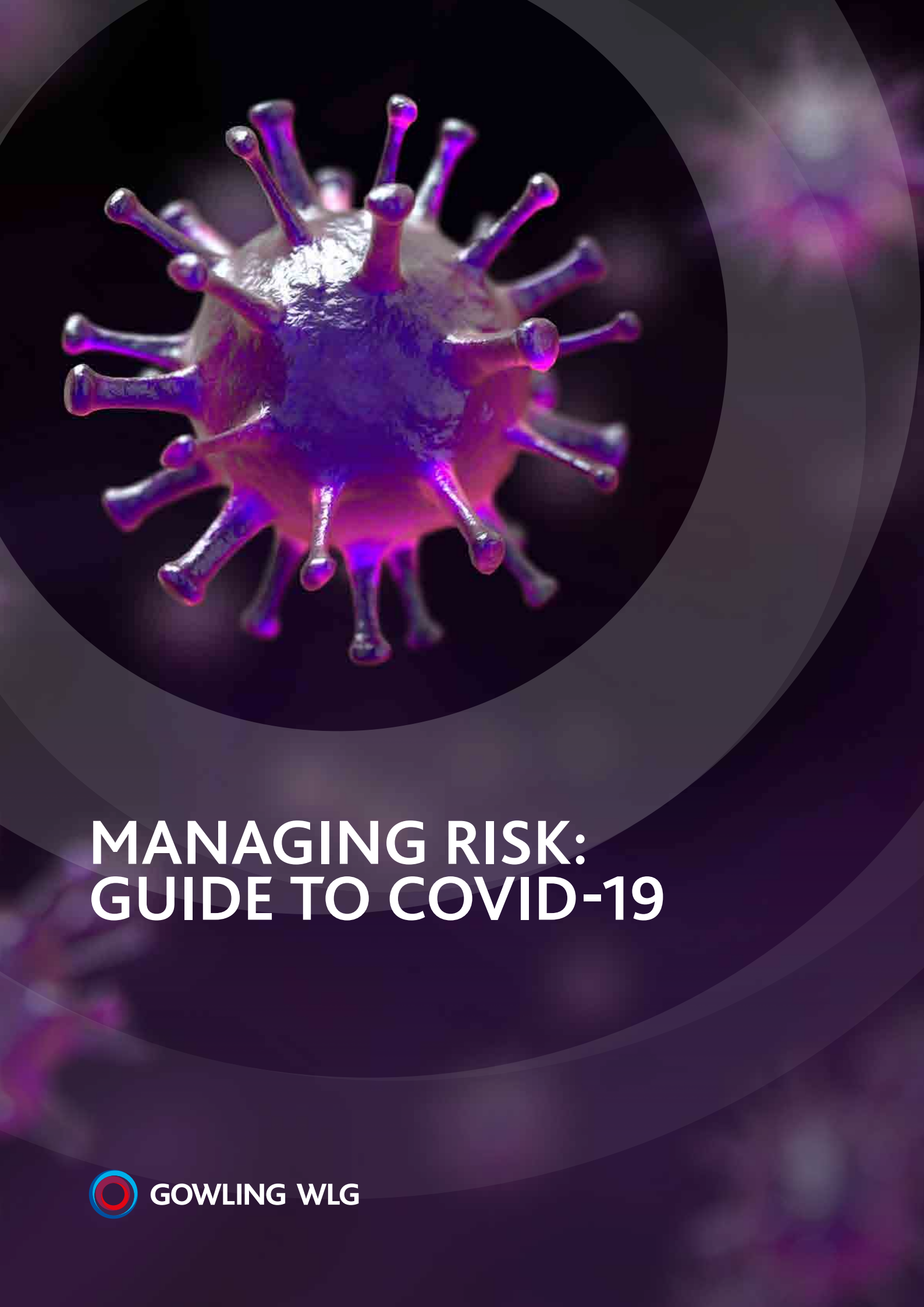


MANAGING RISK: GUIDE TO COVID-19

GOWLING WLG

CONTENTS

INTRODUCTION

AFFECTING COUNTRIES ACROSS THE GLOBE AND PUTTING A STRAIN ON ECONOMIES, GOVERNMENTS AND COMMUNITIES, THE COVID-19 PANDEMIC IS UNDOUBTEDLY THE BIGGEST CHALLENGE THE WORLD FACES TODAY.

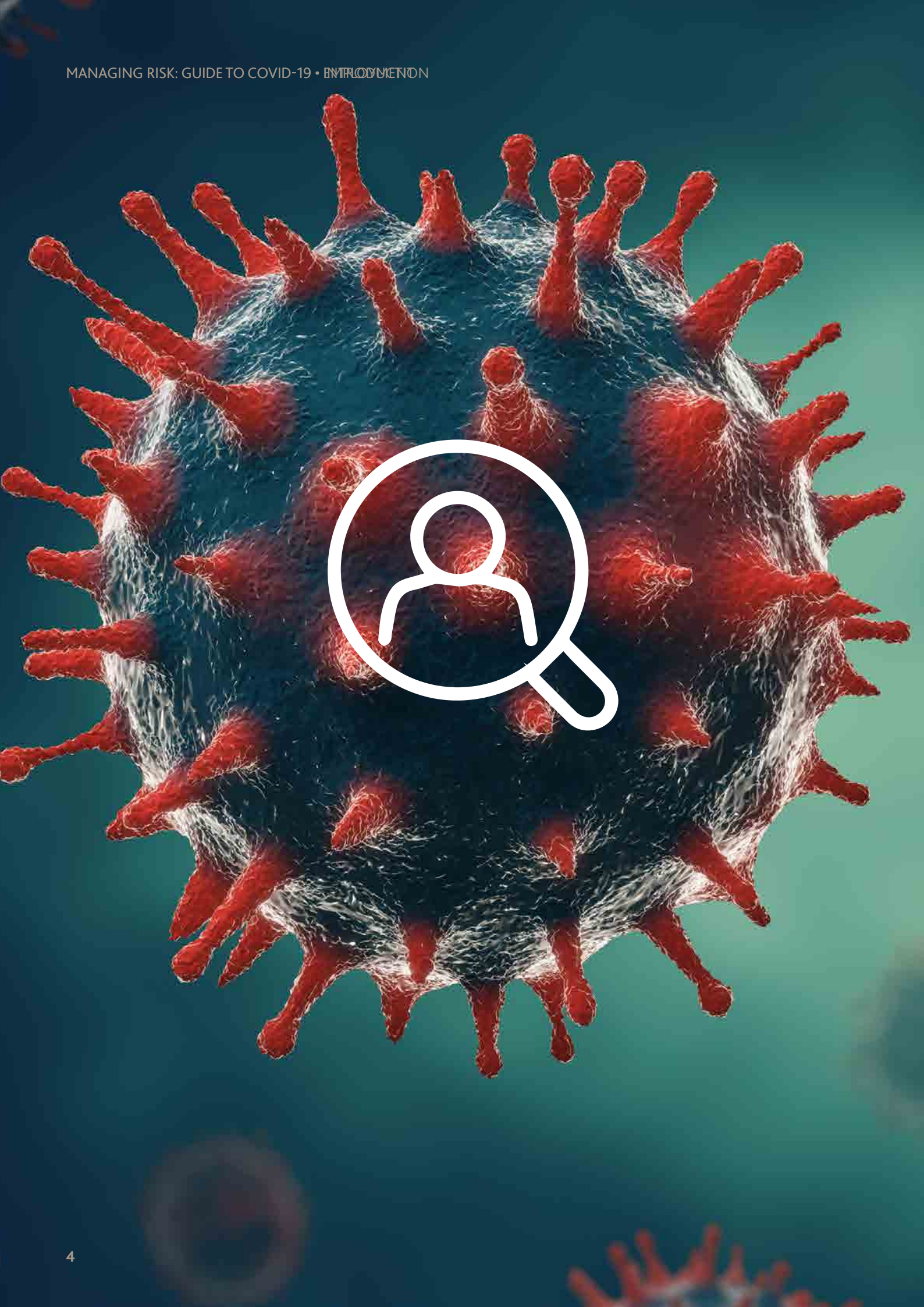
The coronavirus (COVID-19) outbreak is already having a profound effect on businesses worldwide, causing issues such as supply chain disruptions, insurance coverage disputes, employment and human rights, occupational safety, and securities filings to name just a few.

With the situation changing and new developments coming to light by the hour, companies need to adapt in response to rapidly evolving circumstances.

Gowling WLG has assembled a global task force to help our clients manage and navigate this increasingly difficult situation. This guide provides advice on the key considerations and actions businesses should take to respond to and manage the risk of COVID-19.

Topics include:

- Employment
- Construction contracts and supply chains
- Force majeure and the supply chain
- Pensions
- EU export restrictions
- FCA regulatory requirements
- Tax - IR35 reform
- Business insurance
- Public procurement
- Cyber security
- Emergency capital raises for public companies



EMPLOYMENT

WE ARE SEEING UNPRECEDENTED CHALLENGES FOR EMPLOYERS IN MANAGING THE PANDEMIC.

A touchstone of employment law is 'reasonableness' and applying that concept should assist employers in finding a fair balance between the needs of the business and the interests of the workforce. The key to getting this right is to have sound business reasons for decisions and then implementing those decisions in a clear and transparent way.

It is worth remembering that staff will not forget. How you approach the pandemic will resonate amongst the workforce, unions and works councils for many years to come.

CORONAVIRUS JOB RETENTION SCHEME – THE DETAIL

Under the Coronavirus Job Retention Scheme, employers will be able to claim back 80% of the wages (up to £2,500 per month) of employees who have been furloughed (i.e. put on a leave of absence) in response to the COVID-19 pandemic. The guidance provides some much needed detail of the Scheme following the Chancellor's announcement on 20 March, including some detail on which businesses and employees will be covered, what counts as 'furloughing' for this purpose and how employees' wages will be calculated.

When reading the HMRC Guidance, it is important to remember that the guidance is for what employers can claim via the Scheme, not guidance on employee rights.

1. What is the scheme and what period will it cover?

The scheme is designed to support employers whose operations have been severely affected by coronavirus (COVID-19).

Employers can use a portal to claim for 80% of furloughed employees' (employees on a leave of absence) usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage.

The Scheme is a temporary scheme that will run for at least three months starting from 1 March 2020 (to be extended by HMRC if necessary). It is expected that the Scheme will be up and running by the end of April 2020.

Employers can use the Scheme anytime during their operational period.

2. Which employers can claim?

The Scheme is open to all UK employers that had created and started a PAYE payroll scheme on 28 February 2020 and have a UK bank account.

Any UK organisation meeting the above criteria with employees can apply, including:

- Businesses
- Charities
- Recruitment agencies (agency workers paid through PAYE)
- Public authorities

Where a company is under the management of an administrator, the administrator can access the Scheme.

While potentially eligible, the government expects that the scheme will not be used by many public sector organisations.

Where employers receive public funding for staff costs, and that funding is continuing, HMRC expect employers to use that money to continue to pay staff in the usual fashion - and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.

Organisations that are receiving public funding specifically to provide services necessary to respond to COVID-19 are not expected to furlough staff.

It is only in a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, that the Scheme may be appropriate.

COMMENT: The latest guidance states the Scheme is "to assist employers whose operations have been severely affected by coronavirus". While the aim is to help safeguard employees from being made redundant, there does not appear to be a requirement that employers demonstrate they had no other option than to make employees redundant.

3. Who may be placed on furlough leave?

3.1. 28 February 2020 key date

Furloughed employees must have been on the employer's PAYE payroll on 28 February 2020.

Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme.

Employees who were made redundant since 28 February 2020, if they are rehired by their employer may be furloughed.

Employees on unpaid leave cannot be furloughed, unless they were placed on unpaid leave after 28 February.

COMMENT: If rehiring employees previously made redundant, specialist advice will be need on the treatment of redundancy payments and notice payments as well as issues around continuity of employment.

3.2. PAYE is key rather than type of contract

The Scheme appears to be based around PAYE, so anyone registered as self-employed for tax purposes will not be covered by the scheme.

The term 'employee' is used by reference to PAYE, not under the complexities of employment law that distinguishes between 'employees' and 'workers'.

Provided the 'employee' is on the payroll on 28 February 2020, the Scheme can be used. The guidance specifically references "any type of contract", including:

- full-time employees
- part-time employees
- employees on agency contracts
- employees on flexible or zero-hour contracts

COMMENT: Some employers may take the view that those casual or zero hours workers and employees who are not guaranteed work from the employer do not need to be put on furlough leave at all because the employer can instead simply refrain from offering them work. However, this approach is not in the spirit of the scheme which intends to ensure that employees and workers who are subject to PAYE retain a basic income during the crisis stages of the pandemic.

3.3. No work requirement

When on furlough, an employee can not undertake work for or on behalf of the organisation. This includes providing services or generating revenue.

If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for this scheme and employers will have to continue paying the employee through their payroll and pay their salary subject to the terms of the employment contract that was agreed.

3.4. Alternating work/furlough

Employers do not need to place all their employees on furlough. However, those employees placed on furlough cannot undertake work. The minimum furlough period is three weeks.

COMMENT: While the guidance does not expressly provide for alternating periods of work and furlough for sets of employees, it is possible for employers to furlough part of their workforce for 3 weeks only and then furlough a different part of their workforce for three weeks to cover the same work.

3.5. Can an employee request furlough leave?

The guidance is silent on this. While there is nothing to prevent an employee requesting to be put on furlough leave, the employer does not have to agree. It is the employer's decision which employees to place on furlough leave, if any.

COMMENT: It seems that it is also the employer's decision whether to place employees on furlough leave or make them redundant. Potentially redundant employees do not have a right to require their employer to place them on furlough leave as an alternative to redundancy. However, it is hoped that many employers will see the new scheme as preferable to business closure and making redundancies. It is unclear whether refusing to place an employee on furlough leave and making them redundant could amount to an unfair dismissal.

It may seem to some employees that it is unfair that they will be required to continue working, potentially increasing their risk of infection if they are unable to work from home, and others will be permitted to receive a substantial proportion of salary and not be required to do so. However, provided the employer has used appropriate, non-discriminatory criteria to choose who is placed on furlough leave, it is possible for an employer to lawfully choose to furlough only part of the workforce. Some employees may look at this issue the other way and prefer to continue to receive full pay so the employer may find that seeking volunteers for furlough identifies the preferences of individual employees and avoids a feeling of unfairness.

3.6. Can employees be placed on holiday leave instead?

The guidance is silent on this. It is the employer's decision which employees to place on furlough leave, if any.

COMMENT: The Scheme does not contain any provisions that prevent the taking of holiday leave instead. In a separate measure, the Government has amended the Working Time Regulations 1998 (WTR) to allow carry forward of up to four weeks accrued holiday leave. This will allow leave to be taken sometime in the following two years but only where the holiday leave was not taken in this current holiday year as a result of the effects of coronavirus on the worker, the employer or the wider economy or society. See our alert, COVID-19: How Coronavirus is impacting the taking of UK holiday leave - permissible carry over.

While carry over is now permitted, workers who are not on sick leave or statutory family related leave (maternity, paternity etc), can still be instructed by their employer to take statutory annual leave on particular dates, provided that they are given the required amount of notice. The amount of notice will be as contained in the contract of employment. If silent, the default position is that twice as much notice as the period of holiday leave to be taken must be given.

3.7. Need to notify employees

To be eligible for the subsidy, employers should write to their employee confirming that they have been furloughed and keep a record of this communication.

Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.

3.8. Employees with more than one job

If an employee has more than one employer, they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

3.9. Employees is on sick leave

The guidance provides that:

- Employees on sick leave or self-isolating should get Statutory Sick Pay, but can be furloughed after this.
- Employees who are shielding in line with public health guidance can be placed on furlough.

COMMENT: The guidance only deals with employees on sick leave before being put on furlough leave. The Guidance does not address the question of employees who become sick while on furlough leave.

It is likely that once employees are on furlough leave, they cannot then go on sick pay as:

To be eligible for SSP, an employee must have a day of incapacity for work (which sits within a period of incapacity for work). A day of incapacity for work is generally understood to mean one on which a person is not fit, through illness or injury, to perform their duties.

A day of incapacity is defined as - "A day on which the employee concerned is, or is deemed in accordance with regulations to be, incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under that contract" (Section 151(4), Social Security Contributions and Benefits Act 1992).

As such, an employee who has been placed on furlough leave is not incapable of work by reason of illness because they are on furlough leave under their contract because there is no work that they can reasonably be expected to do.

3.10. Employees on maternity leave, contractual adoption pay, paternity pay or shared parental pay

Individuals who are on or plan to take maternity leave must take at least two weeks off work (four weeks if they work in a factory or workshop) immediately following the birth of their baby (the Compulsory Maternity Leave period). This is a health and safety requirement.

If the employee is eligible for Statutory Maternity Pay (SMP) or Maternity Allowance, the normal rules apply, and they are entitled to claim up to 39 weeks of statutory pay or allowance.

Employees who qualify for SMP, will still be eligible for 90% of their average weekly earnings in the first six weeks, followed by 33 weeks of pay paid at 90% of their average weekly earnings or the statutory flat rate (whichever is lower). The statutory flat rate is currently £148.68 a week, rising to £151.20 a week from 5 April 2020.

Where the employee is entitled to enhanced contractual maternity pay, this is included as wage costs that the employer can claim through the Scheme. The same applies where employees qualify for contractual adoption, paternity or shared parental pay.

COMMENT: Employees on statutory family rated leave such as maternity leave can be put on furlough leave. While this will not impact their right to statutory pay, it can impact any enhanced contractual pay.

3.11. Volunteer work or training

A furloughed employee can take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of the employer's organisation.

However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

COMMENT: While work that provides services to or generate revenue for the employer cannot be done, self-improvement training can be undertaken.

4. What can be claimed

4.1. Claim for wage costs through this scheme

Employers will receive a grant from HMRC to cover the lower of 80% of an employee's regular wage or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage. Fees, commission and bonuses should not be included.

At a minimum, employers must pay their employee the lower of 80% of their regular wage or £2,500 per month. An employer can also choose to top up an employee's salary beyond this but is not obliged to under this scheme.

Further guidance on how employers should calculate their claims for Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions is to be provided before the scheme becomes live.

4.2. Actual salary before tax

For full time and part time salaried employees, the employee's actual salary before tax, as of 28 February should be used to calculate the 80%. Fees, commission and bonuses should not be included.

COMMENT: Salary before tax as at 28 February is to be used to make the calculation. When reading the HMRC Guidance, it is important to remember that the guidance is for what employers can claim via the Scheme, rather than guidance on employee rights. To claim under the Scheme, the starting point is salary as at 28 February 2020, but if a salary cut has been agreed since then, that is the salary that would otherwise be payable to the employee and so the revised salary would appear to apply. What you cannot use is any pay increase post 28 February (even if agreed before this date) to calculate the amount that can be claimed via the Scheme.

4.3. Employees whose pay varies

If the employee has been employed (or engaged by an employment business) for a full twelve months prior to the claim, employers can claim for the higher of either:

- the same month's earning from the previous year
- average monthly earnings from the 2019-20 tax year

If the employee has been employed for less than a year, you can claim for an average of their monthly earnings since they started work.

If the employee only started in February 2020, use a pro-rata for their earnings so far to claim.

4.4. Employer National Insurance and pension contributions

Once the proportion of the employee's salary that can claim for has been worked out, employers must then work out the amount of Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions they are entitled to claim.

All employers remain liable for associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on behalf of their furloughed employees.

Employers can claim a grant from HMRC to cover wages for a furloughed employee, equal to the lower of 80% of an employee's regular salary or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on paying those wages.

If employers choose to provide top-up salary, employer National Insurance Contributions and automatic enrolment contribution on any additional top-up salary will not be funded through the scheme. Nor will any voluntary automatic enrolment contributions above the minimum mandatory employer contribution of 3% of income above the lower limit of qualifying earnings (which is £512 per month until 5th April and will be £520 per month from 6th April 2020 onwards).

4.5. National Living Wage/National Minimum Wage

Individuals are only entitled to the National Living Wage (NLW)/ National Minimum Wage (NMW) for the hours they are working. Therefore, furloughed workers, who are not working, must be paid the lower of 80% of their salary, or £2,500 even if, based on their usual working hours, this would be below NLW/NMW. However, if workers are required to for example, complete online training courses whilst they are furloughed, then they must be paid at least the NLW/ NMW for the time spent training, even if this is more than the 80% of their wage that will be subsidised.

COMMENT: This means furloughed employees receiving 80% of their salary, or £2,500 should not dip below their NLW/NMW as they are not working any hours (save for the possible personal training exception).

5. Making a claim?

5.1. What employers need to make a claim

The guidance again stresses that employers should discuss with their staff and make any changes to the employment contract by agreement. Employers may need to seek legal advice on the process. If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment. To claim, employers will need:

- their ePAYE reference number
- the number of employees being furloughed
- the claim period (start and end date)
- amount claimed (per the minimum length of furloughing of 3 weeks)
- their bank account number and sort code
- their contact name
- their phone number

The employer will need to calculate the amount they are claiming and HMRC will retain the right to retrospectively audit all aspects of your claim.

5.2. Claim submissions

Employers can only submit one claim at least every 3 weeks, which is the minimum length an employee can be furloughed for. Claims can be backdated until the 1 March if applicable.

6. What to do post-claim

Once HMRC have received the claim and the employer is eligible for the grant, HMRC will pay it via BACS payment to a UK bank account.

The employer should make your claim in accordance with actual payroll amounts at the point at which it runs its payroll or in advance of an imminent payroll.

The employer must pay the employee all the grant received for their gross pay, no fees can be charged from the money that is granted.

Once the scheme has been closed by the government, HMRC will continue to process remaining claims before terminating the scheme.

7. Rights of employees that have been furloughed

Employees that have been furloughed have the same rights as they did previously. That includes Statutory Sick Pay entitlement, maternity rights, other parental rights, rights against unfair dismissal and to redundancy payments.

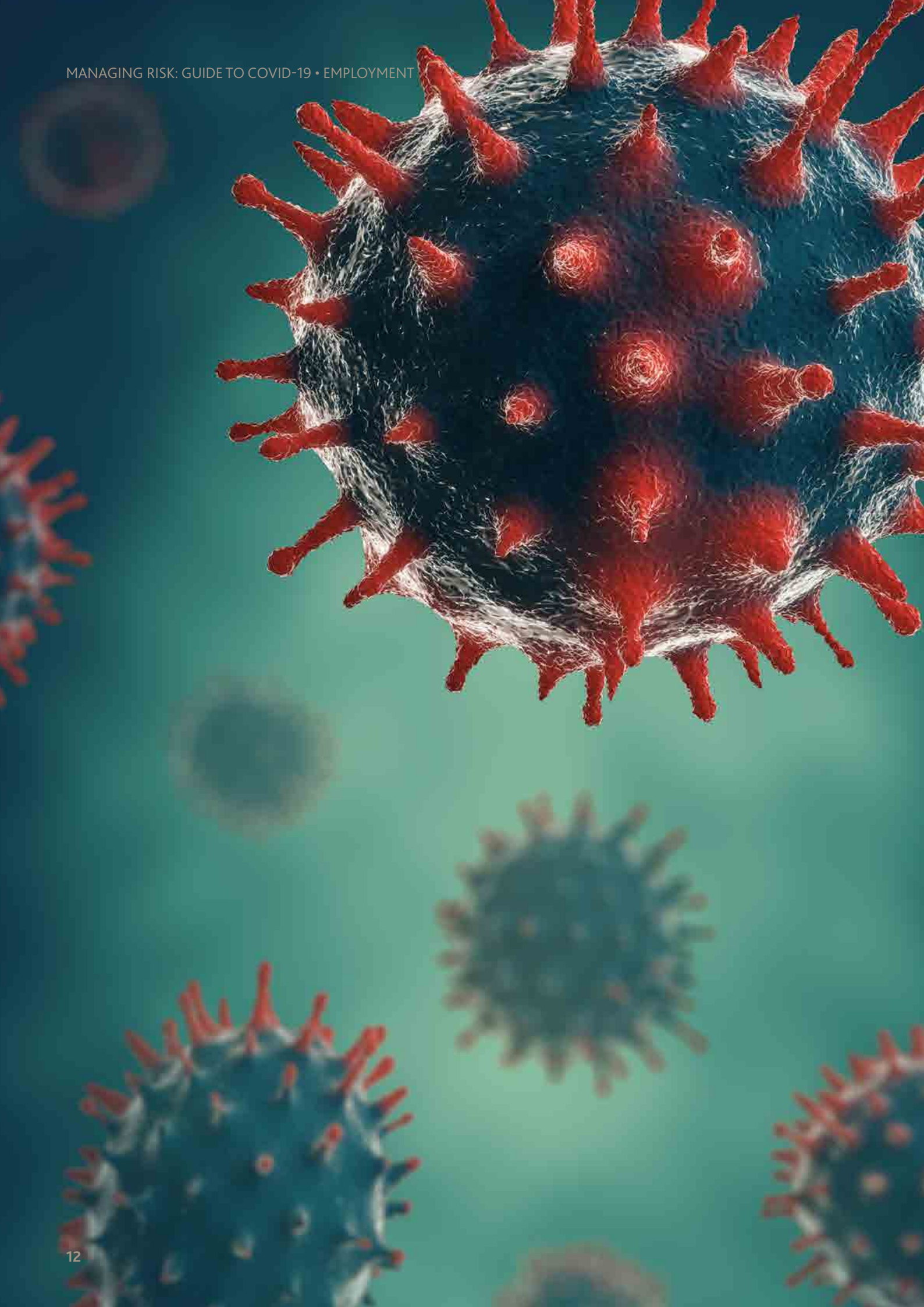
Wages of furloughed employees will be subject to Income Tax and National Insurance as usual. Employees will also pay automatic enrolment contributions on qualifying earnings, unless they have chosen to opt-out or to cease saving into a workplace pension scheme.

Employers will be liable to pay Employer National Insurance contributions on wages paid, as well as automatic enrolment contributions on qualifying earnings unless an employee has opted out or has ceased saving into a workplace pension scheme.

8. Tax treatment of the Coronavirus Job Retention Grant

Payments received by a business under the scheme are made to offset these deductible revenue costs. They must therefore be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles.

Businesses can deduct employment costs as normal when calculating taxable profits for Income Tax and Corporation Tax purposes.



EMPLOYMENT – TAKING HOLIDAY LEAVE – PERMISSABLE CARRY OVER

On 27 March, the Government amended the Working Time Regulations 1998 (WTR) to allow carry forward of up to four weeks accrued holiday leave. This will allow leave to be taken sometime in the following two years but only where the holiday leave was not taken in this current holiday year as a result of the effects of coronavirus on the worker, the employer or the wider economy or society.

This temporary suspension of the 'no carry over' rule will help to alleviate pressure on employers where workers ask to reschedule leave already booked or seek to delay booking leave as a result of social-distancing requirements, business closures and travel restrictions. Instead of insisting that workers take their full holiday entitlement in this current leave year, this amendment means that employers will be able to allow up to four weeks leave to be carried forward for up to two years.

However, while employers will be able to allow or even require carry over where it has a good coronavirus-related reason to do so, this does not mean that it must do so.

What employers should be considering now

1. Start thinking about:

- How you will handle requests to postpone already booked holiday leave. The Easter holidays are nearly here.
- How you will handle requests for leave later in the year; will you allow people to carry over leave?

2. Some workers may welcome a break:

- Even though travel is not possible at the moment, it can still be important to take time away from work.
- Those on reduced sick pay may prefer to take their holiday leave on full pay instead.

3. Listen and communicate

- Be mindful of differing worker circumstances. While some workers will be happy to take time off now as a welcome break, others may need to reschedule their untaken pre-arranged holiday to a later date or risk losing deposits/payments. Some may also be anxious to visit and spend time with friends and family they have not been able to see during the travel restrictions.
- If unable to accommodate a worker's preferred option, clearly communicate the business reasons for that decision.

Now for the detail of the change...

Normal rules still apply

Other than the ability to carry forward all or part of the four week holiday entitlement provided by regulation 13 WTR for up to two years as a result of the effects of coronavirus, the normal rules on taking annual leave under the WTR will continue to apply.

Reminder of the holiday leave normal rules

1. Under the WTR, every worker is entitled to 5.6 weeks' annual leave (subject to special provisions for accrual in the first year of service).

2. A week's leave should allow workers to be away from work for a week. It should be the same amount of time as the working week: if a worker works a five-day week, he or she is entitled to 28 days' leave; if he or she works a three-day week, the entitlement is to 17 days' leave. This is subject to a statutory maximum of 28 days. This means that a worker who works a six day week is only entitled to 28 rather than 32 days leave.

3. Regulation 13 leave is four weeks leave and gives effect to the Working Time Directive (WTD).

4. Regulation 13A leave (or regulation 26A for some pre 1 October 2007 contracts) provides an additional 1.6 weeks and is a matter of purely UK law. It is intended to represent the number of UK bank holidays in a year, but need not be used for them.

5. Until this amendment, if a worker has not taken their full holiday entitlement during a leave year, regulation 13 leave cannot be carried over (reg 13(9)(a)) WTR. It is this provision that is being amended in light of the impact of coronavirus.

6. In contrast it is possible for an employer to agree to the carry-over of regulation 13A/26A leave into the following leave year, but the worker cannot insist on carry-over. Following much case law, exceptions apply regarding the carry over rule in relation to those on sickness absence, family related leave and those incorrectly classed by the employer as self-employed.

7. Under regulation 14, workers are entitled to be paid in lieu of untaken statutory leave entitlement but only in the leave year in which employment terminates, regardless of whether this is regulation 13, 13A or 26A leave.

8. Under regulation 15, workers must give appropriate notice that they intend to take leave. These requirements can be set out in the contract. If they are not, the default position is that twice as much notice as the period of leave requested must be given.

9. Under regulation 15(2), employers can:

    - refuse permission for leave to be taken on particular days provided they give notice which is at least as long as the holiday requested and so long as this does not effectively prevent the worker from taking holiday at all (in other words allow rescheduling at a later time in the leave year); and

    - set the times that workers take their leave, for example for an annual shutdown (exceptions exist for family related leave/sickness absence situations).

Workers may want to take annual leave as an alternative in situations where they would otherwise be on sick leave and on reduced sick pay. This is permitted, although the employer cannot compel them to do so. Workers who are unable to take annual leave due to sickness absence and who have not had the opportunity to take leave within the same leave year must be able to carry it forward for up to 18 months.

What has changed

The current restriction contained in regulation 13(9)(a) WTR that prevents carry-over of any part of regulation 13 leave (four weeks) has been relaxed.

New regulations 13(10) and (11) provide that *"where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation [13] as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave"* to be *"taken in the two leave years immediately following the leave year in respect of which it was due."*

Under new regulation 13(12), an employer may only require a worker not to take regulation 13 leave on particular days (as already provided for in regulation 15(2) where the employer has good reason to do so.

The provision on payment in lieu of untaken holiday leave on termination of employment also makes it clear, that if termination takes place in one of the years into which leave was carried forward, any carried forward leave will need to be paid in full, with only the fresh holiday year entitlement for that year being subject to the pro-rata formula.

What does the change mean?

This is in effect a temporary relaxation of the prohibition of regulation 13 leave introduced in response to the effects of coronavirus. This is not limited to the impact on the individual worker's health but extends to the impact on the employer's operations or on the wider economy or society.

For example, employers will not now need to ensure that all workers take their full leave entitlement in the current leave year. Employers will not need to worry that if they allow all or the majority of their workforce to defer taking annual leave until after the current coronavirus restrictions are lifted, it will be faced with the difficulty of accommodating too many members of its workforce wanting to take holiday at the same time.

Where an employer has a good reason to do so, employers can refuse permission for leave to be taken in current leave year. Instead leave will be carried over. Employers can also cancel previous booked holiday leave for later in the current leave year, provided they give notice that is at least as long as the holiday requested (or in accordance with a contractual provision), and they have a good reason for doing so.

What has not changed?

While carry over is now permitted, workers who are not on sick leave or statutory family related leave (maternity, paternity etc), can still be instructed by their employer to take statutory annual leave on particular dates, provided that they are given the required amount of notice.

The amount of notice will be as contained in the contract of employment. If silent, the default position is that twice as much notice as the period of holiday leave to be taken must be given.

The carry forward period of up to two years applies in relation to regulation 13 leave only, so four weeks leave. It does not apply to the additional 1.6 weeks entitlement under regulation 13A/26A, which remains restricted to the existing provisions for carry over into the following leave year that are subject to agreement.

Deemed order conundrum?

Despite making a distinction regarding the potential permitted carry over period of up to two years in relation to regulation 13 leave but only one year in relation to regulation 13A/26A leave, the WTR still remain silent on the order in which the different class of holiday leave are deemed taken.

Unfortunately case law also does not provide clear assistance on determining the order in which the different classes of leave are taken (this is also important for other reasons such as what must be included in calculating the related holiday pay). Some case law points to the regulation 13 leave being deemed taken first, followed regulation 13A/26A leave and then any additional contractual leave (option 1). However, other case law unhelpfully says that an individual's holiday entitlement must be considered a "composite whole", with each day's leave consisting of entitlement under all sources taken together (option 2).

While we continue to await future expected Supreme Court guidance on this issue, some employers will have deemed order provision in their annual leave policies in accordance with option 1.

Carrying forward holiday leave from the current holiday year into the next should not present any administrative difficulties. However, if some untaken leave from the current leave year is taken into the leave year after the next leave year, so second carry over year, employers will need to keep track of the class of statutory leave being carried forward into that leave year.

HOW CAN UK EMPLOYERS DEAL WITH THE SPECIAL CIRCUMSTANCES CREATED BY COVID-19?

As the virus continues to spread extensively, it poses significant challenges to businesses and raises various points of employment law for employers.

The Legals

1. Reduced hours and/or reduced pay

If an employer anticipates a downturn in business or is forced to close due to COVID-19, in most cases the employer will still be contractually obliged to pay their workforce, unless there is an express contractual right to suspend without pay. If there is not, then employers who stop pay could face claims for breach of contract and unlawful deduction of wages.

Employers may wish to avoid redundancies but genuinely need to reduce pay/hours to keep the business afloat. If in such a positon, the employer will need to vary the contracts of employment to avoid possible later claims for breach of contract and unlawful deduction of wages.

Under normal circumstances, a general variation clause contained in a contract of employment will only assist with variations of a minor nature. It would not allow an employer to make significant changes (but these are unprecedented times so whether a tribunal would take a different view in light of current circumstances is impossible to predict).

Employers are therefore faced with three approaches to securing the necessary variation:

- Employers could seek express agreement with the workforce. This may be possible for small employers, but will be challenging for large employers. There is a real risk that employers won't achieve 100% agreement and that would then create inequality amongst staff (those who had agreed -v- those who had not). Also the speed at which the COVID-19 pandemic is progressing may make this option difficult from a timing perspective.
- Employers may choose to impose the pay/hours reduction unilaterally and in breach of contract. This is likely to impact adversely on employee relations and creates the risk of litigation. Employees could resign and claim constructive dismissal (if they have two years' service). This may not be a significant risk if there is market wide uncertainty as employees are unlikely to voluntarily make themselves unemployed. The potentially greater risk is that employees continue to work under protest. Provided they do not accept the breach, the right to claim unlawful deduction of wages is preserved and claims could be brought in the future both by employees who remain in employment and those who leave.
- Dismissal and re-engagement is also a possibility, but where 20 or more employees are affected, the collective redundancy consultation requirements will need to be complied with to avoid a potential protective award and the time taken to complete that process is unlikely to be available to many employers (see below).

Employers may therefore have to choose the least worse option in light of the extraordinary circumstances they face due to COVID-19. Whichever option is chosen, employers need to clearly communicate.

2. Redundancy

There is a legal obligation to consult with employees in large scale redundancy situations. Large scale for these purposes means 20 or more proposed dismissals over a period of 90 days.

The basic position is that careful redundancy planning and consultation is essential in order to address the risk of unfair dismissal or other employment tribunal claims which may result from redundancy situations. To minimise the risk of successful claims it is important that employers carry out a full and fair procedure in reaching redundancy proposals, selecting employees for redundancy and in effecting those dismissals. Non-compliance could result in the employer facing a potential penalty of a protective award of up to 90 days' uncapped pay per employee if the statutory process is not correctly followed.

When it comes to COVID-19 the position is less clear. These are extraordinary times, with time for planned redundancy exercises a luxury that some employers may simply not have. There is a 'special circumstances' defence available for employers who fail to comply with their collective consultation obligations but it is clear from existing case law that even in insolvency situations there is an extremely high hurdle to be cleared before that defence will succeed. However that is not to say that in these unprecedented circumstances a tribunal might accept in mitigation the need to implement redundancy dismissals without full compliance with the collective consultation obligations in defence of claims for a protective award and reduce any award accordingly.

Dealing with COVID-19 is very much unchartered territory but we expect to see the unprecedented effect of COVID-19 being relied on by employers to explain shorter consultation periods. Whether that will lead to reduced protective awards remains to be seen. As a minimum, employers should consult with the workforce in the time that is available. They will also need to consider other practical challenges including, for example, how to manage the election process and how to conduct consultation meetings where workers are no longer physically in the workplace.

Statutory lay off and short term working

These are relatively rarely used legal provisions which cover situations where there is not enough work for employees to do.

- **Lay-offs:** employer asks an employee to stay at home and not attend work or be paid for a temporary period.
- **Short-time working:** the employer requires their employee to work less than their regular contractual hours, for example a three-day week.

An employer may lay off some employees during a short-term, temporary downturn in work but must have a contractual right to do so. The contract should make clear that the employee will not receive their normal salary during the lay-off period.

If an employer lays off an employee without an express or implied right to do so, it will be in fundamental breach of contract entitling the employee to resign and claim constructive dismissal.

If an employer exercises an express right to lay off an employee or put the employee on short-time working, the employee will in some circumstances become entitled to claim a statutory redundancy payment. Those circumstances are where the employee:

- Satisfies the qualifying conditions to bring a claim by having the required length of service (at least two years) and having been laid off or kept on short-time working for the required length of time (at least four or more consecutive weeks, or a total of six weeks (of which no more than three are consecutive) in any period of 13 weeks.
- Follows the statutory scheme set out in the Employment Rights Act 1996. This requires the employee to initiate that process by serving a written notice indicating their intention to claim a redundancy payment. The employer may then serve a counter-notice if it reasonably expects that further work will become available within four weeks.

Alternatively, such an employee may be entitled to be paid a statutory guarantee payment (SGP) by their employer on up to five "workless days" in a three-month period. A "workless day" is a day during any part of which the employee would normally be required to work in accordance with their contract, when the employee is not provided with work by their employer because either:

- There is a reduction in the requirements of the employer's business for work of the kind which the employee is employed to do; or
- There is any other occurrence which affects the normal working of the business in relation to this type of work.

Guarantee pay is low. It is only £29 per day (£30 from 6 April) making the current max £145.

In the absence of an express clause which deals with how long an employee may be laid off, a contractual right to lay off employees indefinitely is not subject to any implied reasonableness term. This is because Parliament has provided a scheme for balancing the rights and interests of employers and employees in this situation by allowing them to claim a statutory redundancy payment after the prescribed period has elapsed.

But employers should be aware of possible breach of trust and confidence claims if a very long period is imposed. Employers should also be aware that as the contract of employment remains in place, holiday leave will continue to accrue.

3. Statutory sick pay (SSP)

13 March 2020 changes

Previously, in order to qualify for Statutory sick pay (SSP) an employee had to be absent from work due to incapacity. With effect from 13 March 2020 the emergency Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 provide that a person is deemed incapable of work where they are:

"isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England, NHS National Services Scotland(d) or Public Health Wales(e) and effective on 12th March 2020."

In other words self-isolation following government guidance is deemed to be absence from work due to incapacity for the purposes of SSP so that employees have some limited income entitlement rather than being treated as on unauthorised absence. Self-isolation does not mean that they cannot work - and if they can and do work they should be paid anyway. Employers will need to continuously view the Government guidance which is being regularly updated to check who is entitled to self-isolate as the pandemic continues. Please note, whether someone is classed as incapacitated will have knock on effects for some other rights which are discussed below.

Forthcoming changes

In the Budget on 11 March 2020, the Government also announced that SSP will be made available from day one (instead of from day four) for those affected by coronavirus when self-isolating. These provisions will become law in the forthcoming COVID-19 Bill. The Budget also announced measures whereby employers with less than 250 employees can claim a refund for COVID-19 related SSP costs (up to two weeks per employee).

4. Working from home

Can an employer direct people to work from home (where that is possible) as a precaution?

Whether it is possible for an employee to work from home will of course depend on the nature of their work. Where it is possible for employees to carry out their work from home, this will be a reasonable instruction by the employer. The employee will continue to receive their normal pay.

Can an employer direct people not to attend work if they suspect they should be self-isolating?

If there is an identified risk that an employee may have been exposed to COVID-19, then it is reasonable, in light of an employer's duty to protect the health and safety of other employees, that the employer would wish to keep that employee away from the workplace until the risk has passed.

If an employer sends an employee home for a reason falling within government self-isolation advice, it is likely that the employer should treat the employee as being on sick leave and pay them SSP or (if applicable) contractual sick pay. Alternatively, if the employee is able to work from home the employer should allow this. The individual will continue to receive their normal pay.

What about non-asymptomatic self-isolators?

Is it reasonable for an employer to instruct an employee who self-isolates for 14 days because they are living in a household with someone with symptoms but are themselves asymptomatic to go on sick leave? On the flip side can an asymptomatic self-isolator insist they be allowed to work from home?

In such a case, the employee is deemed incapable under the Government guidance. Does such an employee need to be treated as on sick leave and so paid in accordance with the employer's sick pay policy/SSP? Probably. Or can they work from home (where this is possible) and receive full pay? Possibly by agreement. The employer and employee should discuss how the situation will be dealt with. These are uncertain times.

5. Enforced holiday leave

Can annual leave be used by workers to cover periods of absence? Can employers require this?

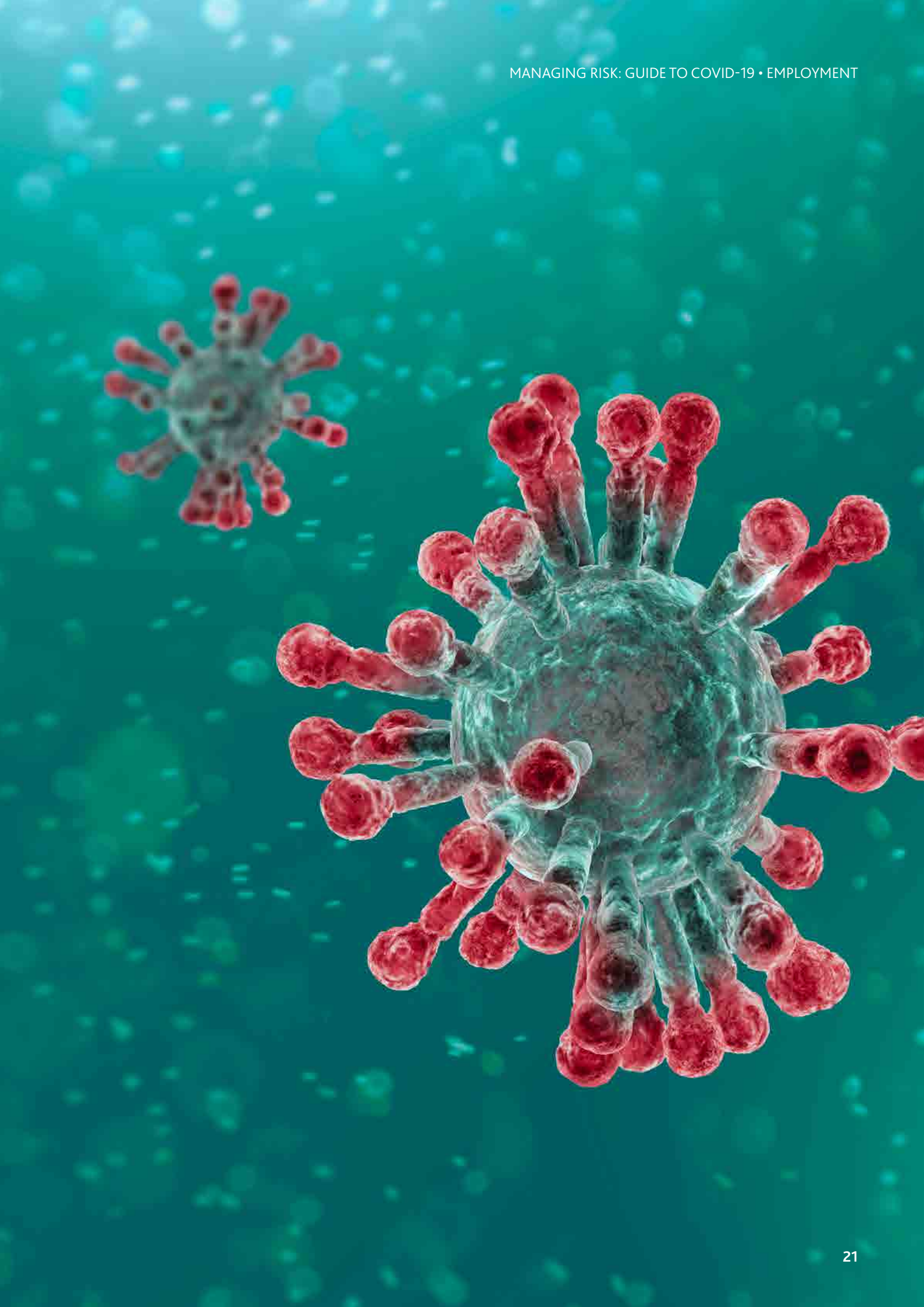
The normal rules on taking annual leave under the Working Time Regulations 1998 continue to apply. Workers may wish to take annual leave as an alternative to scenarios where they would otherwise be on SSP or nil pay. Workers are entitled to take statutory annual leave during sickness absence but may not be compelled by the employer to do so.

Workers who are not on sick leave can be instructed to take statutory annual leave by their employer, provided that they are given the required amount of notice. The amount of notice will be as contained in the contract of employment. If silent, the default position is that twice as much notice as the period of holiday leave to be taken must be given.

6. Maternity leave

Absence from work on account of pregnancy related illness will trigger the start of Ordinary Maternity Leave (OML) automatically if the absence is after the beginning of the 4th week before the expected week of childbirth.

Pregnant women have been advised to socially distance themselves. Is this enough to trigger OML? Probably if treated as sickness related absence. What if they are self-isolating due to someone in their household having symptoms? That is unlikely to trigger OML but currently, there is no clear answer or guidance.



7. Discrimination

Following press reports of Chinese people facing abuse over coronavirus, employers need to monitor closely any allegations or emerging patterns of harassment, based on someone's nationality.

There may also be age discrimination issues relating to people perceived as being older in light of the over 70s being identified as a high risk category, and also disability discrimination issues for those with underlying health conditions (including making reasonable adjustments to help those with a disability to change working practices).

If carrying out health checks ensure that any checks are carried out uniformly amongst all staff - and all visitors. Targeting certain groups could potentially lead to allegations of discrimination (for example age claims if you select older staff for the checks). Employers should also remind staff that they will not tolerate victimisation/harassment etc. of people who have been isolated/may have symptoms.

8. Data protection & health screening

Employers will require consent to undergo medical examinations, including taking an employee's temperature. There may a right to do so included in the employment contracts and in data privacy policies/privacy notices but its unlikely employers will be able to rely on these. Best practice would be to have consent at the time of the examinations and checks themselves.

From a practical point of view, employers can't force employees to agree but providing that the employer has a strong enough justification for requesting the check the employer could refuse to allow employees (and others) in unless they agree to be checked. The risk from employees is that they assert that this is a breach of the implied duty of trust and confidence. However in these unprecedented times and the employer's duty to protect the whole of its workforce this is likely to be a limited risk.

Remember health data is special category personal data. Employers need to ensure it is protected (and tell people it will be). This means being careful not to give information that will readily identify someone who is ill/suspected or having the virus.

WHAT EMPLOYERS SHOULD PRACTICALLY CONSIDER

The full effect of the coronavirus on the UK workforce has yet to be seen. Employers face having to ensure that their staff are protected as far as practicably possible and the wider knock-on effect of precautionary measures such as social distancing and self-isolation. Steps to protect your workforce:

Health advice

- Keep up to date with Government and public health advice - this is fast moving. Share with staff the impact on them at work.
- Basic hygiene.
- Making sure your workplace is clean and hygienic.
- Promoting regular and thorough hand-washing by everyone.
- Providing all employees with an alcohol-based hand sanitiser.
- Encouraging people to use and bin tissues.
- Keep staff regularly updated on what is being done to reduce risks of exposure and to mitigate the effects of coronavirus in the workplace.
- Have a plan for dealing with staff confirmed as having the virus - remember this will be sensitive personal data for data protection purposes.

Agile working

- Consider options with regards to home-working or agile/remote working. Ensure that your IT is fit for purpose and will facilitate home/agile working. Remember your health and safety obligations.

- Consider if home working policies need to be updated. If there is a restriction on home working while also child minding, this may need to be revised.
- Consider issuing staff with laptops so they can work remotely if necessary.
- Limit the amount of face-to-face contact, for example, video conferencing to facilitate remote meetings. For customer-facing organisations, consider introducing or maximising the use of self-service options and online services.
- Consider what preparatory steps should be taken at this point in the event of a lockdown.
- Check that all staff (including contractors) contact numbers and emergency contact details are up to date.
- Keep in touch with staff. Working from home does not suit all and some may live alone, or may have mental health issues which could be aggravated without social contact.

Staff management

- Update staff regularly. Communications from you as to what you are doing and what it means for employees will be invaluable. Government press briefings will raise questions for staff, and social media is rife with information of varying levels of quality and accuracy.
- Publicise all the help available - employee assistance programmes for example, and think about what else you can do to share tips for working from home, keeping children entertained when schools shut and even how to keep fit and healthy is stuck at home.
- Plan for staff shortages particularly where roles cannot be performed from home.
- For employees willing to work additional hours, remember your working time obligations.
- Ensure that people are treated fairly and vulnerable groups are taken into account. Keeping up to date on the latest advice on those classed as vulnerable groups is essential.
- Identify key services and roles that are essential and can't be put on hold, as well as projects or roles that could be temporarily stood down.
- Identify those individuals and managers who have transferrable skills, who can fulfil more than one function and could be allocated to more essential roles.
- If your operations are severely affected, consider:

  - voluntary special leave policy on a temporary basis whereby individuals can opt to take reduced paid or unpaid leave. Be mindful that there could be some employees who are willing to take additional time off and welcome a break, but others may struggle financially if they lose pay.

  - offering a shorter working week or other flexible resourcing arrangements.

  - In both cases, clearly communicate the business reasons to employees.

  - Have a clear communication strategy. This will be key. Ensure employees are aware of measures being taken to manage the situation in your organisation. Understand concerns of the workforce about catching the virus or worries about family or friends.

  - Promote the resources you have available to support people's health and well-being in relation to both physical and mental health.

CONSTRUCTION CONTRACTS AND SUPPLY CHAINS

MINIMISING THE CONTRACTUAL RISKS IN CONSTRUCTION

With the spread of COVID-19, construction businesses are impacted at every level of operation and may well find themselves unable to fulfil contractual obligations, due to factors such as a reduced workforce, or issues flowing through the supply chain.

You need to be aware of how COVID-19 affects your contractual position and who bears the risk of its negative effects.

To what extent can parties reduce or avoid the consequences of non-performance? The contract will of course determine which party bears the risk of any delay/non-performance - if (and only if) the contract contains force majeure provisions, you need to consider whether or not those provisions will be applicable.

If there are no force majeure provisions in the contract, other considerations will apply, as briefly referenced below. Here, we focus on force majeure provisions and non-performance resulting from COVID-19.

FORCE MAJEURE ARISES FROM YOUR CONTRACT (OR NOT)

There is no underlying or prescribed principle of force majeure, so it will only apply if it is provided for in the contract (and only then subject to a number of key considerations as set out below).

The intention of a force majeure clause is to provide for what happens where there is non-performance which is caused by events beyond the control of the party/parties. Where it is applicable, the non-performing party is "excused" in part usually from the adverse effects of the force majeure.

How it affects your business however entirely depends on the specific wording of the force majeure provisions in your contract.

Consider for example the standard form JCT 2016 Design & Build (D&B) contract:

- force majeure is listed as a "Relevant Event", entitling the contractor to claim an extension of time if the contractor can prove that works were delayed as a result;
- force majeure however is not a "Relevant Matter" (which would potentially entitle the contractor to loss and expense).

This follows the general philosophy adopted by the JCT that the risk of "neutral" events should be shared between the employer and the contractor - so, the contractor obtains an extension of time and relief from liquidated damages, but is not entitled to claim loss and expense,. Equally, the employer will not have the right to claim liquidated damages as a result of the works being delayed, but does not pay the contractor for any loss and expense.

Aside from force majeure, another "Relevant Event" under the JCT 2016 D&B contract that may be applicable is clause 2.26.12 which refers to "the exercise after the Base Date by the United Kingdom Government of any Local or Public Authority of any statutory power that is not occasioned by the default of the Contract…..but which directly affects the execution of the Works". The closures and "lock-down" measures now in place, may constitute a "Relevant Event" under this clause (but again not a "Relevant Matter").

WILL COVID-19 CONSTITUTE A FORCE MAJEURE EVENT?

Again, this will depend on the wording of your contract, if it contains force majeure provisions. If there are no force majeure provisions, then it will simply not apply. So:

- where there is a force majeure provision, force majeure may or may not be defined;
- where it is defined, the definition may (or may not) include reference to an epidemic or pandemic or to government actions/decisions; and
- where (say) pandemic is included as a force majeure event, there is likely to be a strong argument that this will include the current COVID-19 outbreak.

Continuing the example above, in the JCT 2016 D&B contract, force majeure is not actually defined in the standard form wording. It is for the party seeking to rely on the force majeure event to prove that the provision applies, but employers should expect contractor claims for force majeure arising out of COVID-19 and its effects.

In terms of building contracts still under negotiation, whether or not to amend the JCT standard wording will generally be a commercial consideration e.g. the developer may wish to be specific (thus hoping to minimise events that fall within the definition) whilst the contractor may wish to resist such an amendment.

WHAT IF THE CONTRACT DOES NOT PROVIDE FOR FORCE MAJEURE?

If there are no force majeure or other relevant provisions in the contract (or indeed they do not apply in these circumstances) and one party does not (or cannot) perform its obligations, what is the position?

In summary:

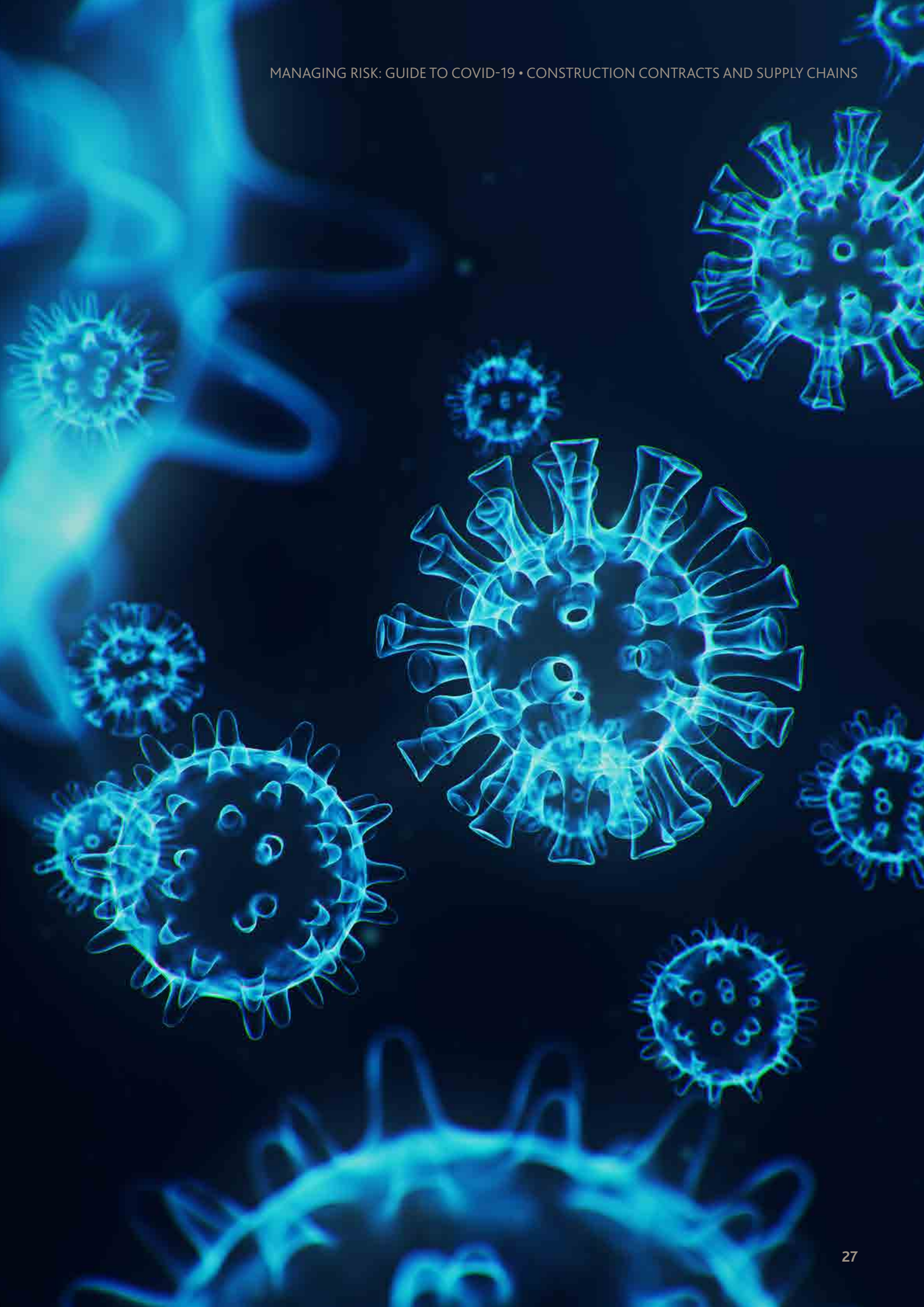
- the contract will provide for any delay to the completion date and liquidated damages or loss and expense, where applicable;
- ultimately, the non-performing party may be in breach of contract resulting in a claim for damages and a possible right to terminate; and
- there may be a potential claim under the principle of frustration, although this is narrowly defined and such claims are not straight forward.

A contract is considered to be frustrated where an event occurs after the formation of the contract and that event is unexpected and beyond the control of the parties and either makes it impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation.

MINIMISING THE RISK

COVID-19 is undoubtedly beyond the control of contractors and, if your contract contains force majeure provisions, these need to be considered. Taking an example, if a subcontractor factory is closed because the Chinese government has closed it, this is an event preventing the subcontractor supplying the contractor. In turn, the contractor cannot fulfil its obligations under the main building contract because their subcontractor has not supplied. That may arguably amount to force majeure, but as set out below, other factors will be relevant, such as whether or not the materials can be obtained elsewhere.

Hopefully you won't end up in a dispute situation but there are some points to consider that will help you to protect your position going forward.



Five points to watch out for if the contract contains force majeure provisions:

1. **Are there contractual notice requirements?**
   Many contracts require notice to be given of a force majeure event as a pre-condition to relying on the event, so check carefully to ensure both the requisite timescales and any provisions governing the service of contractual notices are complied with.

2. **Amendment to the standard form wording**
   Standard terms are likely to be amended at the negotiation stage - check what is and what isn't included as a force majeure event, if the standard clause has been or is to be changed. The force majeure clause might be amended to provide that events in existence at the time of the contract (e.g. COVID-19 now!) or that are foreseeable at the time the contract is made will not constitute force majeure events.

   Bear this in mind if you are just about to sign - will you list "epidemic or pandemic" as a force majeure event?

3. **Duty to mitigate.**
   Subject to provisions under the contract, there is likely to be a duty to mitigate the impact of the force majeure. So contractors will need to try and overcome the force majeure e.g. by using an alternative supplier or use existing stocks etc. They cannot just sit back, do nothing and call force majeure. The obligation to mitigate is limited to reasonable steps so contractors will need to demonstrate reasonable steps have been taken. It also means that if a contractor can partially perform their obligations then they may be obliged to do that - they cannot necessarily use a force majeure event covering a small element of the works to justify suspending all performance. It will be important to be able to prove the steps that have been taken to mitigate the impact, so both from the employer's and the contractor's perspective, keep clear records which will help resolve any potential areas of dispute.

4. **Must the force majeure be the sole reason?**
   Whilst each case turns on its own facts and specific contract wording, the courts have tended towards a construction that does not allow a party to rely on a force majeure event if there was another reason preventing performance e.g. party X's "real" reason for failure to perform is say, defective workmanship (i.e. a breach) and then X seeks to rely on a concurrent force majeure event. If there was no force majeure, could the contractual obligation have been performed? If not, then the courts have tended towards a finding of no force majeure (on the basis that it is not the only causative event). This raises important issues of concurrency which again depend on the facts and contract wording.

5. **Could the event/situation have been anticipated?**
   Subject to the wording of the contract, if the affected party could have reasonably anticipated the event, it might be argued that it cannot be said to be beyond the reasonable control of the party and so in turn, that it cannot be a force majeure event.

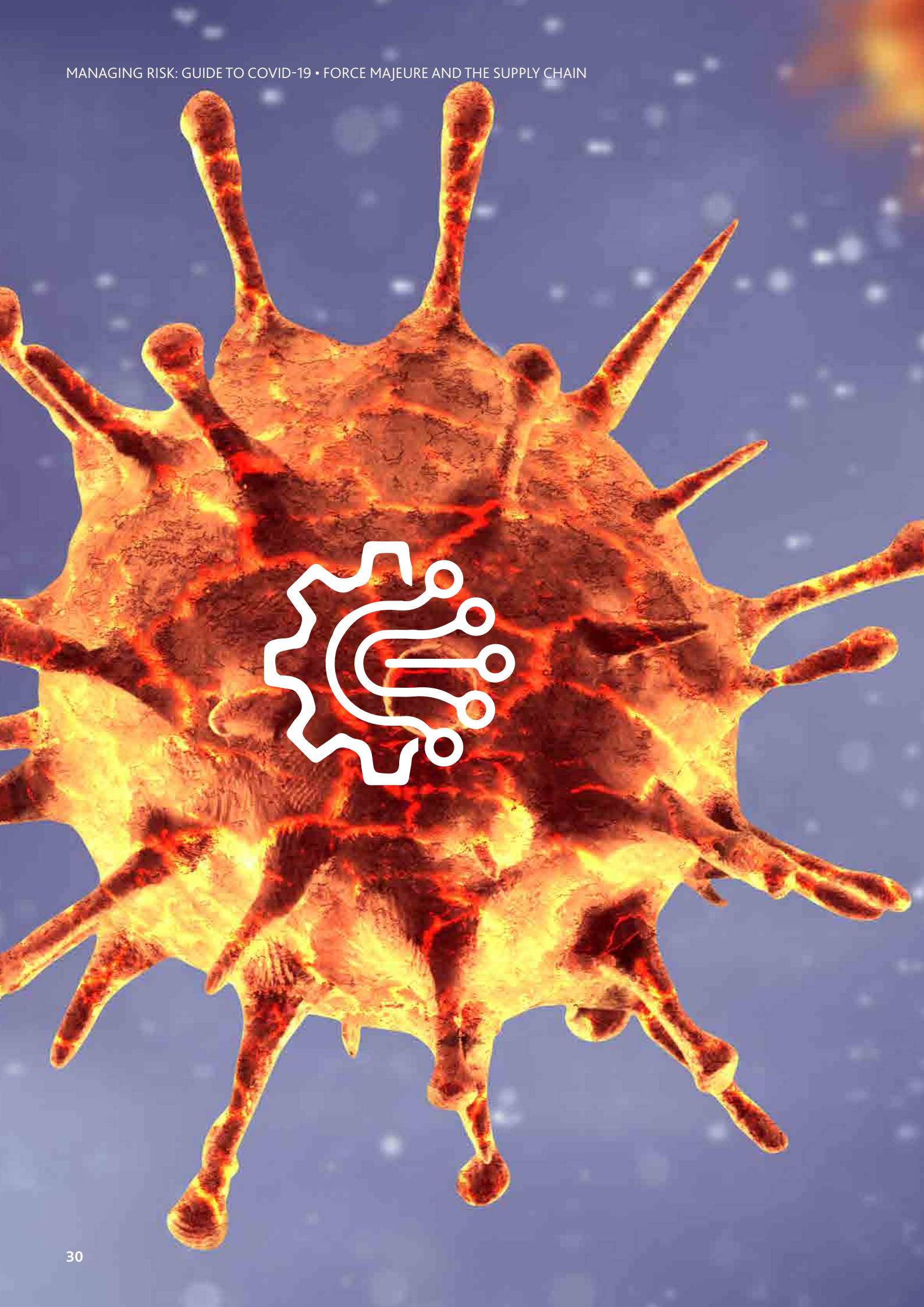
Whilst use of the term force majeure in a contract without defining what force majeure actually means (as in an un-amended JCT 2016 D&B) does leave an uncertainty as to the prospects of success, you can see that it would be difficult to say that factually, the COVID-19 virus was reasonable to anticipate for most contracting parties. Contrast this to for example, UK importers and exporters who will now struggle to claim they had not anticipated the UK might Brexit.

Within the construction industry, the losses arising from non-performance or delayed performance may be significant. The terms of the main building contract are pivotal both for the parties to that agreement and across the project. Agreements for lease and development agreements mostly define force majeure to include anything that entitles the contractor to an extension of time under the building contract (unless caused by the employer).

So if the contractor can claim an extension of time under the building contract as a result of COVID-19, there is likely to be a corresponding entitlement to an extension of time under the contracts up the chain i.e. agreements for lease and development agreements.

There is relatively little case law on force majeure and each case turns on its own specific facts and contract wording. As with all contract interpretation, the courts will start with the natural and ordinary meaning of the words used but the courts (at least English courts) generally interpret force majeure events narrowly as they are treated as a limitation of liability, for which very clear words are required.

That said, when something happens that is self-evidently an unforeseen and major event (e.g. COVID-19) then there will no doubt be claims that this constitutes a force majeure event - it will depend on the wording of the specific contract whether or not that claim succeeds.



FORCE MAJEURE AND THE SUPPLY CHAIN

BUSINESSES ARE SEEING UNPRECEDENTED EFFECTS ACROSS THEIR OPERATIONS, INCLUDING THROUGH THEIR SUPPLY CHAINS.

Disruption in global supply chains may mean that businesses are unable to supply their customers, which poses a real threat to corporates.

Businesses will then be looking to their contracts to understand what happens if: (a) they cannot perform and/or (b) their counterparties cannot perform (or say they cannot).

In particular, can you or your supplier rely on a force majeure clause or the common law doctrine of "frustration"?

FORCE MAJEURE! STEP BY STEP

1. Get the contract.

What the contract says is really important. Force majeure clauses do vary. The application of the specific words to the precise facts is crucial - every case is different.

2. What law applies?

The impact of a force majeure event will depend on the governing law. This note is for contracts subject to English law only. Each country's laws on force majeure do vary. We have also put together alerts on force majeure in Canada, UAE and China.

3. Identify what is causing the supply issue.

COVID-19 does not itself usually stop a contract being fulfilled. It is the consequences of COVID-19 which causes problems. For example, is the issue that a factory has been closed due to a government instruction, or is it because of workforce issues due to lockdown/remote working? Identifying what is actually causing problems is important for the legal analysis.

4. What can be done to work round the problem?

If a factory in Milan is shut, does the supplier have other factories it can use (or acting reasonably, rent?)? Is it impossible to perform or just more difficult/expensive?

5. Does the contract have a force majeure clause?

With no force majeure clause it will be more difficult to claim relief. This means that the person who cannot fulfil the contract could be in breach of contract. If the contract has no force majeure clause then frustration may apply. We have set out a section on frustration below.

6. If there is a force majeure clause then read it!

The section below on force majeure sets out what you need to know. To claim relief under a typical force majeure clause you will normally need to work through the following:

- An event has happened outside the control of the party. This is the specific issue that is hindering performance - see step 3. COVID-19 is not enough. What is the specific consequence of COVID-19 that is causing the problem?
- What is the impact - how is it hindering performance? Is it merely inconvenient (not a force majeure) or does it make performance impossible or "radically different" form what the contract envisages (more likely to be a force majeure) or is it a shade in between.
- Could the force majeure event be reasonably anticipated? For many contracts entered into before January 2020 then COVID-19 issues could not have been anticipated. But it would be more difficult to claim that COVID-19 issues could not have been anticipated for a contract entered into mid-March 2020. This is important as if COVID-19 issues could reasonably have been anticipated, then relief for force majeure is probably not available.
- What can be done to overcome the force majeure event? You will need to use reasonable endeavours to overcome the force majeure impacting your performance.
- Tell the other party. Many contracts expressly require the party impacted to tell the other party within a specified timetable. Even if no express requirement it will be challenging to claim relief for a force majeure without telling the other party.

7. If there is a force majeure event, do read the payment arrangements to work out whether payments are due or not.

The position will depend on the detail of the contract. You will want to understand the payment impact before claiming force majeure.

8. Read the rest of the contract.

You may have other responsibilities (e.g. initiate a business continuity plan) or rights (you may be able to terminate or alter the price regardless of the force majeure).

9. Do not sit back.

Once you have called a force majeure you need to keep trying to overcome the force majeure.

10. Consider if you have any relevant insurance.

A CAUTIONARY NOTE

Force majeure clauses and the doctrine of frustration are deliberately intended to be invoked only in extreme circumstances. Your counterparty may also resist your doing so. If you terminate the agreement when you are not entitled to that will be a wrongful termination which will entitle the other party to bring a claim against you for its losses, which is most likely to be in the form of a claim for damages. Also consider the impact on future business relations in seeking to rely on force majeure - what will the consequences be in 6 months' time. It may be overall better to seek and agree a compromise (say, to defer delivery) than to call force majeure or claim frustration.

LEGAL OVERVIEW - FORCE MAJEURE

Jurisdiction

Force majeure is not a general concept with a standard meaning under English common law - this differs to the position in some other jurisdictions (such as China), so you should check the governing law and jurisdiction of the contract first. In a contract governed by English law, whether or not a party can claim relief for a force majeure event and what constitutes a force majeure event depends on the terms of the contract itself. If there is no force majeure clause, relief for force majeure will not generally be available. Frustration might instead be available - see below.

Definition

If the contract does include a force majeure clause, the definition of force majeure will need to be considered carefully to assess whether Covid-19 and, in particular, whether the impact that COVID-19 is having on your or your supplier's ability to perform is covered.

Most clauses will define force majeure as "an event outside of the reasonable control of a party". They may then specifically refer to various events such as war or Act of God, or, more relevant here, "epidemic" or "pandemic" or "quarantine". In a normal force majeure clause it does NOT need specifically to refer to an epidemic, or pandemic or quarantine to be a force majeure event - the key question is usually whether it is outside the reasonable control of a party.

Although COVID-19 is almost certainly for most contracts an event outside the reasonable control of a party that is not enough. COVID-19 itself will probably not hinder performance, it is the consequences that matter. A government decree which is legally binding ordering a factory shut is almost certainly for a pre-2020 contract an event outside the reasonable control of the parties. Mere non-binding government advice to close a factory might not be.

Most force majeure provisions then go on to say that such event has to "prevent" or "materially affect" a party's ability to perform. There may also be requirements to take steps to mitigate the effects of force majeure (and if no express requirement the courts will still expect the affected party to try to limit the impact). It is these provisions that may well prove the stumbling block for parties seeking relief. Where it has become impossible to perform the contract (e.g. because it is illegal), then it will be much easier to claim force majeure. Commercial considerations such as increasing costs (e.g. due to having to engage more labour or using different means of transport) do not, in themselves, prevent performance and are unlikely to be covered by the provisions. In fact, a party may actually be required to take such measures if there is a contractual duty to mitigate.

There are shades of grey to this depending on the circumstances - if an entire workforce is not available because they are severely ill, or self-isolating, that might be force majeure, but a moderate proportion of work force being unavailable might not be.

Bear in mind that the question is whether performance has been materially affected or prevented (or whatever it is that the clause requires). This means that just not wanting to perform is not enough. Buyers may want to cancel orders as they have a drop in onward demand, however a drop in demand for products due to COVID-19 is most unlikely to be a force majeure event - COVID-19 does not prevent the buyer paying for the products it has contracted to buy.

Another potential obstacle is whether the impact of COVID-19 could reasonably be anticipated. This will depend on when the contract was signed. It is unlikely that the parties to a 2019 contract could reasonably anticipate COVID-19 and the measures that have been introduced. However, if a contract was signed in mid-March 2020, it is probable the courts would consider it should have been reasonably anticipated, and be less likely to allow relief.

Notice

Check the notification requirements in the clause. Force majeure provisions often require immediate or prompt notice to the other party and a failure to do so might mean a party is then barred from relief.

Consequences

You also need to check the consequences of a force majeure event - it may allow a party to terminate after a sustained period or be relieved from performance temporarily, or both. Alternatively it may just relieve liability for breach (effectively the same outcome but legally different).

Interaction with payment

The usual starting point with force majeure is working out whether an issue with the supply of goods or services is a force majeure event.

But also consider what happens on payment. Normally payment is conditional on supply of the goods or services. But that is not always the case. There may for example be a fixed cost that is paid regardless of performance (or for example minimum volume obligations). Therefore it is important to carefully consider the price and payment arrangements.

LEGAL OVERVIEW - FRUSTRATION

Frustration is a doctrine which may - in very limited circumstances - be available to parties in an English law contract that contains no express force majeure provisions. Where there are force majeure provisions, Frustration is unlikely to be available as the Courts will determine that the parties have already considered and made express provision for this risk.

Test

The threshold for proving Frustration is high. In order to be able to claim Frustration there must be an event which occurs after the contract is formed and which:

- is fundamental to the contract and was not contemplated by the parties when the contract was formed.
- is not due to the fault of either party.
- results in performance being impossible, illegal or makes it radically different to that contemplated by the parties when the contract was formed,

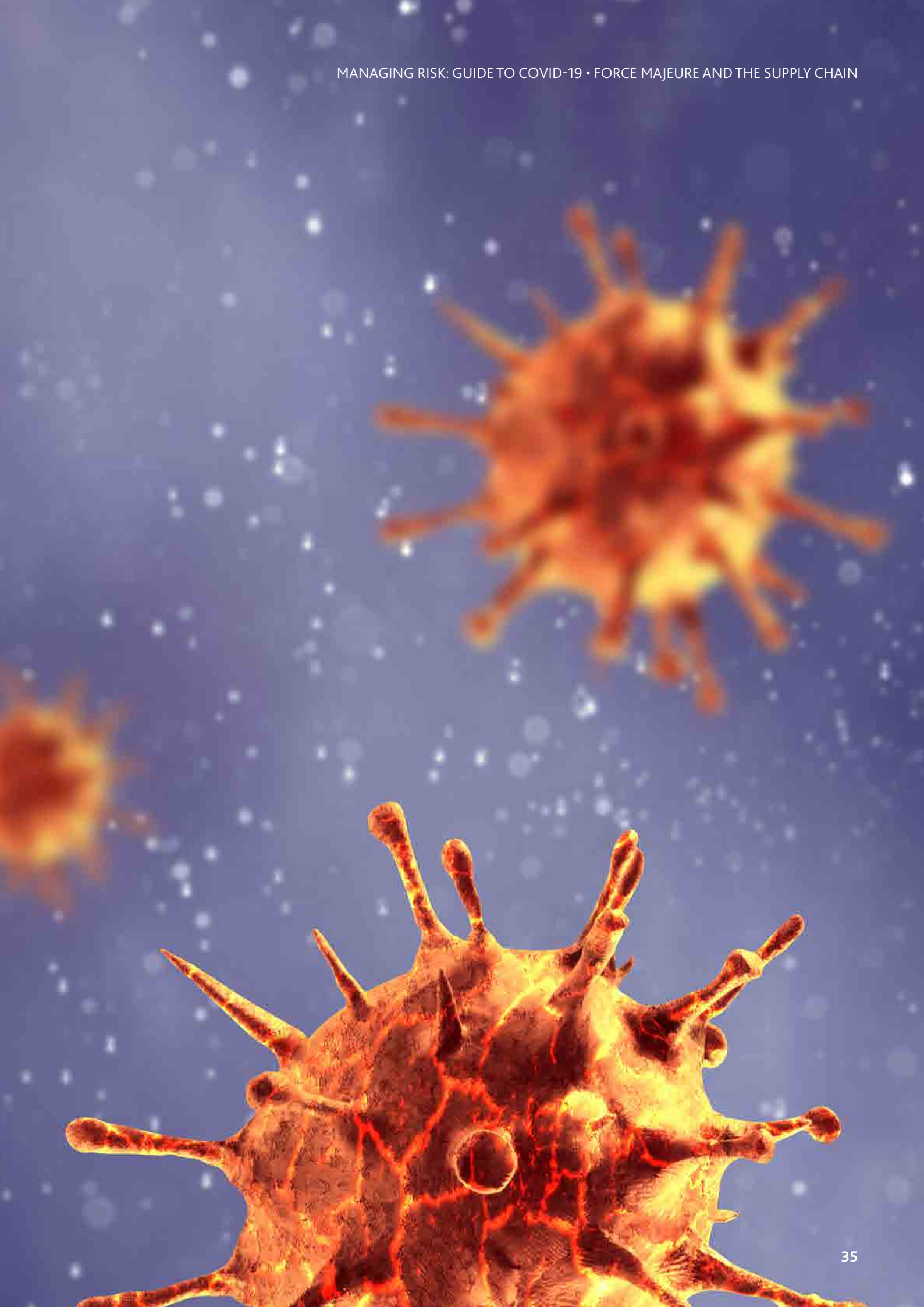
Examples of events to which the doctrine may apply (as seen by cases) include destruction by fire of a venue at which events were to be held and the cancellation of an expected event (such as the postponement of King Edward VII's coronation - although there is debate whether that case would be decided differently in the 21st Century).

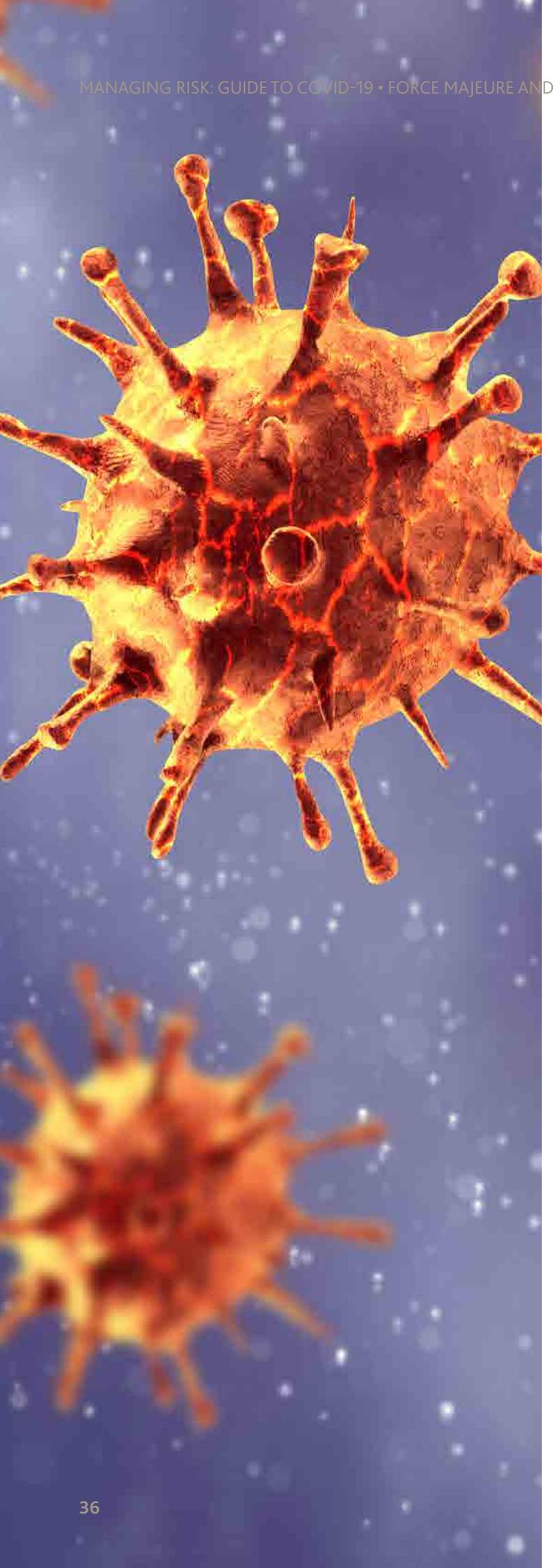
Frustration is therefore not going to be available where, for example, there are simply changes in economic conditions or just as a result of a contract being more expensive to perform.

Normally the high test for frustration is not met, and this is why force majeure clauses are common. However certain consequences of COVID-19 might reach the bar. If the government has passed a law closing all venues then it has become impossible for the venue to open and therefore the venue hire agreement will likely become frustrated. Therefore unlike many other events of force majeure nature we may see that contracts are genuinely frustrated, at law, by COVID-19 issues.

Consequences

Frustration means that the contract is automatically terminated immediately and the parties no longer have to perform future obligations.





FAQS

We are a parts manufacturer, the government has made us shut our factory indefinitely so we cannot manufacture parts to supply to our customers.

Although you would need to look at the specific terms of the force majeure clause in the contract, if the factory is your only means of manufacturing the relevant parts, this is likely to be a force majeure event.

Check the contract for the notice requirements and the consequences of force majeure (e.g. can you or the customer terminate and when - or does the clause just excuse liability for a default whilst the force majeure event continues); and, if a termination, what does the clause say about payment?).

If there is no force majeure clause, if the factory is the only means of manufacturing the goods, it is also possible that the contract has been frustrated. This is because having a factory in which to manufacture the goods is fundamental to the contract, closure is not the supplier's fault and performance would be radically different to that contemplated by the supplier when it entered into the contract.

If you do have other means of manufacturing the goods, such as other factories which are viable/ still open for business, it is less likely that you will satisfy the requirements of the force majeure clause or the doctrine of frustration. You will need to try to fulfil using those alternative means.And this might include not just other factories that you own or already rent from which you could manufacture, but other factories that you could, acting reasonably, now rent or access - that said, obviously with Covid-19, any government decree is likely to apply across all of the UK.

We are a customer in the retail sector, sales have dropped and I want to cancel orders from some of our suppliers.

You should look at the relevant contracts to see if you have the contractual right to cancel orders irrespective of force majeure, as there may be a simpler way to cancel.

Otherwise, unless the force majeure clause (if there is one) specifically addresses falling demand from your customers in these circumstances, it is very unlikely that this will constitute force majeure as the drop in sales does not prevent you honouring your orders.

Frustration will not be available here, as again, honouring your orders is not impossible. You will need to seek a negotiated arrangement with the suppliers, asking suppliers to share your short term pain in return for a longer term opportunity.

Can we pass our increased costs on to our customers?

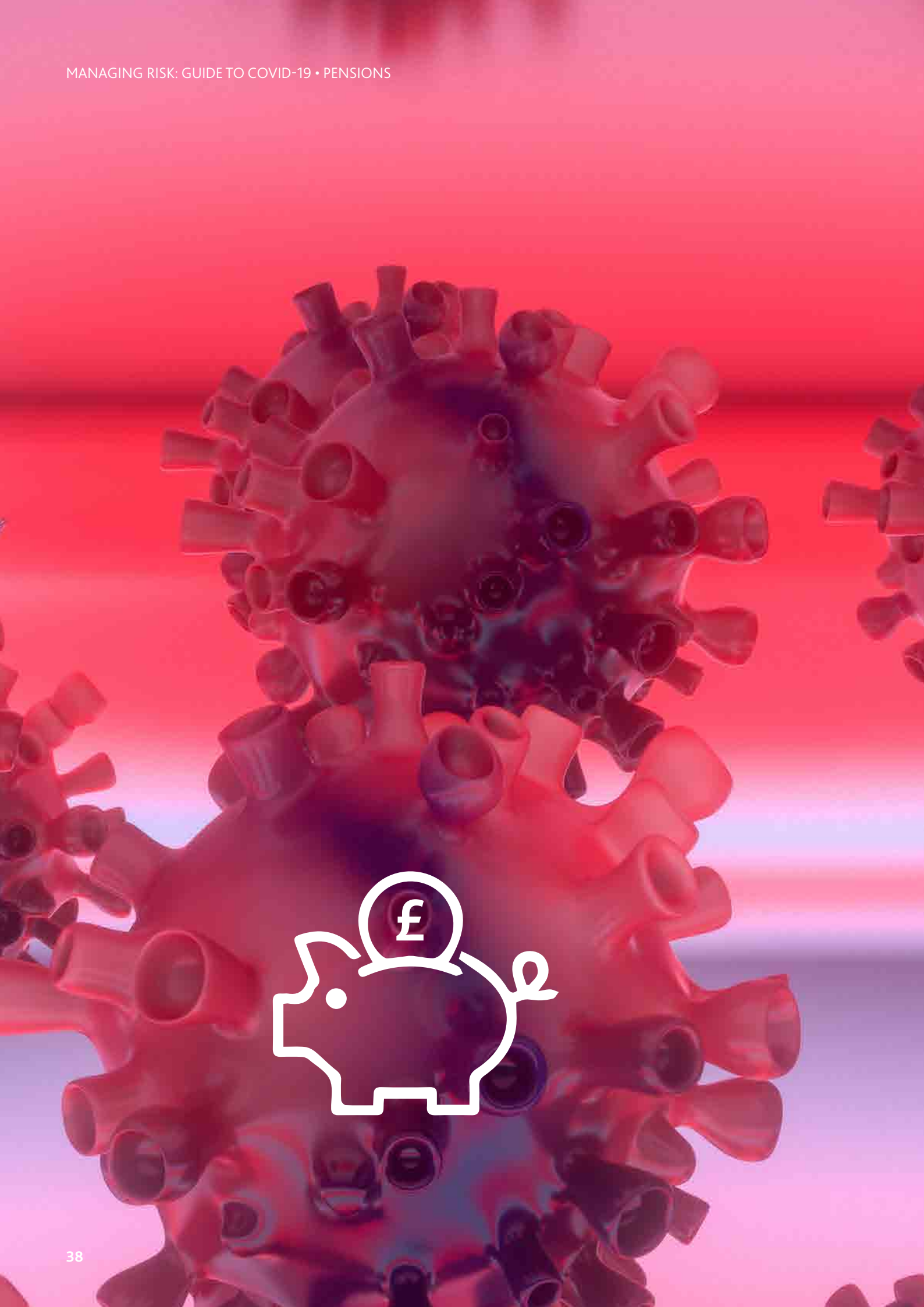
This depends on the terms of the contract. Start by considering the position if there was no force majeure. If the price is fixed then the supplier will be stuck. However if the price has an open book element (e.g. fixed cost plus transport costs) then the price may well adjust.

Alternatively look at the force majeure clause. Normally each party bear its own costs. However sometimes the force majeure provisions may specify whether you can pass on your extra costs and expenses incurred as a result of force majeure.

All of that said, an increase in costs is very unlikely to allow for force majeure (absent very clear wording in the clause) or frustration.

We supply various healthcare products and are seeing unprecedented increased demand for our products. In most of our customer contracts we have various volume related incentive mechanisms such as rebates. Can we use the force majeure clause to scrap the rebates?

The simple answer to this is no; and the long answer is almost certainly not - force majeure clauses are not drafted or intended for use to improve the commercial terms of a contract for a party. Frustration will not be available as there is no issue of radical difference or impossibility of performance.



PENSIONS

WHAT PRACTICAL STEPS CAN TRUSTEES TAKE NOW TO PLAN AND PREPARE FOR INTERRUPTION TO BUSINESS AS USUAL?

BUSINESS CONTINUITY

1. Ask service providers to confirm that they have business continuity plans in place

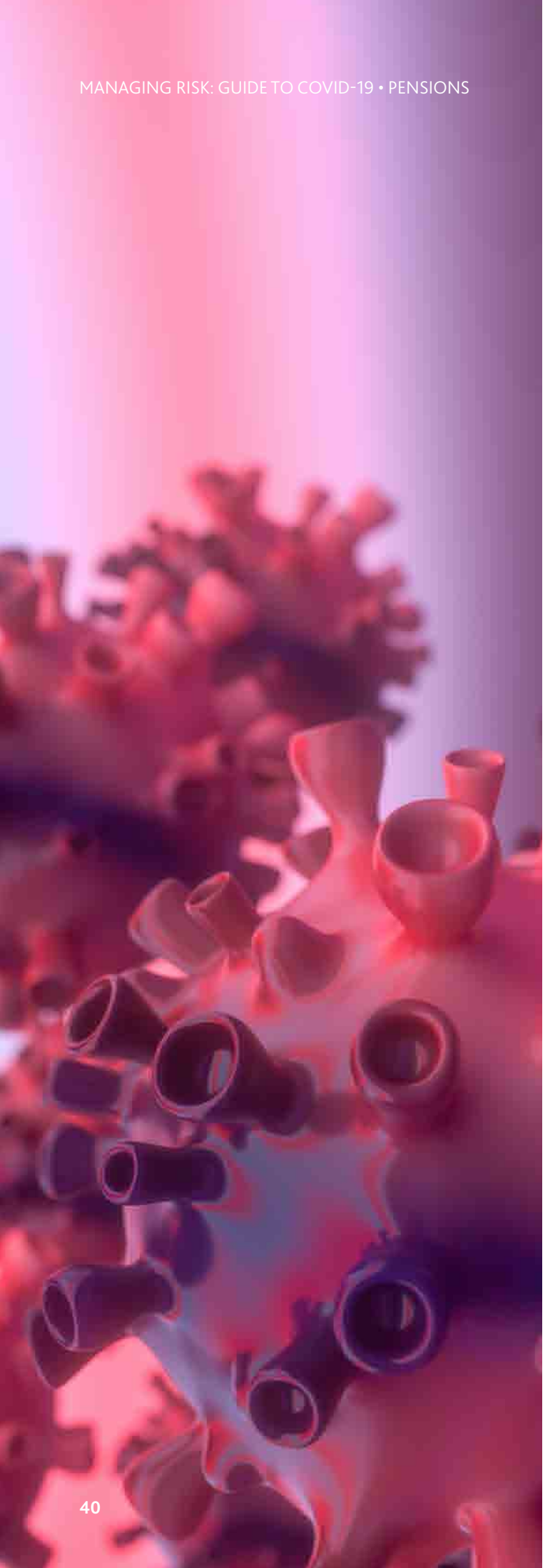
Trustees are reliant on third parties such as administrators to provide many day-to-day services to members. Most professional service firms will have well-developed and tested business continuity plans in place to ensure an acceptable minimum level of service is provided. If they haven't already volunteered this information, ask your contacts at key third party service providers to confirm that they have plans in place for dealing with spikes in staff absences, remote working and meetings via telephone or video conference.

2. Put in place steps to mitigate against the disruption of time sensitive or business critical projects

There are certain projects that need to be completed by hard deadlines or which are business critical to the employer and/or trustee. An example this month is the submission of contingent asset documentation to the Pension Protection Fund.

Trustees and their advisers should look ahead to the coming quarter and:

- determine if there are any time sensitive or business critical projects;
- consider delaying projects which are not time or business critical. This will provide more capacity to complete tasks that do need to be completed by a specific deadline or which are strategically important to the trustee;
- identify if there are any critical milestones or roles and plan for dealing with these being missed or unavailable;
- consider if there are practical mitigations which could avoid challenges in the future (e.g. could documentation be submitted to the PPF earlier than the end of month deadline?); and
- put in place contingency plans to deal with projects that need to meet deadlines or continue through an escalation of the outbreak.



TRUSTEE MEETINGS AND DECISION-MAKING

3. Check that trustee meetings can be held remotely

Trustee meetings do not necessarily have to be held in person. There do, however, have to be provisions in place in relevant governing documents that allow meetings to be held electronically or by telephone / video conference. The relevant powers will usually be set out in the trust company's articles of association (for corporate trustees) or the scheme's trust deed and rules (for individual trustees).

4. Ensure that the trustees can continue to take decisions

A sharp rise in the level of cases raises the prospect of 'key person' risk. In particular, trustees may need to consider whether:

- they should designate a reserve chair for main trustee meetings and sub-committees;
- meetings will be quorate in the event of widespread illness and how this will be handled;
- powers are suitably and clearly delegated to allow the trustees to function without being too reliant on individual trustees; and/or
- authorised signature lists are up to date and suitably flexible to permit authorisation of instructions;

In addition, trustees might want to pre-agree actions such as the formation of an emergency response committee and having stand-by trustee-candidates ready to fill vacancies (whether on a temporary or permanent basis).

MEMBER COMMUNICATIONS

5. Get ready to deal with a spike in member queries

After seeing the world's equity markets fall sharply, many people are worried about the immediate and longer term impact on their finances. In addition, some members may be concerned that there will be an interruption in the payment of their benefits and seek reassurance. In both cases, this could lead to a spike in member queries. Trustees can take several practical steps to help deal with an increase in member queries:

- prepare a statement dealing with anticipated frequently asked questions and make it available to administrators who are fielding member queries. There may need to be a specific section dealing with concerns from members approaching retirement who are concerned about the impact of lower defined contribution / AVC fund values;
- this statement could also provide reassurance to members in terms of short-term turbulence in the markets versus the trustees' focus on investing for the long term; and
- direct members to information pages set up online where trustees can provide relevant information without placing additional strain on administration teams.

SCHEME FUNDING AND INVESTMENT

6. Consider the impact on the strength of the employer covenant

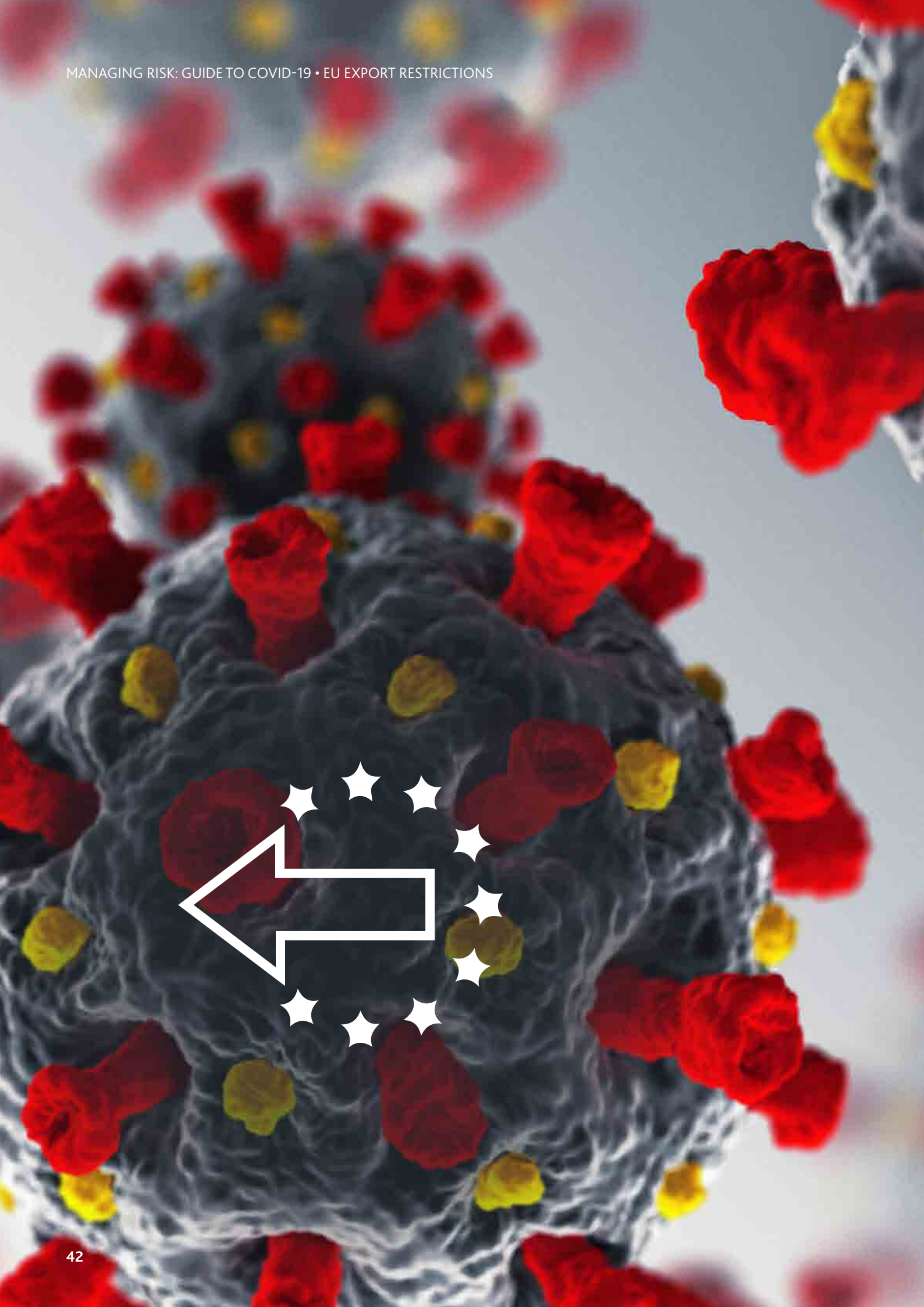
Certain sectors are being severely impacted by the restrictions arising from attempts to tackle coronavirus. Even sectors that are not immediately impacted will have to deal with the financial shock caused by the sudden slowdown in world trade. They will also have to deal with unanticipated costs of materially higher employee absences, putting in place business continuity plans and complying with regulations issued under the government's emergency powers legislation.

Trustees should discuss the potential impact on the employer covenant with their covenant advisers and liaise directly with their scheme's employer to understand its contingency planning and business impact assessment and/or the mitigating steps it has taken. This will inform a decision on whether trustees need to open discussions with sponsoring employers or review funding documentation. Trustees might also need to consider requests from employers for flexibility on the payment of deficit repair contributions and/or review the scheme's recovery plan and consider alternative forms of security.

7. Scheme investments

Initial muted responses from the market have been replaced by volatility, with a sharp fall in equities across the world and an increase in demand for bonds. Central banks are responding by cutting interest rates and providing additional liquidity. The fall in interest rates will negatively impact on gilt yields and this could have an impact on the discount rate used in valuations. This combination is likely to see deficits increase or, at least, not fall by as much as might previously have been anticipated.

Trustees should talk to their investment advisers and discuss whether their current investment strategy remains appropriate. In addition, if any investment changes are being planned, discuss with the scheme's investment advisers as to whether it is sensible to progress at this point in time.



EU EXPORT RESTRICTIONS

ASIDE FROM THE EXPORT OF SENSITIVE (MILITARY / DUAL USE) GOODS, MANUFACTURERS HAVE FACED VERY FEW HURDLES TO EXPORT PRODUCTS OUT OF THE EUROPEAN UNION (EU).

However, the EU looks to be one of the first major economies to adopt trade measures to stem sales of products to overseas customers in the interest of the protection of public health during the COVID-19 crisis.

With effect from 15 March 2020, the export of Personal Protective Equipment, which covers equipment such as masks, protective spectacles and visors, face shields, mouth-nose protection and protective garments, will be subject to obtaining an authorisation from the EU Member State of export. The initial restriction is set to last for six weeks but this could be extended by the European Commission with relative ease. We understand that the UK will be treated as a Member State for the purposes of the export restrictions and will therefore not be treated as a third country for export purposes. The European Commission is providing support to Member States to adopt a process for establishing processes to enable authorisation application and review.

Article XX of the World Trade Organization's General Agreement on Tariffs and Trade, to which the EU is a signatory on behalf of the Member States, allows for deviation from the rules and principles of non-discriminatory measures against third countries and/or restriction of free trade in a number of exceptional circumstances. These circumstances include the protection of human health.

UK and EU exporters should consider what further export restrictions may be introduced in the coming weeks. Measures could foreseeably extend to medical equipment, consumer healthcare products and food. Therefore supply chain planning and reviewing agreements with non EU customers is vital to understand the risk landscape.

FCA REGULATORY REQUIREMENTS

CORONAVIRUS – A NEW REGULATORY RISK FACING FIRMS IN THE UK FINANCIAL SERVICES SECTOR

The full impact of COVID-19 is yet to be determined but already, it has led to severe market volatility, interest rate cuts and diminished consumer confidence.

The UK has moved from the 'Contain' to 'Delay' phase in its response to COVID-19, with anyone displaying symptoms of COVID-19 being requested to self-isolate. This is a fast-moving picture, and firms should watch out for further developments.

All UK Financial Services firms will be expected to implement measures to protect and support their staff from being exposed to or contracting COVID-19, and observe relevant UK Government policy implemented from time to time.

However, regulators will also be expecting firms to take all reasonable steps to ensure they continue to meet their regulatory obligations and are able to continue to operate effectively. The FCA has made clear that, together with the Bank of England and HM Treasury, it will be reviewing the contingency plans of a wide range of firms which will *"include assessments of operational risks, the ability of firms to continue to operate effectively and the steps firms are taking to service and support their customers."*

CONTINGENCY MEASURES - SIX KEY CONSIDERATIONS

While these measures are by no means exhaustive and individual firms should consider the operational risks in the context of their specific business models, firms should consider the following when determining whether their contingency arrangements are adequate:

1. Governance arrangements

Given the serious threat of COVID-19 to particular groups, including the elderly and those with underlying health conditions, and the fact that the full threat of COVID-19 is as yet unknown, it is imperative that firms ensure they have a robust crisis management policy in place and identify all internal personnel who carry out key governance functions. Firms should prepare for the risk that Senior Managers approved by the FCA/PRA under the Senior Managers and Certification Regime (SMCR) may be personally impacted by COVID-19 and that their roles may need to be temporarily carried out by others who may need to be pre-approved by the relevant Regulator.

Businesses should also consider the impact of COVID-19 on the running of the Board and that sufficient contingency arrangements are in place to ensure continuity of Board decision-making. Examples may include Board members dialling in to meetings remotely so that they are not all in the same location, thereby minimising the risk of the whole Board contracting COVID-19 if one member has it. Firms should also consider the impact on any quorum requirements for Board meetings and meetings of any relevant sub-committees responsible for ensuring effective governance and oversight over the business.

2. Cyber resilience

The European Central Bank has recently warned banks to prepare for an increase in cyberattacks as cyber-criminals seek to take advantage of potential chaos caused by COVID-19. Firms should ensure that mass staff shortages do not impact on their cyber-resilience and ability to withstand malicious attacks.

There have been press reports of a significant rise in the number of phishing emails in which cyber-criminals take advantage of fears over COVID-19. Given the impact of COVID-19 on financial markets, there is a high risk that cyber criminals may attempt to manipulate investors through similar phishing exercises. Financial firms should ensure they are taking all reasonable measures to shield their customers from such practices.

Firms should also ensure that their IT systems are able to cope with increased demand from consumers for online services. For example, self-isolation measures may mean that bank customers may be forced to use online services rather than using branch services, thereby increasing the strain on online services.

3. Treating customers fairly

Firms should ensure they are continuously assessing the impact of COVID-19 on customers and ensure they treat customers fairly and consider the needs of those potentially affected by the Coronavirus. The potential risks of COVID-19 are wide-ranging and could include certain businesses becoming insolvent due to worsening trading conditions and increasing unemployment levels. As a result, some consumers may face severe financial difficulties, for example, not being able to meet mortgage or other credit commitments. Firms should ensure they identify any particularly vulnerable customer segments and treat them accordingly.

COVID-19 has had an unprecedented impact on financial markets, causing billions to be wiped off stock markets worldwide. The European Securities and Markets Authority (ESMA), together with National Competent Authorities, have made clear that:

- all financial market participants, including infrastructures, should be ready to apply their contingency plans, including deployment of business continuity measures, to ensure operational continuity in line with regulatory obligations;
- issuers should disclose as soon as possible any relevant significant information concerning the impacts of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under the Market Abuse Regulation;
- issuers should provide transparency on the actual and potential impacts of COVID-19, to the extent possible based on both a qualitative and quantitative assessment on their business activities, financial situation and economic performance in their 2019 year-end financial report if these have not been finalised or otherwise in their interim financial reporting disclosures; and
- asset managers should continue to apply to the requirements on risk management, and react accordingly.

Insurers should also be carefully managing the impact of coronavirus on their operations. With the travel industry being significantly impacted by COVID-19, insurance companies are likely to face a rise in the number of claims for cancelled holiday bookings.

Firms should ensure that their operations can continue to handle claims in accordance with regulatory requirements. They should also treat customers fairly, in what is an anxious time for many, and by being clear in their communications as to what exclusions may exist which may impact on any claims resulting from COVID-19.

Firms in all sectors of the financial services industry should prepare for increased levels of customer contact. Consumers, whether they be investors who are worried about the impact on their investments or holiday makers who want to claim on their travel insurance policies, are understandably concerned about the impact of COVID-19 on their circumstances and firms should ensure they are treating customers fairly in their responses to increased consumer engagement.

4. Systems and controls

The FCA has stated in its most recent statement *"we expect firms to take all reasonable steps to meet their regulatory obligations. For example, we would expect firms to be able to enter orders and transactions promptly into the relevant systems, use recorded lines when trading and give staff access to the compliance support they need. If firms are able to meet these standards and undertake these activities from backup sites or with staff working from home, we have no objection to this."*

As such, firms should ensure that for any employees permitted to work from home whose activities are ordinarily subject to routine oversight and monitoring in the workplace, they continue to be monitored when working remotely. This may, for example, mean enabling telephone call recording for home workers and enabling secure remote access to work systems.

Firms should also consider the possibility of imposing requirements on a proportion of staff to work remotely from home in the absence of any governmental policy requiring businesses to enforce remote working. Given the high risk of contagion of COVID-19, this may mitigate the risk of mass staff absence/illness where a handful of infected individuals could potentially infect the entire workforce.

5. Outsourcing arrangements

FCA/PRA regulated firms which outsource services, in particular critical or important services, should be monitoring their outsourcing arrangements closely. The regulated firm remains responsible to the relevant regulator for the activities being conducted by outsourced providers. In the event that the operations of the outsourced provider are impacted by COVID-19 to the extent that it can no longer meet its obligations under the outsourcing agreement, the regulated firm should take swift action to ensure continuity of business.

6. Capital and prudential considerations

Firms need to consider what the impact would be on their business if a number of their customers become insolvent. This could challenge firms' liquidity and capital positions, and previous stress-testing and related assumptions may need to be reviewed in view of a possible global recession and volatile or declining market conditions. Firms with significant exposure to customers in the retail, leisure, hospitality and catering sectors in particular may need to re-visit this.

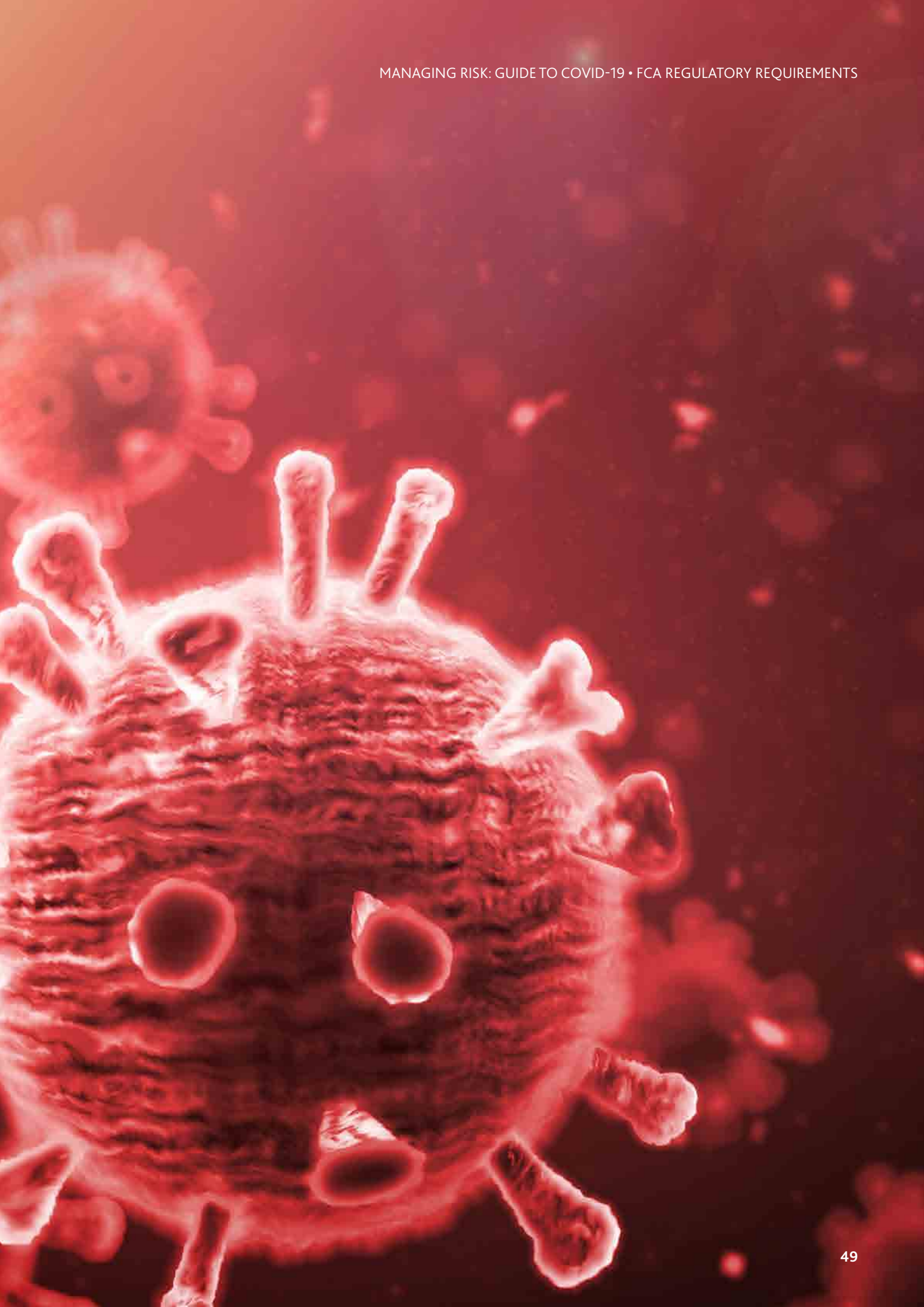
LESSONS LEARNT

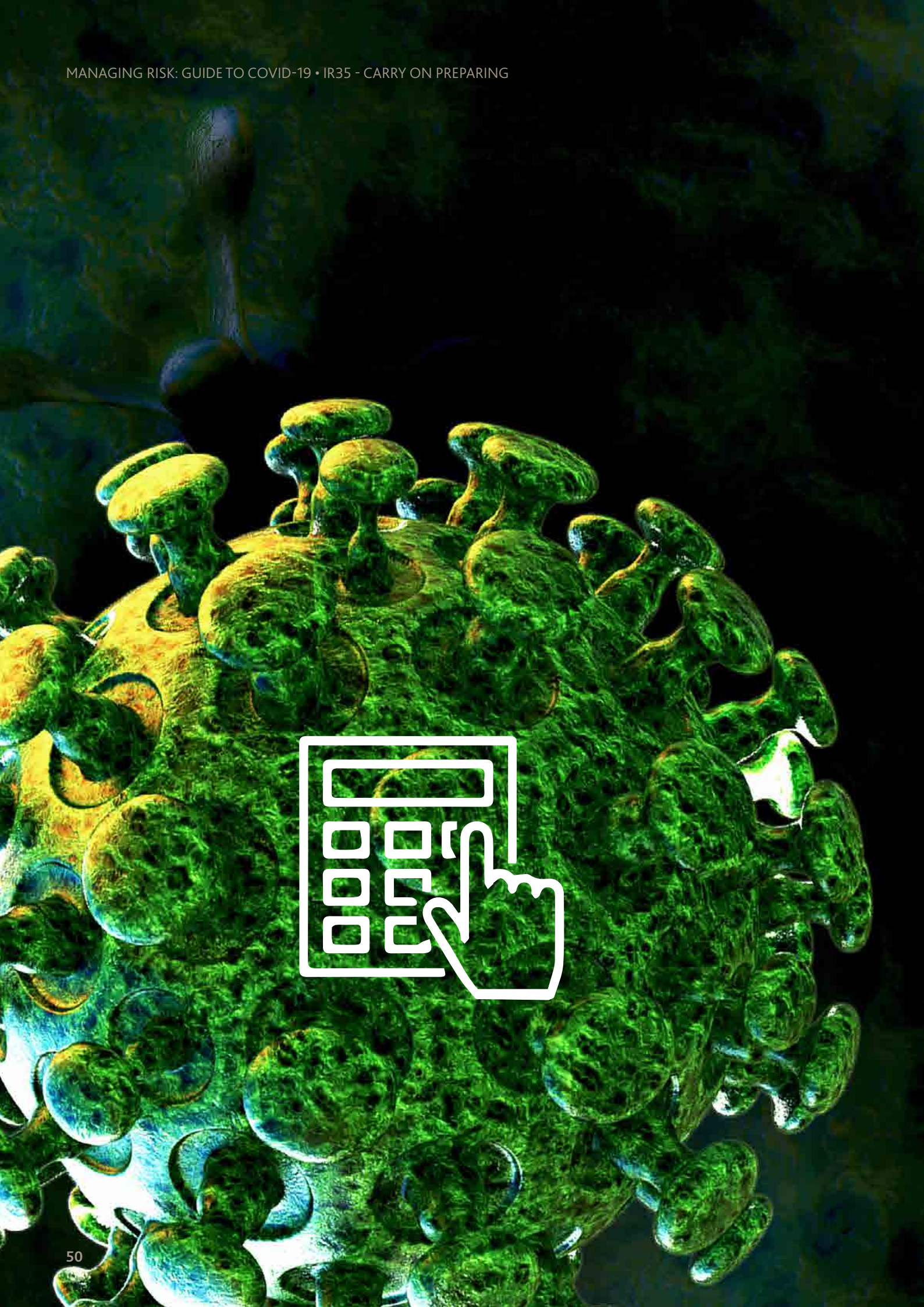
It is crucial that firms accurately document how they are meeting their regulatory requirements through deployment of their contingency plans and, where there are lessons to be learned, documenting them so that improvements can be made for future incidents. Senior managers have a key role to play in this, and need to demonstrate involvement and appropriate oversight to mitigate the risk of personal liability.

Given today's technological advancements, firms should be considering the extent to which they may be able to deploy tools such as Artificial Intelligence in future contingency planning arrangements.

NEXT STEPS

All FCA regulated firms should be preparing for the potential impact of COVID-19 on their day to day activities and ensuring that they have implemented reasonable measures to minimise the risk of disruption to their businesses.





IR35 - CARRY ON PREPARING

THE IR35 TAX RULES APPLY WHERE A CONTRACTOR WHO PROVIDES THEIR SERVICES THROUGH AN INTERMEDIARY (OFTEN THEIR OWN LIMITED COMPANY) WOULD BE CONSIDERED TO BE AN EMPLOYEE IF THAT INTERMEDIARY WERE NOT USED.

The rules ensure that the contractor is subject to broadly the same income tax and National Insurance Contributions as employees. Currently, the individual contractor is responsible for determining their own employment status for tax purposes. If IR35 applies, the intermediary must account to HMRC for the resultant tax charge.

From 6 April 2021, the responsibility for making the determination will shift to the end client or hirer. The end client is obliged to pass the status determination (along with the reasons for it) to the next entity along from it in the supply chain, as well as direct to the worker.

If the arrangement is within IR35, the person paying the intermediary will be responsible for paying the tax to HMRC. The amount paid to the contractor is included when calculating the Apprenticeship Levy. The VAT exclusive amounts must be accounted for through Real Time Information (RTI), in the same way as for an employee.

The change applies to large and medium sized incorporated enterprises

There is a client-led status disagreement process aimed at resolving any disputes around the determination status (sanction for non-compliance with the process is that the client becomes liable for the tax). There is also a measure aimed at preventing clients making blanket determinations.

CONTROVERSIAL BUT COMMITTED

The IR35 changes are controversial but the government confirmed that it was going ahead with the changes after its review of changes to the off-payroll working rules. The House of Lords has also held a wide inquiry relating to the proposed extension of the off-payroll working rules to the private sector. The remit included the real-life experiences of individuals and organisations, as well as more general responses, for example, relating to the impact of these (and predecessor) measures on the tax classification of workers and the broader impact on the labour market. The deadline for submissions was Tuesday 25 February 2020 and the outcome is awaited.

However, the announcement from the Chief Treasury Secretary, Steve Barclay, made it very clear that the decision to delay IR35 was a deferral in response to the ongoing threat of COVID-19 and not a cancellation of IR35.

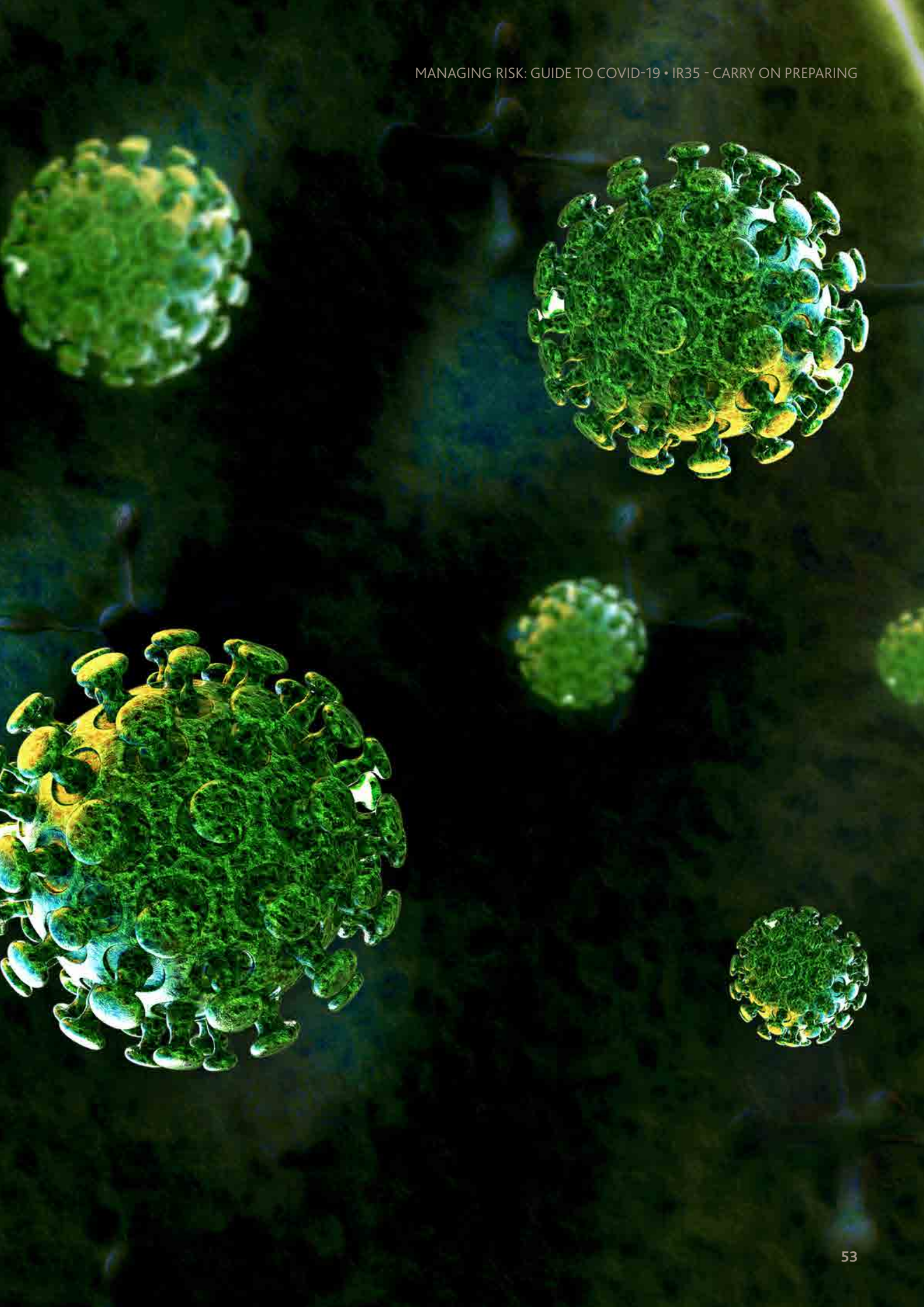
The government confirmed it remains committed to reintroducing the IR35 policy.

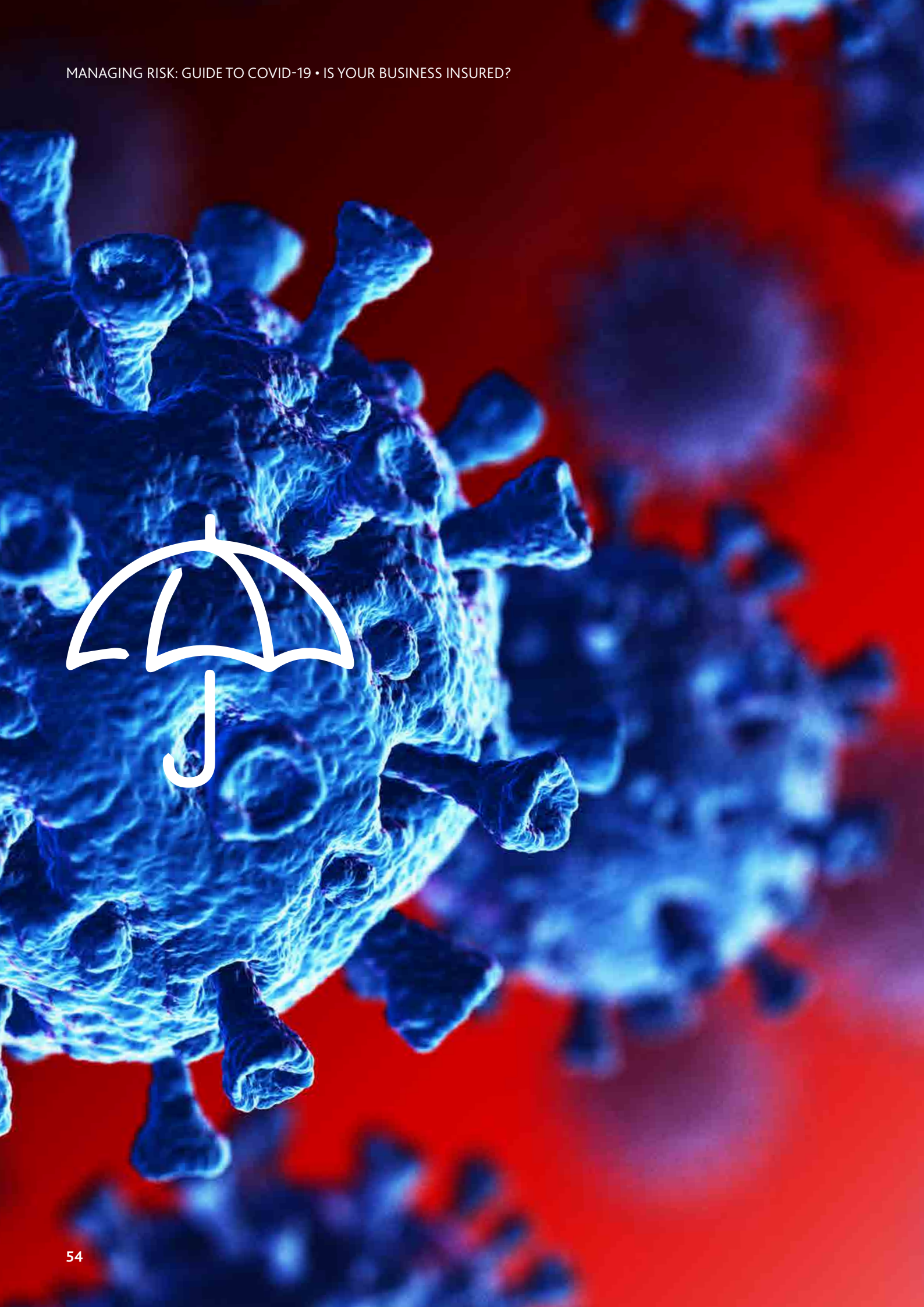
WHAT TO DO NOW

Employers who receive services from individual workers through an intermediary need to ensure that they are ready to implement the changes before 6th April 2021. The delay to the implementation date is helpful because it allows a reasonable interval in which to properly consider and implement all the necessary measures. These considerations extend to resourcing strategy and processes as well as drafting of contracts. However, HMRC may be less lenient in applying penalties in the first year following implementation because there is now plenty of time to put the necessary measures in place.

This delay is a good opportunity to prepare thoroughly for the changes. The steps to take could include reducing the extent to which contractors are used in the business, perhaps reducing risk by taking on more workers who are dealt with by agency payroll under the agency rules or who are employed by an umbrella company. Some businesses will choose to use zero hours employment contracts.

Existing arrangements need to be assessed and contracts updated or terminated. Many businesses will update their processes for bringing in and working with contractors. Each business will have its own specific requirements to minimise IR35 risk and make sure they can deal with the necessary compliance in a streamlined way. Our specialist team assists at all stages of the process, from risk assessment to implementation.





IS YOUR BUSINESS INSURED?

MANY BUSINESSES MIGHT EXPECT TO BE COVERED BY THEIR EXISTING INSURANCE POLICIES FOR CRISES SUCH AS THE COVID-19 PANDEMIC. HOWEVER, COVER FOR THESE SORTS OF EVENTS CAN OFTEN BE QUITE LIMITED.

Businesses should be looking closely at the wording of their policies, preferably with their insurance broker and their lawyer, to understand exactly what cover they have and whether they can bring an insurance claim for the impact that COVID-19 has had / may still have on their business. In this article, we look at the most common types of insurance policies, how they might respond to COVID-19 claims and what businesses should be doing now to check whether they are covered.

COVER FOR LIABILITIES TO THIRD PARTIES

Public liability insurance

Most UK businesses will also have public liability cover. This provides them with cover in the event that a third party (not an employee) brings a claim against them for personal injury or property damage, and in some cases financial loss. It would be relevant, for example if a customer alleged that they became ill due to inadequate hygiene standards at an establishment. Bodily injury is usually defined in these policies as including disease but there may be limited cover for emotional distress if, for example, a customer alleged that they were exposed to the virus but were later shown to have tested negative.

Typically public liability policies also exclude cover for contamination or pollution. There may be some debate as to whether this might include COVID-19. However, these exclusions are generally designed to exclude cover for gradual pollution escaping from the premises rather than presence of a disease or virus on the premises themselves. On this basis, it seems unlikely that this would operate to exclude cover in most circumstances.

Employer liability insurance

In the UK, employers must take out employers' liability insurance of at least £5 million each and every occurrence. This will provide employers with cover for claims by employees for bodily injury, which includes diseases such as COVID-19. It may become relevant if an employee brings a claim because they believe that they were exposed to the virus at work due to the negligence of their employer.

Directors' & officers' liability insurance

Whilst less of an immediate concern, businesses may also want to check that they have appropriate directors' and officers' liability insurance cover in place. It is possible that decisions that are being made now by senior management are criticised later down the line by regulators or lead to claims by shareholders, investors or insolvency practitioners. A directors' and officers' policy will provide the individual director with cover in relation to those claims, and also give the business cover in the event that it is required to indemnify its directors.

COVER FOR BUSINESS LOSSES

Property damage and business interruption insurance

The immediate concern for businesses is the impact that COVID-19 is having on their ability to operate or trade as normal. Many will assume that their business interruption policy will provide cover for this. They are likely to be disappointed.

Unless there is a relevant extension to cover, a standard business interruption policy will typically only provide cover for losses resulting from physical damage to the premises. Even if it can be shown that premises were closed down due to the tangible presence of the COVID-19 virus on the premises (and, of course, most premises will not have been closed down for that reason) it is unlikely, due to the fact that the virus is only present on surfaces temporarily, that this will be sufficient to establish permanent loss or damage to the premises themselves.

POLICY EXTENSIONS

There are two possible extensions to cover that may be relevant, but these are often sub-limited or contain higher excesses than are typically found under the main policy wording.

Notifiable or communicable disease

Some policies provide cover for business interruption losses where it has been necessary to close down the insured premises as a result of a notifiable or communicable disease. The extent to which a business is covered depends entirely on the policy wording, and so it is important to check this.

Often these policies will only provide cover where someone is found to have contracted the disease at or within a certain distance of the premises. It may, therefore, be necessary to check whether there any confirmed cases of COVID-19 within that area. Other policies may require closure to have been mandated by a competent authority, which, following a statement by the Prime Minister on 23 March, will now apply to many businesses as the country enters lockdown.

Businesses should also check which diseases are covered. Some policies will only cover certain specified diseases which are then listed in the policy. Given that COVID-19 is a new virus, however, this is unlikely to be covered. Other policies will provide cover for notifiable diseases. This now includes COVID-19 but only since 5 March 2020.

Denial of access cover

Another potentially helpful extension to cover is denial of access. This provides cover for business interruption losses where a business is prevented from accessing its premises by order of a competent authority usually in conjunction with a threat to public health or danger to life. Businesses need to check the wording carefully as this cover is usually drafted so as to respond to more localised events (such as a terrorist attack) rather than a global pandemic.

THE TRICKY PART...

If a business manages to get a business interruption claim off the ground, it must then quantify its loss. This presents its own difficulties.

The decision in Orient-Express Hotels Ltd v Assicurazioni Generali SA established the correct approach for assessing business interruption losses in these circumstances. The case concerned a business interruption claim by a hotel that was damaged as a result of Hurricane Katrina in 2005. The hotel was required to show that "but for" the damage to the hotel itself, it would not have suffered the same loss. It was unable to do so because even if the damage had not occurred, it would have suffered the same business interruption losses regardless due to the devastation to the surrounding area.

Applying this to COVID-19, a business would have to establish that it had suffered a loss due to the closing down of its premises, and not as a result of the widespread impact of the COVID-19 virus more generally. In other words, it would need to compare its actual financial position to the position that it would have been in, had it remained open whilst the population at large was social-distancing. In this way, it can be seen that the loss is, therefore, likely to be quite limited.

SPECIALIST POLICIES

Cancellation policy

A cancellation insurance policy usually covers the costs of big events like conferences being cancelled. Once again, businesses with this type of insurance should look very carefully at their policy wording. Cover is usually only triggered when cancellation is beyond the policyholder's control and so will typically only respond when cancellation became necessary because of a decision by the relevant competent authority to impose a quarantine, restrict travel or ban public gatherings as a consequence of COVID-19. Furthermore, these policies often exclude cover for communicable disease.

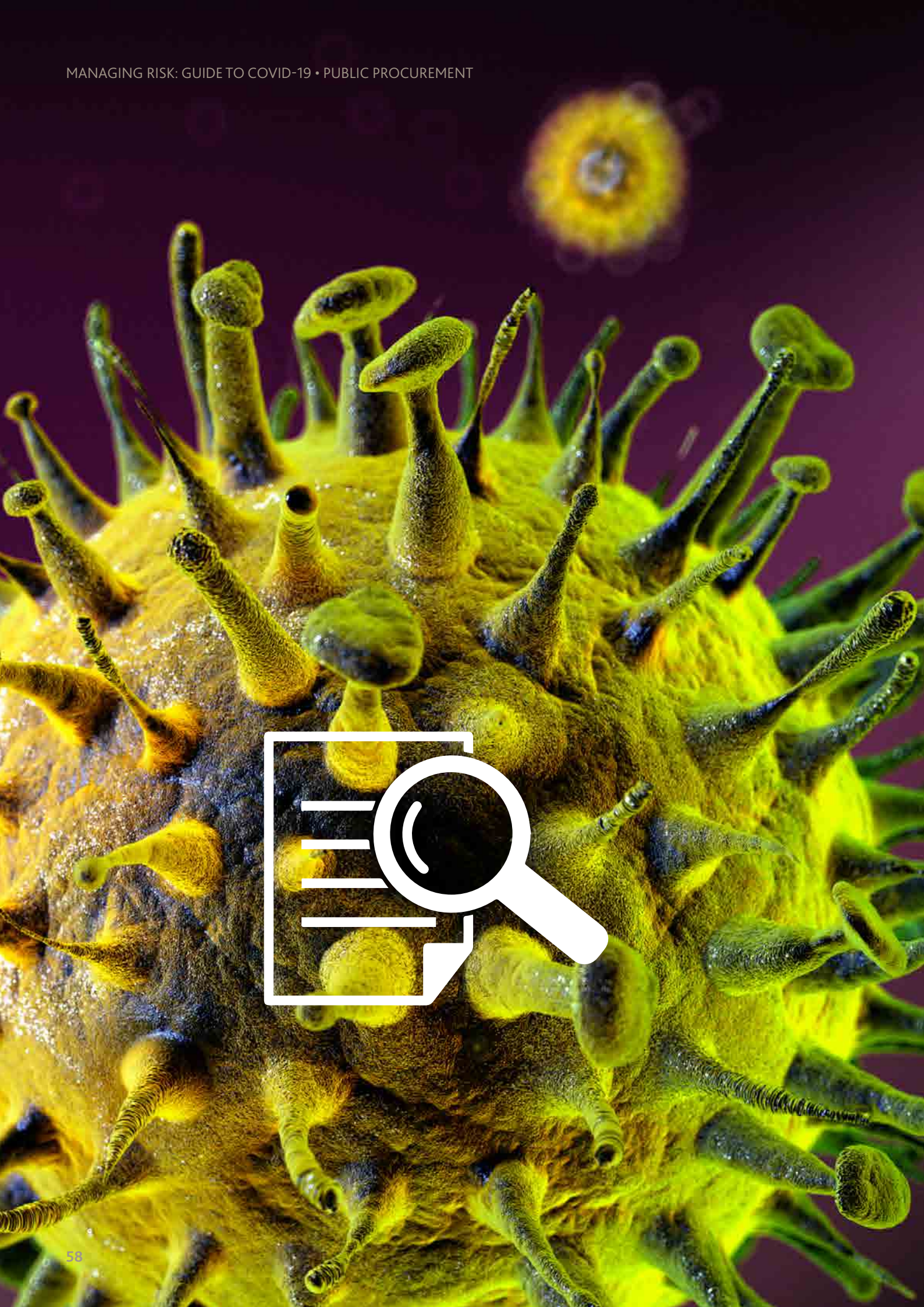
Business travel cover policy

In a similar way, a travel insurance policy is only likely to cover the costs of cancelling an overseas trip once there has been FCO guidance against employees travelling to or from the countries in question. It is also important to bear in mind, of course, that when employees are travelling against government advice, they are unlikely to be covered.

WHAT TO DO NOW

Businesses will obviously have a number of competing priorities in the immediate aftermath of COVID-19 but in order to make sure that they are protected, they need to be digging their policies out now and reading them closely. Speak to your insurance broker and, if necessary get specialist legal advice on whether you are covered for incidents relating to COVID-19. If you think you might be covered, you should make a notification of claim to your insurer making sure that you follow the notification procedure in your policy. If you are not covered, and you may not be, consider whether you are eligible for any of the government-backed schemes – businesses may find that these are a good practical alternative to insurance.

Keep good records and if you are planning to make a business interruption claim, check how loss is calculated for the purposes of your policy and start collating the relevant information now which could help support your claim. Early quantification of your claim may convince your insurer to make an interim payment, particularly if your loss is likely to far exceed the level of any available limit of indemnity. This may be critical in mitigating the more immediate impact of the crisis on your business.



PUBLIC PROCUREMENT

THE CABINET OFFICE HAS ISSUED TWO PROCUREMENT POLICY NOTES ('PPNS') TO SUPPORT CONTRACTING AUTHORITIES AND THEIR SUPPLIERS IN MITIGATING THE IMMEDIATE IMPACT OF COVID-19.

PPN 01/20 (Responding to COVID-19) provides guidance for Contracting Authorities on how to respond to the impact of COVID-19, and how contracts can be awarded in cases of extreme urgency. PPN 02/20 (Supplier relief due to COVID-19) focuses on payment of suppliers to ensure service continuity during and after COVID-19.

PROCUREMENT POLICY NOTE 1/20 - RESPONDING TO COVID-19

The first of the PPNs provides guidance for Contracting Authorities on the available options for procuring goods works and services in an emergency, including of note, through the use of Regulation 32(2) of the Public Contracts Regulations 2015 ('PCR') which allows a direct award of a contract due to reasons of extreme urgency.

Other options considered are:

- direct award due to extreme urgency;
- direct award due to absence of competition or protection of exclusive rights;
- call off from an existing framework agreement or dynamic purchasing system;
- call for competition using a standard procedure with accelerated timescales; and
- extending or modifying a contract during its term.

DIRECT AWARD DUE TO REASONS OF EXTREME URGENCY

For any Contracting Authority considering relying on Regulation 32(2)(c), they will need to evidence that:

- there are genuine reasons for extreme urgency;
- the events that have led to the need for extreme urgency were unforeseeable;
- it is impossible to comply with the usual timescales in the PCRs; and
- the situation is not attributable to the contracting authority.

Contracting Authorities should ensure they maintain records of their applicable justification and the steps taken to awarding a contract in accordance with the PCR. What is also clear from the guidance is that Contracting Authorities may only place reliance on Regulation 32(2)(c) for goods, works and services which are "absolutely necessary" in the circumstances, and it is equally important that Contracting Authorities still achieve value for money and use good commercial judgement.

Whether relying on Regulation 32(2)(c) or any of the other options referred to in PNN 01/20, Contracting Authorities should limit the duration and/or scope of the award or modification of contract and keep a written justification to evidence how it has considered and can satisfy each of the relevant conditions. Where applicable, the justification should demonstrate that the decision is related to the COVID-19 outbreak with reference to specific facts - the PPN provides the examples of staff redeployment or shortages.

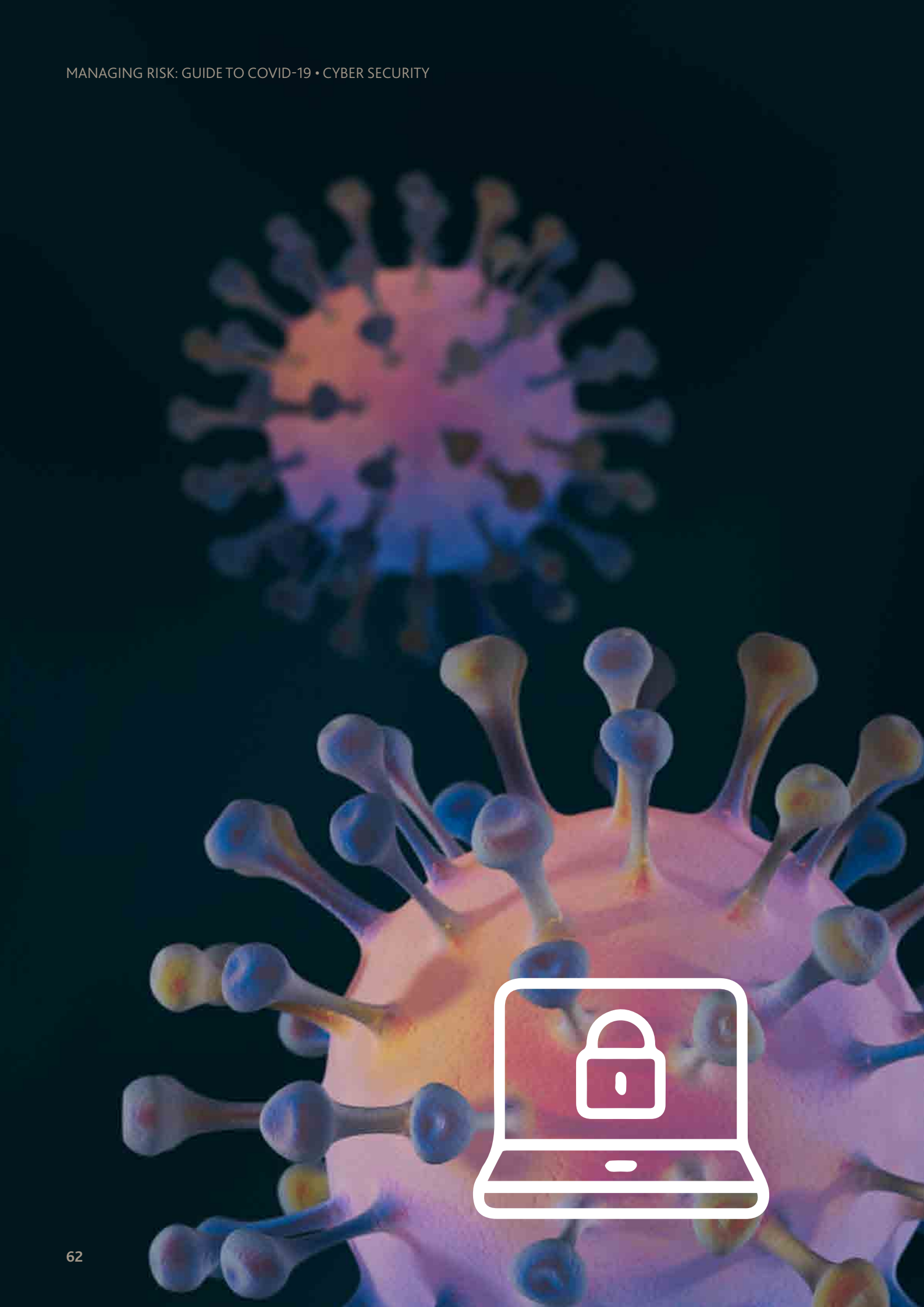
PROCUREMENT POLICY NOTE 2/20 - SUPPLIER RELIEF DUE TO COVID-19

In the second of the two PPNs issued, Contracting Authorities are advised to urgently review their contracts, and in particular payment provisions with a view to ensuring service continuity during and after the current COVID-19 outbreak. Contracting Authorities are also advised to ensure that suppliers who are at risk are in a position to resume normal contract delivery once the outbreak is over including by:

- informing suppliers who they believe are at risk that they will continue to be paid as normal until at least the end of June;
- putting in place payment measures to support supplier cash flow;
- where a contract involves payment by results, payment should be on the basis of previous invoices;
- suppliers should agree to act on an open book basis and make cost data available to the contracting authority during this period; and
- ensuring invoices submitted by suppliers are paid immediately on receipt in order to maintain cash flow in the supply chain and protect jobs.

Contracting Authorities will need to work with their suppliers to ensure business continuity is preserved as far as possible.

In the event that a Supplier seeks contractual relief, Contracting Authorities are advised to work with Suppliers to amend or vary contracts instead. The guidance is clear that these will need to be considered on a case-by-case basis, but suggests that changes may include to contract requirements, delivery locations, frequency and timing of delivery, targets and performance indicators etc. Other relief that might be offered to Suppliers might include by way of a contract extension or waiver of the Contracting Authority's rights (e.g. to service credits or termination).



CYBER SECURITY

IN THESE STRANGE AND UNCERTAIN TIMES, A SIGNIFICANT NUMBER OF EMPLOYEES WILL BE WORKING FROM HOME FOR THE FORESEEABLE FUTURE. FOR MANY THAT WILL BE A NEW EXPERIENCE AND FOR OTHERS, AT LEAST, A SIGNIFICANT CHANGE IN WORKING PATTERN.

For many employees, and employers, the right infrastructure and measures might not be in place, or if they are, they may not have been properly tested. Cyber and hacking criminals do not care and are already taking advantage. Organisations and their employees, as well as individuals, all need to be extra vigilant and exercise caution. Here are some of the key things to think about

CYBER ATTACKS

Now, more than ever before, we are relying on our digital systems and infrastructure to allow our organisations to continue to function, and to allow our employees to have contact with each other, with clients, customers and other third parties. On a personal level too, our primary contact with those outside our home will be on a digital platform.

A broad-based cyber attack could therefore have a devastating impact, not only on an organisational level, but there could also be a risk of widespread infrastructure failures that could take down entire networks and leave people completely isolated.

Everyone needs to be more cyber-aware than ever.

PHISHING

Phishing attacks often provide hackers with the first route into an organisation. They are commonly hidden in emails where individuals are invited to click on links that take them to webpages run by cybercriminals. They are extremely creative in devising new ways to exploit users and technology to access passwords, networks and data. When working from home, away from other colleagues and the workplace environment, and perhaps distracted by children or other family members at home, people may be less vigilant and may click on a link they would have thought twice about in the office.

The National Cyber Security Centre (NCSC) is urging businesses and the public to consult its online guidance, including how to spot and deal with suspicious emails, as well as mitigate and defend against malware and ransomware.

In the last week, the NCSC has also issued guidance for organisations on preparing for an increase in homeworking.

Employers should remind employees to think carefully about opening unsolicited emails and/or links within those emails and being wary of attachments and clicking on any hyperlinks within attachments. Employees also need to be careful about revealing sensitive or financial information in an email and should not respond to unsolicited email requests for this information.

Many people are understandably interested in information specifically relating to the coronavirus and it has been widely reported that hackers are already preying on people's heightened anxiety and desire for more information in this area. Individuals must take care to check that any emails received are from a trusted source and not allow curiosity for detail on COVID-19 to override their need to remain vigilant.

The NCSC guidance on homeworking includes a reminder that the most important thing is for employees not to panic if they do click on a link that is suspicious and to contact their IT department to let them know.

Clearly it is best to not get to that position at all. Make sure workers are reminded of their cybersecurity training and consider if it is necessary, or prudent, to issue additional guidance given the additional cybersecurity challenges that need to be managed.

DEVICES

Anyone accessing a corporate network should be doing so via a virtual private network (VPN), creating an encrypted network connection that authenticates the user and/or device and encrypts any data in transit.

However, working on laptops and other devices away from the office will mean they are at more risk of being lost or stolen. Many devices have the tools to allow data to be retrieved and/or wiped remotely in the event that a device is lost, but the effectiveness of those tools depends on the device being adequately secured, and on any theft or loss being reported immediately. Ensure workers understand the importance of software and security updates on their devices and making sure certain strong passwords are set, to ensure they are fully protected and what they need to do to help with this.

In addition, not everyone will be set up to work from home as effectively as from the office and it is more likely that people might consider using their own personal devices to support them. They may not realise the risks involved in forwarding company or personal data to personal email accounts, or accessing it on personal devices to allow multiple documents to be viewed at the same time, or perhaps documents to be printed more easily. Organisations need to make sure employees are aware of their position on using personal devices to work remotely and, if the use of personal devices is allowed, are fully up to speed with the bring your own device to work (BYOD) policy

DATA PROTECTION

The Information Commissioner's Office (ICO) has also acknowledged that we are all facing unprecedented challenges during the coronavirus pandemic. Clearly data protection laws remain in place but the ICO has accepted that information may need to be shared more quickly and people may need to adapt the way they normally work. It has produced some guidance on dealing with personal data during this time.

For example the government, the NHS and other organisations will need to make sure people get vital public health messages via phone, email or text and individuals will not need to give them consent for this to happen. If a person becomes ill with coronavirus, their employer might need to tell colleagues, but this does not mean they will need to give out the individual's name.

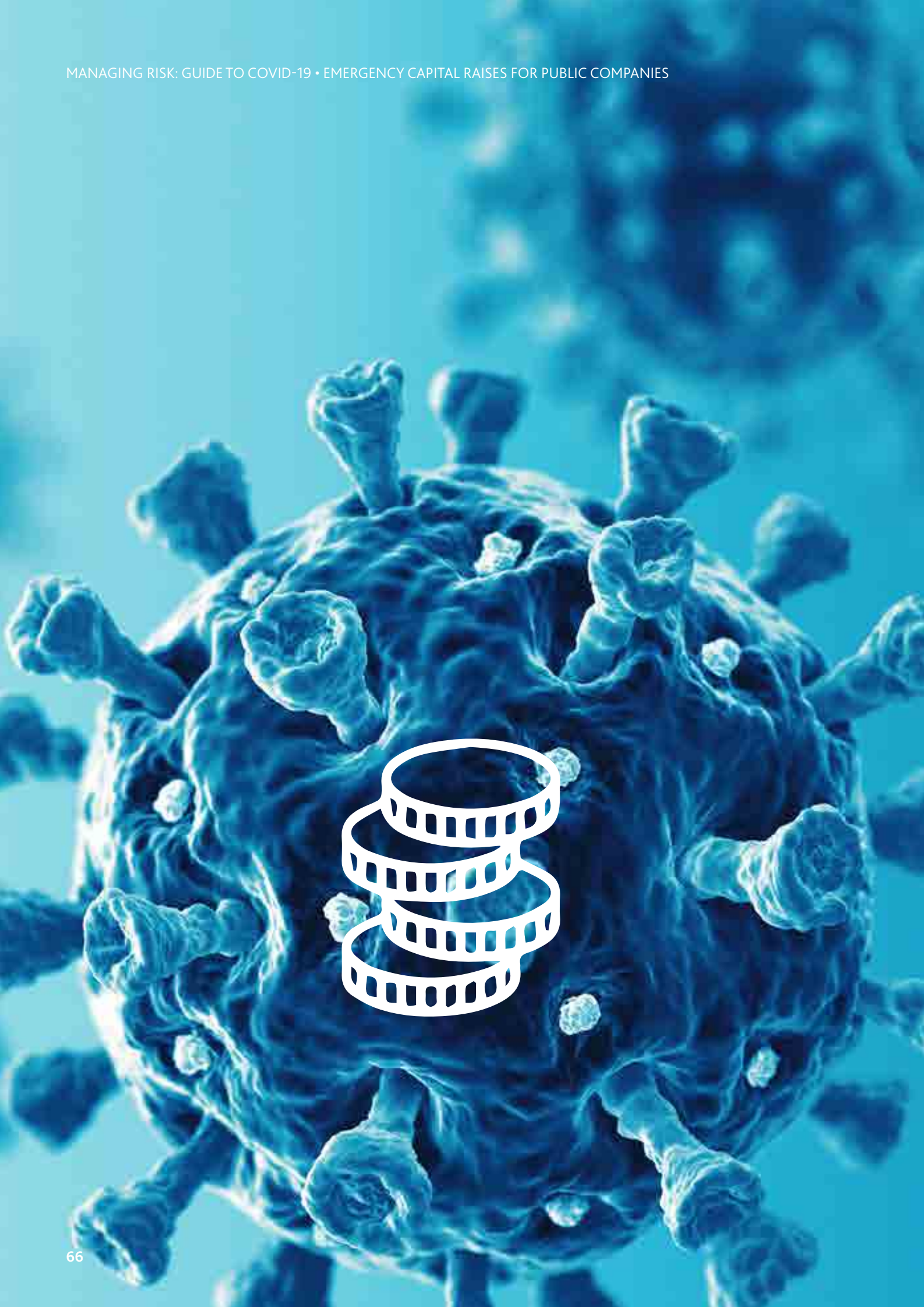
The ICO has also accepted that resources, whether they are finances or people, might be diverted away from usual compliance or information governance work. The ICO will not penalise organisations that need to prioritise other areas or adapt their usual approach during this extraordinary period. The guidance acknowledges that as a consequence, individuals may experience delays in responding to information rights requests, such as data subject access.

Any data protection breach will still however require an organisation to notify the appropriate data protection authority - in the UK, this is the ICO. There may also be an obligation to notify the applicable sector regulator, for those engaged in regulated business. Notwithstanding the unprecedented challenges, organisations still risk facing substantial penalties for breaches involving personal data.

ADVICE

The message is clear, remain vigilant and make sure employees do not let their guard down because they are working remotely.

- Organisations need to make sure employees have access to protected devices and connections.
- If possible, have a dedicated source of help available for queries and problems to be raised.
- Warn employees about the increased likelihood of phishing attempts and scams and ask them to remind themselves of any company policies that may be available.
- Stress the importance of ensuring all available updates are downloaded onto company devices and of individuals using strong unique passwords.
- Remind employees about any BYOD policy and the issues that could arise if personal devices are used for business purposes.
- Stress that employees should report any suspicious emails, if there is any doubt that an email is genuine just don't open it - better to be safe than sorry.



EMERGENCY CAPITAL RAISES FOR PUBLIC COMPANIES

AS THE WORLD FINDS ITSELF IN A GLOBAL CASH FLOW CRISIS, LISTED COMPANIES ARE FEELING THE FINANCIAL IMPACT OF THE CORONAVIRUS, EVIDENCED BY THE RECENT NUMBER OF TRADING ANNOUNCEMENTS.

However, notwithstanding market conditions, they may soon have to raise capital on an urgent and heavily discounted basis. The issue will be whether the market can digest so many capital raisings at once.

Companies that are seeking to raise such emergency capital will have a number of options available to them. Typical structures include rights issues, open offers, placings, convertibles or a combination of these. This article focuses on the principal capital raising structures that issuers might use, and some of the practical and legal considerations issuer will face, particularly in light of COVID-19.

METHODS OF EQUITY FUNDRAISING

A company can raise funds by issuing further shares on a pre-emptive or non pre-emptive basis. Rights issues and open offers are pre-emptive structures which are typically used for issuers seeking large amounts, whilst smaller fundraisings are usually undertaken by way of non pre-emptive structures such as cash placings or cash box placings. Convertible debt can also be used as a non pre-emptive structure.

1. Rights issue

A rights issue is an offer of shares to existing shareholders in proportion to their existing shareholdings. New shares are issued for cash and shareholders have the option either to take up their rights and buy the new shares, or sell or to trade their entitlements (known as 'nil-paid rights'). Any shares not taken up will be sold in the market and shareholders may receive a cash payment if those shares are sold for more than their subscription price (and the expenses of sale).

There is no limit on the size of a rights issue so it can be as large or as small as required to raise the funds needed. Whilst smaller rights issues can be organised without requiring shareholder approval if the issuer already has shareholder authority from its previous AGM to issue sufficient shares, the majority of rights issues will require shareholder approval.

An FCA approved prospectus will usually be required for a rights issue, for both main market and AIM quoted companies, so the time and costs associated with preparing such a prospectus often make smaller rights issues a less appealing choice, as does the relatively high administrative cost required to implement a rights issue and the trading of the nil-paid rights.

2. Open offer

An open offer is also an offer of shares to existing shareholders in proportion to their existing shareholdings. However shareholders cannot trade their entitlements as they can do in relation to rights issue. An open offer is therefore considered as being more aggressive than a rights issue as a shareholder who does not participate will be diluted, and will be unable to realise any value by way of compensation. However, an open offer is generally faster than a rights issue, enabling an issuer to raise funds more quickly, and the administrative costs are lower.

An open offer will normally require a prospectus, unless it can rely on one of the exemptions under the Prospectus Regulation Rules, the key ones being that either the offer is to less than 150 persons other than qualified investors (i.e. retail shareholders), or is for less than €8 million. Like a rights issue, depending on the size of the offer and other factors, shareholder approval may be required.

3. Compensatory open offer

A compensatory open offer is also a pre-emptive open offer to existing shareholders. Used for the first time in the UK by Lloyds Banking Group in May 2009 around the time of the previous financial crisis, under a compensatory open offer an existing shareholder who does not take up his entitlement to subscribe for new shares at a discount may instead receive a sum of money if those shares are bought by other investors at a price above the discounted rate which the shareholder would have paid. This more 'shareholder friendly' approach than a typical open offer can be useful to maintain shareholder confidence provided that institutional shareholders are willing to back it, and should allow an issuer to raise funds more quickly than a traditional rights issue.

4. Placing

A placing is an issue of shares for cash to selected investors on a non pre-emptive basis. Shares are placed both with existing investors and new investors. The size of a placing often depends on the issuer's annual disapplication of pre-emption rights (normally around 5-10% of the issued share capital) and authority to allot (normally one third of the issued share capital) to ensure shareholder approval is not required. A placing is likely to be exempt from the requirement to publish a prospectus, except when main market issuers issue securities of the same class that represent more than 20% of the number of securities already admitted to listing over a 12 month period.

Cash placings can be carried out at speed, and if structured as an accelerated bookbuild, can could be completed in as little as one day. However, this needs to be assessed against the limit on the number of shares that can be issued and the funds that can be raised.

5. Cashbox placing

Statutory pre-emption rights do not apply on an issue of shares for non-cash consideration. A cashbox placing is therefore structured to ensure that the issuer receives non-cash consideration by incorporating an offshore special purpose vehicle (SPV), typically a Jersey company. The transaction is structured so that the issuer issues shares as consideration for the shares in the Jersey SPV, which in turn holds the cash paid by investors, rather than issuing the shares directly for cash.

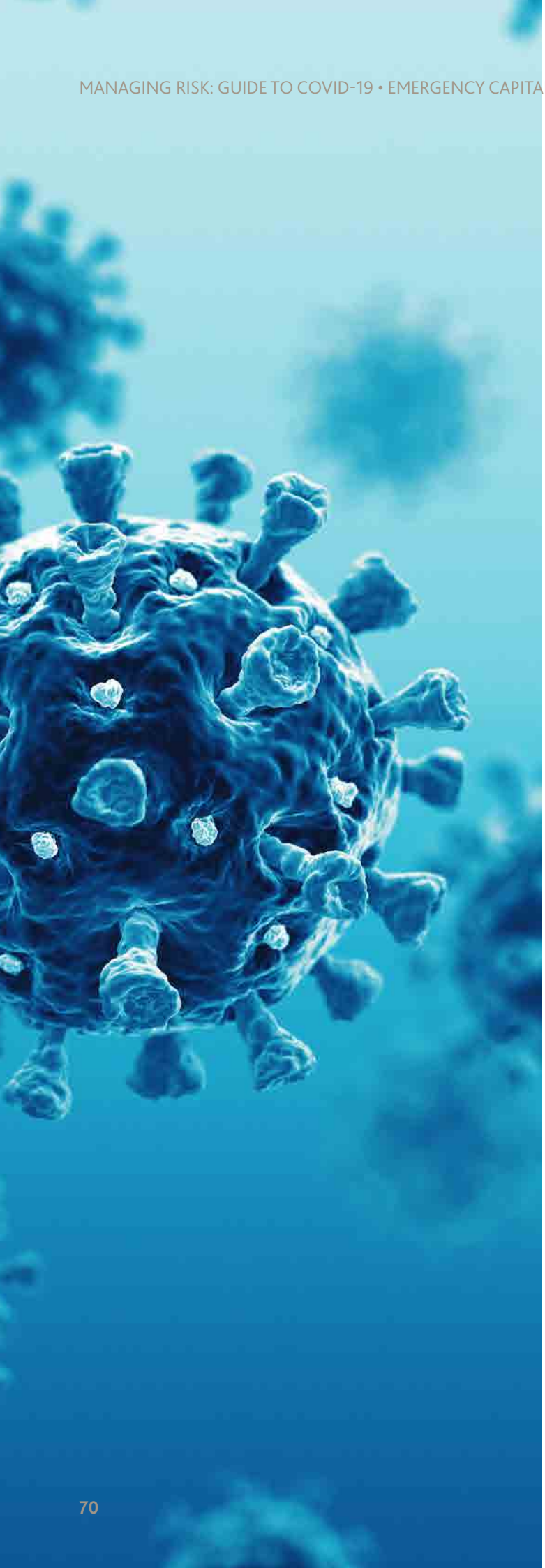
Like a normal placing, the timetable for cashbox placing is short, but with limits on the number of shares that can be issued and the proceeds that can be realised. No shareholder approvals are required, provided that the issuer has sufficient existing authority to issue shares. However, cashbox placings have been controversial in the past given they are a more aggressive variant on a placing and companies should always consider investor reaction to a procedure which can dilute their holdings beyond the percentage previously approved in general meeting.

6. Convertibles

Convertible instruments can come in different forms, such as convertible preference shares, convertible loan notes or listed convertible bonds, any of which at some stage can be converted into shares in the issuer according to a pre-arranged formula. An issue for example of convertible loan notes to a handful of investors, including a strategic investor, can be relatively quick, depending on the time taken for negotiation of the terms, whereas issuing a listed bond is likely to take more time with marketing, application for listing and the preparation and regulatory review of a disclosure document.

In either case, an issuer will need to have the relevant share authorities in place (for both the amount of shares to be allotted, and for them to be allotted on a non pre-emptive basis) at the time of the issue or the convertible instrument, not the time of its conversion, and therefore a general meeting may be required if share authorities are insufficient to cover the shares into which the instrument could convert (and a reasonable assessment will need to be taken if the formula for conversion is based on a future market price).

An issuer is able to combine the different fundraising structures above to suit its needs, and certainly in the current environment, where companies may be seeking to raise as much cash as possible, it would be prudent to consider combining both pre-emptive issues with non pre-emptive routes to funding (possibly using different discounts, as required).



CHOOSING THE CORRECT STRUCTURE

Given the COVID-19 situation, and whilst the UK Government has promised businesses financial support over the next few months, issuers are likely to want to seek to raise emergency equity capital alongside any debt that they are taking on to shore up their balance sheet and avoid covenant breaches. For the more aggressive, it may not be an issue of survival, and instead, with some of their competitors failing and the weak pound, they may see acquisition opportunities. In any case they will therefore need to review each of the available options, considering which best fits their circumstances. Choosing the right structure will also depend on shareholder support and how quickly cash flow might dry up. Outlined below are some of the key factors that issuers will need to consider.

INVESTOR SENTIMENT

Issuers will need to canvass their shareholders if they intend to carry out an emergency capital raising to determine if they will obtain the support required for any resolutions being sought, as well as investor demand for additional shares. Issuers will undertake a marketing programme to large institutional shareholders for rights issues or open offers, generally through an investor roadshow and discussions with management. Conducting market soundings with key shareholders before announcing a capital raising provides a useful way of assessing shareholder support, although as most institutional shareholders will only agree to be 'brought inside' shortly before the announcement, structuring decisions will generally need to be made well in advance.

Rights issues and open offer will be heavily reliant on existing investor participation and, in the case of a rights issue, to some extent on an active secondary market in nil-paid rights. Placings however can target new investors, although a combination of a rights issue or open offer with a placing can be used to cover as much of the investor base as possible, allowing existing shareholders an opportunity to participate in an issue with the certainty of placing a large amount of equity.

TIMING

Issuers will need to weigh the different timetables for each offer against their funding deadline. If FCA approval of a circular or prospectus (or both) is required, this will inevitably require approval time to be built into the timetable. Shareholder approvals will also add time. Therefore if funding is needed on a particularly urgent basis, a placing may be the only feasible option.

As noted, some structures are quicker than others. In an open offer, the offer period for the new issue can run alongside the timing of the general meeting notice period, whereas the offer period in a rights issue can only begin once shareholder approval is obtained.

Structure

Minimum offer period

Rights issue

If shareholder approval is required, a general meeting can be called on as little as 14 clear days' notice. Once shareholder approval is given, the offer period has to be open for 14 calendar days.

If no general meeting is needed, then the offer period must be open for 14 calendar days.

Open offer

10 business days

Placing

No minimum period applies and in the case of an accelerated book the period can be very short

Cash box placing

As for a placing, there is no minimum period provided no shareholder approval is required

SIZE OF RAISE AND PRICING

Due to the limit on the number of shares that can be issued non pre-emptively, a placing may not be the best choice for a large fundraising. Instead, both rights issues and open offers have no maximum limit on the number of shares that can be issued, provided that shareholders pass (or have previously passed) a resolution granting the directors the necessary authority to allot shares. A distressed issuer can in theory then issue a multiple of its existing market capitalisation if necessary. The ability to issue a greater number of shares resulted in the number of rights issues and open offers pursued in 2009 more than doubling in comparison to any other year between 2006 and 2019, whereas the number of placings that took place in the same period remained unchanged.

When the markets are volatile, issuers will need to take into account that it can be difficult to price assets, especially when an offer is in the market over a longer period of time, and investors may use this to negotiate a reduction in the price. Applying a discount to an offer price will however encourage shareholder involvement and can protect the issue against adverse market movements. However, institutional investor guidelines published by investor protection groups such as the Investment Association and Pre-Emption Group will need to be taken into account. In addition, the Listing Rules provide for a 10% limit on the discount which can be applied to a share issue (that is, a placing or open offer) without shareholder approval. However there is no maximum discount applicable to a rights issue, and indeed they are commonly made at a substantial discount. A deep discount (being a price well below the market price) should entice shareholders to follow their rights and take up their entitlement, although on the other hand shareholders may also feel pressurised into taking up their rights to avoid significant dilution.

Convertibles that are only convertible at a future date, and based on an average trading price at that time, may offer some protection against immediate price volatility, and can offer an attractive coupon in a low interest environment. Issuing such debt to investors with deep pockets on a non pre-emptive basis can be an efficient way to raise funds, but will very much depend on the issuer's existing debt position and the covenants it has in place - having to negotiate any related debt or security with other lenders will also take time.

SECTOR COMPETITION

In the current environment there is likely to be fierce competition for new capital. The 2008/9 financial crisis saw a wave of emergency capital raisings, starting with financial institutions and spreading to the mining and then property sectors.

If a particular sector is struggling, such as aviation or hospitality and retail with COVID-19, making multiple fund raisings a likely possibility, being the first to go to the market with any equity issue can help to ensure that an issuer obtains at least its fair share of the limited demand for stock in a sector. This is turn will have a bearing on the type and timing of the choice of structure.

SHARE AUTHORITIES

A study by the Rights Issue Review Group in 2009, to look at ways in which equity capital raising could be made more efficient and orderly, led to timetables for rights issues being shortened, and the then Association of British Insurers increasing the ceiling on share allotments to two-thirds of issued share capital, where the additional one-third headroom is used for fully pre-emptive rights issues. Many companies now ordinarily take such authorities at their Annual General Meeting. If they have done so at their most recent AGM, this should help in the current climate where companies want to carry out larger rights issues.

WORKING CAPITAL STATEMENTS AND PROPERTY VALUATION REPORTS

The FCA will look carefully at these to ensure that they are not qualified by any other disclosure within the prospectus, as well as the risk factors, to ensure that potential discussions on requiring additional financing in the longer term do not impact on the necessity of a "clean" working capital statement. Discussions with the FCA around the risk factors and capitalisation and indebtedness statements may also delay the publication of the prospectus.

If, as in 2009, property prices are badly affected then guidance may be required by the FCA on how up-to-date a property valuation report is required to be in an issuer's prospectus, and at what date a "no material change" statement can be given.

TIMETABLES

The typical timetable for a rights issue is set out above, depending on whether a shareholders meeting is required and how long it takes to prepare any prospectus. In the current environment they need to be as short as possible where companies need to access funds very quickly with the share price fluctuating dramatically in the process, and the risk of disclosure having to be updated (which may lead to a supplementary prospectus, which in turn, affords withdrawal rights to investors). The underwriters will also look to as short a timetable as possible to mitigate their own exposure. Generally preparing to launch the issue takes the most time (although a standby underwriting agreement may help) given the time required to prepare a prospectus.

The Prospectus Regulation introduced a simplified prospectus regime for secondary issues with effect from 21 July 2019. The proportionate disclosure regime for rights issue prospectuses under the Prospectus Directive regime was not widely used. It remains to be seen whether the new simplified prospectus regime for secondary issues will now be taken up by issuers, but it is anticipated that a full prospectus will continue to be expected for larger rights issues. Commentators in the past have argued a prospectus is largely irrelevant as the main investors will already be bought in and few people will have the time to review it properly in any case. After the financial crisis, there were discussions to exempt the requirement of a prospectus on a rights issue but these were never made into law.

2009 did however result in the offer period being reduced for a rights issue from 21 days to ten business days under the Listing Rules (although 14 calendar days is required under the Companies Act 2006, so the longer of the two applies). It is unlikely that an issue can be made any quicker than this (unless there is Government intervention). Whilst there was an argument to try to make the rights issue offer period and general meeting notice period to run concurrently (with conditional trading only, pending the outcome of the general meeting), this has not occurred to date, the argument being that retail shareholders, or those without access to adequate information, who acquired nil paid rights in the market during the offer period, could be left with something worthless if the requisite shareholder resolutions were not passed.

If issuers do opt for rights issue, there may also be an increase in those that go the "Gazette route". This structure is used where statutory pre-emption rights have not been disapplied and the issuer has overseas shareholders to whom it wishes to avoid making the offer for practical purposes. In these circumstances, the Companies Act 2006 requires that notice of the offer, or the offer itself, must be published in the London Gazette, leading to the name. The Gazette route can be helpful to avoid a resolution to disapply the pre-emption rights, saving the issuer from having to hold a general meeting.

DISCOUNTS

There is no limit on the maximum discount to market price at which new shares issued in a rights issue can be offered (save that shares cannot be allotted at less than their nominal value). Market practice on discounts has changed significantly since 2009, and deep discounts (of 30% to 50%) have become more acceptable as it enables more flexibility in uncertain markets and increases liquidity in trading of nil paid rights. An analysis of discounts on rights issues in 2009 showed about one-third at a discount of less than 50% to the pre-announcement price (with very few having a discount of less than 40%), one-third with a pre-announcement discount of between 50% and 60% and one third having a discount of more than 60% to the pre-announcement price.

CONVERTIBLES

As noted above, if an issuer has existing creditors who are amenable to it taking on additional convertible debt, and it has existing share authorities in place to cover the shares arising on conversion (or can obtain those authorities in a short period of time - for example with a general meeting on 14 clear days), then convertibles may offer a viable alternative to, or can be used in combination with, a standard equity fundraising structure. It is also possible to use a cashbox structure for convertibles to cut down on timing.

BANKS AND BROKERS

At the time of the crisis, institutional shareholders demanded that issuers proceed with rights issues, despite the difficulties they entailed, in order to maintain their pre-emptive rights in a low pricing environment. Despite this, given the competition in the market for new money, issuers needed confidence before pressing ahead, and so some of the market sounding practices that banks and brokers operate today evolved from this set of circumstances. In the current environment, market soundings will need to be handled carefully as in a very volatile market institutions will not want to be insiders for very long, or at all, and issuers will need to work out any cleansing strategy if inside information is imparted to investors and the transaction aborts. In addition, banks and brokers will need to manage their internal conflicts if they have separate clients competing to access the same investors. Those issuers who do receive the green light from investors will still need to review carefully the termination rights in any placing or underwriting agreement, in particular any material adverse change provisions or any termination rights arising from wide scale market dislocation issues. Given the amount of funding that may be required, we would also expect to see many fundraisings carried out on a syndicated basis amongst banks and brokers to spread risk, albeit that this increases timing and complexity.

The financial crisis also saw the rise of standby underwriting agreements - these are used where the marketing has been successful but the company is still awaiting sign off on its prospectus from the regulator. A standby arrangement shows that the underwriter will support the rights issue on a fully underwritten basis on terms to be agreed (including the discount), which then enables the issuer to announce that it has secured the necessary funding.

THE IMPACT OF COVID-19

Set out below are a number of issues which arose from emergency fundraisings during the financial crisis in 2008/9, some of which to longer term market practice, and which we may see arise again over the forthcoming months.

GOWLING WLG CORONAVIRUS TEAM

WE HAVE ASSEMBLED A GLOBAL TASK FORCE TO HELP OUR CLIENTS MANAGE THIS INCREASINGLY DIFFICULT SITUATION.

The efforts to contain the spread of the outbreak present various challenges to people, businesses and communities around the world. We are well placed to support your business with a range of complex legal issues resulting from COVID-19.

You can contact any of our team below or email coronavirusupdate@gowlingwlg.com for further guidance.

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