

HOW WILL AUTOMOTIVE PRODUCTION RESTART AFTER COVID-19 LOCKDOWN?

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The automotive industry, through trade bodies the European Automobile Manufacturers Association (ACEA) and European Association of Automotive Suppliers (CLEPA), has set out a Code of Business Conduct to facilitate the re-opening of Europe's production lines. The Code is a high-level statement of principles that players in the automotive supply chain should aim to abide by. On 13th May the Society of Manufacturers and Traders (SMMT) published its further guide: COVID-19: Automotive Aftermarket Industry Guidance (Guide).

Building on the lessons learnt following the 2008 financial crash, the overarching themes of the Code are 'minimising risks for employees' and working 'in the spirit of a partnership, in compliance with the applicable competition and antitrust laws'. The Guide builds on those themes with a series of principles and related guidance notes to address real practicalities.

Workplace safety

Manufacturers and suppliers across the supply chain must ensure they maintain safe working environments, as 'the minimising of risks for employees and the community at large should have always highest priority'. Firms in the industry should share best practices with partners in the supply chain to achieve this. As expected, the SMMT has coordinated UK industry response in formulating the Guide.

The Code also calls for cooperation in setting common conditions that must be met before employees can return to work. As governments across Europe differ in their response to coronavirus, it is important that the sector applies standard conditions to avoid creating a second wave of coronavirus cases.

At an individual level, companies must communicate properly with employees and provide the requisite training to ensure they return safely to work. The Guide contains detailed provisions around People (including training, health assessment, vulnerable employees, social distancing, hygiene, PPE, mental health, employee travel, operational adjustments and logistics). It also addresses issues related to Place including car parking and working areas.

The automotive sector's strong collaborative track record in setting safety standards gave it a real head start here. What about the legal overlay? The Code and the Guide both make it clear that companies must continue to comply with legislation and related government guidance and to seek appropriate expert advice.

Under UK health and safety law, employers have a duty to ensure, so far as reasonably practicable, that their employees and other people who might be affected by their business, are not exposed to risk to their health safety or wellbeing from their activities. Breach is a criminal offence by the employer, which carries the sanction of an unlimited fine. That sanction would not be insured. It is not legally possible to contract out of the duty. Regulators are treating COVID-19 as a workplace risk that employers must manage.

Employers must discharge this duty by carrying out comprehensive COVID-19 specific risk assessments in relation to each of the activities that employees undertake so as to evaluate the risk and decide on precautions which need to be put in place. The assessments need to be site specific, task specific and individual specific. They need to be kept under review as the position changes and we learn more about the COVID risk. The control measures arising from the risk assessment need to be closely aligned with the latest Government, public health and industry standards. Employers should also keep in mind that the changes which are made to reduce the COVID 19 risk might introduce new risks. These new risks also need to be assessed.

Finally, it is essential that employees are trained on the new ways of working and that an audit or policing system is put in place to make sure that the new systems are followed.

Partnership and Collaboration

Coordination across the supply chain is important to ramp-up production capacities in a timely manner. To avoid wasting finite financial resources, firms must be transparent with partners and provide any necessary information about 'the shutdown, downtime and ramp-up of capacities'. If you are not already, you should consider sharing such information with

your supply chain partners.

Business partners should also consider revising the details of ongoing projects in light of current production capacities. This could involve delaying planning deadlines and project milestones to prioritise more immediate concerns. Where projects are subject to joint venture arrangements there will usually be detailed legal documentation in place. That might need to be reviewed to ensure that general provisions such as budgeting and employee related issues are properly dealt with as well as reviewing, for example, key veto matters. We have published some more detailed guidance on this topic.

The Code is clear that contractual terms, particularly terms regarding payment, delivery and acceptance, must be respected. Although, the Code does acknowledge that a pragmatic approach is required to avoid unnecessary costs. This could include temporary amendments to contracts to reflect current circumstances. The Gowling WLG commercial contracts team can help guide you through the amendment process and properly document such variations.

We are also expecting that, as production ramps up and more working capital (beyond that which has been used up during hibernation) is needed, assistance will be required up and down the tiered supply chain. We are hearing about loans, advanced payments and, in some cases, equity investment. It's clear that restarting production will place extraordinary financial strain on all participants in the supply chain and that a coordinated and collaborative approach will be necessary.

In light of the current crisis, force majeure clauses are receiving increased attention as a possible route out of contractual obligations. Such clauses must also be applied pragmatically, but the Code does not go as far as saying such clauses should not be used. Should you have any concerns about force majeure clauses then please contact our commercial contracts team or our commercial litigation team.

However, such cooperation should not breach applicable competition laws and ACEA and CLEPA have committed to regularly reviewing the legal effects of their coordination efforts. Parties must be really careful as to the data that they share, ensuring that it does not lead to breaches in competition laws, particularly around pricing.

Commercially sensitive information should only be shared with 'partners of the same value chain'. Any exchanges of information with competitors should be structured in compliance with Article 101 TFEU or other applicable competition laws. Our competition and antitrust team are on-hand to assist with structuring such communications in a compliant manner.

Conclusion

The Code of Business Conduct sets out a pragmatic guide for firms as we move towards lifting national lockdowns. We would encourage our colleagues across the automotive sector to read the Code and implement its principles. The Guide offers some more practical guidance to deal with restarting production and will need to be reviewed carefully. We welcome this "safety first" approach to reopening as striking a good balance in a very practical and useful way.

Should you have any queries then please speak to Stuart Young who heads our Automotive Group or your usual Gowling WLG contacts, who remain available to support your business.

The [ACEA](#) represents Europe's 16 major vehicle manufacturers, including BMW, Daimler, FCA, Ford, Honda, Jaguar Land Rover, PSA and Renault. [CLEPA](#) represents more than 3,000 companies in the automotive supply chain throughout Europe.

The [SMMT](#) has also published guidance notes for the [Automotive Aftermarket Industry](#) and for the [Automotive Retail Sector](#) (in conjunction with the National Franchised Dealer Association).

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Author(s)

Stuart Young

Partner - Chair of automotive group,
[Birmingham](#)

 Email

stuart.young@gowlingwlg.com

 Phone

+44 (0)20 3636 7968

 vCard

Stuart Young

Andrew Litchfield

Partner - [Birmingham](#)

 Email

andrew.litchfield@gowlingwlg.com

 Phone


+44 (0)121 393 0400

 vCard

Andrew Litchfield

Amber Strickland

Principal Associate - [Birmingham](#)

 Email

amber.strickland@gowlingwlg.com

 Phone

+44 (0)121 393 0667

 vCard

Amber Strickland