majeure*.

Is Covid-19 a force majeure event?

Historically, French courts have rather strictly applied the *force majeure* criteria and have usually found them not to be met by a health epidemic.

Nevertheless, given the novelty of the Covid-19 disease, its scope and impact, and the nature and severity of the governmental measures that have been implemented (prohibitions on working, travelling or even circulating, bans affecting the sale of certain products, etc.), French courts may decide otherwise as regards the Covid-19 epidemic itself and/or as regards said governmental measures, depending on the case at stake. In this respect:

- > depending on the circumstances, the outbreak and spread of Covid-19 and/or the subsequent governmental measures is likely to be deemed to be **beyond the control** of the party invoking force majeure. For instance, a compulsory lockdown ordered by the local government would likely be deemed to fulfil this criterion.
- > depending on when the contract was entered into (after the Covid-19 occurrence in China, after the date on which Covid-19 was declared a public health emergency by WHO, etc.), a debate may arise as to whether the outbreak of Covid-19 and/or the governmental response was **reasonably foreseeable**.
- > depending on the circumstances, the Covid-19 and/or the subsequent governmental measures may **prevent the performance of a particular contractual obligation** and thus constitute *force majeure*. However, if the Covid-19 and/or governmental measures only make a particular performance more difficult or expensive, it would likely not be considered as *force majeure*, as alternative means are available to comply with the contractual obligation (work reorganisation, different supply sources, etc.).

French Courts will also likely take into account the statements made by the French Minister of Economy and Finance, Bruno Le Maire, who declared that Covid-19 will be considered as a *force majeure* event for all public contracts.

It is also interesting to note that in a few recent cases, although specific to administrative custody, French courts have already held that Covid-19 situation did constitute a *force majeure* event (see, for instance, Douai Court of Appeal, 4 March 2020, No. 20/00395; 5 March 2020, Nos. 20/00400 and 20/00401; Colmar Court of Appeal, 12 March 2020, No. 20/01098; 16 March 2020, Nos. 20/01142 and 20/01143; Colmar Court of Appeal, 23 March 2020, Nos. 20/01206 and 20/01207).

Force majeure clauses

Under French law, parties drafting a contractual *force majeure* clause can deviate from the statutory definition in Article 1218. They may, for instance:

- > choose to widen or narrow the definition of what constitutes *force majeure* (e.g., by agreeing to forego the requirement of lack of foreseeability),

decide to include a list of events which will automatically be considered as *force majeure* events regardless of whether they fulfil the criteria of Article 1218, or
- > modify the effects of the *force majeure* (e.g., by introducing a duty to renegotiate the agreement).

The question of whether Covid-19 will qualify as *force majeure* in such case mainly depends on the wording of the contractual *force majeure* clause in question. If the clause does not expressly mention pandemics or epidemics as covered events (or, alternatively, does not exclude them), French courts will look at whether the event otherwise falls within the contract's definition of *force majeure* or, in its absence, the statutory definition of *force majeure*.

What is hardship?

Hardship (*imprévision*) is an event or circumstance rendering performance extremely onerous. As defined by Article 1195 of the French Civil Code (applicable to contracts entered into as from 1 October 2016), three conditions must be met:

- > **There must be a change of circumstances which was unforeseeable at the time of conclusion of the contract.** As the text is silent as to the nature of the change of circumstances which is required, Article 1195 may cover a change of circumstances of any kind (e.g., economic, legal, technological, or environmental, etc).
- > **This change of circumstances must make performance excessively onerous for a party.** This condition introduces a lower threshold than *force majeure*. That being said, it must be shown that performance of the contract has become economically unbearable for the aggrieved party, and not merely more difficult.
- > **Said party must not have accepted to bear that risk.**

What are the outcomes of hardship?

Article 1195 provides for a phased approach in presence of a hardship:

- > a party suffering from a hardship may first request its co-contracting party to renegotiate the contract;
- > in case of a refusal or failure of the renegotiations, the parties may jointly agree to terminate the contract, or request the judge to adapt it;
- > finally, in the absence of an agreement within a reasonable time period, one of the parties can seize the court and request that it revises or terminates the contract.

The aggrieved party is required to continue to perform its obligations, irrespective of the consequences, during the renegotiation and the subsequent phases.

Parties may also choose to include hardship clauses in their contracts which vary from the statutory definition, or to exclude the applicability of hardship altogether.

Managing commercial relationships

Is Covid-19 a hardship event?

Given that the statutory test for hardship is less onerous than that for *force majeure*, it would seem even more likely that the Covid-19 situation will be found, in certain cases, to constitute hardship.

In light of the degree of propagation of the virus and the governmental measures that have been implemented, the performance of a contract could be impacted by changes of circumstances of multiple types (sudden increase in the price of raw materials, new policies, etc.).

Depending on whether the performance has become excessively onerous for a party, there is a high chance that the Covid-19 situation will be considered as meeting the standard of a hardship event under French law.

However, if the parties fail to jointly come to an agreement as to the renegotiation or the termination of the contract at stake, it is unclear whether, in practice, a party will be able to request the revision or termination of the contract before French courts in a timely manner.

Indeed, since the start of the lockdown on 16 March 2020, French courts are closed and all hearings are postponed, except those relating to the so-called "essential litigation" (see below).

Key questions

Close attention must be paid to the following key questions:

- > **Does the agreement contain any provision concerning force majeure or hardship?** Are they applicable? Is there a specific procedure to be followed (notification, etc.)?
- > **When was the contract entered into?** The answer will be relevant as regards the applicability of the statutory provision on hardship (applicable to contracts entered into as from 1 October 2016) and as regards whether the situation could be deemed as unforeseeable.
- > **What are the consequences of the event?** Does the situation created by Covid-19 / the governmental measures prevent the performance of the obligation or at least make it excessively onerous?

Paralysis of certain contractual clauses

Order No. 2020-306 of 25 March 2020, issued further to Law No. 2020-290 of 23 March 2020 declaring a state of health emergency of two-month duration (subject to extension), contains provisions intended to temporarily "paralyse" the operation of contractual clauses aimed at "*penalizing the non-performance of an obligation within a given time-period*", such as cancellation clauses, liquidated damages clauses or acceleration clauses.

Under this Order:

- > a "protected period" is instituted, from 12 March 2020 to one month following the end of the declared state of health emergency currently in force in France (the "**Protected Period**");
- > cancellation clauses, liquidated damages clauses or acceleration clauses which should have produced their effects during the protected period will only take effect one month after the expiry of the Protected Period, in the event the debtor has not performed his/her obligation in the meantime;
- > the application of liquidated damages clauses which started running prior to 12 March 2020 is suspended for the duration of the Protected Period, and will resume on the day following the expiry of said Protected Period;
- > in the case of contracts which can only be terminated during a given period, or which are automatically renewed if no notice to the contrary is given within a certain time limit, that period or that time limit will be extended by two months from the end of the Protected Period if it would normally have expired during the Protected Period.

Commercial disputes before French courts

In the case of a dispute, the parties should take into account two key measures that have been implemented by the French government:

- > Since the start of the lockdown on 16 March 2020, French courts are closed and all hearings are postponed, except those relating to so-called "essential litigation". This notion has not been clearly defined to date, but should include summary and *ex parte* proceedings, where urgent interim relief is sought.
- > Order No. 2020-306 dated 25 March 2020 provides that where a time limit that is established by law or regulation:
 - (i) must be respected, under penalty of, inter alia, nullity, inadmissibility, expiry, or other, and
 - (ii) expires within the Protected Period (as defined above),

said time limit will start running again, in its entirety (i.e. without taking into account the time accrued prior to the interruption of the time limit), as from the end of the Protected Period, up to a limit of two months.

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5

Corporate law: boards, shareholders' meetings and financial statements

Corporate law: boards, shareholders' meetings and financial statements



As anticipated following the vote by the French Parliament of an emergency law on 23 March 2020, the French Government has issued several ordinances (ordonnances) on 25 March 2020 dealing with various exceptional temporary measures to address the emergency situation resulting from the Covid-19 outbreak and the lockdown imposed to limit its expansion.

Two of those ordinances are related to corporate law:

- > Ordinance Nr 2020-321 adapts rules regulating board and shareholders' meetings (and other governance bodies) of French legal entities to enable their continuous operation during the Covid-19 outbreak;
- > Ordinance Nr 2020-318 adapts rules relating to the preparation, audit, approval and publication of financial accounts and other documents and information that French legal entities are required to file during the Covid-19 outbreak.

Key takeaways are as follows:

Boards and shareholders' meetings (and other governance bodies)

Scope of application

The ordinance applies to all type of French legal entities and covers any type of shareholders' meetings, and any other type of governance bodies such as board of directors, supervisory boards, bondholders' meetings, etc.

The ordinance has a retrospective effect and is applicable for board or shareholders' meetings held as from 12 March 2020 and until 31 July 2020, subject to possible extension by the Government up to 30 November 2020.

Shareholders' meetings

The board of directors (or equivalent body) is entitled to convene the shareholders' meeting without the shareholders and other attendees (e.g. statutory auditors or employees' representatives) being present, whether physically or by any means of communication, if administrative restrictions are applicable when the general meeting is convened or held. In such a situation, the shareholders will vote remotely and in advance. It does not impact the rights of shareholders that may be exercised without being present at shareholders' meeting (e.g. right to submit written questions, right to file draft resolutions ahead of the meeting). This decision entails however the temporary suspension of shareholders' rights that they would otherwise hold through their presence (e.g. right to ask questions, right to request amendments to draft resolution during the meeting).

Companies which decide to adopt this approach at a moment when all or part of the convening formalities have already taken place shall communicate such decision to the shareholders by any possible means at the latest 3 business days prior to the meeting. Listed companies shall make a public announcement as soon as possible.

With a view to facilitate the participation of the shareholders, the use of video conference and other telecommunication tools for shareholders' meetings is now permitted whether provided for by the articles of association or not.

The time period for holding the shareholders' meeting is extended: for companies with a financial year ending between 30 September 2019 and one month after the end of the lockdown, the time period to hold their annual general meeting is extended by 3 months unless the statutory auditors have issued their report on the financial statements before 12 March 2020.

Invitation and access to information prior to shareholders' meetings

Shareholders' meetings of companies listed on a regulated market will not be void for failure to send a convening notice by post, to the extent such failure is due to circumstances beyond their control.

For companies listed on a regulated market, communication of documents prior to the shareholders' meeting upon shareholders' request can be made by email at the email address provided by shareholders.

Board and other governance bodies

As for shareholders' meetings, the possibility to use video conference and other telecommunication tools has been extended temporarily for other governance bodies notwithstanding any other legal provisions or restriction resulting from provisions in the articles of association. This would apply in particular to board meetings held to approve the annual accounts. Even if there is no specific provision in this respect, the boards of directors, supervisory boards and management boards can also make decisions in writing.

Financial statements

This ordinance provides for timing extensions in relation to financial statements:

- > Timing to approve financial statements and other related documents and to accordingly convene the shareholders' meeting for this purpose is extended by 3 months. This applies to companies with a financial year ending between 30 September 2019 and one month after the end of the lockdown. However, if the statutory auditors have issued their report on the financial statements before 12 March 2020, companies cannot benefit from this extension;
- > Timing for the board of directors, the management board ("directoire") and managers ("gérants") forecast documents is extended by 2 months. This applies to companies with a financial year ending between 30 November 2019 and one month after the end of the lockdown.

Finally, no specific rule has been adopted with respect to the payments of dividends, whereas this was contemplated in the emergency law that has authorized the Government to adopt the ordinances.

Last Update: 27/03/20

Links

Décret n° 2020-418 du 10 avril 2020 portant adaptation des règles de réunion et de délibération des assemblées et organes dirigeants des personnes morales et entités dépourvues de personnalité morale de droit privé en raison de l'épidémie de covid-19

Ordonnance n° 2020-318 du 25 mars 2020 portant adaptation des règles relatives à l'établissement, l'arrêté, l'audit, la revue, l'approbation et la publication des comptes et des autres documents et informations que les personnes morales et entités dépourvues de personnalité morale de droit privé sont tenues de déposer ou publier dans le contexte de l'épidémie de covid-19 - Rapport au Président de la République

Ordonnance n° 2020-321 du 25 mars 2020 portant adaptation des règles de réunion et de délibération des assemblées et organes dirigeants des personnes morales et entités dépourvues de personnalité morale de droit privé en raison de l'épidémie de covid-19 - Rapport au Président de la République

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6

Impacts on regulated firms in the financial services sector

Impacts on regulated firms in the financial services sector



Serious communicable diseases such as Covid-19 may lead to disruption to the operation of financial services firms as a result of travel restrictions, quarantine measures and/or heightened levels of staff illness.

At this point, regulated firms in the financial sector are expected to continue to comply with their regulatory obligations, especially those as apply in a crisis or risk management context.

Licensing applications, change in control applications and EEA-passport notifications

The French banking regulator (the “**ACPR**”) has informally confirmed that their teams at the Authorisations Unit are able to continue processing applications remotely and the College is able to continue deliver the relevant authorisations accordingly. When entities anticipate some delay in the contemplation of their projects (delays in implementing IT systems integration is an example given by the regulator), they should be mindful of keeping the regulator informed.

Distribution of dividends and share buy-backs

In line with the ECB and EBA announcements, the ACPR published a press release date 30 March 2020 requesting credit institutions and financing companies to refrain from distributing any dividends (and from taking any firm commitments to do so or undertake share buybacks in order to remunerate shareholders) for the financial years 2019 and 2020.

On the financial markets side, the French Financial Markets Authority (the “**AMF**”) has taken certain separate measures and recommendations.

Universal registration documents and permanent information rules

The AMF published a declaration on filing of universal registration documents and permanent information rules in the context of the Covid crisis-19. This publication deals with the impact of Covid-19 on the risk factors section of the URD (the AMF recalls ESMA’s guidance on risk factors), reassessment of previously announced financial outlook, Market Abuse Regulation, etc.

Ban of net short positions

The AMF has taken quick actions to prevent any devaluation of French financial values. On 18 March 2020, the AMF held a short selling ban applying for one month commencing 17 March. According to this AMF decision, “this prohibition applies to any natural or legal person, irrespective of their country of residence, regardless of whether trading takes place in France or in another EU or non-EU country, on a trading venue or over-the-counter.” Later on, ESMA issued a positive opinion with respect to such emergency measure (ESMA70-155-9581).

Transaction reporting

The AMF recalled to market participants that they “must ensure that the transmission of reports remains steady, of good quality and is carried out within the regulatory timelines.”

In the event of any difficulties with report transmission, the AMF invited firms to contact their usual AMF staff member in order to provide information on the nature of the difficulties and inform on the projected return to normal.

SFTR reporting

ESMA postponed the reporting obligations related to securities financing transactions under the Securities Financing Transactions Regulation (“**SFTR**”) extending its TR authorising procedure deadline beyond 13 April 2020, in order to allow actors to be ready to report as of 13 July 2020.

Indeed, ESMA stated it was expecting from authorities “not to prioritise their supervisory actions towards entities subject to Securities Finance Transactions (“SFT”) reporting obligations as of 13 April 2020 and until 13 July 2020. ESMA also expects TRs to be registered sufficiently ahead of the next phase of the reporting regime, i.e. 13 July 2020, for credit institutions, investment firms, CCPs and CSDs and relevant third-country entities to start reporting as of this date.” (ESMA80-191-995)

The AMF informed participants that this new timeline will be taken into account in accordance with ESMA’s 26 March 2020 press release.

Market abuse surveillance and controls.

Firms will need to maintain effective market abuse systems and controls, and be able to conduct surveillance on in-scope trading activity undertaken by traders working from home. The firm will need to be confident that inside information controls in respect of who the traders are talking to and who can access their IT infrastructure remain robust. Enhanced surveillance suited to the remote access trading being carried on, and extra checks and samples, may be needed to reflect and be responsive to the unusual circumstances.

> Telephone taping requirements.

In line with MiFID II obligations, the AMF stressed the importance of audit trail and voice-recording obligations although it underlined the challenging situation. The authority still expects participants to take appropriate steps to ensure these requirements are complied with in a deteriorated operational environment brought about by the geographical separation of staff. Firms will still need to ensure that lines used for business purposes are recorded, and that traders are not making telephone calls on privately-owned equipment which the firm is unable to record.

This matter was considered at European level in order to ensure necessary harmonization and ESMA has clarified its position on call taping under MIFID 2 on March 20 (ESMA35-43-2348).

> Systems and controls, particularly data confidentiality, risk management and operational resilience.

Confidentiality is a key issue. Firms will need to consider how the obligation to have in place sound security mechanisms, and to maintain data confidentiality, can be met where staff, especially client-facing staff, work from home. Practical concerns regarding effective cybersecurity of the home IT infrastructure need to be considered, as well as whether adequate confidentiality controls can be maintained in a home environment in which other individuals, not employed by the firm, may have access. Given the focus on operational resilience, firms will need to balance carefully the continuity of service to clients with the risks of data breach, system failures and risks arising from potentially weakened governance and oversight as a result of unprecedented levels of home-working. Although likely not applied by most of the financial institutions, it is worth noting that the French government in theory allows financial sector employees, when homeworking is not possible, to go to their place of work, provided they have permission from their employer.

In that sense, the AMF recalled to market operators that they are not prohibited from working remotely. However, firms are expected to be watchful, notably in case of:

- matters of conflict of interest;
- possible latency risks which may incur difficulties with the monitoring of real-time trading.

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Financing issues

Financing issues

Capital markets and loan financing



Issuers or underwriters working on international offerings of securities and agents or lenders on loan financings should consider certain commercial, practical, and legal issues that may arise from Covid-19.

Market volatility, economic outlook, and investor sentiment are no doubt important factors, but the following issues should also be considered by market participants.

Validity of approvals or consents

To the extent that an issuer or borrower has obtained any approval or consent from regulators or third parties for a proposed financing, it should review any validity period of such approval or consent in case the timing of the transaction is delayed in light of Covid-19.

We are not anticipating any delays in respect of the review, approval or admission processes of the French *Autorité des marchés financiers* (the “AMF”) at this stage. The majority of the AMF Markets Dept staff are working from home and remain fully operational. They have invited participants to contact their usual contacts at the AMF in order to inform them of any difficulties. For standalone bond issues, issuers should consider the timing prescribed by the Prospectus Regulation when filing prospectuses for approval by the AMF (i.e. in principle 10 working days for review from the submission of the draft prospectus, which can be extended to 20 working days for first-time issuers) to ensure compliance in light of the unprecedented events. We also recommend the issuers to contact the AMF as soon as possible in order to validate the contemplated timetables.

Due diligence and disclosure

- > **Due diligence.** Any logistical issues on the due diligence process should be discussed at the outset of a proposed financing – e.g. practical difficulties with on-site visits, etc. Enhanced due diligence requirements (if any) also need to be addressed – e.g. to assess the impact on, or the disruption to, a

company’s business or those of its suppliers and/or customers, and any impact on credit ratings, etc. Additional questions with respect to Covid-19 and its consequences on the business of the issuer are now usually included in the issuers’ due diligence questionnaires (“DDQ”). Certain issuers may also prefer to answer DDQs in writing rather than by conference call.

Expect additional diligence and disclosure requirements (and possibly delays) relating to business impacts of Covid-19.

Carefully monitor approval, consent and termination or default provisions to ensure strict compliance in light of the unprecedented events; do not assume “business as usual”.

- > **Disclosure.** Market participants should consider whether risk factors should be enhanced or introduced to reflect the actual or potential impact of Covid-19 on the issuer and its business. Issuers admitting securities to trading on a regulated market in the EEA should also consider risk factor disclosure in light of the requirements of the Prospectus Regulation, and the ESMA Guidelines, as generic risk factors discussing Covid-19 will not fulfil the relevant criteria. Issuers need to ensure that risk factors are specific and establish a clear and direct link to the issuer and its business, highlighting the areas of its business which may be impacted by Covid-19. Prospectuses approved before 21 July 2019 that benefit from the grandfathering clause referred to in Article 46.3 of the Prospectus Regulation can be updated by way of a supplement incorporating by reference the issuer’s URD with respect to the risk factors’ section and including a press release on Covid-19 if the issuer has published one. Many issuers have already updated their risk factors sections and amended or suspended their previously announced trends and guidances accordingly.

Capital markets and loan financing

Termination, force majeure and material adverse change

Market participants may also wish to consider the impact of any termination, force majeure, material adverse change and market disruption clauses in an underwriting agreement or loan agreement, and whether there is a risk that parties would elect to exercise any termination or walk-away rights (see the **“Managing commercial relationships”** chapter of this document). In addition, to the extent that any back-to-back swap or hedging is being put in place in connection with the proposed issue of securities or loans, parties should also consider any termination and force majeure clauses in the related swap or hedge for potential mismatches.

Interest payments, etc.

Market participants may wish to revisit clauses relating to funding requirements – e.g. definition of business days in the context of funding an interest payment or relevant grace period before a default scenario kicks in for non-payment, etc., to deal with any ad hoc or extension of public holidays in the relevant jurisdiction.

Roadshows

Any logistical issues with roadshows should be considered and workarounds agreed upfront (if possible) e.g. net roadshows and investor conference calls. In addition, underwriters and arrangers should re-examine their existing deal roadshow guidelines given the increased interactions with potential investors through net roadshows and investor conference calls.

Syndication

Where a loan financing has been underwritten, arrangers will need to understand what rights they have under syndication and market flex provisions to make changes to the economics, deal terms or structure in order to achieve a successful syndication.

Settlement and closing

Physical signing and closing are rare these days on issues of securities, loan financings or derivatives. However, if one is contemplated, then market participants should consider the need for any potential workarounds (e.g. signing and closing by email or the use of e-signing platforms, etc.) and how this may impact any requirement for “wet ink” or notarized originals required for registration. Issuers and borrowers may also consider appointing a power of attorney prior to a signing, to ensure availability of an authorised signatory in the relevant jurisdiction. According to ICMA Covid-19 market updates, it seems likely that, with respect to syndicate / dealer panels signing the documentation of a new bond issue or a programme update, banks will start to sign documentation individually to avoid the logistical challenges associated with coordinating signing authorities. In addition, the logistics for the delivery of originals of any transaction document should also be discussed and agreed upfront before signing and closing. In any event, the delivery of originals may be delayed due to the current French lockdown ordered to limit Covid-19 expansion. To the extent there is any related swap or hedging, market participants should also consider any business day convention or definition to ensure that there is no mismatch on settlement dates.

Any impact on required deliverables such as original commercial registry extracts or the need to enter into security which requires registration should be considered in light of expected practical constraints of dealing with the commercial registry offices. The French government has taken certain measures to facilitate registration requirements so that often these can be completed after the emergency health period.

Post-closing/ongoing financing obligations

Market participants should review applicable post-closing obligations and ongoing financing obligations to ensure that no issues will arise as a result of Covid-19 outbreak (e.g. change in notice period requirements, definition of business days, closure of government registry offices, etc.).

Capital markets and loan financing

Ordinance No. 2020-306 on deferral of deadlines

It should be recalled that Ordinance No. 2020-306 dated 25 March 2020 relating to the deferral of deadlines falling during the period of the state of health emergency plus one month (see the “**Government Support Measures**” chapter of this document) is also applicable to bonds and loan financing. Article 4 of this Ordinance suspends the ability to terminate a contract or accelerate an obligation because of a default in respect of an obligation the performance of which falls due during the period commencing on 12 March 2020 and which will end one month after the date of the end of the state of health emergency which was declared in France on 23 March 2020 (the “**Protected Period**”). Article 4 also suspends the application of “*clauses pénales*” (penalty clauses) during the Protected Period, an expression which includes any clause pursuant to which where an obligor fails to perform a contractual obligation, such obligor must pay a certain sum of money by way of damages, and could include default interest provisions. Such clauses will only take effect one month after the end of the Protected Period (which may be extended) if the debtor has not performed an obligation sanctioned by such clauses in the meantime.

Financing issues

Derivatives

Market participants should monitor announcements in relevant financial centres for unscheduled holidays and market closures. In case of such an event, market participants would have to consider whether the event would affect settlements and valuations, and whether it triggers a disruption event and what the applicable fall-back is. The consequences may be different for different asset classes and/or different market documentation standards. Issuers or underwriters working on international offerings of securities, market participants entering into derivatives and agents or lenders on loan financings would benefit from considering certain commercial, practical, and legal issues that may arise from Covid-19. Market volatility, economic outlook, and investor sentiment are no doubt important factors, but the following issues should also be considered by market participants.

Unscheduled holidays may impact settlement dates, and/or impact transactions in other ways. Parties should make sure to be familiar with the specific terms of their chosen master instrument, especially around market disruptions.

Force majeure and other potential default events

Market participants would also need to consider how any event impacts the performance of their obligations under documentation such as the International Swaps and Derivatives Association, Inc. ("**ISDA**"), *Fédération Bancaire Française* ("**FBF**") or other market standard documentation.

In order to assess the rights of the parties provided for under their derivatives documentation, typically two levels of inquiries are to be made:

- > first, whether such an event (or any consequent nonperformance) would constitute an event of default or a termination event under the relevant master agreement; and
- > secondly, whether any particular disruption event which is already provided for in the transaction has been triggered, and if so, whether those provisions will take precedence over the termination provisions in the applicable master agreement. Market participants should also consider any

related financing (see the "**Termination, force majeure and material adverse change**" paragraph above).

In conjunction with this analysis of the contractual terms of their derivatives documentation, market participants would also need to consider how any event impacts the performance of their obligations as a matter of law (even if the documentation does not provide for specific provisions) (see the "**Managing commercial relationships**" chapter of this document).

Ordinance No. 2020-306 on deferral of deadlines

The aforementioned Ordinance No. 2020-306 dated 25 March 2020 suspends the ability to terminate a contract or accelerate an obligation because of a default in respect of an obligation the performance of which falls due during the Protected Period. However, Article 1 of such Ordinance provides that such suspension is not applicable to financial obligations and related financial collateral referred to in Articles L-211-36 *et seq.* of the French Monetary and Financial Code (the "**French Financial Netting and Collateral Regime**"). Even if determining whether derivatives transactions fall within the scope of the French Financial Netting and Collateral Regime can only be done on a case-by-case basis, most usual OTC derivatives should benefit from this safe-harbour; accordingly, the suspension of rights provided by Article 4 of the Ordinance should not affect the enforceability of the close-out netting provisions under market standard derivatives documentations in respect of such transactions.

Ban of net short positions

Market participants would also need to consider how applicable short selling bans may impact their ability to trade certain derivatives or undertake certain hedging strategies in connection thereto.

Differences in market terms

Market participants should be mindful of any technical differences in terms for transactions entered into under different documentation. For example, it is possible for uncleared transactions and cleared transactions to have terms which differ, thereby giving rise to different consequences. Similarly, cleared transactions on

Derivatives

different clearing services may have different terms. In addition, terms may vary depending on the market standard documentation used in connection with the relevant transactions (e.g. ISDA vs FBF). It will be important to consider the detailed provisions of each set of terms in order to analyse these issues.

Market guidance

ISDA held calls to discuss potential legal and documentation issues arising from Covid-19. ISDA also produced market guidance in respect of unscheduled holidays or market closures and regularly updates a *Global Jurisdiction Monitor on Emergency Insolvency and Short-Selling Legislation*.

These elements, together with other Covid-19 related material, can be found on the ISDA [website](#).

Financing issues

Liquidity and cash flows

The Covid-19 outbreak is exposing corporates across a range of sectors to varying degrees of disruption in their supply chains (affecting operations and ability to deliver) and dampening demand among customers and consumers for their goods or services.

Covid-19 has already led to short-term – but potentially significant – pressure on liquidity and cash flows. The OECD has called on governments to implement measures aimed at supporting such businesses (e.g. by providing banks with additional liquidity and reducing reserve requirements). The French government has notably put in place a number of measures to support French corporates, that are essentially twofold: granting of (i) guarantees for certain types of bank credit lines/loans (either by the State or by BPI, the French state owned investment bank) and (ii) direct lending/financing (credit lines and reverse factoring) by BPI to ensure increased liquidity to businesses suffering from the Covid-19 crisis.

The government is also encouraging the French banking sector to implement the deferral of debt maturities for up to 6 months with no penalty and fast-track credit review procedures and has also implemented laws disapplying termination clauses sanctioning the non-performance of certain obligations due to be performed during the emergency health period.

Legal and commercial teams need to be alert to the following issues:

1. **Assessing the impact.** Understand the impact on the business, and whether that impact is direct (e.g. it's in an exposed sector, such as the travel industry) or indirect (e.g. the business itself is not affected but one or more of its key suppliers or distributors are). Note that the impact may also be on a business's people (and that the impact might be indirect, varied and location-specific, e.g. reduced ability to attend work as a result of nursery or school closures or effects on transport).
2. **Identify liquidity needs and stress test.** Identify the likely short-term and medium-term liquidity needs to ensure the business has a stable platform. Ensuring adequate credit support is available for the supply chain (e.g. letters of credit, bonding, import facilities) is also critical. To the extent possible given current uncertainties surrounding the impact of Covid-19, base case and worst case scenarios should be developed (e.g. as to duration and extent of any slowdown) and used to stress test cash flows, taking into account ordinary liquidity cycles, seasonality, etc. Key issues to consider include:
 - > cash conservation – if potential liquidity issues are identified, establishing outgoings that can be deferred as non-business critical should be a priority;
 - > upcoming amortisation and debt interest payments and their impact on cash levels, practical steps may be to pre-emptively draw down currently available facilities;
 - > near-term debt maturities – with turbulence in the equity and credit markets, understanding refinancing needs and timing is crucial if alternative options potentially might need to be put in place (e.g. plan ahead and request short-term extensions from existing banks);
 - > FX requirements/hedging arrangements;
 - > potential liquidity events and any associated relief required (e.g. for breach of covenants);
 - > extent of any group cash pooling arrangements or any cash being trapped in local jurisdictions and the impact of this on individual entities; and
 - > effects of tightening credit terms, removal of credit insurance or withdrawal of ancillary facilities.

Liquidity and cash flows

3. **Accessing other pools of liquidity.** Consider whether debt documentation permits you to enter into arrangements which may help to free up liquidity, such as cash pooling, factoring, supply chain financing and asset-based financing including sale & leasebacks. Documentation may also permit additional local facilities, and/or allow for additional financing within applicable basket exceptions.
4. **Remedy periods.** It might become important to understand the impact of any actual or potential event of default under debt documentation and the permitted time periods (including grace periods) for remedy, reporting and covenant compliance.
5. **Opportunistic transactions.** In addition to presenting certain challenges, dislocation in the debt markets might also create opportunities. A drop in secondary loan prices might, for example, provide opportunities for companies to reduce leverage at a price below par through debt buy-backs.
6. **Assess viability of mothballing operations.** In the worst case, it may be necessary to consider a temporary operational shutdown of parts of the business to conserve cash. The significance for the rest of the business, for employees, of negative PR, etc. will need to be considered carefully, as will the potential costs in restarting operations, and this may not be a viable option across all sectors.
7. **Manage information flows and stakeholders.** An overall strategy aimed at preserving and enhancing liquidity will need to involve corporates making sure they have appropriate information flows in place with lenders, suppliers and counterparties. Alongside stakeholder identification and discussions, corporates should consider PR strategy and the timing of regulatory announcements (as far as possible) in order not to exacerbate the company's problems.
8. **Take advice on local law directors' duties.** At times of liquidity stress, directors may be concerned about their duties and any personal liability, disqualification or criminal sanctions depending on the jurisdiction. Ensure proper communication and be aware of local insolvency legislation that may apply when a company is facing liquidity issues, as this may have an impact on the conduct of directors in a particular jurisdiction (please see the section 4 on the adaptation of French insolvency law during the health emergency period of the "**Government support measures**" chapter of this document).

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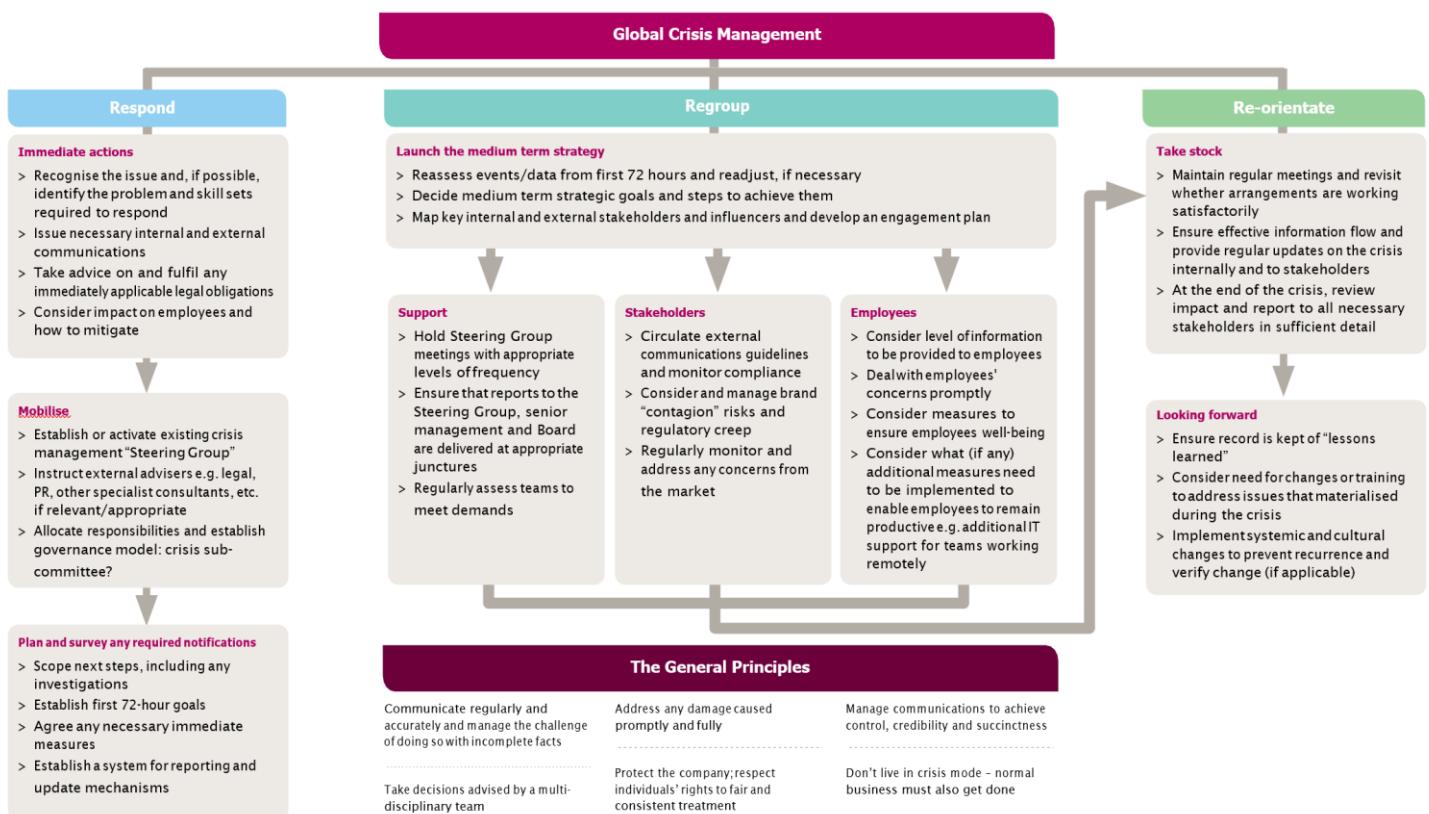
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Crisis Management

Crisis Management

Each organisation should have in place a crisis management policy to ensure that key employees and management are familiar with its operation.

Please refer to the graphic on the next page, and our [crisis management website](#), for guidance on how a situation like Covid-19 may be approached from a crisis management perspective.



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