

CORONAVIRUS (COVID-19) - RISK CHECKLIST FOR COMPANIES OPERATING IN THE HEALTHCARE AND LIFE SCIENCES SECTOR

As the 2019 Novel Coronavirus (**COVID-19**) continues to spread across the world, the challenges for companies operating in the healthcare and life sciences sector are increasing. Below is a list of some of the new risks emerging for pharma and medtech companies.

GENERAL ISSUES		HEALTHCARE / LIFE SCIENCES SPECIFIC ISSUES	
EMPLOYMENT LAW	<p>The COVID-19 outbreak raises challenging issues for employers. Aspects to focus on from an employer's point of view:</p> <ul style="list-style-type: none"> ✓ Maintain a safe working place, whilst at the same time maintain volume and standard of operations ✓ Minimize exposure to liabilities: <ul style="list-style-type: none"> • Protect the health and safety of employees • Protect the health and safety of vendors, clients and persons liaising with the firm • Protect employees unduly or unexpectedly retained abroad due to travel bans ✓ Review applicable government health alerts, track travel and health restrictions ✓ Maintain communication with employees ✓ Facilitate remote working where possible 	SHORTAGES OF MEDICINES, MEDICAL DEVICES AND BIOCIDES	<p>The disruptions caused by the COVID-19 outbreak may lead to a shortage of medicines, medical devices and biocides. Regulators and industry associations are working to prevent and mitigate any potential shortages through close coordination and communication with stakeholders. However, if the situation persists there may be inevitable disruptions due to the shutting down of factories and shipping infrastructures, reduced workforce as a result of quarantines and travel bans, additional import and export controls and increase in demand.</p> <p>These challenges are aggravated by the fact that China is the world's largest producer of active pharmaceutical ingredients (APIs) on which manufacturers of final medicinal products highly depend. China also manufactures a significant amount of upstream components used to manufacture final medical products. Drug, medical device and biocides shortages as a result of COVID-19 could therefore ultimately lead to:</p> <ul style="list-style-type: none"> ✓ Export restrictions ✓ National authorities' request to release products outside regulatory requirements, when test results are not yet confirmed. Consequences of such premature release could include product liability and insurance issues ✓ Government appeals for emergency supply of products to state-owned customers (e.g. health services, hospitals) vs other customers ✓ Price regulation imposed by national authorities on some products ✓ Delayed/declining quality control (site inspections by US/EU regulators interrupted due to travel bans) ✓ Potential need to identify alternative suppliers (added delays) ✓ Surge of anticompetitive practices (see below) ✓ Launch of joint procurement procedures (see below) <p>Despite the outbreak, companies will still need to ensure sufficient stock of critical medicinal products and medical devices for which there are no alternatives in the market and which relate to life threatening conditions. Obligations to keep the market supplied may still apply and can be regarded as a reputational issue.</p>
	<p>CONTRACTUAL LIABILITIES</p> <p>COVID-19 has a direct impact on supply contracts. This impact is particularly relevant in the healthcare and life sciences sector, where the supply chain is vast and complex. It is therefore important to review supply contracts in order to assess the following:</p> <ul style="list-style-type: none"> ✓ Possibility to invoke <i>force majeure</i> provisions in order to cancel or delay shipments ✓ Validity of <i>force majeure</i> claims made by counterparties ✓ Explore other avenues, such as contract frustration <p>Invoking <i>force majeure</i> ultimately depends on the wording of the contract. Some key questions to consider when reviewing the contract include:</p> <ul style="list-style-type: none"> ✓ Is "<i>force majeure</i>" defined? Does it expressly include pandemics, epidemics or other similar crises? Does it include events, which are beyond the parties' reasonable control? ✓ What kind of failure of performance does the clause cover? Does the clause cover hindrances and delays to performance? ✓ Does the clause require any steps to be taken to invoke it? Are there other clauses in the contract providing alternative ways of performance? <p>It is also necessary to assess the consequences of invoking a <i>force majeure</i> clause. These depend on what the contract provides. Common types of relief include the right to:</p> <ul style="list-style-type: none"> ✓ Suspend contractual obligations ✓ Be excused from liability for non-performance or delay ✓ Terminate the contract ✓ Renegotiate the terms of the contract <p>Even if the contract does not include <i>force majeure</i> provisions, there may be other avenues of relief. It is also important to consider other side aspects, such as reputational risks and potential damage to long-term supply relationships.</p>		

GENERAL ISSUES		HEALTHCARE / LIFE SCIENCES SPECIFIC ISSUES		
INSURANCE	<p>The impact of COVID-19 on business continuity, supply chains and travel needs may lead to significant losses. It is important to assess and understand whether these losses are covered by insurance policies. Companies should therefore:</p> <ul style="list-style-type: none"> ✓ Determine whether the insurance policies provide the right types and levels of coverage for crisis situations and are responsive to any changes in the business ✓ Understand the losses they are seeking to guard against (e.g. pandemics). Determine whether these losses are covered ✓ Assess the impact of force majeure on insurance arrangements 	COMPETITION LAW/IP LAW	<p>Shortages as a result of the disruption caused by the outbreak are likely to have an impact on competition law related aspects, such as:</p> <ul style="list-style-type: none"> ✓ Parallel trade restrictions ✓ (Excessive) pricing of medicines, medical devices and raw materials ✓ Possibility for Governments to draw upon compulsory licensing schemes ✓ IP rules around new COVID-19 treatments ✓ Donations and generic supplies impacting on pricing and IP protection 	
	SUPPLY CHAIN		<p>The outbreak has a direct impact on supply chains. As a result, companies are facing significant and urgent business and legal challenges. What can be done to relieve the pressure?</p> <ul style="list-style-type: none"> ✓ Conduct a full risk assessment on the impact of the outbreak on their business activities ✓ Evaluate options when core supply chains are disrupted (e.g. alternative suppliers, prioritization of certain categories of customers) ✓ Consider whether there are alternative ways of performing the contractual obligations ✓ Consider whether there are ways of mitigating the effects ✓ Are new contracts are needed? If yes, draft provisions clearly and comprehensively so as to cover eventualities such as the present outbreak ✓ Consider the possibility of invoking force majeure clauses ✓ Monitor the announcement of any new governmental or regulatory policies ✓ Consider having a without-prejudice discussion with counterparties since a joint effort may sometimes lead to resolution of issues 	CLINICAL TRIALS
TAX		<ul style="list-style-type: none"> ✓ Companies belonging to the same group may be required to engage at arm's length terms(as if they were third parties to one another) ✓ Decisions affecting the supply chain require looking at intercompany agreements, functions, risks, etc. borne by each entity, to, in turn, assess in particular who should be bearing the costs or losses associated with the factual situation faced (same if the situation actually generates exceptional profits). This must be appropriately documented ✓ Major crises often give rise to donations / gifts from corporations to support their employees, the health system, etc. thus playing their part in the resolution of the issues. This type of support is generally quite regulated (as it can give rise to tax credits) and should be carefully reviewed 	DIGITAL HEALTH	
		DISCLOSURES		<p>Public companies and companies with listed securities are required to warn investors of plausible business or legal risks that could affect their operations. Failure to do so could lead to litigation. These companies should therefore consider the following:</p> <ul style="list-style-type: none"> ✓ Include COVID-19 in the 'risk factor' section of their periodic reports, prospectuses and SEC filings ✓ Describe how COVID-19 could affect their businesses. (SEC recommends to be as specific as possible) ✓ Subsequent updates to the reports may be needed depending on the evolution and impact of the outbreak
DISCLOSURES	<p>Public companies and companies with listed securities are required to warn investors of plausible business or legal risks that could affect their operations. Failure to do so could lead to litigation. These companies should therefore consider the following:</p> <ul style="list-style-type: none"> ✓ Include COVID-19 in the 'risk factor' section of their periodic reports, prospectuses and SEC filings ✓ Describe how COVID-19 could affect their businesses. (SEC recommends to be as specific as possible) ✓ Subsequent updates to the reports may be needed depending on the evolution and impact of the outbreak 		JOINT PROCUREMENT	<p>The magnitude of the outbreak may lead Governments to consider the need to combine joint procurement actions:</p> <ul style="list-style-type: none"> ✓ for the purchase of protective equipment, diagnostics, respiratory machines ✓ for the COVID-19 vaccine once it is authorized