COVID-19 - A Practical Guide

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Introduction

The extraordinary circumstances of the COVID-19 pandemic has presented new challenges for all of us. At Ogier, our robust business continuity planning and technological infrastructure have been thoroughly tested and allowed us to continue supporting our clients and contacts.

Across our global network of offices we have been preparing – tailoring each plan to its jurisdiction and the advice of the relevant authorities.

Our priority throughout has been – and will continue to be – the safety of our employees and their families, our commitment to the communities we work in and providing a comprehensive service to our clients.

As part of our continued commitment to providing the best service to our Channel Island clients, we have prepared this guidance on the topics and issues that our clients and contacts will be facing over the coming weeks and months, including insurance, health and safety, annual leave and business continuity.

We hope that this will provide a useful starting point but would also stress that members of the Ogier team are here to help and are available to address legal and practical questions that you have.

Regulated Business

Continuity planning

The Jersey Financial Services Commission (JFSC) and the Guernsey Financial Services Commission (the GFSC, and together, the Regulators) have taken steps to enact their respective business continuity plans to ensure [1]
together with the JFSC, the Regulators) have taken steps to enact their respective business continuity plans to ensure that they are each able to sufficiently manage the impact of the COVID-19 outbreak on their regulatory oversight function.

In turn, the Regulators also expect that all regulated businesses undertake a similar form of business continuity planning to ensure that they too “continue to operate effectively and meet regulatory obligations”.

The general response by the Regulators to the COVID-19 response has so far been to assure businesses that they understand that working practices are likely to change as more staff work from home but expect businesses to have sufficient continuity and contingency measures in place so that regulatory obligations are adhered to.

The JFSC has advised regulated businesses to ensure (amongst other matters) that contingency plans are developed so that compliance monitoring is not diminished, the span of control function is not compromised, (especially where businesses are operating at minimum levels), that there is no interruption of individual specific accountabilities i.e. Principal Person and Key Person roles and any outsourcing arrangements are robust such that alternative arrangements can be enacted should the outsourced party be unable to fulfil the outsourced activities.

Capital Adequacy and Solvency

The Regulators recognise the effect COVID-19 has had on balance sheets and have reiterated the need for regulated businesses to actively monitor capital, financial resource and solvency requirements and manage operational resilience. Regulated businesses in Jersey should consider:

1. making sure that their finance functions are regularly monitoring forecast budgets against actual performance;
2. increasing the frequency of Adjusted Net Liquid Asset (ANLA) and Margin of Solvency calculations to maintain specified thresholds; and
3. updating and formally documenting that their directors (or partners, certificate holders or other senior managers) are satisfied that the business can maintain adequate resources in order to meet business commitments.

Concessions

The JFSC now expects and encourages regulated businesses to contact it via email or its available electronic portals. Accordingly, the JFSC is happy to accept personal questionnaire declarations and financial statements electronically with electronic signatures. For all documents which are signed electronically, please retain reliable and appropriate evidence identifying the person signing the documents, demonstrating (where appropriate) that the signatory has given authority for an electronic signature to be used.

The JFSC has agreed to extend some of the forthcoming business deadlines for submissions of audited accounts, fund statistics returns and prudential returns (amongst others). The JFSC is encouraging all regulated businesses to make their regulatory submissions before the revised deadlines, where possible. Full details of the extensions can be reviewed here [link to JFSC website].

Similarly the GFSC has indicated, amongst other matters, that:

1. returns to the Commission which would ordinarily require auditing (e.g. because they relate to a year end result) may be submitted in an unaudited form without a special concession being sought from the Commission; and
2. those financial returns for insurers, insurance intermediaries and managers, investment firms, funds and fiduciaries which would require submission by the end of April 2020, may be submitted at any point before the end of May 2020 in unaudited form. Similarly, the deadline for submission of unaudited returns for other firms with a non-calendar financial year, is extended by 1 month (so, for example, a firm with a year-end of 31 January would not be required to file the financial return before the end of June, rather than the usual requirement to file by the end of May).

Where a regulated business foresees non-compliance with any of its regulatory obligations, the Regulators have requested that such regulated business contact their relevant regulatory supervisor in a timely manner. In particular, the GFSC has said that any firm which knows that it will not be able to make the revised filing deadlines should write to the Commission to explain what issues it is experiencing, how it is remediating those issues and when it expects to be able to file. The Regulators have also reinforced the regulatory obligation to be cognisant of suspicious activity and to note that reporting obligations still remain in place.

Please refer to the full suite of GFSC updates [link to GFSC website].

For a full list of the additional matters that the JFSC encourages regulated businesses to consider, please refer to the full JFSC updates [link to JFSC website] and [link to JFSC website].
Economic Substance

Under the Taxation (Companies – Economic Substance) (Jersey) Law 2019 and the Income Tax (Substance Requirements) (Implementation) (Guernsey) Amendment Ordinance 2018 and the Income Tax (Substance Requirements) (Implementation) Regulations 2018, Jersey and Guernsey tax resident companies which derive income from certain “relevant activities” (including holding company business, finance and leasing business and fund management business) are subject to requirements designed to ensure that those companies have a level of substance in the relevant Island which is commensurate with their economic activities.

Directed and managed test

The requirements include the “directed and managed” test which provides, among other things, that meetings of the board of directors of such companies must be held in the relevant Island at adequate frequencies, that a quorum of the board of directors must be physically present in Jersey or Guernsey, as applicable, at those meetings and, where a meeting is called to consider a strategic matter, or a matter relating to the companies’ core income generating activities, a majority of directors must be physically present in Jersey or Guernsey.

There has been concern, in light of the restrictions on travel as well as the need for individuals to self-isolate as a result of the COVID-19 pandemic, that it will not be possible or practical for some companies to comply with the directed and managed test for as long as the situation persists. In response to this concern, the Comptroller of Revenue in Jersey and the Director of the Revenue Service in Guernsey have issued guidance to reassure companies that they will not be determined to fail the economic substance test where they have to adjust their normal operating practices temporarily, for example, by holding board meetings virtually rather than physically in Jersey or Guernsey.

Whilst this is a practical solution for many companies, we would advise that companies should:

- continue to ensure that board meetings are properly convened and held;
- maintain and retain relevant records to demonstrate the reasons why the company was prohibited from complying with the requirements of the directed and managed test;
- consider the appointment of alternate directors who are resident in the relevant Island and who will be available in the event that individual directors are unavailable or temporarily incapacitated; and
- If the company conducts a regulated activity, advise the Jersey Financial Services Commission or the Guernsey Financial Services Commission, as appropriate, in the event that any matter arises which requires the company to notify, or seek any regulatory approvals from, the relevant regulator.

Property

Tenant considerations

Most commercial leases will oblige tenants to comply with all statutes, regulations, notices or orders made by a competent authority. If advice from the Governments of Jersey or Guernsey develops - to the effect that notices or orders were made requiring the closure of offices or ensuring staff work from home to reduce the spread of COVID-19 – a tenant would be required to comply with such directions otherwise they would risk breaching the lease terms.

If a lease does not have an upcoming break date or lease expiry, tenants will not be able to terminate and rent will remain payable.

Generally, Jersey and Guernsey leases do not contain force majeure clauses, which might otherwise allow the parties to end the lease. Instead, Tenants may look to the doctrine of frustration. However, this requires an act to occur which renders it impossible to perform an obligation under the agreement, which amounts to a very high threshold. There are no reported cases on this point in Jersey, Guernsey or the UK at present but, in the current commercial climate, it seems likely that a tenant will seek to argue that the lease has been frustrated if their occupation is prevented by the landlord - even if pursuant to a government directive.

Where a lease contains a ‘cesser of rent’ clause, and where the clause has been widely drafted to cover situations where a tenant “cannot occupy the premises”, it is possible that this would cover occupation of commercial premises prevented by an order or notice from the Government of Jersey or Guernsey.

Looking to business interruption insurance, whilst most tenants will not have such policies the majority of business interruption policies are usually linked to property damage and therefore would not cover the current scenario. Only non-damage business interruption cover (which is very rarely obtained or available) would be capable of covering COVID-19. However, the specific terms would need to be considered carefully to assess whether or not it can be relied
upon

Whilst ‘keep-open’ clauses are extremely rare in Jersey and Guernsey leases, occasionally they are included for retail tenants. Depending on the provisions of the lease and any Government of Jersey or Guernsey guidelines, keep-open clauses have the potential to cause disputes between landlord and tenant.

**Landlord duties**

Landlords should consider any obligations they may have under local health and safety legislation in respect of the premises and keep up to date with relevant government advice.

Landlords may be required to implement preventative measures, for example, increased cleaning of communal areas and ensuring that suitable handwashing facilities are provided to occupiers of the premises (where the landlord has such responsibility under the lease provisions). Currently, the Governments of Jersey and Guernsey have not put any explicit obligation on commercial landlords regarding the provision of extra cleaning services in their premises to prevent the further spread of COVID-19. However, many landlords are nevertheless taking pragmatic steps, especially where the landlord remains responsible for common parts under the lease provisions.

Cost implications to landlords will result if more frequent and thorough cleansing of common parts are required as a result of COVID-19. We would recommend that landlords check the service charge provisions to ensure they are able to recover such charges. However, we would note that the majority of service charge provisions in commercial leases will include a ‘sweep-up’ provision permitting the landlord to recover reasonable costs incurred in line with the principles of “good estate management”. These clauses may go further and allow costs incurred as a result of compliance with applicable laws, which, should the Governments of Jersey or Guernsey impose prescriptive measures, may also catch increases in service charges for sanitation purposes. In each case, the recoverability of a landlord’s costs for enhanced cleaning measures would be subject to any tenant negotiated service charge cap or specific exclusions in the list of services contained in the lease. This may lead to tenant disputes. Firstly, as to what constitutes "reasonable costs” (and therefore recoverable under the service charge) and, secondly, whether the landlord has any discretion under the lease terms as to whether it must provide the additional cleaning services.

**Electronic signatures and original documents**

With increasing remote working and self-isolation, signatories may be forced to sign documents remotely via electronic signature.

Ogier has the ability, via its IT infrastructure and products such as DocuSign, for timely sign-off to support completions administered remotely. Also our Skype for Business video conferencing facilities allow easy access to our qualified staff, who are able to help on general queries.

Generally, an electronic signature will be legally effective to conclude a contract, so long as:

- it is applied with the requisite intent and appropriate authority;
- for a legal entity, there are no restrictions on the use of electronic signatures in its constitutional documents;
- the law of the place of a company’s incorporation permits electronic signatures and the use of electronic signatures will not impact on the validity of the contract;
- there is nothing in the contractual terms themselves that stipulates something else.

In Guernsey, the Electronic Transactions (Guernsey) Law, 2000 confirms that a signature, seal, attestation or notarisation in electronic form will not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form. A signature in electronic form satisfies a law requiring a signature written by hand.

The Electronic Transactions (Electronic Agents) (Guernsey) Ordinance, 2019 provides enhanced certainty in relation to the legal effect, validity and enforceability of a contract carried out by means of an ‘electronic agent’ in relation to the formation, execution, performance and termination of a contract. The Electronic Transactions (Exemptions) Order, 2001 sets out certain exclusions.

In Jersey, the Electronic Communications (Jersey) Law 2000 was amended on 9 October 2019 by the Electronic Communications (Amendment of Law) (Jersey) Regulations 2019 to clarify the provisions around electronic information, electronic signatures, and the making of contracts by electronic means. A signature, seal, attestation or notarisation is not to be denied legal effect, validity or enforceability only because it is in electronic form.

Notwithstanding the legislation, individual companies will still be bound by any particular requirements that are stated in their respective articles of association.
Most modern articles authorise electronic signatures but old articles will likely not. Be aware of requirements in old articles of association for execution under seal and for signatures to be “in writing”.

Powers of attorney granted under the Powers of Attorney (Jersey) Law 1995 or under the Powers of Attorney and Affidavits (Bailiwick of Guernsey) Law 1995 granted by individuals will need to be signed in the presence of a witness in order to be effective. Consideration will therefore need to be given as to how this can be achieved.

Other circumstances where an electronic signature should not be used are where:
- the requirements of a specific statute or contract expressly require physical writing
- the document needs to be presented to an authority and it requires a wet ink original
- the document is to be signed by an overseas entity and, as a matter of local law, it does not have the capacity to use electronic signature or the person signing does not have the authority to use an electronic signature, and
- enforcement action may need to be taken in another jurisdiction and that may be made difficult as a matter of local law because of the use of an electronic signature.

Companies that wish to use a digital signature platform will need to agree a licence for the product and ensure that their signatories are able to use the platform.

Where signatories are working at home, companies should ensure that they are able to access signature documents remotely, print signature pages as necessary and return scanned signature pages.

Where security is created over securities pursuant to the Security Interests (Guernsey) Law, 1993 or the Security Interests (Jersey) Law 2012, physical possession of the relevant certificates of title by the secured party might be required. Consideration should be given to how this will be achieved. Ogier would be happy to discuss practical solutions with clients on a case by case basis.

Commercial Contracts

These are unprecedented times with much uncertainty for businesses, particularly those in the supply chain sectors, such as logistics providers, manufacturers, providers of mechanical equipment and customer facing service providers. Whilst you cannot meticulously plan for the unforeseeable, you can be as prepared as possible for what may come.

Contract due diligence

- Allocate staff to carry out contract due diligence.
- Identify all key supply chain contracts within your business. Understand whether any contracts are interdependent (e.g. is the ability to perform obligations under a contract dependent on the supply of goods or the provision of services by others?)
- Know who is responsible for the day-to-day management of key contracts within your business and that of your customers and suppliers.
- Ensure the key contract terms are understood:
  - What is the governing law of the contract?
  - What are the production / supply demands? Are there specific quantities and times for delivery?
  - Does the contract contain service levels and prescribe penalties for non- or delayed- performance, such as service credits?
  - Are there any mechanisms built into the contract to allow for renegotiation or variation of terms?
  - Is there an express force majeure provision?
  - What are the provisions concerning dispute resolution e.g. arbitration?
    - Do you have a business continuity plan that is business or contract specific?
    - Make sure key personnel know the triggers for commencement of the plan and understand their obligations.

Know your insurance cover

Dedicate a staff member or team to review your insurance policies. Such reviews should identify what type of loss they cover, the limits of any cover, and how to commence a claim. In particular, check for any coverage which may be
applicable to COVID-19 situations, such as:

- inability to access premises due to, for example, government measures regarding lock down or the mandatory
vacation of premises to be used for other purposes
- the failure or under-performance of utilities, such as broadband
- loss of attraction, meaning loss of turnover / profit in certain circumstances
- notifiable disease, leading to closures or restrictions that would inhibit normal business functioning
- credit or event cancellation
- travel cancellation or port closures

Unavoidable non-performance or under performance

If your business is unable to meet its contractual obligations, consider what measures can be taken.

Force Majeure

- Does your contract have a force majeure provision (ie a provision temporarily or permanently excusing the unforeseen
or unavoidable non- or delayed performance of a party under the contract)?

- What does the clause cover and how is it triggered? For example, does it cover epidemics, pandemics, global health
events, outbreak of disease or similar, government action mandating or resulting in the closure or temporary
suspension or reduction of premises, supply chain or necessary workforce, interruption of utilities, shortage of labour
or materials or other disruption of supply chain?

- Do you have an obligation to continue paying for services if your counterparty wishes to rely on force majeure?

- Can you demonstrate that the impeded performance of your obligations is a direct consequence of the force
majeure event?

- What are the notification requirements under the clause?

- Does the clause specify a specific time for which impeded performance may continue before either party has a right
to terminate the agreement?

- Can you demonstrate that you have attempted to mitigate the impact of the force majeure event?

- Can the provisions of the force majeure clause be waived and is this something you may wish to consider (e.g.
renegotiation of terms as opposed to termination of the relationship)? Consider the ramifications of accepting,
rejecting or waiving the force majeure, seeking legal advice where appropriate. In particular, consider any
interdependent contracts.

- Note that increased costs of or lower returns from performance may not always justify reliance on force majeure
provisions.

Practical steps to mitigate loss / damage

It is important to keep customers / suppliers abreast of performance issues. However, you may wish to seek legal advice
in advance of such discussions.

Would it be reasonably possible to:

- Re-allocate staff and resources?
- Agree to vary or renegotiate contract terms with your counterparty? For example, could performance be delayed or
rescheduled, prices varied, substitute or alternative products and materials used?
- Consider a compromise. Try to preserve future goodwill and relationships where possible.

Termination of contracts for breach

Make sure you understand the termination provisions under key contracts in respect of breach of contract, including
material breach and persistent breach provisions, when they are triggered and the consequences of terminating the contract should you or the counterparty invoke the provisions.

Dispute resolution

It is possible that your commercial arrangements could turn contentious. Knowing the dispute resolution terms of your contracts is essential but seek legal advice early and start keeping good records today. Ensure problems with supply are noted in detail, alongside the events that have caused such problems (e.g. have government restrictions been imposed on transport or required labour reduction in the workplace and how has this directly impacted your ability to meet your obligations?).

Employment

Sick pay and procedures

- If an employee has COVID-19, your usual sick leave and pay entitlement will apply.

- If an employee has been medically advised to self-isolate and is unable to work from home, you are not required to provide sick leave or pay but it would be good practice, otherwise you risk the employee coming to work.

- Consider temporarily varying your contracts, policies and handbook to allow flexibility in the timescales for providing a medical certificate if an employee has been medically advised to self-isolate. Variation can be done informally (e.g. by email), but ordinary principles concerning lawful variations apply.

- In Jersey and in Guernsey, employees can claim incapacity benefit if they need to self-isolate and cannot work based on the latest Government advice on COVID-19. If you provide sick pay, you may deduct the amount of benefit from pay (£222.53 per week in Jersey and £196.84 per week in Guernsey).

- If an employee is social distancing based on Government advice (and is unable to work from home), you are not required to provide sick leave or pay but it would be good practice, otherwise the employee may come to work and put themselves at risk.

Protecting your employees

- Keep staff updated on actions being taken to reduce exposure in the workplace.

- Make sure employee contact details and emergency contacts are up to date.

- Remind staff about the importance of handwashing, disposal of tissues, using hand sanitiser and provide suitable facilities.

- You have a duty to provide a safe place of work – conduct a risk assessment paying particular attention to employees in high-risk categories and those in customer facing roles.

- Limit or suspend visitors to the workplace.

- Limit or suspend business travel and face to face meetings on island.

- Make sure managers can recognise COVID-19 symptoms and are clear on processes (e.g. if a member of staff reports symptoms, or enquires about sick pay).

- If possible, designate an isolation room in case an employee reports feeling unwell at work.

- Where there is a suspected case in the workplace, you do not have to close the workplace or send other staff home while the outcome of test results for COVID-19 are completed.
Consider increasing your workplace cleaning services, particularly where there are suspected or confirmed cases of COVID-19.

Ask the right questions

- Ask employees to advise you if they develop symptoms or if they have had contact with anyone (e.g. a family member) who has symptoms.

- Identify staff who may be particularly at risk if there is an outbreak locally (e.g. pregnant women, those with impaired immunity and those over age 65). Employees must voluntarily consent to providing this information and data protection principles will apply.

Employees who are not able to attend work

- Offer flexible working or remote working if you can.

- Consider allowing employees to request paid holidays or unpaid leave.

- Review your policy on time off for emergencies as employees may request unpaid time off to look after a child or dependent who is sick or in isolation, or if a child’s school has closed.

- If an employee is not sick but refuses to attend work, listen to your employee’s concerns and try to resolve any genuine issues. You are entitled to take disciplinary action but should be cautious of dismissal without proper cause.

Remote working

- With increasing numbers of employees likely to be working remotely, remind employees that contractual obligations and workplace policies continue to apply.

- Flexibility in core working hours will likely be essential in managing deadlines and expectations.

- Consider introducing a home working policy to ensure that employees are clear on their rights and responsibilities.

- Provide appropriate equipment, technology and software licenses where necessary and advise staff whether you will contribute a sum towards the cost of their home utility bills.

- Help employees to work successfully at home by providing guidance on issues such as -
  - allocating a separate space to work
  - keeping to a schedule
  - making sure your home set up does not create physical health problems
  - staying in touch with colleagues
  - working from home with children present following school closures

Staff availability and working hours

- If you have suffered a downturn in work or your business is required to close, staff could be ‘laid off’ temporarily without pay, but only if you have an express contractual right to do so.

- Consider inviting employees to temporarily reduce their working hours.

- Consider inviting employees to take annual leave during the next few months particularly if they are unable to work from home.

- With potentially increasing numbers of employees who are sick, self-isolating or social distancing, review your
contracts, policies and handbook on normal working hours, shift-work, overtime and rotas.

- Consider splitting staff into separate shifts to limit potential exposure and ensure business continuity.

Annual leave

- Enforced travel restrictions will give rise to holiday cancellations. Potentially, accrued untaken leave levels could be markedly higher in the latter part of 2020 than the norm at that stage in the business’ holiday year. This may present a range of operational challenges.

- Keep workforce annual leave planners and calendars under review. Subject to the (foreseeable) needs of the business, you may wish to discuss with employees proposals to change current policy rules and requirements, to include requirements to take a minimum proportion of leave within certain time periods. Ordinary principles regarding variations to terms apply.

- Consider other relevant provisions such as carry over arrangements between holiday years. Making the ‘right’ decision on such issues will be dependent on a number of factors, to include: the starting position under the contract; how the COVID-19 outbreak might improve or deteriorate in 2020 and how it has impacted and may impact your business and its operating requirements; and the characteristics of the specific employee and how they have been impacted (in terms of their annual leave arrangements) by COVID-19.

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Data protection

Information Commissioners

It is likely that COVID-19 will have a significant impact on the operations of many Jersey and Guernsey data controllers and data processors. However, the requirements of both island’s data laws continue to apply in the usual way. The Jersey Office of the Information Commissioner (JOIC) has stated that it will take the relevant circumstances into account when assessing compliance with Jersey’s data laws. It is likely that the Office of the Data Protection Authority in Guernsey (ODPA) will adopt a similarly pragmatic approach.

Confirmed cases of infection

You have an obligation to ensure the health and safety of your employees, as well as a duty of care. Data protection principles do not prevent you from adhering to such obligations.

You should keep staff informed about cases in your organisation. However, personal data concerning health is ‘special category data’. If an employee has COVID-19, you can let other employees know that there has been a confirmed case within the business but you must not include any details about the individual who is absent without their express consent. It is unlikely that you will need to name individuals and you shouldn’t provide more information than is necessary.

Data collection

You can lawfully collect information in order to help your business respond to the COVID-19 crisis.

As indicated immediately above, this is likely to involve the further collection of special category data and you should be clear as to the lawful basis upon which you seek to do so. Notwithstanding the basis that you consider to be most relevant to the collection, you should consider undertaking an assessment of the ‘legitimate interests’ (as between you and the data subjects in question) connected to this further processing.

In pursuit of the ‘transparency’ principle, you should be clear with your data subjects (ie your staff) about the additional data collected. Privacy notices should be reviewed and you may wish to consider the adoption of a standalone notice - specific to the data collection activities that are proposed in response to COVID19.

If your organisation is a data controller, the central record listing the processing activities it conducts should be updated with the details of the further processing activities undertaken.

External communications

Many businesses will want to advise or update their contact base in response to the COVID-19 situation. If your normal practices concerning client communications involve accurate databases containing up to date contact information, coupled with a clear understanding of the lawful basis upon which you are able to communicate with your clients and
contacts, you should be wellplaced. However, it would be prudent to keep your communication practices under review to ensure, for example, that the nature and frequency of such communications does not extend beyond the bounds of the communication practices that you have agreed with your contact base or that they would reasonably expect.

Remote working

With increasing numbers of employees likely to be working remotely, remind employees of your internet security, confidentiality and data protection policies when they are working outside of the office.

Any papers permitted to be removed from your place of business that contain personal data and/or confidential information should be transported safely and securely. You may wish to remind staff that any ‘clear desk’ practices employed at your offices remain in force and that all possible measures should be taken to lock information away at the end of each day. Any paperwork removed should be destroyed (eg shredded) or returned for destruction as soon as possible after it becomes surplus to requirements. Information, whether contained in hard copy or on screen, should be accessed in a place where it cannot be viewed by unauthorised persons, such as visitors to the property (eg contractors).

Whilst it is expected that staff take appropriate steps each day to secure their properties when they leave them, however temporarily, they should be encouraged to take even greater care in remote working circumstances.

Data law obligations such as the reporting of personal data breaches and responding to information requests must be actioned within specific timescales and through the appropriate internal and external channels. Review your policies that cover these processes and consider what if any adjustments need to be made. You must be satisfied that staff know what to do in these situations whilst working remotely.

Responding to data subject rights

The operational impact on business caused by COVID-19 will not justify non-compliance with key obligations, such as responding to requests from data subjects to access their information. Your business should do everything it can to adhere to its obligations in this regard. However, JOIC has indicated its understanding that resources, whether they are finances or people, might be diverted away from usual compliance or information governance work. It is unlikely to penalise organisations that can demonstrate the need to reprioritise, or adapt their usual approach, in response to COVID-19. It is likely that ODPA will adopt a similar stance.

Data transfers

Alternative operational measures that you are considering or may have implemented, or additional data collection activities that you may have adopted in response to COVID-19 and that you wish to share within your wider business, could cause information to be removed from the jurisdiction. Care should be taken to assess where personal data will be processed and consider the relevant data transfer rules under both Jersey and Guernsey’s data laws in order to ensure compliance.

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Competition Law

The Channel Islands Competition and Regulatory Authorities (CICRA) have reminded businesses that competition law remains in force despite the COVID-19 pandemic although they have confirmed that the approach to enforcement will be pragmatic. Whilst it remains to be seen if the separation of CICRA from 1 July 2020 impacts the approaches taken, it may now be more important than ever for business to reconsider the requirements of the Channel Islands’ competition laws.

Anti-competitive arrangements

- Anti-competitive agreements are prohibited in both Guernsey and Jersey, very much in summary, where the object or the effect of the agreement is to hinder or prevent competition to an appreciable extent. Regulators will continue to investigate alleged breaches of the law and will not allow businesses to exploit the crisis as a pretence for non-essential collusion.

- In the usual way, businesses should be mindful of entering into or continuing with anti-competitive arrangements and remain alive to any high risk practices that may fall foul of the law including for example: price fixing, market sharing and imposing minimum resale prices.

- CICRA have, however, confirmed that no competition law enforcement action will be taken against cooperation between businesses or rationing of products in light of the COVID-19 pandemic to the extent that this is necessary to
protect consumers, for example arrangements to avoid a shortage of supplies.

- If your business is entering into such an agreement, consider:
  - whether the agreement is in the interests of consumers; and
  - if it goes beyond what is necessary to alleviate the urgent circumstances of the pandemic.

- Seek legal advice on the nature of the agreement or comfort from the regulator if you are unsure of the status of a proposed agreement.

**Considerations for dominant businesses**

- If your business holds a dominant position, continue to guard against abusive practices including for example: excessively high pricing, refusals to supply, price discrimination, setting discounts at predatory levels or in a manner aimed at foreclosing the market.

- Is your business operating in new markets or markets with limited competition? If so, consider whether it may have a newly conferred dominant status.

- A dominant status occurs normally, although not always, where a business persistently holds a share above 50% in the market place and is less likely to occur where a business holds a share of less than 40% (unless there is wider evidence of dominance). However, dominance needs to be considered on a case by case basis.

- Do not assume that abusive conduct will be exonerated because the interests of your business are in alignment with government policies or are in aid of the “greater good” throughout the COVID-19 pandemic.

- Pay particular attention to business pricing strategies; regulators are likely to be particularly alert to allegations of unfair pricing.

- Be able to objectively justify any conduct which may be perceived as abusive and demonstrate that it goes no further than is necessary to achieve a legitimate aim. For example, be able to justify why your business is supplying one type of customer with scarce resources instead of another.

**Mergers and Acquisitions**

- The regulators have not announced any plans to halt their consideration of mergers, though they have indicated that the adoption of a pragmatic approach to supervision during the COVID-19 pandemic means that there may be delays to the consideration of these applications. Parties to a merger should therefore notify the relevant regulator (or both) where pre-approval for a merger is mandatory under the law. The regulators will continue to only approve mergers that do not “substantially lessen” competition.

- In Guernsey, parties to a merger must also demonstrate that the merger does not prejudice consumers, the public interest or the economic development and well-being of the Bailiwick.

- If your business is party to a proposed merger:
  - consider the timetable for the merger as a whole – there may be potential delays in the merger process as many businesses will face challenges as a result of the crisis;
  - where pre-approval is required under Channel Islands’ competition law, consider whether the proposed merger will pass the "substantially lessen test", considering that there may be less competition by nature of the current climate;
  - if your business faces a delay in obtaining approval, do not engage in any conduct with the other parties in the pre-approval stage which may contravene competition law and lead to financial penalties, including formulating contingency plans; the approval of the regulator will not exonerate pre-approval misconduct.
About Ogier

Ogier provides practical advice on BVI, Cayman Islands, Guernsey, Jersey and Luxembourg law through its global network of offices. Ours is the only firm to advise on these five laws. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found at www.ogier.com

ogier.com
Key Contacts

Jonathan Hughes
Partner
Jersey
jonathan.hughes@ogier.com
T+44 1534 514336
M+44 7797 759977

Helen Ruelle
Director of Local Legal Services
Jersey
helen.ruelle@ogier.com
T+44 1534 514417

Martyn Baudains
Partner
Guernsey
martyn.baudains@ogier.com
T+44 1481 752217
M+44 7797 711364

Christopher Jones
Partner
Guernsey
christopher.jones@ogier.com
T+44 1481 752337
M+44 7797 819909

Bryon Rees
Partner
Guernsey
bryon.rees@ogier.com
T+44 1481 752312

Rachel DeSanges
Head of Employment, Guernsey
Guernsey, London
rachel.desanges@ogier.com
T+44 1481 752251
M+44 7797 756352
Matthew Shaxson
Group Partner, Ogier Legal L.P.
Jersey
matthew.shaxson@ogier.com
T+44 1534 514064

Katharine Marshall
Counsel
Jersey
katharine.marshall@ogier.com
T+44 1534 514304
M+44 7797 828607

Will Austin-Vautier
Senior Associate
Jersey
will.austin-vautier@ogier.com
T+44 1534 514460

Rebekah Agyeman
Senior Associate
Jersey
rebekah.agyeman@ogier.com
T+44 1534 514039
M+44 7797 778526

Martín Casas
Senior Associate
London, Guernsey
martin.casas@ogier.com
T+44 1481 752214
M+44 7797 912428

Laura Malpass
Senior Associate
Jersey
laura.malpass@ogier.com
T+44 1534 514496
M+44 7797 911398

Sarah Parish
Senior Associate
Jersey
sarah.parish@ogier.com
T+44 1534 514249
Laura Shirreffs
Associate
Jersey
laura.shirreffs@ogier.com
T+44 1534 514096

Kate Morel
Senior Paralegal
Jersey
kate.morel@ogier.com
T+44 1534 514198

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