

# Covid-19 and relaxing the lockdown: what do UK businesses need to consider?



April 2020

With many European countries looking at easing restrictions imposed because of the Covid-19 pandemic, we look at the issues UK businesses may need to start thinking about ahead of a possible relaxation of similar measures here.

The UK Government is under increasing pressure to set out how it proposes to manage a possible easing of the Covid-19 lockdown in order to allow more everyday activities to resume, particularly economic activity. The Prime Minister has urged caution, but we think it makes sense to look ahead to how the lockdown might be eased so that businesses can take appropriate steps to prepare.

## 1 What might a relaxation of the lockdown in the UK look like?

### KEY POINTS

- The immediate outlook: The UK's lockdown is not as restrictive as some other countries – so there may be less scope for easing of restrictions in the weeks following the next review of the lockdown (expected to take place on or before 8 May).
- Looking further ahead: But in the months ahead, the UK is likely to consider similar measures to other countries – see below for more detail.
- Restrictions could be re-imposed: Businesses need to take account of the possibility that restrictions could be tightened up again – possibly on a regional/local basis or by curtailing certain categories of activity.

At the time of writing, no relaxation of the UK's lockdown is envisaged until 8 May 2020 at the very earliest - and only then if certain conditions are met. These include a consistent fall in Covid-19 death and infection rates and confidence that the health system will not be overwhelmed by any new cases (for full details of the five tests set out by the UK Government, [click here](#)).

The overall package of restrictions imposed in the UK is not as extreme as in some other countries. See our article on restrictions in other jurisdictions [below](#).

This discrepancy may mean that publicity about relaxation of lockdowns in other countries is potentially misleading as regards the UK, because their outbreaks may have started earlier and because a very strict lockdown may offer more scope for relaxation than the UK's measures. That said, it is likely that the UK will consider some of the measures that other countries are already looking at, such as:

- **Movement/activity restrictions:** A gradual lifting of restrictions based on the criteria of vulnerability and infectivity e.g. the elderly would be encouraged to restrict their movements whilst those in younger age groups would be allowed to resume higher levels of normal activity. People diagnosed with Covid-19 or with symptoms would be required to remain in quarantine for an appropriate period.
- **Shift to targeted measures:** General prohibitive measures should be replaced with targeted measures such as requirements or recommendations to undertake regular cleaning and disinfection of transport hubs and vehicles, shops and workplaces.

- **Resumption of business activity:** Commercial activities such as retail, restaurants etc. would be allowed to resume but subject to restrictions on e.g. opening hours, maximum numbers of people allowed in the premises and requirements to observe social distancing within the premises (and possibly a requirement to wear a face mask). The position may well be different depending on the activity in question; other countries have followed this approach to varying extents and the UK Government is understood to be looking at easing restrictions based primarily on workplace type, rather than industry sector.
- **Reducing infection risk:** Businesses could also be asked to consider a range of other ways of reducing infection risk e.g. reorganising workplaces to allow for greater social distancing between staff, operating shift systems to reduce the number of staff on the premises at any one time and so on (although this is more likely to be dealt with in guidance and steps to be taken by businesses will vary depending on the nature of their activities). Click [here](#) for more detail.
- **Transport:** Lower risk individualised transport such as private cars would be allowed but public transport would only be permitted to resume subject to restrictions on numbers of passengers and requirements for personal protective equipment (e.g. face masks).
- **Public gatherings:** Larger public gatherings would remain prohibited but smaller ones e.g. under 20, 50 or 100 people could progressively be permitted.
- **Contact tracing apps:** It is also possible that businesses could be asked to encourage people entering their premises or using public transport to show that they have downloaded an official contact tracing app and that the app indicates that they have not been exposed to infection. Similarly, employers could be asked to encourage staff to download the app and use it to show that they have not been exposed to infection. Click [here](#) for more detail.



**While we await detail from the UK government, the approaches being taken by other countries provide a useful guide to possible ways of exiting the lockdown.**

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## 2 What are the implications of easing the lockdown for force majeure clauses and associated termination rights?

Force majeure clauses can relieve the parties of some or all of their obligations under a contract where an event beyond their reasonable control such as an epidemic has occurred. For more detail, see our earlier briefing.

Such clauses are generally only suspensory in their effect: that is to say, if the force majeure event comes to an end, then the parties are once again expected to comply with their obligations in full. Obviously if the current Covid-19 lockdown is eased, then some force majeure clauses may cease to apply – which means that legally, your customers or suppliers are entitled to expect you to perform the contract. The reality may be rather messier than this, because for many businesses it will not be "business as usual" and despite the removal of lockdown restrictions or prohibitions, it may still be difficult to comply with your obligations. In these circumstances, the contract is unlikely to offer much assistance and the best course of action will often be to engage with your customers or suppliers with a view to agreeing

a way forward. Ideally, a formal written variation of the contract should be obtained which clearly documents what you have agreed. Click here for our checklist on variations.

## IMPACT ON ASSOCIATED TERMINATION RIGHTS

As noted above, it is possible that having been relaxed, the lockdown is then tightened up again because, for example, there has been a spike in Covid-19 infections. This may well mean that force majeure clauses will be reactivated, which in turn raises questions about the impact on associated termination rights. Many contracts include a right for a party to terminate if the force majeure persists for longer than say, 90 days. If the lockdown is lifted before the end of that 90-day period, then termination will not be possible. But what happens if the lockdown has to be re-imposed? Is that a new force majeure event, causing the clock to be reset to zero? Or do you restart the clock from where you left off when the lockdown was originally relaxed?

### DO YOU RESTART OR RESET THE CLOCK IF LOCKDOWN MEASURES ARE TIGHTENED UP?

Let's say that a contract contains a provision allowing termination if a force majeure event continues for 90 days; lockdown measures are relaxed at the 40 day point but tightened up again at 70 days. A common sense position might seem to be as follows: as the underlying force majeure event (i.e. the Covid-19 pandemic) has remained the same, the clock should be suspended if performance becomes possible at the 40 day point, but restarted when the measures are tightened up again (rather than reset to zero). However, there may be situations where the drafting of the clause or the contractual background makes a difference. For example, if during the period when the lockdown was relaxed, a customer has managed to obtain all the goods it needs from its supplier, then it may be arguable that the parties must have intended the clock to be reset to zero. This would be on the basis that the 90-day period is designed to allow the customer to buy elsewhere only if it has not been able to secure the goods it needed from its supplier within that 90-day period (which is clearly not the case in this example).

The problem is that many termination rights associated with force majeure events will not address this issue of whether to restart or reset the clock, which means that there is scope for disputes to arise. Make sure that you are aware of all contracts which have termination rights linked to force majeure events. If you have large numbers of contracts to review, our [free Covid-19 force majeure app](#) can help you to spot clauses with termination rights attached to them.

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## 3 What are the implications of easing the lockdown for Government-backed finance packages?

The UK Government has launched an unprecedented stimulus package to help support businesses in the wake of the COVID-19 outbreak. Read more about these schemes in our full briefing here.

These schemes already have a fixed end date and therefore easing the lockdown has no immediate bearing on their duration. For instance:

- **The COVID Corporate Financing Facility** (whereby the Bank of England has committed to buy commercial paper issued by investment grade companies) is available for an initial 12- month period (ending March 2021) and at least 6 months' notice will be given before closing it.
- **The Coronavirus Business Interruption Loan Scheme (CBILS)**, whereby accredited lenders provide Government-backed finance to companies with turnover of up to £45 million, is currently set to run until 30 September 2020, but this may be extended.
- **The Coronavirus Large Business Interruption Loan Scheme (CLBILS)** is currently set to run until 20 October 2020, but this may also be extended.

- **The New Future Fund** (a convertible unsecured bridge financing loan facility expected to be utilised by venture-capital-backed start-ups, expected to go live in May 2020) will initially be open until the end of September 2020.

However, the withdrawal of such schemes to new business would not mean the end of Government assistance. Note in particular that Government-backed lending under CBILS can potentially have a six-year term (under CLBILS, which supports larger businesses, the limit is three years). Hence, regardless of the status of lock down in the UK, any debt issued under these schemes could still be live for years to come, with lenders continuing to benefit from the Government guarantee.

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## 4 What are the implications of easing the lockdown for employers?

Managing the return of employees to the workplace is likely to present a number of new challenges for employers. Set out below are some of the key employment considerations.

- **Phased return:** Any easing of lockdown restrictions is likely to be gradual and employers will therefore likely need to consider a phased return of staff to the workplace. Employers may face difficult decisions about which employees to recall, particularly given some will be keen to return, while others will prefer to stay at home because of ongoing childcare issues or safety concerns. Employers will need to navigate potential allegations of unfairness or even discrimination associated with selecting some staff over others. Some employers are considering rotating staff at work and at home, where possible, to help ensure more equal treatment. Employers will also need a plan for responding to a likely spike in requests for flexible working where employees feel this has worked well during lockdown. These challenges will be more pronounced if, as is predicted, schools are to return on a phased or rotational basis, as many employees will have ongoing childcare needs.
- **Health and safety:** Protecting the health and safety of staff and visitors to the premises will be paramount. Employers will therefore need to ensure that any return to work is done in a way which allows appropriate social distancing and is consistent with the evolving guidance from the Government and Public Health England. The rotation of staff, splitting of shifts and staggering start and finish times are all measures being considered but particular concerns are being raised around common areas, such as canteen, rest and changing facilities, where social distancing is more challenging. Businesses are also having to think about appropriate protective equipment, testing of staff and the use of contact tracing apps, along with the associated data protection issues raised ([see below](#)). Difficult issues around the interaction of sick pay and how to treat staff who refuse to come to work due to safety concerns will also need to be navigated. Some guidance on safety measures can be taken from the experience in other countries across Europe who have slowly begun easing lockdown restrictions (see our article below on [restrictive measures across Europe](#)).
- **Unravelling furlough:** 71% of UK employers have furloughed at least some of their staff, according to a British Chamber of Commerce survey. Under the Government's Coronavirus Job Retention Scheme ([see our Q&A on CJRS](#)), employers can furlough staff (i.e. stand them down temporarily) and claim 80% of their wage costs from the Government (up to a cap of £2,500 per employee per month). Despite the Government boost, many employers will need to implement further cost saving measures once lockdown restrictions are lifted, to be able to retain staff, such as agreeing longer-term wage cuts or reduced hours, or in some cases, even redundancies. Employers may need to consult collectively with staff over such measures in the coming weeks, particularly where changes to terms and conditions affecting 20 or more employees are proposed or 20 or more redundancy dismissals are likely.
- **Workforce mental health and wellbeing:** The Covid-19 pandemic has raised a whole host of new challenges for employers in relation to managing employee mental health and wellbeing. This will continue with any easing of lockdown restrictions, as some employees will be anxious about returning to their daily commute and normal

working lives. Others will sadly have suffered bereavement or will continue to be concerned about vulnerable family members. Others still will simply be unsettled by all the recent change. Employers will need to think carefully about how they manage this through extensive workforce communications and a package of support measures for staff.

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## 5 What are the business implications of the proposed contact tracing apps?

### WHAT ARE CONTACT TRACING APPS AND HOW MIGHT THEY BE USED IN THE UK?

Health and contact data is a crucial component in the global fight against Covid-19. In line with other countries, UK policymakers are exploring the potential of contact tracing apps for transitioning out of the crisis. While clearly no silver bullet on their own, these apps are likely to feature in the UK Government's broader Covid-19 exit strategy to enable us to emerge from lockdown. Given the pace at which the Covid-19 crisis has developed and the novelty of these apps, development efforts have been made worldwide by both national health authorities and tech and other businesses, generating potentially different policy and privacy concerns in relation to their use by businesses, which we explore below.

#### CONTACT TRACING APPS: WHAT IS THE UK GOVERNMENT DOING?

In the UK, efforts are focused on NHSX (the digital innovation wing of the NHS) which is developing an app with input from Oxford academics and cooperation from leading smartphone platform operators Google and Apple. At the time of writing, much about this proposed NHSX app remains unclear, in terms of both technical mechanics and the personal data (if any) that will be processed. We understand that app users will exchange unique anonymous tokens via Bluetooth with other users in their vicinity. Should a user develop symptoms and declare this in-app, other users who have been in close contact will be notified, prompting self-isolation. Other data may well be collected too, for example as a result of any symptom checking functionality.

We hope that some of these questions will be clarified by the Government sooner rather than later, not only to allay concerns that the public may have about the potential privacy intrusion, but so as to encourage uptake, for any app will only be successful if it has a strong use rate.

For the time being, the ICO has published guidance to organisations which are contemplating using contact tracing and location data in connection with the pandemic, and to potential developers of the apps, addressing potential privacy concerns, and setting out how these can be addressed without undermining the effectiveness of the technology. Similar apps (again for voluntary rather than mandatory use) have been developed for deployment across Europe, with the EU and European Data Protection Board having published a roadmap and toolbox which provide their own take on the rollout of such apps and address associated privacy concerns.

### HOW MIGHT BUSINESSES MAKE USE OF CONTACT TRACING APPS, AND WHAT ARE THE POTENTIAL ISSUES TO CONSIDER?

The extent of an employer's responsibility for privacy in relation to such apps will depend to a certain degree on whether the employer is simply relying on its employees to pass on relevant information to it, generated from Government-sponsored contact tracing apps, to the extent that employees have loaded these onto their smartphones; or whether the employer opts to take matters into its own hands by procuring/imposing its own technology solution, whether via app or other device, from the many tech companies racing to build surveillance tools. These tools are designed to give businesses more control over potential outbreaks when they do open up their offices and facilities, and with it, greater confidence to bring their employees physically together again, and are very much aimed at this market.

## OPTING FOR YOUR OWN TECHNOLOGICAL SOLUTION: THE ISSUES

Opting to buy in/use own technology as opposed to Government-sponsored apps will most likely mean that the employer has greater data protection responsibilities in respect of any data generated by the app. This is because the employer is more likely to be the data controller in respect of all data generated by the app (as opposed to simply the output of any information it obtains from employees using Government-sponsored apps). The employer will have a greater responsibility to ensure transparency as regards its staff, and more data to keep safe; and is likely to have to put data processing agreements in place with the providers of such apps, if they are holding data collected via the app on behalf of the employer. With this will come due diligence obligations to ensure that data is kept safe and secure by app providers.

Having said this, there are many similarities in terms of data protection for both options: in both cases, the processing of data will need to have a lawful basis, the employer should only process the data it needs, privacy policies will need to be updated so that the employer is transparent about the data it is collecting and what the data will be used for, and data will have to be kept secure and only for so long as necessary. Similar measures will need to be adopted as those put in place to process other Covid-19 related personal data (for further details of such measures, please see our briefing, [Covid-19: protecting personal data while protecting your employees](#)).

Employers will also have to consider the impact which contact tracing may have on health and safety obligations, and update employment policies accordingly. For example, they may have to prevent employees who are traced as having been in contact with an infected person from entering the workplace, even when an employee is otherwise seemingly healthy.

## WHAT ABOUT CUSTOMERS AND OTHER VISITORS TO THE PREMISES?

Whilst these apps are most likely to impact businesses as employers, there could be broader consequences as regards, for example, visitors to premises. Consumer-facing businesses in retail, leisure and hospitality sectors may have to consider the collection of data from either the NHSX app or any other app with a recognised status in the market in respect of visitors/customers to their premises. For example, retail outlets may want to see whether a customer has a 'green' light confirming they have not been exposed to infection on an app before permitting entry, and as and when they are permitted to re-open, restaurants and gyms may want to take similar information when booking diners in or before readmitting gym members.

## CUSTOMERS AND OTHER VISITORS: THE DATA PROTECTION IMPLICATIONS

Whether data protection rules are engaged will depend very much on whether any personal data has to be processed by the business in the first place; for instance, the mere checking for a green light by a retail outlet without taking the identity of visitors and customers is unlikely to result in the processing of personal data, thereby side-stepping data protection concerns. However, where a more involved process is put in place, such as recording health data against a guest or member's name (for example as part of a restaurant-booking process or linked to a gym membership card), data protection compliance would have to be considered and wired into the process. Either way, businesses will have to think carefully about whether it is proportionate to ask for this information, as much from a reputational perspective as for legal reasons. In particular, they will need to think carefully about how strictly they apply any such policy and for whom they are prepared to make exceptions.

For further information about contact tracing apps, please refer to our separate briefing to be published shortly.

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## 6 What will easing the lockdown mean for the real estate sector?

The easing of the lockdown will mean different things for different parts of the UK's real estate sector, but here are some of the main themes to emerge so far:

- **Rent mitigation** - Rental recovery rates for the March quarter date were low. Some tenants requested rent holidays, rent reductions, and monthly as opposed to quarterly rent payment schedules. Other declined to pay rent or certain items of service charge, and some have tried to exit their leases altogether. See our detailed notes on these topics [here](#). As the lockdown eases, landlords and tenants are likely to consider varying their leases to cater for longer-term interruptions. This might include varying the payment arrangements to substitute stepped or turnover rents for fixed rents, and/or introducing "pandemic clauses" into new leases which will mean that the tenant will not have to pay any rents during any periods of lockdown, now or in the future.
- **Government assistance for leaseholders** - The Government has taken some actions to try to ease the pressure on occupiers, for instance, by making it illegal to forfeit commercial leases for arrears of rent until 30 June 2020 and possibly longer, preventing landlords from using commercial rent arrears recovery unless rents have been outstanding for 90 days or more, and by granting restaurants, cafés and bars a temporary right to change their planning use.
- **Health and safety obligations on landlords** - Landlords will have ongoing health and safety obligations to their tenants under the Control of Substances Hazardous to Health Regulations 2002, as explained in more detail [here](#).
- **Rethinking office space post-lockdown** - When offices re-open, employers may need to reconfigure their spaces to ensure that social distancing measures are followed. One-way systems might be introduced to ease workers' journeys through buildings, meeting rooms will have smaller maximum capacities, and canteens are unlikely to be re-opened in the initial phases of the release from lockdown. Desks may have to be moved further apart, and small meeting rooms and breakout areas may be turned into temporary individual offices.
- **Construction sites** - Several housebuilders plan to remobilise their construction sites imminently, in a phased process, following Government guidance. This will be done by implementing revised health and safety protocols, changing the layout of some sites and using bespoke PPE where tasks require more than one person.
- **Lasting change in the real estate sector?** - Some property analysts are optimistic about the capacity of the real estate sector to embrace the current changes to their working practices, and some anticipate that they could lead to lasting improvements such as an increased adoption of technology across the sales cycle (enhanced online marketing, online sales auctions, and contract exchange via online execution platforms), and the more flexible provision of streaming services such as the gym operators' new online workout sessions.

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## 7 What is the status of restrictive measures in other jurisdictions?

At a time when restrictive measures are being implemented by governments across the globe in response to COVID-19, we understand it is difficult for organisations to keep abreast of these developments. With the assistance of some of the leading lawyers across Europe, we have put together a high-level summary of current government measures in key jurisdictions which you can access via our [interactive map on our website](#).

In the coming weeks, we will seek to keep this up to date by tracking developments across Europe and monitoring progress towards the easing of lockdown measures. We hope this will be a useful resource as the UK business community plots its way back to something like 'business as usual'.

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## 8 What are the implications of the UN's "Build Back Better" campaign?

To conclude this newsletter, we thought we would look to a more positive future and highlight the [UN's Build Back Better](#) campaign, launched on International Earth Day on 22 April, which encourages national governments to think about how we can turn the current crisis into an opportunity to reset priorities and rebuild our economies, our businesses and our personal lives for the better, with a particular focus on becoming greener, more sustainable and more resilient.

In the words of the UN Climate Chief:



**With this restart, a window of hope and opportunity opens... an opportunity for nations to green their recovery packages and shape the 21st century economy in ways that are clean, green, healthy, safe and more resilient**

UN Climate Chief

UN Secretary General, António Guterres, proposed [six climate-related actions](#) to shape the recovery:

- *"First, the huge amounts of money to be spent on recovery from the coronavirus must deliver new jobs and businesses through a clean, green transition.*
- *Second, where taxpayers' money is used to rescue businesses, it must be tied to achieving green jobs and sustainable growth.*
- *Third, fiscal firepower must drive a shift from the grey to green economy, empowering societies and people to be more resilient.*
- *Fourth, public funds should be used to invest in the future, not the past, and flow to sustainable sectors and projects that help the environment and the climate. Fossil fuel subsidies must end, and polluters must start paying for their pollution.*
- *Fifth, climate risks and opportunities must be incorporated into the financial system as well as all aspects of public policy making and infrastructure.*
- *Sixth, all need to work together as an international community."*

The "Build Back Better" concept has been used before in previous post-disaster reconstruction programmes, but the current campaign has a strong environmental focus. Mindful of the fact that the UN Climate Change Conference (COP26), due to take place in Glasgow this Autumn, has been postponed due to the Covid crisis, the UN is keen to communicate a strong message that the need for sustained climate action is not on hold, pointing out that the periods of recovery from previous economic crises have been associated with higher emission growth than before the crisis.

The UK Government has yet to formally respond to the UN campaign, but investors are likely to be asking questions of companies about their resilience in the face of this and future crises, increasing their focus on risk management and ESG factors, and there will be opportunities for businesses who can demonstrate a genuine commitment to a sustainable business strategy.

For our full briefing on the Build Back Better initiative, [click here](#).

Also, watch this space for the launch of our new Sustainable Business knowledge portal which will contain a range of resources, advice and guidance to help the business community to achieve its sustainable development goals.

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## 9 Conclusion

We have been supporting many clients through this crisis, offering guidance on a wide range of crisis management issues, including, in particular, access to the Government's financial assistance measures, business continuity, supply chain and contract termination issues and employment issues, and we have a comprehensive suite of guidance notes on these and other topics our [COVID-19 site](#).

As we tentatively start to look to the recovery period, if you would like more information on any of the issues mentioned in this newsletter or on the Covid-19 site, please do get in touch.

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