

**COVID-19 CHECKLIST  
FOR FINANCIAL  
INSTITUTIONS**



# COVID-19 checklist for financial institutions

In addition to the human tragedy, COVID-19 challenges the financial sector's operating and business models and engages a wide range of law and regulation. As organisations strive to maintain business continuity and protect their workforce, they will face competing legal and regulatory pressures, particularly those operating on a cross-border basis, with regulated sector entities facing the further challenge of specific regulatory expectations.

Heavily stress-tested business continuity and resilience programs will enable management to evaluate and plan to mitigate identified risks and, in particular, to take steps to ensure their financial market operations continue to function. In this respect, the experience of the bird flu (2014), swine flu (2009) and SARS (2002-3) pandemics over the last 20 years will be relevant as will the experience of business continuity issues during the global financial crisis.

The current pandemic, however, raises uniquely far-reaching issues in terms of breadth of markets and business practices that may be impacted and the potential extent of economic disruption. This high-level checklist provides an overview of key legal and regulatory issues that may require attention in the short-, mid- and long-term.

# 1 Customers

With focus in impacted markets on maintaining and protecting the relationship with existing customers rather than acquisition of new market share, attention must be on ensuring any COVID-19 risk mitigation measures treat customers fairly and maintain customer trust and confidence.

- ✓ Ensure all customer communications show empathy and are mindful of the unforeseen circumstances that customers may find themselves in, whether as a direct result of COVID-19 or its economic effects, with particular focus on heightened risk of social media impact on customer loyalty in the short term and enduring reputational risk thereafter.
- ✓ Review business-as-usual activities such as debt recovery and credit risk management to meet the expectation of emergency legislative or regulatory relief granted to customers (e.g., obligations arising from regulated loans and property finance or regulators' expectations over insurance policies).
- ✓ Consider implications of significant increases in hardship cases. Expect regulators to focus on how firms comply with their obligations to treat customers fairly when many (including previously non-impacted cases) could be facing financial hardship, uncertainty over their job security and financial arrangements, and personal distress and grief or significant change in circumstances.
- ✓ Consider what further steps could be taken beyond the businesses' usual practices to support consumers during this time. Consider to what extent firms can extend any forbearance on amounts due, without affecting their own financial stability.
- ✓ Assess and address the circumstances where reduced operational capacity or increased volumes of business impact on the ability to treat customers fairly where, for example, resources need to be allocated to vulnerable customers or to safeguard operations.
- ✓ Review the ability to manage increased demand for customer communication in circumstances where normal distribution channels may be understaffed (e.g., inbound and outbound contact centres), transitioning to higher than normal traffic by email and social media.

# 2 Contractual counterparties and service providers

Current market conditions require organisations to increase their scrutiny of other businesses whose failure would either impact their own solvency or impede their operations.

- ✓ Monitor exposures to counterparties where either the value of one or more contracts collectively is significant to the business. With respect to financial instruments ensure where relevant that regulatory requirements are followed.
- ✓ Credit control: ensure that fees and service charges are paid within the contractually agreed time-period. Balance proactive debt management with reputational risk considered above. Consider offering discounts for earlier payment. Develop a policy and a strategy in respect of forbearance requests to ensure consistency and defensibility of practices if subject to scrutiny or criticism.
- ✓ Review the competitiveness of providers and seek to renegotiate terms including more favourable payment terms if cash flow is in issue.
- ✓ For service providers, identify critical business services as part of business continuity and resilience (for which, see below). Update contingency plans to bring services in-house or to substitute the provider should the entity fail. Confirm where relevant that regulatory requirements over outsourcing are satisfied.

## 3 Employment

COVID-19 raises challenging issues for employers, particularly those that have multiple locations, provide a variety of services, and employ a global workforce that may travel routinely for business. See our COVID-19 Global Employer [Guide](#).

Multinational organisations planning for and responding to a pandemic require a strategy for (1) maintaining a safe workplace, (2) maintaining operations in the face of a pandemic, and (3) minimising exposure to potential liabilities that may result.

Aspects to focus on from an employer's point of view include:

- ✓ Where applicable, maintain a safe working place, while at the same time maintaining volume and standard of operations.
- ✓ Present a considered and consistent approach to paying employees affected by COVID-19 or quarantined.
- ✓ Minimise exposure to liabilities:
  - Protect the health and safety of employees (in particular, vulnerable employees such as those with disabilities or caring responsibilities for vulnerable relatives).
  - Protect the health and safety of vendors, customers and persons liaising with the company.
  - Protect employees affected by travel bans or who are quarantined abroad.
- ✓ Review applicable government health alerts, and track travel and health restrictions.
- ✓ Maintain and, likely, increase communication with employees taking steps to promote their wellbeing.
- ✓ Facilitate remote working where possible (but minimise related data security risks).

## 4 Further specific regulatory issues

An organisation's usual business models, on which their regulatory permissions and supervisory compliance are based, may be subject to amendment or workarounds in order to maintain business as usual. Businesses should:

- ✓ Consider whether any licensing issues arise out of the geographical relocation of staff as a result of remote working or by staff in other locations providing cover or support.
- ✓ Review whether remote working gives rise to any licensing issues, for example, reduced levels of supervision and, for sales staff and those trading on the financial markets, compliance challenges over the recording of their communications.
- ✓ Specifically review whether any reverse solicitation business model remains appropriate where staff have been relocated.
- ✓ Maintain close contact with dedicated supervisors where relevant or otherwise keep the regulator appropriately updated on material developments affecting the operations.

## 5 Data privacy and security

For financial institutions, data privacy is already a top compliance obligation and, in particular, for those firms whose business model is online. Many businesses have needed to make urgent decisions to keep their workforce safe and ensure business continuity, which may involve additional data processing because of the crucial role that data plays in containing the spread of the virus. Employers will need to assess whether certain data processing will comply with data privacy regulations. See our [guide](#) to COVID-19 Data Privacy and Security.

Aspects to focus on from a data privacy and security point of view include:

- ✓ Assess whether data privacy regulations allow firms to lawfully collect and process, from employees or visitors, personal and, sometimes, sensitive data, such as body temperature and travel information.
- ✓ Check if your local data privacy regulator has issued any guidance either permitting or restricting the collection of personal data for the purposes of identifying COVID-19 cases.
- ✓ Assess, under both data privacy and employment legislation, whether as an employer you may establish information channels requiring employees to declare certain COVID-19 information about themselves or colleagues to HR or line managers.
- ✓ Ensure any teleworking strategy you design and implement minimises the related cybersecurity and data privacy risks that arise, for instance, because you open up usually restricted systems for remote access, you allow employees to use personal devices for accessing organisation systems and resources, or malicious actors leverage COVID-19 to attack organisations.

## 6 Corporate governance and tax

COVID-19 also raises issues for corporate governance and decision-making, which in turn affects business continuity.

- ✓ Businesses directly affected by the coronavirus will need to keep their governance arrangements under review and make appropriate changes as circumstances change. In this respect, check whether regulators allow for the appointment of temporary substitutes and if any role requires prior approval or technical qualifications.
- ✓ COVID-19 related travel restrictions, general advice not to travel and public health warnings to avoid large gatherings will have implications for corporate decision making, particularly in jurisdictions that require board members to be physically present at board meetings and where board members may live or be temporarily residing in different countries. Evaluate the need for physical board meetings and consider whether they can instead be held by remote means.
- ✓ Check that any changes to the business's normal corporate decision-making practices will not have any knock-on effects, such as for holding companies in jurisdictions with economic substance requirements that require the directors' physical presence at board meetings.
- ✓ Similarly, annual general meetings will be affected by travel restrictions and public health concerns. Review the applicable requirements and consider whether postponing meetings or virtual attendance is permitted, and monitor any guidance or temporary relaxation of requirements issued by corporate registries in response to COVID-19.
- ✓ When making decisions about losses incurred due to disruptions to the provision of services, be mindful that a decision taken in relation to loss by one entity in the group that is in a different country to where the loss was actually incurred, may impact on the tax deductibility of that loss. See our [guide](#) to COVID-19: Tax measures and relief information.

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## Business continuity and resilience

Even in circumstances where business continuity and resilience measures have satisfied recent regulatory inspection, the resilience of organisations' systems and controls, processes and procedures should be reviewed in light of changes in the risk profile. This is particularly important where reliance is placed on the provision of outsourced services.

- ✓ Review existing business continuity plans and consider whether further work is needed to address issues arising specifically from COVID-19.
- ✓ Identify critical business services, set impact tolerances and consider if it is appropriate and proportionate to integrate these into existing business continuity planning.
- ✓ Report to regulators when business continuity plans are triggered. While regulators generally do not expect firms to provide them with their plans, be ready to do so if requested.
- ✓ Be prepared to demonstrate to regulators that senior management are exercising proper oversight over the operation of the firm's business continuity plans. This requires a regular review of how arrangements are working, and documenting discussions and actions.
- ✓ Determine whether insurance policies provide the right types and levels of coverage for crisis situations and are responsive to any changes in the business.

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## Conduct risk

As happened during the 2008 financial crisis, conditions of market stress and the use of business continuity regimes can present heightened exposure to conduct risk, as well as financial crime, such as market abuse and fraud.

- ✓ Identify any change in regulators' prioritisation of key risks and regulatory responses, adjusting compliance programmes and prioritisation accordingly.
- ✓ Focus on culture and governance due to increased conduct risk and financial crime vulnerabilities arising from stressed market conditions.
- ✓ Where regulators relax the usual supervisory requirements, for example, where it is not possible to record calls from traders or enter orders promptly, firms should consider how to mitigate the increased risk of market abuse, for example, through enhanced monitoring or retrospective review.
- ✓ Special attention is required to ensure that product governance standards are adhered to with respect to managing the risk of mis-selling in stressed markets.
- ✓ While organisations may be tempted unilaterally to relax or alter onboarding requirements to expedite revenue opportunities during a business downturn, firms should consider *increasing* AML and CTF due diligence and account monitoring efforts to meet the increased risk of money laundering and terrorist financing exploiting instability and stressed market conditions. In some jurisdictions, KYC and other on-boarding requirements may have been relaxed or altered by regulators, but caution should be applied before adopting reduced safeguards given the heightened ML/TF risk.

## 9 Antitrust and competition

During periods of economic volatility, it is well known that the risk of competition law infringements increases. It is therefore critical that businesses keep the following in mind during this crisis:

- Competition law applies, even during a global crisis.
- Collaboration with competitors, however well intentioned, entails competition law risks and should always be legally vetted. For example, in some countries, the authorities have stated that coordination between competing businesses will not result in enforcement action, provided it is only to address concerns arising from the current crisis and does not go further or last longer than necessary.
- Aligning with government goals or acting in the common interest does not automatically shield you from competition law risks.
- Abusive behaviour will likely attract enforcement action, as well as civil claims and reputational damage, and possibly direct regulation. Firms in a position of market power, even if temporary, need to be alert to their special responsibilities.
- If firms require subsidies or other support from the authorities, ensure that it is properly structured and permissible.

## 10 Contractual liabilities

Given the unexpected nature of the COVID-19 outbreak and its impact on a wide range of business operations, parties to commercial contracts may choose to make or face claims of force majeure or other concepts, such as frustration, material adverse change or illegality, in order to excuse delay or non-performance.

- ✓ Review each contract carefully, with particular regard to the governing law and force majeure provisions, including any time bars or other procedural requirements. Although the 2002 ISDA Master Agreement contains a force majeure provision, many financial contracts do not.
- ✓ Form a preliminary view on whether any force majeure provision is "open" or exhaustive in relation to the list of force majeure events and whether the outbreak or resulting government crisis measures are covered or excluded. Also, consider the validity of force majeure claims made by counterparties.
- ✓ If it is necessary to invoke a claim, consider the obligation to mitigate the effect on non-performance and what steps might be taken. Starting a mindful dialogue with the counterparty may be an important part of the process.
- ✓ Consider any potential consequences from the invoking of a claim, such as termination of the contract, including the need to notify regulators where critical services are involved or outsourced.
- ✓ Explore other remedies that may be available, such as contract frustration, the doctrine of changed circumstances or under a material adverse change clause. In joint venture agreements, consider whether the failure of joint venture parties to agree on a course of action to be taken in light of COVID-19 circumstances could trigger exit or other rights under the agreement.
- ✓ Assess the impact of force majeure on insurance arrangements.
- ✓ Review whether it is possible to rely on electronic signatures as opposed to "wet signatures" where physical execution is impeded.

Further practical considerations:

- ✓ For a counterparty that receives a force majeure claim it does not consider to be valid, there is the practical issue of enforcement of the contract, particularly if it does not provide for international arbitration, when courts may be closed. Can the issue be dealt with by online issue of proceedings and virtual hearings? If not, how does this impact legal and credit risk analysis and strategy?
- ✓ There are reputational risks and potential damage to long-term relationships with key business partners. Even where there is no legal basis for force majeure relief, parties that receive such claims may wish to be flexible about amending the contract to accommodate the affected party.
- ✓ Declaring force majeure or receiving a force majeure claim may affect insurance arrangements. Check first to see if your organisation holds a relevant insurance policy, such as force majeure insurance, business interruption insurance or other forms of insurance that may cover the whole or part of the potential losses without running litigation and reputational risk. If so, comply with any procedural steps (e.g., prior notification to insurers) and review substantive coverage requirements (e.g., whether, as is often the case, direct physical loss to the business, suppliers or clients is required to claim).
- ✓ Firms that are part of a chain of contracts, for example, in relation to outsourced services, may themselves need to declare force majeure in response to a subcontractor's declaration, in order to avoid being in breach. Each contract in the chain may be on different terms or subject to entirely different governing laws and this can create substantial challenges for the end user, especially where their downstream contract has less favourable (or no) force majeure provisions. There may also be separate time bars or other procedural requirements.
- ✓ When entering into new contracts during this period, consider the force majeure provisions with particular care.

Also see our COVID-19 Global Real Estate [Guide](#), which is designed to address some common questions landlords and tenants will be considering in these unprecedented and uncertain times.

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# Financial resources

Organisations should be focused on their own financial soundness and stability. The regulators' focus has been heightened by the COVID-19 outbreak and the ensuing financial crisis. Financial institutions may see revenues reduce, while expenses increase, together with potential calls on liquidity, for example, to meet client claims and collateral calls.

- ✓ While the authorities and regulators are generally supportive of entities continuing to operate and many countries are providing flexibility in this regard, organisations should plan ahead and ensure sound management of finances — including how government schemes may be helpful as part of a firm's plan to meet debts as they fall due. See our [guide](#) to COVID-19 Government Intervention Schemes in Europe.
- ✓ Where entities believe they may get into financial difficulties, they should be proactive in notifying and engaging with regulators as soon as possible to ensure an orderly wind down.
- ✓ Organisations should increase the monitoring of their exposures to third parties, particularly for key relationships.
- ✓ When necessary, financial institutions should consider taking steps now rather than later to strengthen their balance sheets or increase their liquidity.
- ✓ Where required, recovery and resolution plans should be reviewed and updated.
- ✓ While some jurisdictions may have relaxed certain legal provisions relating to insolvency (e.g., wrongful trading suspension in the UK) these do not entirely extinguish other, related corporate and directors' duties relating to insolvency, such as transactions at undervalue and preference risk.



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