COVID-19 NEWS OF INTEREST

COVID-19: UK Government Response to Assist Businesses

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On Friday 20 March, the UK Government announced a series of measures to help support businesses through the COVID-19 crisis. Their approach is a mixture of tax relief, financing and support towards the cost of employees. While helpful general guidance has been given, the details of some of the measures are currently unclear. We expect more clarity on the Government's plans as further guidance comes out this week. However, from what we know so far, many businesses will find Government-backed finance impossible to access, and furloughed employees will face substantial wage cuts.

Coronavirus Job Retention Scheme

Under the new Coronavirus Job Retention Scheme, UK employers (including companies, charities, partnerships and unincorporated businesses) will be able to access government grants to help cover a proportion of the salaries of employees who would otherwise have been laid off, made formally redundant, or asked to take a period of unpaid leave during the crisis.

The scheme applies to the cost of wages from 1 March 2020 and is currently expected to run for three months (but may be extended). Existing Government systems are not set up to make payments to employers and so HM Revenue & Customs (HMRC) are working to put those in place now, with the first payments to be made to employers at the end of April.

The Government has said the grants will be for 80% of an employee's wage, up to a maximum payment of £2,500 per month for each employee. Employers will have a choice as to whether they make up the shortfall to their employees. It has been widely reported that employees will receive 80% of their wages but the Government guidance is less clear, saying that the grant is to cover “all employer costs”. It may be the case that employers would be able to deduct other costs of employment such as employer pension contributions (min. 3%) and employer National Insurance contributions (13.8%) from the grant, before paying the balance (net of payroll deductions) to the employee, who might receive less than 70% of his or her normal wage (but may then claim other Government benefits). We are waiting for further information on the details of the scheme to confirm if this is what is envisaged.

To claim under the scheme, UK employers (including UK subsidiaries of overseas companies) would need to designate affected employees as “furloughed workers” and notify them of this change. In order to take a salary cut, the employee would need to consent to becoming a “furloughed worker”, but in the current economic environment, it is likely most will accept (if the alternative is redundancy without pay). The employer would then submit information to HMRC about those employees through a new online portal, which is currently being set up.

HMRC Time to Pay

All UK businesses (whatever their nature and including the UK subsidiaries of overseas companies) in financial distress, and with outstanding tax liabilities, have always been eligible to apply to defer payment of their taxes through HMRC’s Time to Pay service.

Previously, HMRC granted little flexibility for payment of PAYE and VAT (as these taxes are typically collected by the business on behalf of others). However, following representations by industry bodies and the Government’s COVID-19 tax helpline being overwhelmed by applicants last week, it was decided that VAT deferral would be automatic (see below).

Any UK businesses experiencing difficulties with paying other taxes, including corporation tax and payroll taxes in respect of employees who have not been put on furlough, can apply for a deferral, which will be considered by HMRC on a case-by-case basis.

Deferral of VAT quarterly payment

The payment of VAT between 20 March 2020 and 30 June 2020 will be automatically deferred for all businesses that pay VAT in the UK. However, quarterly returns should still be filed as normal and HMRC will pay VAT refunds and reclaims as normal (providing much needed cash flow for some businesses).

The payment of VAT that has been deferred under the scheme should be paid at the end of the next tax year, in April 2021.

Business rates holidays and cash grants

- There is a business rates holiday for retail, hospitality and leisure businesses in England for the 2020 to 2021 tax year. The scheme is automatic and will be applied to the next council tax bill in April 2020.
- Businesses in the retail, hospitality and leisure sectors in England with a rateable value under £15,000 will receive a grant of £10,000 on top of the business rates holiday. Businesses in these sectors with a rateable value of between £15,001 and £51,000 will receive a grant of £25,000 on top of the business rates holiday. There is nothing businesses need to do to access the scheme; eligible businesses will receive letters from their local authority shortly.

Coronavirus Business Interruption Loan Scheme (CBILS)

- A new loan scheme will launch on Monday 23 March to support small and medium sized businesses to access bank lending (including overdrafts, asset finance facilities, term loans and invoice discounting facilities).
- Lenders providing loans to eligible businesses through the CBILS will have the benefit of a Government guarantee of up to 80% of each such loan. The maximum value of a loan that is able to be made through the scheme is £5 million (and the minimum value is £25,000).
- The scheme is open to businesses which are based in the UK with a turnover not exceeding £45 million per year, operate in an eligible sector and are unable to meet a lender's normal lending criteria. Businesses that have already received government aid in excess of £200 million in the previous three years are not able to access the CBILS.
- The Government will cover the cost of the initial interest payments on the loans but has not yet confirmed how many months it will cover.

The Covid Corporate Financing Facility (CCFF)

The CCFF is intended to support liquidity among larger firms which were in a strong financial position prior to the COVID-19 crisis. The facility is designed to help eligible firms bridge COVID-19 disruption to cash flows by providing a framework to support the issue and purchase of short term debt in the form of commercial paper issued on standard terms at reasonable rates of interest.

Non-financial companies will be eligible if they make a “material contribution” to the UK economy and were in “sound financial health” prior to 1 March 2020. Guidance from the Bank of England says they consider companies to make a “material contribution” if they are UK incorporated with a genuine business in the UK, have a significant number of employees in the UK or are headquartered in the UK. Companies may be eligible if they generate significant revenues in the UK, serve a large number of UK customers or have a number of UK operating sites; UK subsidiaries of foreign companies are therefore potentially eligible.

The Bank of England has set the threshold of “sound financial health” high and this will exclude most businesses from accessing the scheme. They have said that the clearest way to demonstrate sound financial health is to have (or have had as at 1 March 2020) a short-term rating of A3/P3/F3 or above, or a long-term rating above BBB-/Baa3/BBB- from at least one of the major credit ratings agencies: S&P, Moody’s or Fitch. If companies have different ratings from different agencies and one of those is below investment grade, the commercial paper will not be eligible.

Companies do not need to have previously issued commercial paper or currently have (or have had as at 1 March 2020), a credit rating in order to participate. The Bank of England has been speaking with the ratings agencies in advance of the launch of the facility and have advised companies that do not currently have a credit rating to contact one of the major ratings agencies and indicate that they wish to use the CCFF.

The minimum size of an individual security issuance will be £1 million and the CCFF will be available for commercial paper with a maturity of between one week and 12 months at interest rates that would have prevailed in the market prior to the COVID-19 crisis.

The scheme is intended to come in to operation on Monday 23 March and operate swiftly. Where a company is confirmed as being eligible before 4pm on a working day, it will be able to sell commercial paper to the Bank of England on the following working day. Further details, including the application forms and terms and conditions, are expected to be published by the Bank of England on Monday 23 March.

The CCFF will operate for 12 months and for as long as steps are required to relieve cash flow pressures on eligible companies; six months’ notice will be given prior to the withdrawal of the facility.

EU state aid rules

Under EU state aid rules, advantages granted by EU Member States to specific companies require prior approval by the European Commission (the Commission) under Article 107 of the Treaty on the Functioning of the European Union (TFEU). Under the terms of the EU Withdrawal Agreement, the EU state aid regime continues to apply in the UK until 31 December 2020.

Measures for the benefit of individuals (e.g. wage subsidies) or measures that benefit all companies across a Member State equally (e.g. zero interest tax holidays or changes to the insolvency regimes) are generally not considered state aid under Article 107 TFEU. In contrast, specific support for companies in a specific sector (e.g. passenger air transport) would require Commission approval.

The Commission emphasised on 13 March 2020 that it would use the full flexibility of the state aid rules to support the steps taken by Member States and would deal with any individual applications for approval very fast. Consistent with this promise, the Commission has approved a number of state aid schemes in as little as 48 hours over the past few days. In addition, the Commission adopted on 19 March 2020 a “Temporary Framework” under Article 107(3)(b) TFEU which now applies until the end of this year, which sets out certain types of state aid measures by EU Member States and the UK designed to remedy the serious disturbance in the economy caused by the Covid-19 outbreak which the Commission considers fulfill the criteria for legitimate state aid measures. This means where a notified state aid measure fulfills these criteria the Commission will approve the state aid measure in short order. State aid measures which fall outside the criteria contained in the Temporary Framework will be individually assessed by the Commission in light of the general rules on state aid measures.

While companies should be aware of the state aid regime under EU law, the primary focus for companies should be on their assessment of the announced support measures and whether they make sense for a particular business. That said, it makes sense to continue to track to what extent state aid measures have been approved by the Commission and to follow the debate between Member States and the Commission in this regard.

Conclusions for investors and portfolio companies

Despite the series of measures introduced by the Government to support the economy through the COVID-19 outbreak, this will undoubtedly be a challenging time for many businesses and achieving operational resilience will require significant contingency planning.

Investors and funds will experience a range of responses across their portfolio companies as various industries are challenged in different ways by the outbreak. By working closely together, investors and their portfolio companies can best prepare themselves to minimise business disruption.

Specific actions to be considered include:

- Close monitoring of ongoing obligations and covenant compliance under existing facility arrangements.
- Strict enforcement by investors of rights to financial information and monitoring across their portfolio companies.
- Proactive assessment of liquidity needs at the portfolio company level by investors and the enforcement of investor-led solutions where required.

- Engagement with auditors at the portfolio company level to identify any audit issues stemming from the outbreak.
- Assessing key supplier and business partner disruption and related legal rights and obligations.

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click here to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

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