ALERT MEMORANDUM

COVID-19: UK Government's Latest Measures to Support Businesses

Updated November 19, 2020

This memorandum updates the position as at November 19, 2020 in relation to the UK government's wide-ranging economic measures to support UK businesses and mitigate the economic disruption caused by the coronavirus pandemic ("COVID-19"). Since March 2020, a number of measures have been implemented and/or announced, and the official guidance has evolved. In particular, the Chancellor's 'Winter Economy Plan,' delivered on September 24, 2020, included a number of measures to assist businesses and individuals.[1]

As part of these measures, the UK government announced during the first half of 2020 that it would be making available to UK businesses an initial £330 billion of government-backed and guaranteed loans, making a material contribution to the salary and wage bills of those who are furloughed in connection with the pandemic and financially supporting the self-employed. HM Treasury and the Bank of England (the "Bank") also continue to provide major financing schemes to help UK businesses bridge COVID-19 related disruption to their cash flows.

The UK government was granted new legal powers via the Coronavirus Act 2020 (the "Act"), which received royal assent on March 25, 2020 after a rapid passage through parliament. The Act enables the UK government to offer any further financial support that is required in order to prevent, mitigate or compensate for the impact of COVID-19 on UK businesses.

This memorandum outlines the economic and fiscal measures implemented and/or proposed by the UK government and certain other developments likely to be relevant to UK businesses.

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[1] *See:* https://www.gov.uk/government/speeches/chancellor-of-the-exchequer-rishi-sunak-on-the-winter-economy-plan

I. Bank Rate cut

The Bank's Monetary Policy Committee ("MPC") voted at a special meeting on March 10, 2020 to cut the Bank's base rate of interest ("Bank Rate") by 50 basis points to 0.25%. However, by March 19, 2020, the MPC found that conditions in the UK gilt market had deteriorated, and UK and global financial conditions had generally tightened, prompting the MPC to reduce Bank Rate further to 0.1%, its lowest level ever. Since May 6, 2020, the MPC has voted unanimously to maintain Bank Rate at 0.1%.

The reduction in Bank Rate is intended to support business and consumer confidence during the COVID-19 outbreak and bolster the cash flows of businesses and households. It reduces the cost, and improves the availability of finance — handy, given the significant funding measures included in the package of measures (and discussed below).

II. Salary and wage support for all UK employers

On November 5, 2020 the Chancellor announced that the 'Coronavirus Job Retention Scheme' ("CJRS") would be extended further until March 31, 2021.[2] Although the government's new Job Support Scheme (see further, part I para G below) had been due to replace the CJRS from the start of November, the Chancellor extended the CJRS in response to national lockdown measures *"and the economic trauma they would cause…[including] job losses and business closures."* [3]

Under the extended CJRS, any UK employer, regardless of size and sector, can receive government funding to cover 80% of an employee's salary or wage, up to a maximum of £2,500 per month, if they are furloughed but kept on the payroll in connection with the pandemic, rather than made redundant. This level of support mirrors that which was provided under the CJRS in August 2020, despite a scaling down of support in September and October. The government will review the scheme in January 2021 to determine whether economic circumstances are improving sufficiently to ask employers to contribute more from February 2021.

Employers can top up the amounts paid by the UK government, but they do not have to (although see further below regarding holiday pay).

As a departure from previous iterations of the scheme, HMRC will publish details of employers who make claims under the extended CJRS scheme, starting from December 2020. This information will include the name and company number of the employer as well as a "reasonable indication" of the amount claimed. An exception may be made for employers who can show that such publication would expose the employer or employees to a "serious risk of violence or intimidation." This information will remain public for a maximum of one year after publication.

Preliminary guidance on the operation of the extended CJRS has been provided through a policy paper published on November 5, 2020 by HM Revenue & Customs ("HMRC"), with detailed guidance subsequently published on November 10, 2020.[4] On November 13, 2020, HM Treasury published a Treasury Direction[5] formally extending the CJRS until March 31, 2020 and setting out further guidance.

For further details on previous iterations of the CJRS, please see previous versions of this memorandum.

[2] *See*: https://www.gov.uk/government/publications/extension-to-the-coronavirus-job-retention-scheme/extension-of-the-coronavirus-job-retention-scheme

[3] *See*: https://www.gov.uk/government/speeches/chancellor-statement-to-the-house-furlough-extension

[4] *See*: https://www.gov.uk/government/collections/coronavirus-job-retention-scheme

[5] *See*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935146/201112_CJRS_DIRECTION_No_5___CJRS_extension_1_Nov_-_31_Jan__SIGNED.pdf

A. Who can claim?

- The scheme is available to any business, charity, recruitment agency, individual employer and public authority with a UK 'Pay As You Earn' ("PAYE") payroll scheme registered on or before October 30, 2020 and a UK bank account. There is no requirement that an organisation be incorporated in the UK.
- Whilst the scheme is intended to help employers whose operations have been severely affected by the pandemic, there is no requirement to demonstrate such impact when making a claim under the scheme, as the UK government has acknowledged that different businesses will face different impacts from COVID-19.[6]
- Employers can claim under the extended CJRS even if they, or the relevant employees, had not previously benefitted from previous iterations of the CJRS.
- The government has indicated that it expects publicly-funded organisations will not use the extended CJRS.

B. Who is an 'employee' for this purpose?

- Provided that they were hired, were on a PAYE payroll and had been notified to HMRC via an RTI submission on or before October 30, 2020, claims can be made in respect of any employee regardless of whether they are employed on an indefinite or fixed-term contract or on a full-time, part-time or zero-hours basis.
- As with previous iterations of the CJRS, claims can also be made in respect of certain other categories of workers including company directors and members of limited liability partnerships who are treated as employees for UK tax purposes (so called 'salaried members') (for simplicity, we use the term 'employees' and 'employers' in this part II to cover all possible beneficiaries).
- Employees who were made redundant, had a fixed-term contract expire or otherwise stopped working after September 23, 2020, can be re-employed and furloughed in certain circumstances.
- An employee serving statutory or contractual notice can be furloughed until December 1, 2020. However, claims may not be made for any days on or after December 1 during which the employee is serving a contractual or statutory notice period (this includes people serving notice of retirement or resignation).
- Vulnerable employees shielding (or staying at home with someone who is shielding) in accordance with government guidance[7] can also be furloughed. However, the scheme is not intended to apply to employees during short-term sickness absence.
- Employees returning from maternity leave must give the statutory eight weeks' notice to end maternity leave early in order to be furloughed.
- Under the extended CJRS, there is no maximum number of employees for whom the grant can be claimed. Under previous iterations of the scheme, the number of employees for whom the grant could be claimed was limited to the number of employees claimed for prior to June 30, 2020.

C. What can be claimed?

- For periods starting on or after November 1, 2020, an employer can claim 80% of an eligible employee's gross regular salary or wage (their 'reference pay'), up to a maximum of £2,500 per month.

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[6] *See*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

[7] *See*: https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19

- As in August 2020, employers must bear the cost of paying employer National Insurance contributions and any pension contributions, whether in respect of the government-funded portion or any employer top-up.
- The way to calculate 'reference pay' and an employee's 'usual hours' depends on whether they were previously furloughed (in which case the same approach should be adopted as before) or are being furloughed for the first time under the extended CJRS.
- The government will review the scheme in January to decide whether economic circumstances are improving enough to ask employers to contribute more.

D. What does being furloughed involve?

- An employee will be considered 'fully furloughed' if they are placed on a temporary leave of absence by their employer, and either do not undertake any work, provide any services or generate any revenue for their employer (or any connected organisation). Since July, it has also been possible to place an employee on 'flexible furlough,' meaning that they are furloughed for some of the time and work the rest of the time.
- There is no minimum furlough period; an initial furlough period can be extended for any period of time, and an employee can be furloughed more than once. Employers do not need to place all of their employees on furlough but must ensure any decisions taken in relation to the scheme are not discriminatory.
- Employees continue to accrue, and can take, annual leave whilst on furlough. However, an employee's normal rate of holiday pay applies, meaning that the government's grant will need to be topped up during holidays.
- Please see previous iterations of this memorandum for more details on permitted volunteering, company director and employee representative activities during furlough.

E. How do I put someone on furlough?

- An employer must, in all cases, agree with the employee that they are a 'furloughed worker,' including the hours that the employee will and will not work. This agreement does not strictly need to be in writing, but the employer must provide the employee with written confirmation of the furlough agreement, and a copy must be retained for at least five years. A record of how many hours the employee works, and the number of hours they are furloughed, must be retained for six years.

F. How do I make a claim?

- Employers will be able to submit claims under the extended CJRS from 8am on November 11, 2020, and claims can be made in respect of furlough agreements applying retrospectively from November 1, 2020, provided they are put in place on or before November 13, 2020.
- Detailed guidance on how to calculate the claim amount is available,[8] as well as a helpful online calculator[9] and a step-by-step guide[10] to making a claim via the online portal.[11]

G. Job Support Scheme

- On September 24, 2020, the Chancellor announced the 'Job Support Scheme' (the "JSS") as part of the UK's 'Winter Economy Plan,' consisting of two salary support schemes: JSS Open (for businesses operating with employees

[8] *See*: https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme

[9] *See*: https://www.tax.service.gov.uk/job-retention-scheme-calculator/

[10] *See*: https://www.gov.uk/government/publications/coronavirus-job-retention-scheme-step-by-step-guide-for-employers

[11] *See the "claim now" link:* https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme

working at least 20% of their usual hours) and JSS Closed (where employers are legally required to close due to local or national coronavirus restrictions).[12] The JSS was originally intended to launch on November 1, 2020, but has now been postponed until at least the end of March 2021 following the extension of the CJRS.

- JSS Open is designed to protect viable jobs in businesses which can operate safely but are facing reduced demand due to COVID-19. Under the JSS Open scheme, the government will pay 61.67% of hours not worked up to a cap of £1,541.75 per month, with the employer contributing 5% of non-worked hours up to a cap of £125 per month,[13] with the employee forfeiting the remaining 33.33% of wages for the unworked hours. Time worked by the employee will be paid as usual by the employer.
- In contrast, JSS Closed will provide temporary support to businesses whose premises have been required to close by law as a direct result of COVID-19 restrictions. Under the JSS Closed scheme, the government will pay two-thirds of an employee's normal pay, up to a limit of £2,100 per month, for time not worked while premises are closed.[14]

H. Job Retention Bonus

- As part of the Chancellor's "Plan for Jobs 2020" presented to Parliament on July 8, 2020, the Chancellor announced that businesses would receive a one-off Job Retention Bonus ("JRB") of £1,000 for each worker furloughed under the scheme who is brought back into work and who remains in employment until at least January 31, 2021. However, following the extension of the CJRS until March 2021, the government announced that the JRB would not be paid in February 2021. Instead, "*a retention incentive will be deployed at the appropriate time*."

III. Financial support for small- or medium-sized UK businesses

A. Term Funding Scheme

The Term Funding scheme with additional incentives for Small- and Medium-sized Enterprises ("TFSME") was launched in March 2020 as part of the measures to respond to the economic shock from COVID-19. The TFSME opened for drawings on April 15, 2020 and is financed by the issuance of central bank reserves. The scheme was later enlarged in March, May and September 2020 to ensure that the TFSME continues to deliver its objectives. The Bank estimates that this scheme should lead to around £100 billion being provided in term funding.

At the outset, the TFSME scheme offered, for a period of 12 months, four-year funding of at least 10% (increased from an initial 5% allowance) of banks' lending to the real economy at interest rates at or close to Bank Rate. Additional funding is available for banks that increase lending, especially to small- and medium-sized enterprises ("SMEs"). It was anticipated that the TFSME scheme would:

- help transmit the effect of the reduction in Bank Rate to the real economy;
- provide participants with a cost-effective source of funding to support additional lending to the real economy; and
- incentivise banks to: (i) provide credit to businesses and households to bridge through a period of economic disruption; and (ii) support lending to SMEs that typically bear the brunt of economic downturns.

Eligible participants in the TFSME are banks and building societies that are participants in the Bank's Sterling Monetary Framework ("SMF")

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[12] The JSS Closed was announced as an 'extension' to the JSS Open scheme on October 9, 2020.

[13] *See*: https://www.gov.uk/guidance/check-if-you-can-claim-the-job-support-scheme-open-if-your-business-is-still-operating. Please note that this guidance has since been withdrawn.

[14] *See*: https://www.gov.uk/guidance/check-if-you-can-claim-the-job-support-scheme. Please note that this guidance has since been withdrawn.

and that are signed up to access the Discount Window Facility ("DWF"). SMF participants that are not already signed up to the DWF can apply for access alongside applying to use the TFSME. Institutions that are not currently SMF participants can apply to join, subject to the Bank's usual eligibility criteria. Collateral must be pre-positioned with the Bank. Eligible collateral consists of all collateral currently eligible in the SMF.

On May 2, 2020, the Bank announced amendments to the TFSME to further support the new Bounce Back Loans Scheme ("BBLS") discussed below. These amendments enabled TFSME participants to extend the term of some funding they access via the TFSME from four to six years to align with the six-year term of loans provided through the BBLS. The amount of TFSME drawings that can be extended is expected to be determined in the first half of 2021, based on the quantity of BBLS loans outstanding at that time.

On September 24, 2020 the Bank announced that it would allow TFSME participants to extend part of their borrowings again, out to a total term of up to 10 years. This means that participants may be permitted to extend the term of TFSME loans by up to a further four years, at the point at which existing six-year TFSME loans mature.

As of November 11, 2020, it was reported that over £49.65 billion of funding has been made available under the TFSME since the start of the COVID-19 crisis.

B. Asset Purchase Facility

On March 19, 2020, the MPC also voted to increase the Bank's holdings of UK government and corporate bonds by £200 billion (to a total of £645 billion). The additional purchases of bonds (the majority of which comprise UK government bonds but will include some additional sterling non-financial investment-grade corporate bonds) are funded by the issuance of central bank reserves.

On April 2, 2020, the Bank announced that it would utilise the Corporate Bond Purchase Scheme ("CBPS") that was launched in August 2016 to purchase at least £10 billion of eligible sterling non-financial corporate bonds in coming months, increasing the level of purchased corporate bonds to at least £20 billion. The Bank also increased the maximum purchase size per bond in each auction, as stipulated under the CBPS, from £10 million to £20 million.

An updated list of corporate bonds eligible for purchase under the scheme is available on the Bank's website.[15] Eligible bonds comprise conventional investment-grade senior unsecured or secured, unsubordinated debt securities that are, *inter alia*, admitted to official listing on an EU[16] stock exchange and have a minimum residual maturity of 12 months (no perpetual debt). On June 4, 2020, the Bank updated the list of eligible securities to include additional bonds with three months to maturity par call features. Bonds with complex or non-standard structures and convertible or exchangeable bonds will not be eligible.

Eligible issuers include companies (including their finance subsidiaries) that make a material contribution to the UK economy, subject to the restrictions set out above. Companies with significant employment in the UK or headquartered in the UK will normally meet this requirement, but the Bank will also consider whether a company generates significant revenues in the UK, serves a large number of customers in the UK or has a number of operating sites in the UK. Corporate bonds issued by banks, building societies, insurance companies and other financial sector entities regulated by the Bank or the Financial Conduct Authority ("FCA") will not be eligible. Bonds will also not be eligible if issued by leveraged investment vehicles or from companies within groups which are predominantly active in businesses subject to financial sector regulation.

[15] *See*: https://www.bankofengland.co.uk/markets/bank-of-england-market-operations-guide/information-for-participants

[16] We presume that this includes the UK.

The Bank undertakes operations via reverse auctions, which began on April 7, 2020. Details of the purchase process are available on the Bank's website.[17] The Bank will keep the size of the scheme and purchase pace under review in light of prevailing market conditions and any future MPC decisions.

C. Contingent Term Repo Facility

On March 24, 2020, the Bank announced that it was activating the 'Contingent Term Repo Facility' ("CTRF") as a temporary enhancement to its existing sterling liquidity insurance facilities with operations initially run on March 26, 2020 and April 2, 2020.

The CTRF is a flexible liquidity insurance tool that allows participants to borrow central bank reserves (cash), in all major currencies, in exchange for collateral. Eligible collateral comprises collateral assets eligible in the SMF. The CTRF is open to banks and building societies that signed up to the DWF.

The CTRF provided funding for a period of either one or three months, allowing participants to use the CTRF as a way to bridge beyond the point at which drawings under the TFSME could be made in order to support lending to the real economy as quickly as possible.

In light of more stable funding market conditions and usage patterns, the Bank has since discontinued the one-month and three-month term CTRF operations. The Bank's regular liquidity insurance facilities will continue to operate, including the six-month Indexed Long-Term Repo, which currently operates weekly, and the on-demand DWF.

The Bank will keep the situation under review and has stated that operation of the CTRF can be reintroduced at any stage if justified by market conditions.

D. Coronavirus Business Interruption Loan Scheme

On March 11, 2020 the Chancellor announced the 'Coronavirus Business Interruption Loan Scheme' ("CBILS"), a temporary loan scheme delivered by the British Business Bank, which became available the week commencing March 23, 2020.

The scheme provides support to UK SMEs with a turnover of no more than £45 million per year, for up to six years for term loans and asset finance facilities and three years for overdrafts and invoice finance facilities. The scheme provides participating lenders with a government-backed guarantee of 80% on each loan (subject to pre-lender cap on claims) of up to £5 million and, with the UK government covering the first 12 months of interest payments and any lender-levied fees, seeks to bolster lenders' confidence in continuing to provide financing to SMEs. On November 2, 2020, the government announced that operation of the CBILS will be extended until January 31, 2021.

Over 100 accredited lenders including Barclays, RBS, HSBC and Lloyds are currently providing funds under the scheme as term loans, overdrafts or asset-based lending secured on equipment or invoices.

Eligibility is determined by application. The CBILS was initially limited to SMEs that were unable to secure regular commercial financing. However, on April 2, 2020 the Chancellor indicated that the scheme would be made available to all viable SMEs affected by COVID-19, regardless of whether they could secure commercial financing outside of the scheme.

For facilities below £250,000, accredited lenders are not permitted to take any form of personal guarantee. For larger facilities, personal guarantees may still be required at a lender's discretion; however, recoveries are capped at 20% of the outstanding balance of the facility

[17] *See*: https://www.bankofengland.co.uk/markets/market-notices/2020/consolidated-market-notice-for-asset-purchase-facility-gilt-purchases-august-2020

after the proceeds of business assets have been applied. Furthermore, principal private residences cannot be taken as security under the CBILS. These amendments apply retroactively to any financing arrangements that have already been put into place under the scheme as well as all new facilities.

As of October 18, 2020, it was reported that £17.16 billion of loans had been approved under the CBILS since the start of the COVID-19 crisis.[18]

E. *Support for innovative businesses*

On April 20, 2020, the Chancellor announced a £1.25 billion COVID-19 support package to assist businesses driving innovation in the UK (ranging from tech to life sciences), which may be unable to access other business support programmes (such as CBILS) and are reliant on equity investment.

Future Fund. The government committed an initial £250 million towards a loan scheme (the "Future Fund") for high-growth companies that have been impacted by COVID-19. The fund is delivered in partnership with the British Business Bank and provides funding from the government and the private sector on a match funded basis.

The scheme aims to provide government loans to UK-based companies ranging between £125,000 and £5 million, subject to at least equal match funding from private investors. It is intended that these loans will automatically convert into equity on the company's next qualifying funding round, or at the end of the loan term if they are not repaid.

To be eligible for this scheme, a business must be an unlisted UK-registered company that has previously raised at least £250,000 in equity investment from third-party investors in the last five years. Since the scheme launched in May 2020, its eligibility criteria has been amended to include innovative companies that participate in accelerator programmes based outside the UK. The scheme has also since been extended until January 31, 2021 when it will close for new applications.

As of October 18, 2020, it was reported that over £770.8 million of convertible loans had been approved under the scheme[19] — far exceeding the initial funds allocated by the Treasury.

Continuity grants and loans scheme. The government's support package also included a further £750 million in grants and loans made available through Innovate UK's grants and loan scheme to SMEs focusing on research and development. This scheme was launched on May 15, 2020.

Under this scheme, up to £90 million was made available until May 29, 2020 in the form of continuity grants for SMEs and existing Innovate UK customers whose projects were at risk as a result of COVID-19. These grants aimed to support eligible companies that expected to have a funding gap of between £25,000 and £250,000.

Up to £210 million is available in continuity loans to SMEs and third sector organisations that are experiencing difficulties in continuing a live project for which they have an award from Innovate UK. These loans aim to support eligible companies that expect to have a larger funding gap as a result of COVID-19 of between £250,000 and £1.6 million. Continuity loans will remain open for applications until the earlier of the date on which all available funds have been allocated or December 31, 2020.[20]

F. *Bounce Back Loans*

On May 4, 2020, HM Treasury and the Bank launched the BBLS to enable smaller businesses to access financing more quickly during the COVID-19 crisis. Under this scheme, eligible businesses may borrow up to 25% of their annual

[18] *See*: https://www.gov.uk/government/collections/hm-treasury-coronavirus-covid-19-business-loan-scheme-statistics
[19] *See*: https://www.gov.uk/government/collections/hm-treasury-coronavirus-covid-19-business-loan-scheme-statistics
[20] *See*: https://www.gov.uk/government/publications/access-coronovirus-business-innovation-support-package

turnover, with the maximum loan amount capped at £50,000. On November 2, 2020, the government announced that the BBLS will be extended until January 31, 2021.

Loans provided under the scheme are fully guaranteed by the government, with no repayments due and no fees or interest payable for the first 12 months, following which the interest rate on such loans will be 2.5% per annum.

Under the scheme, each loan initially had a six-year term with the option for early repayment without incurrence of any fees or penalties. In October, the Chancellor announced new 'Pay as You Grow' measures for borrowers who have accessed the scheme. The measures give borrowers the option to:

- extend the term of the loan to 10 years;
- make interest-only payments for six months, with the option to use this up to three times throughout the loan; and
- once six payments have been made, request a six-month repayment holiday.[21]

From November 10, 2020, lenders participating in the BBLS can also offer businesses a "top-up" to their existing loan if they have borrowed less than the maximum amount available to them. Top-ups are only available from a borrower's existing BBLS lender. A borrower may apply for a top-up that is for the lesser of £50,000 or 25% of the annual turnover the borrower certified in its original successful BBLS application form, minus the value of its original loan.[22]

To be eligible, businesses must be based in the UK, must have been established before March 1, 2020 and must have been adversely impacted by the outbreak. Eligible businesses include banks, insurers and reinsurers (but not insurance brokers), public-sector bodies and state-funded primary and secondary schools. Businesses already benefiting from the CBILS, CLBILS or the CCFF (each as defined below under Part IV) will not be eligible. However, businesses that had already received a loan of up to £50,000 under one of these schemes could transfer it into the BBLS (to take advantage of the six-year term, for example). Businesses seeking to transfer their loans to the BBLS had until November 4, 2020 to arrange this with their lender.

A borrower is also required to declare whether or not the business was, on December 31, 2019, a "business in difficulty" and does not breach State aid restrictions under the State Aid Temporary Framework. If a borrower was a "business in difficulty" then it is required to confirm it does not breach *de minimis* State aid restrictions and will not be used to support export-related activities.

The government made changes to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, which defines the "regulated activities" for which authorisation from the FCA or Prudential Regulation Authority ("PRA") is needed in the UK. Lending under BBLS that would otherwise have resulted in regulated credit agreements (i.e., loans of £25,000 or under to sole traders, certain small partnerships and other relevant small businesses) will fall outside regulated lending activity. This means that the usual regulatory regime that applies to regulated credit agreements, including the requirements in the Consumer Credit Act 1974 (the "CCA"), will not apply to lending or post-lending (other than debt collecting) activity under BBLS. In addition, the new Business and Planning Act 2020 stipulates that section 140B of the CCA does not apply in respect of BBLS lending.[23]

There are currently 28 lenders participating in the BBLS including many large retail banks. Banks subject to the UK leverage ratio will also be able to apply to the PRA for a "modification by

[21] *See*: https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/bounce-back-loans/faqs-for-small-businesses/

[22] *See*: https://www.british-business-bank.co.uk/bounce-back-loan-scheme-top-ups-open-for-eligible-businesses/

[23] Sections 140A–140C of the CCA cover the ability of the court to make determinations on the fairness of the relationships between debtors and creditors, which would limit the scope of any complaints or claims raised by borrowers.

consent" allowing them to exclude loans under the BBLS from the UK leverage ratio exposure measure.

As of October 18, 2020, it was reported that £40.2 billion of loans had been approved under the BBLS since its implementation.[24]

G. Support for UK employers

Under the 'Coronavirus Statutory Sick Pay Rebate Scheme,' employers with fewer than 250 employees (which is estimated to include approximately 2 million employers), as at February 28, 2020, are eligible for a government refund of up to 14 days of Statutory Sick Pay paid to any employee who, on or after March 13, 2020 is either ill or required to self-isolate for at least four days because of COVID-19. Under legislation amended by the Act, an employer who fraudulently or negligently receives a refund is liable to a penalty not exceeding £3,000.

Statutory Sick Pay is currently paid at a rate of £95.85 per week to eligible employees on a five-day work schedule (with different amounts payable to those on other types of schedules), for up to 28 weeks in any period of incapacity for work or in any series of linked periods of incapacity for work. The online claim portal is now open.[25]

With effect from March 13, 2020, the eligibility criteria for Statutory Sick Pay were also relaxed in two respects:

- Statutory Sick Pay is payable from the first day of sickness absence as an enhancement to the usual rule (which provides for payment from the fourth qualifying day in any period of incapacity for work); and
- Statutory Sick Pay is payable to any employee who is ill because of COVID-19, or who is following UK government advice[26] to self-isolate or shield, whether or not they are ill or showing any symptoms of COVID-19. As of May 28, 2020, this includes employees self-isolating where they have been told to self-isolate under the NHS "Test and Trace" system.

With effect from October 15, 2020, the definition of deemed incapacity for the purpose of Statutory Sick Pay has been further relaxed to include employees who, since July 6, 2020, have been shielding.

H. Grants for certain small enterprises

Approximately 700,000 small businesses that already pay little or no business rates are eligible for £10,000 grants to help meet business costs (the UK government estimates that this is roughly the cost of three months of rent). Local authorities will write to businesses that are eligible for grants and funding commenced in early April 2020.

Additionally, a cash grant of up to £25,000 may be available for businesses in the retail, hospitality and leisure sectors operating from premises that have a rateable value (for business rates purposes) of over £15,000 and less than £51,000.

IV. Financial support for larger UK businesses

A. Covid Corporate Financing Facility

On March 23, 2020, HM Treasury and the Bank launched the 'Covid Corporate Financing Facility' ("CCFF") to provide funding to businesses by purchasing, at a minimum spread over reference rates, newly issued commercial paper of up to one-year maturity and meeting certain other eligibility criteria issued by non-financial businesses (including their finance subsidiaries) which are considered to make a material contribution to the UK economy.

[24] *See*: https://www.gov.uk/government/collections/hm-treasury-coronavirus-covid-19-business-loan-scheme-statistics

[25] *See*: https://www.gov.uk/guidance/claim-back-statutory-sick-pay-paid-to-your-employees-due-to-coronavirus-covid-19

[26] *See*: https://www.nhs.uk/conditions/coronavirus-covid-19/what-to-do-if-you-or-someone-you-live-with-has-coronavirus-symptoms/

The CCFF was intended to operate for an initial period of 12 months. On September 22, 2020 the Bank announced that the CCFF will close for new purchases from eligible issuers with effect from March 32, 2021. As such, the facility will make no purchases of commercial paper after March 22, 2021. The CCFF will also close to new applications from counterparties and issuers looking to become eligible on December 31, 2020.

Funding under the scheme is provided on terms comparable to those prevailing in markets in the period before the COVID-19 economic shock and is open to firms that can demonstrate they were in sound financial health prior to the shock (i.e., companies that had a short- or long-term rating of investment grade, as at March 1, 2020, or equivalent). The scheme is intended to help such businesses across a range of sectors that have been affected by a short-term disruption of cash flow to finance their short-term liabilities.

UK incorporated companies, including those with foreign-incorporated parents and a genuine business in the UK, companies with significant employment in the UK or firms with their headquarters in the UK, should normally qualify for the CCFF scheme. Eligibility decisions are made by the Bank's risk management staff. Commercial paper issued by non-bank financial companies will, in principle, be eligible, subject to the Bank being satisfied that the company makes a material contribution to corporate financing in the UK.

Commercial paper issued by leveraged investment vehicles or from companies within groups that are predominantly banks, investment banks or building societies will not be eligible. Purchases will be made in the primary market via eligible dealers and after issuance from eligible counterparties in the secondary market.

On May 19, 2020, HM Treasury announced that companies receiving funding under the CCFF for a term extending beyond May 19, 2021 would be required to exercise restraint in respect of dividend payments and other capital distributions as well as senior pay. Issuers would be required to provide a letter of commitment in relation to this if an increase in an issuer's CCFF limit, over and above that suggested by the issuer's investment rating, is requested and approved; and/or a CCFF transaction is entered which involves CP maturing on or after May 19, 2021. Companies participating in the scheme are also able to repay their drawings early, at their discretion.

Since June 4, 2020, HM Treasury and the Bank have also published the names of businesses that have drawn funds under the CCFF, as well as the amounts borrowed under the scheme every Thursday at 3:00 pm (GMT). Publication is intended to make the scheme more transparent and enable participating businesses to demonstrate their access to the scheme.

More information regarding the operation of the CCFF can be found in our memorandum[27] and on the Bank's website.[28] As of November 11, 2020 it was reported that around £15.24 billion of support has been made available under the CCFF.

B. Coronavirus Large Business Interruption Loan Scheme

On April 2, 2020, HM Treasury announced the 'Coronavirus Large Business Interruption Loan Scheme' ("CLBILS") which is intended to provide support to larger UK businesses which are unable to obtain relief under the CBILS (see part III para D. above). The scheme aims to support UK businesses that were viable before the COVID-19 outbreak but which now face significant cash flow difficulties and are unable to secure standard commercial financing. The CLBILS launched on April 20, 2020 and was updated on May 19, 2020. On November 2, 2020 the government announced that operation of the CLBILS will be extended until January 31, 2021.

The scheme provides participating accredited lenders with a government-backed partial guarantee (80%) on each loan provided under the

[27] *See*: https://www.clearygottlieb.com/news-and-insights/publication-listing/covid19-covid-corporate-financing-facility-explained

[28] *See*: https://www.bankofengland.co.uk/markets/covid-corporate-financing-facility

scheme. There are currently 27 accredited lenders taking part in the scheme. Lenders can provide loans of: (i) up to £25 million to UK businesses with an annual turnover of over £45 million up to £250 million; and (ii) up to £50 million to UK businesses with an annual turnover of over £250 million, available on repayment terms of up to three years, in order to encourage lending to medium-sized and larger UK businesses.

On May 19, 2020, HM Treasury announced that loan amounts for eligible firms with a turnover of over £250 million would be increased from £50 million to the lesser of 25% of a firm's turnover or £200 million. This change came into effect on May 26, 2020. The maximum size for invoice finance and asset finance facilities remains set at £50 million.

Lenders are not permitted to take personal guarantees of any form in respect of facilities below £250,000. For facilities above £250,000, personal guarantees may still be required, but claims are capped at 20% of losses after other recoveries have been applied.

Businesses in all sectors are eligible to apply for CLBILS (including companies backed by a private-equity sponsor, which will be treated as standalone applicants for the scheme and whose turnover will be assessed independently from the sponsor's other investment portfolio companies) with the exception of banks and building societies, insurers and reinsurers (but not insurance brokers), public sector organisations, including state-funded primary and secondary schools. Businesses that have received support under the CCFF are also precluded from accessing funding under this scheme.

Borrowings under the CLBILS which are larger than £50 million will be subject to restrictions on dividend payments, senior pay and share buybacks during the term of the loan, including a ban on dividend payments and cash bonuses. Borrowers may, however, make dividend payments to the extent these were declared before the loan was taken out. Under the restrictions on executive pay, borrowers cannot pay any cash bonuses or award pay rises to senior management (including the board) except in cases where such payments:

- were declared before the CLBILS loan was taken out;
- are in line with similar payments made in the preceding 12 months; and
- would not have a material negative impact on the borrower's ability to repay the loan.

Further details regarding the CLBILS are available on the British Business Bank's website[29] and set out in our memorandum.[30]

As of October 18, 2020, it was reported that over £4.57 billion of loans had been approved under the CLBILS since the start of the COVID-19 crisis.[31]

V. Financial support for the self-employed and for members of partnerships

On September 24, 2020 the Chancellor announced that the Self-Employment Income Support Scheme ("SEISS") would be extended to provide two additional taxable grants, which will be payable for the three months from November 1, 2020 to January 31, 2021 and the three months from February 1, 2021 to April 30, 2021. Further guidance, including an increase to the amount of the first grant, was provided in an HMRC policy paper on November 5, 2020.[32]

For details regarding the eligibility criteria for the SEISS, please see previous versions of this memorandum.

[29] *See*: https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/clbils/faqs-for-businesses/#f7

[30] *See*: https://www.clearygottlieb.com/-/media/files/alert-memos-2020/coronavirus-large-business-interruption-loan-scheme-pdf.pdf

[31] *See*: https://www.gov.uk/government/collections/hm-treasury-coronavirus-covid-19-business-loan-scheme-statistics

[32] *See*: https://www.gov.uk/government/publications/self-employment-income-support-scheme-grant-extension/self-employment-income-support-scheme-grant-extension

The first grant under the extended SEISS will be based on 80% of average monthly trading profits and will be capped at £7,500. It will be paid in a single instalment. This is aimed at "*providing the same level of support for the self-employed as is being provided for employees.*"

The government will set the level of the second grant and provide further details at a later date.

The scheme supplements for the self-employed the following three support measures previously announced:

- The Coronavirus Business Interruption Loan Scheme (see part III D. above), which is available to the self-employed provided their activity is channelled through a business account;
- As described further in part VII A. below, payments on account under the self-assessment system, which would otherwise have been due by July 31, 2020, were able to be deferred to the end of January 2021. It may be possible for a taxpayer to put in place a further payment plan using HMRC's "Time to Pay" service; and
- The "minimum income floor" will not be applied during any period a self-employed person is required to stay at home or is ill as a result of COVID-19 prior to April 6, 2020 nor generally from April 6, 2020 for the duration of the pandemic, if they wish to apply for monthly welfare payments (Universal Credit) to help with living costs.

A judicial review challenge to the SEISS is being pursued on the basis that the scheme indirectly discriminates against women. The challenge arises because grants are calculated by reference to average trading profits over various tax years, which could place women at a particular disadvantage compared to men because of reductions in trading income suffered during periods of maternity leave taken in the relevant period, and the application of a blanket criteria (i.e., without exempting periods of maternity leave) is not a proportionate means of achieving a legitimate aim.[33]

VI. Coordinated action with other central banks to enhance the provision of global US dollar liquidity

In a measure that is also calculated to bolster the supply of credit to households and businesses, the Bank will join the Bank of Canada, the Bank of Japan, the European Central Bank, the Federal Reserve and the Swiss National Bank in increasing the frequency of 7-day maturity operations on their standing US dollar liquidity swap lines, which are an important liquidity backstop to mitigate strains in global funding markets, from weekly to daily. These daily operations commenced on March 23, 2020, and will be carried out until at least the end of April 2020. The central banks will also continue to hold weekly 84-day maturity operations.

VII. Fiscal measures in response to COVID-19

A. Tax deferral and support for payment of tax

The original package of measures announced by the Chancellor on March 20, 2020 allowed UK value added tax ("VAT") payments due from businesses to HMRC in the period between March 20 and June 30 this year to be deferred, at the taxpayer's option.

Businesses that opted to defer continued to be required to submit their VAT returns on time but had been given until March 31, 2021 to account for the relevant amounts (with the effect of easing cash-flow problems caused by the impact of COVID-19).

As announced in the Chancellor's 'Winter Economy Plan,' delivered on September 24, 2020, businesses that deferred VAT payments for the period from March 20 to June 30, 2020 can now pay the deferred amounts to HMRC in 11 equal interest-free instalments over the financial

[33] *See:* https://pregnantthenscrewed.com/were-threatening-legal-action-against-the-chancellor-for-indirect-sex-discrimination/

year 2021–2022. This 'New Payment Scheme' is an alternative option to making full payment on March 31, 2021. All businesses that deferred VAT payments under the previous measures are eligible for the new payment scheme, but businesses must opt in if they seek to utilise it. HMRC will put in place an opt-in process in early 2021.[34] Those that are able to pay their deferred VAT amounts can still do so by March 31, 2021.[35]

Taxpayers due to make a payment on account on July 31, 2020 under the Self-Assessment system were, if the impact of COVID-19 caused them difficulty in making payment on time, able to defer that payment on account to January 31, 2021.[36] No late payment interest or penalties will apply to amounts deferred in this way.

It was also announced on September 24, 2020 that taxpayers with up to £30,000 of Self-Assessment liabilities that would otherwise be due on January 31, 2021 (including amounts deferred from July 2020) will be able to apply online using a "self-serve" version of HMRC's "Time to Pay" service for a plan to make payment in instalments over an additional 12 months. Under such an instalment plan, the final payment would not be due until January 2022. However, interest will be applied to any outstanding balance from February 1, 2021 onwards.[37]

Self-Assessment taxpayers and other businesses that are not able to pay their tax bills on time can continue to use HMRC's existing "Time to Pay" helpline to agree payment arrangements.[38] Any such arrangements (such as instalment plans and/or delayed repayments) are typically agreed on a case-by-case basis and tailored to a taxpayer's specific circumstances and liabilities.

B. Business rates relief

The UK government has introduced a business rates 'holiday' for businesses in the retail, leisure and hospitality sectors in England in the 2020–21 tax year. The scope of this measure extends to all businesses in those sectors, regardless of their size. A similar business rate holiday has been introduced for certain nurseries. No action is required from eligible businesses: the measure will be applied automatically to bills for the period beginning April 2020, with existing bills being reissued where necessary to reflect the holiday.

C. VAT reduction

As a temporary measure, VAT will be charged at 5% (rather than 20%) on certain supplies of food and non-alcoholic drinks from restaurants, pubs, cafés and similar premises in the UK, on supplies of hotel and holiday accommodation and on admission to certain attractions across the UK. This temporary rate applies from July 15, 2020 to March 31, 2021.

D. Delays to IR35 reforms and to commencement of DAC6 reporting

Reforms to the off-payroll working rules ("IR35") that would have applied from April 6, 2020 for people contracting their services to large- or medium-sized organisations outside the public sector have been delayed by a year. The planned reforms are an anti-avoidance measure, aimed at contractors who are effectively providing the same service as employees, but via a limited company, giving a different tax result. Once live, they will mean that the recipient of services (where it is a large- or medium-sized organisation in the private sector) will be responsible for determining the employment status of the individual ultimately performing those services. The reforms are now provided for in Finance Act 2020, to take effect from April 6, 2021.

[34] *See*: https://www.gov.uk/government/publications/winter-economy-plan/winter-economy-plan
[35] *See:* https://www.gov.uk/guidance/deferral-of-vat-payments-due-to-coronavirus-covid-19
[36] *See:* https://www.gov.uk/guidance/defer-your-self-assessment-payment-on-account-due-to-coronavirus-covid-19
[37] *See:* https://www.gov.uk/government/news/self-assessment-customers-to-benefit-from-enhanced-payment-plans
[38] *See*: https://www.gov.uk/government/publications/winter-economy-plan/winter-economy-plan

Separately, HMRC has confirmed that it will take advantage of the ability, proposed by the European Commission, to delay by six months the first deadlines for filing and exchanging information pursuant to the Directive on Administrative Cooperation (generally known as "DAC6" and implemented in the UK by the International Tax Enforcement (Disclosable Arrangements) Regulations 2020).[39] DAC6 is a new reporting regime which will apply across the European Union as well as in the UK. It requires those involved in the design and implementation of arrangements which meet certain 'hallmarks' to report information on those arrangements to the tax authorities. Various other jurisdictions have also taken advantage of the ability to delay reporting.

The delay is intended to give those within the scope of the rules, who are already dealing with the effects of the pandemic, further time to ensure that they can comply with their obligations. The first reports will now be due by January 30, 2021, although no changes have been made to the scope of the transactions which will ultimately be reportable once the reporting obligations become live. Secondary legislation effecting the delay came into force on July 30, 2020.

E. Temporary exemption for employer-reimbursed expenses that cover the cost of relevant home-office equipment and tax treatment of other benefits

Established tax exemptions apply where an employer provides home-office equipment directly and retains ownership of that equipment and where the employee's private use of the equipment is not significant. Relief is also available where an employee incurs a cost that is 'wholly, exclusively and necessarily in the performance of the duties of their employment.'

Through crucial phases of the COVID-19 response, employees have been encouraged to work from home wherever possible. To provide support for those employees, a new temporary exemption was introduced to ensure that employer reimbursement for the cost of home-office equipment expenses is exempt from tax and National Insurance contributions.

To be eligible for the new exemption, the expenditure must meet the following conditions:

- the equipment is obtained for the sole purpose of enabling the employee to work from home as a result of the coronavirus outbreak; and
- the provision of the equipment would have been exempt from income tax under existing legislative provisions if it had been provided directly to the employee by or on behalf of the employer.[40]

The exemption is conditional on the benefit of any reimbursement in respect of home-office equipment expenses being made available to all of an employer's employees generally on similar terms.

The exemption applies for amounts reimbursed on or after June 11, 2020 but before the end of the tax year 2020–21 (although HMRC has indicated that, provided the conditions in the legislation are otherwise met, it will exercise its discretion not to collect tax or National Insurance contributions due on any reimbursement payments made between March 16, 2020 and June 11, 2020, when the relevant legislation came into force).

Relatedly, the government has confirmed the tax treatment of various other expenses and benefits made available by employers to their employees during the pandemic. This guidance includes confirmation that the government will introduce an exemption from income tax and Class 1A National Insurance contributions for COVID-19 tests provided to employees outside the government's national testing scheme.[41]

[39] *See*: https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim800010

[40] *See:* https://www.gov.uk/government/publications/income-tax-and-national-insurance-contributions-exemption-for-home-office-expenses/income-tax-and-national-insurance-contributions-exemption-for-home-office-expenses

[41] *See:* https://www.gov.uk/guidance/how-to-treat-certain-expenses-and-benefits-provided-to-employees-during-coronavirus-covid-19

F. HMRC advice for people choosing to give up their income to support their business or donate to charity during the coronavirus pandemic

HMRC acknowledges that many people are choosing to give up part of their income to support their business or employer or to donate to charity. Guidance has been published to help employers, directors and employees understand available options to support a business or employer, including.[42]

- waiving their salary or bonuses before they are paid;
- waiving the right to any dividends; or
- giving salary or bonuses back to their employer after they have been paid.

G. Temporary zero rating of personal protective equipment ("PPE") supplies for VAT purposes

As a temporary measure, PPE that was supplied between May 1, 2020 and October 31, 2020 and that was recommended for use by Public Health England (in its guidance of April 24, 2020 titled 'Guidance, COVID-19 personal protective equipment (PPE)'[43]) was zero-rated for UK VAT purposes. The temporary zero rating was not extended and supplies of PPE made on and after November 1, 2020 will now generally attract VAT at the 20% rate.

H. Stamp Duty Land Tax

As part of the Chancellor's 'summer economic update,' delivered on July 8, 2020, Stamp Duty Land Tax ("**SDLT**") rates payable on residential property purchases will be temporarily reduced. Purchases of residential property with a value of up to £500,000 will not (subject to the special rules for the purchase of a second or additional home) attract any SDLT. Residential purchases of over £500,000 will attract approximately £15,000 less SDLT. This measure will be effective for purchases which are completed or substantially performed between July 8, 2020 and March 31, 2021. The additional 3% rate of SDLT applicable to the purchase of a second or additional residential property will continue to apply to purchases of any value, including those below £500,000. The rates of SDLT are expected to revert to the prior rates and thresholds on April 1, 2021.

I. Taxation of coronavirus support payments

Finance Act 2020 confirms that particular grants to assist businesses, employers and individuals (including partners of partnerships) affected by the coronavirus crisis are within the scope of tax and included as revenue for income tax and corporation tax purposes. The legislation covers payments under the Coronavirus Job Retention Scheme, the Self-Employment Income Support Scheme, the Coronavirus Statutory Sick Pay Rebate Scheme, coronavirus business support schemes and others that may be specified in directions or regulations issued by the government.

New rules provide for "Test and Trace Support Payments" to be made by local authorities to individuals on low incomes who have been required to self-isolate due to coronavirus and who cannot work from home. Regulations have been published to provide that these payments will be exempt from National Insurance contributions,[44] although the government has indicated that the payments will be subject to income tax.

J. Updates to PAYE and overseas workday relief guidance

Updates to HMRC guidance state that, where an employer has an established agreement to operate PAYE on an employee's earnings for work done in the UK, the employer can request an

[42] *See:* https://www.gov.uk/government/news/check-the-tax-rules-on-waiving-your-income-or-donating-to-charity

[43] *See*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881669/COVID-19_personal_protective_equipment__PPE__-_GOV.UK.pdf

[44] *See:* https://www.gov.uk/government/publications/exemption-from-national-insurance-contributions-for-covid-19-test-and-trace-support-payments

amendment to the agreement if restrictions due to coronavirus have impacted the employee's ability to exit or re-enter the UK.

This will mean that where an employee has not been able to leave the UK in the 2020–21 tax year, the employer will be able to operate PAYE on 100% of such employee's earnings. If an employee is unable to return to the UK indefinitely, UK tax could be reduced or may not be due in certain circumstances.[45]

HMRC has also updated its 'overseas workday relief' guidance to cover coronavirus travel restrictions (resulting in individuals performing employment duties in the UK which would normally have been carried out overseas). Overseas workday relief can operate in certain circumstances, for individuals who are UK resident and subject to the remittance basis of UK taxation, to prevent foreign earnings from becoming taxable in the UK where they are not remitted to the UK in the relevant year.

Where individuals are eligible for overseas workday relief, the new guidance provides that daily earnings for work done in the UK will be treated as earnings from UK work and liable to UK tax. This includes earnings for work that would have been carried out somewhere other than the UK if coronavirus restrictions had not prevented the individual from travelling.[46]

K. *Tax residence*

Ordinarily, days spent in the UK in a given tax year could be relevant to the UK's statutory residence test ("SRT"), a series of rules used to determine whether individuals are resident in the UK for tax purposes. An individual is considered to have spent a day in the UK if they are in the UK at the end (midnight) of the day in question.

As part of the UK's response to the COVID-19 outbreak, the services of skilled individuals from outside the UK may be required. As a result, such individuals may spend more days in the UK than anticipated before the crisis. Recognising this (and that a shift in tax residence in such circumstances may be an undesirable or burdensome outcome, both for the individual and, where relevant, for their employer), the Chancellor wrote to the chair of the Treasury Select Committee on April 9, 2020.[47] His letter proposed to relax the SRT requirements on a temporary basis, for individuals who meet specific criteria, so that time spent in the UK between March 1, 2020 and June 1, 2020 is disregarded for SRT purposes.

The changes are included in Finance Act 2020 and take effect retrospectively (from March 1, 2020). They are targeted at medical and healthcare professionals who are in the UK for purposes connected with the detection, treatment or prevention of COVID-19 and at those who are in the UK because they are involved in the development or production of medicinal products (including vaccines), devices, equipment or facilities for the same purposes. The provisions in the Bill include the ability for the relaxation to be extended in duration by secondary legislation (to any date up to and including April 5, 2021) if the government considers it necessary as the COVID-19 situation develops.

The SRT rules already contain a mechanism which allows days spent in the UK by an individual to be disregarded for SRT purposes, in certain 'exceptional' circumstances. The new changes for skilled workers will sit alongside other COVID-19 related guidance[48] on this mechanism published in March 2020. Whilst circumstances will generally be judged on a case-by-case basis, the guidance confirms that time spent in the UK where an individual is, as a result of COVID-19:

[45] *See*: https://www.gov.uk/guidance/new-employee-coming-to-work-from-abroad

[46] *See:* https://www.gov.uk/government/publications/rdr4-overseas-workday-relief-owr

[47] *See*: https://www.gov.uk/government/publications/covid-19-temporary-changes-to-the-statutory-residence-test

[48] *See*: https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm11005

- quarantined or advised by a health professional or by public health guidance to self-isolate in the UK;
- advised by official government advice not to travel from the UK;
- unable to leave the UK as a result of the closure of international borders; or
- asked by their employer to return to the UK temporarily,

will be considered exceptional, when considering whether days spent in the UK can be disregarded for SRT purposes. HMRC has additionally published some 'question and answer' guidance, to clarify how the SRT might apply in certain pandemic-related situations.[49]

It is worth noting that the changes announced to deal with the possibility of a shift in tax residence for individuals have not been mirrored by a similar announcement for companies. Under the UK's tax rules, it is possible for any non-UK incorporated company to become resident in the UK for tax purposes if 'central management and control' ("CMC") of its affairs is exercised in the UK. The CMC test is derived from case law and looks, broadly, at where the highest level of control of the company's business is carried on. Often CMC resides with the board of directors of a company (or the equivalent), but the test looks to the facts and circumstances in each case.

The CMC test carries the risk that a non-UK company may be regarded as tax resident in the UK without ceasing to be tax resident elsewhere (e.g., in its jurisdiction of incorporation). If a double tax treaty ("DTT") is in force between the UK and another relevant jurisdiction, the situation may be dealt with through a DTT 'tie-breaker' clause to determine where residence lies in practice. Failing this, a company may end up as a dual-resident for tax purposes.

Where a non-UK company intends to be (or not to be) a UK tax-resident, it is common to adopt measures — such as controlling where and how board meetings are held, or written resolutions are signed — to ensure that CMC is (or is not) exercised in the UK. However, where individuals find themselves subject to travel restrictions as a result of the COVID-19 crisis, it may not be possible to carry out these measures as before. Travelling internationally to attend a board meeting or to sign a document, which may have been straightforward before the pandemic, has now become much more difficult. The result is that individuals with decision-making authority may find themselves in the 'wrong' place at the point where a business-critical decision needs to be made.

HMRC has issued revised guidance[50] on company residence with this issue in mind. It addresses the position of non-UK companies seeking to avoid UK residence (but not the position of non-UK companies seeking to secure UK tax residence) and does not provide any safe harbours.

The guidance essentially states that HMRC considers the existing UK law and guidance on residence to be sufficiently flexible to deal with the circumstances created by COVID-19. It places an emphasis on the 'holistic' view that HMRC will take in assessing the location of CMC. Whilst the guidance does state that 'a few board meetings' being held in the UK, or 'a few decisions' being taken in the UK 'over a short period of time' will not necessarily result in a non-UK company becoming UK tax resident, it also stops short of ruling this out in a circumstance where business practices have changed solely as a result of the COVID-19 pandemic.

The underlying message is that each case will continue to be assessed on its own particular facts and circumstances. This is unlikely to provide companies with much practical reassurance that (without taking additional steps to manage the risk) their UK residence position will remain unaffected if lockdown measures and travel

[49] *See*: https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13410

[50] *See*: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm120185

restrictions remain in place for a long period of time.

More information is available in our memorandum on corporate tax residence and COVID-19.[51]

VIII. Other UK developments

A. Shareholder meetings

The Corporate Insolvency and Governance Act, passed on May 25, 2020 (the "Act"), contains temporary measures with respect to the requirements for companies to hold annual general meetings ("AGMs").[52] The legislation has retrospective effect from March 26, 2020 and, following extension,[53] applies until December 30, 2020.[54] Importantly, these temporary flexibilities are available to companies irrespective of their articles of association.

Under the Act, companies required to hold an AGM between March 26, 2020 and December 30, 2020, whether pursuant to their articles or statute, have until December 30, 2020 to do so.[55] Companies have two options for holding an AGM: (i) convene a virtual AGM pursuant to the temporary measures under the Act, irrespective of their Articles or other statutory provisions, or (ii) depending on applicable COVID-19 related restrictions, convene an AGM and restrict the physical attendees to those required to achieve the quorum.

On October 6, 2020, the Financial Reporting Council published 'AGMs: An Opportunity for Change' that includes best practice guidance.[56]

B. Operation of English Courts

The English Courts have undertaken to continue their work during the COVID-19 outbreak. Court staff were included in the scope of key workers who are able to continue to send their children to schools despite the general school shutdown effective as of the end of the school day on March 20, 2020. However, the Courts have acknowledged that "it will not be business as usual" and "there will be bumps along the road as [they] get used to new ways of working." The Courts have increased their use of telephone, video and other technology to enable as many hearings as possible to be conducted remotely.

On March 19, 2020 the Lord Chief Justice issued a statement[57] making it clear that the default position is now that hearings should be conducted with one, more than one or all participants attending remotely, whilst noting that attendance of hearings in person may still be necessary in some cases. The Courts have also resolved to deal with many more matters "on paper" rather than by way of a hearing. On April 2, 2020, the Courts and Tribunals Judiciary announced that a 'New Practice Direction 51ZA — Extension of Time Limits' had been approved.[58] The Practice Direction allows parties to agree an extension up to 56 days without formally notifying the court (rather than the previous 28 days) so long as that does not put a hearing date at risk, and also makes certain clarifications of Practice Direction 51Y in relation to audio and video hearings. It took effect immediately and ceased to have effect on October 30, 2020.

The Courts have generally expected litigants and their lawyers to "roll up their sleeves"[59] and,

[51] *See*: https://www.clearygottlieb.com/news-and-insights/publication-listing/corporate-tax-residence-in-the-uk-and-covid19
[52] *See*: https://publications.parliament.uk/pa/bills/cbill/58-01/0128/en/20128en.pdf
[53] The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020.
[54] Regulation may expedite or extend this deadline, but not beyond April 5, 2021.
[55] Regulation may further extend this deadline.
[56] *See*: https://www.frc.org.uk/getattachment/48c4ee08-b7be-4b7c-8f19-bcaf3d44e441/Corporate-Governance-AGM.pdf
[57] *See*: https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/
[58] *See*: https://www.judiciary.uk/announcements/118th-practice-direction-update-to-the-civil-procedure-rules-coronavirus-pandemic-related/
[59] *See*: paragraph 32(iii) of the judgment in *Muncipio De Mariana & Ors v BHP Group Plc* [2020] EWHC 928 (TCC).

consequently, have taken a robust approach to applications for extensions of time. A line of cases has emerged that makes clear the circumstances for getting an extension will need to be specific and well-grounded — while the Courts will take proper account of the difficulties that COVID-19 poses for parties, they won't provide a general excuse to hold up cases.

The Courts and Tribunals Judiciary have also issued a series of FAQs in relation to the operation of Employment Tribunals during the pandemic.[60]

On July 1, 2020, Robert Buckland QC MP (Lord Chancellor and Minister for Justice), the Judiciary and HM Courts and Tribunals Service ("HMCTS") published an update[61] on the recovery plans for courts and tribunals in response to the COVID-19 outbreak. The updates revealed that HMCTS is, amongst other things: (i) working with stakeholders to explore options to stagger and extend court and tribunal operating hours, including starting hearings at different times and weekend sittings, and (ii) introducing measures to make best use of judicial time and to support staff and users. These include supporting judges to list in ways that make full use of space that can safely be employed and supporting alternative dispute resolution in appropriate cases.

Since June 1, 2020 'hybrid hearings' (in which the judge and some participants are in Court, and some participating remotely) have been able to take place in the Rolls Building Courts in London. This new format of hearing supplements other types of hearing which have been available to litigants throughout the pandemic, namely: (i) fully remote hearings (with the judge at home), (ii) remote hearings (with the judge in their office or Court in the Rolls Building), and (iii) normal physical hearings, in which all the participants attend Court in person. The decision as to which type of hearing is appropriate in a particular case lies with the judge.

The work of the Courts has continued since the second lockdown came into force on November 5, 2020 and there are no plans to change scheduled hearings. Remote hearings are still encouraged and the Lord Chief Justice stated on November 1, 2020 that "significantly reduced footfall will continue to be necessary" in Courts.[62]

On November 9, 2020 HMCTS published a report entitled 'COVID-19: Overview of HMCTS Recovery for Civil and Family Courts and Tribunals'.[63] The report provides further information on progress that HMCTS is making to restore capacity in the Courts following the COVID-19 outbreak and follows on from HMCTS's July 2020 report. It sets out five key pillars underpinning recovery across the Courts and the proposed steps to be taken under these, which include maximising the judiciary's capacity to sit on as many days as possible, safely re-opening courts as quickly as possible, utilising COVID-19 operating hours and temporary Court venues which can provide increased capacity, ensuring effective support for remote hearings and support and guidance for users, increasing HMCTS's staff capacity and continuing to reduce case processing times.

C. *Companies House services*

Corporates should be aware that, as from March 17, 2020 and until further notice, Companies House has suspended all same day services due to the COVID-19 outbreak.

Companies House offices in London, Edinburgh and Belfast are closed to the public until March

[60] *See*: https://www.judiciary.uk/wp-content/uploads/2020/05/FAQ-edition-date-30-April-2020.pdf

[61] *See*: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-01/HCWS329/ and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-_Overview_of_HMCTS_response_A4L_v3.pdf

[62] *See*: https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-and-senior-president-of-tribunals-new-covid-19-restrictions-for-england/

[63] *See*: https://www.gov.uk/government/publications/court-and-tribunal-recovery-update-in-response-to-coronavirus

2021, though documents are still being processed daily. Any documents that would previously be sent to London must now be sent to Companies House in Cardiff.[64] Companies House has developed a service to upload documents online.[65]

On April 16, 2020, Companies House announced that it would temporarily pause the strike off process in an effort to allow businesses affected by the COVID-19 outbreak to update their records and to help them avoid being struck off the register. From September 10, 2020, applications for voluntary strike off have resumed. From October 10, 2020, compulsory strike off by the registrar resumed for companies no longer believed to be in operation.

Companies House have reiterated that if companies do not apply for an extension and their accounts have been filed late, an automatic penalty will be imposed. Appeals to late filing penalties will be treated on a case-by-case basis and appeals based on COVID-19 will be considered under Companies House policies based on unforeseen poor health.

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[64] *See*: https://www.gov.uk/guidance/coronavirus-guidance-for-companies-house-customers-employees-and-suppliers

[65] *See*: https://beta.companieshouse.gov.uk/efs-submission/start?_ga=2.116335620.300031591.1594739227-264965995.1587114758