



COVID-19 Checklist for Consumer Goods and Retail Companies

As the 2019 Novel Coronavirus (COVID-19) continues to spread across the world, the challenges for companies operating in the consumer goods and retail (CG&R) industry are increasing, as consumer spending, production and distribution are considerably impacted. Companies across all industry sub-sectors – from luxury and fashion, food and beverage, cosmetics, consumer durables and electronics, to hotels, resorts and tourism – are facing a number of significant business and legal issues. Here is a checklist of emerging risks and possible solutions aimed at helping CG&R companies navigate the rapidly evolving situation.



Employees

The COVID-19 outbreak raises challenging issues for CG&R employers whose workforce is incredibly diverse, including sales staff, retail and operations managers, buyers, manufacturing and production staff, hospitality workers, designers and business support staff, many of whom are engaged on a flexible or casual basis.

Aspects to focus on from an employer's point of view include:

- ✓ Maintain a safe working place, while at the same time maintaining volume and standard of operations.
- ✓ Present a considered and consistent approach to paying employees affected by COVID-19 or who are being quarantined.
- ✓ Minimize exposure to liabilities:
 - Protect the health and safety of employees (in particular vulnerable employees such as those with disabilities or caring responsibilities for vulnerable relatives).
 - Protect the health and safety of vendors, customers and persons liaising with the company.
 - Protect employees affected by travel bans or who have been quarantined abroad.
- ✓ Review applicable government health alerts, and track travel and health restrictions.
- ✓ Maintain communication with employees.
- ✓ Facilitate remote working where possible.



Customers

Consider how you can best maintain and protect the relationship with your customers, whose continued patronage and loyalty will be critical in the months ahead.

- ✓ Protect the health and safety of customers in your stores, restaurants, hotels or other customer premises by adopting recommended hygiene practices.
- ✓ Monitor government health alerts and restrictions as they may apply to customer premises and ensure compliance.
- ✓ Communicate with your customers, assuring them that their health and safety is your priority, publish the details of your ongoing actions to comply with hygiene standards in the premises and keep customers informed of your efforts.
- ✓ If applicable, publicize the details of your online stores, and invite customers to make purchases online.
- ✓ Keep customers informed about stocks of in-demand goods and any temporary disruptions to their supply, to reassure customers of your ability to meet demand.
- ✓ Ensure all customer communications show empathy and are mindful of the unforeseen circumstances that customers may find themselves in, whether it be being forced to cancel a special planned trip or having to self-isolate due to an outbreak. Communications and responses to customer social media commentary can impact on customer loyalty and endure long after the containment of an outbreak.
- ✓ Monitor shopping habits to anticipate panic buying and meet demand. You may need to consider limiting purchases where appropriate. Ensure you also have not overlooked your more vulnerable customers or those who have had to self-isolate.
- ✓ Maintain customer loyalty: review existing loyalty programs, and consider amending cancellation policies and offering more flexible booking arrangements.



Supply chain

The COVID-19 outbreak is causing unprecedented disruptions to supply chains, and CG&R companies are facing significant and urgent business and legal challenges as a result. What can be done to relieve the pressure?

- ✓ Conduct a full risk assessment on the impact of the outbreak on business activities.
- ✓ Evaluate options when core supply chains are disrupted.
- ✓ Consider whether there are alternative ways of performing the contractual obligations.
- ✓ Consider whether there are ways of mitigating the effects.
- ✓ If you need to enter into new contracts, draft provisions clearly and comprehensively to cover eventualities such as the present outbreak.
- ✓ Consider the possibility of invoking force majeure clauses (see "Contractual liabilities" below).
- ✓ Monitor the announcement of any new governmental or regulatory policies.

You may also need to assess transfer pricing activity undertaken in response supply chain disruptions.

- ✓ Think about losses suffered as a result of supply chain disruption, and who should bear these losses within the group – whether it be your production entity, a local sales subsidiary or the headquarters.
- ✓ Also think about how additional cash paid, for example to your production entity to cover operating expenses, will affect your transfer pricing and financing model.



Retail premises

For businesses with brick and mortar stores and shopping centers, consider the following:

- ✓ Even if access to premises is not restricted, consider what government limitations have been imposed on the use of the premises. For example, a tenant could potentially place itself in breach of its lease if it did not comply with public health requirements such as deep cleaning or restrictions on large gatherings.
- ✓ Consider the impact of neighboring tenants' activities. If another tenant of the same building does not comply with municipal requirements, as a tenant you may be able to ask the landlord to resolve this.
- ✓ Keep abreast of changing best practice for cleaning communal premises, and other additional health and safety requirements. Consider who in the building is obligated to pay for these: if the landlord provides cleaning services under the lease, the extra cleaning is probably recoverable from tenants, if the relevant lease clause has been drafted widely enough to cover extra costs incurred in the interests of good estate management.
- ✓ Check keep-open covenants in leases, and turnover rent provisions (the two often go hand-in-hand). If it becomes difficult to keep retail premises open, whether due to staff absence, or government restrictions, the covenant may be breached. Check if any notices need to be displayed in-store or served on the landlord if you need to temporarily close your stores. If stores are closed for longer periods, or footfall is significantly reduced, both may directly impact turnover rent calculations, and modelling should be adjusted accordingly.
- ✓ Carefully review termination provisions in leases and check if these may be triggered by circumstances relating to COVID-19, and consider whether termination may be an option. However, consider also whether it may be in the interests of both parties to be flexible and negotiate changes to the lease provisions.



Contractual liabilities

Given the unexpected nature of the COVID-19 outbreak and its impact on a wide range of business operations, parties to commercial contracts are considering the prospect that affected parties may invoke force majeure remedies in order to excuse delay or non-performance. This impact is particularly relevant in the CG&R sector, which relies on a complex network of transportation, logistics, distribution and sales parties to source raw materials, produce goods and get them to market and ultimately the end consumer. If you have entered into commercial contracts (whether as a buyer or supplier) that are or may be affected by the outbreak, you should:

- ✓ Review each contract carefully, with particular regard to the governing law and force majeure provisions, including any time bars or other procedural requirements.
- ✓ Form a preliminary view on whether any force majeure provision is "open" or exhaustive in relation to the list of force majeure events and whether the outbreak and/or resulting government crisis measures are covered or excluded. Also consider the validity of force majeure claims made by counterparties.
- ✓ If you may need to invoke a claim, consider your obligation to mitigate the effect on non-performance and what steps you can take. Starting a mindful dialogue with the counterparty may be an important part of the process.
- ✓ Consider any potential flow on effects from the invoking of a claim such as termination of the contract.
- ✓ Explore other remedies that may be available, such as contract frustration, the doctrine of changed circumstances or under a material adverse change clause. In joint venture agreements, consider whether the failure of joint venture parties to agree on a course of action to be taken in light of COVID-19 circumstances could trigger exit or other rights under the agreement.

Aside from your legal position, there are several other important matters of concern:

- ✓ For a counterparty who receives a force majeure claim it does not think is valid, there is the issue of enforcement of the contract, particularly if it does not provide for international arbitration.
- ✓ There are the reputational risks and potential damage to long-term supply relationships with key buyers and suppliers. Even where there is no legal basis for force majeure relief, parties who receive force majeure claims may wish to be flexible about amending or restructuring (e.g. by postponing deliveries) the contract to accommodate the affected party.
- ✓ Declaring force majeure or receiving a force majeure claim may impact on insurance arrangements (see below).
- ✓ Buyers who are part of a chain of supply contracts may themselves need to declare force majeure in response to a supplier's declaration in order to avoid being in breach. Each contract in the chain may of course be on different terms or subject to entirely different governing laws and this can create substantial challenges for the buyer, especially where their downstream contract has less favorable (or no) force majeure provisions. There may also be separate time bars or other procedural requirements.
- ✓ If you are entering into new contracts during this period, consider the force majeure provisions with particular care.



Insurance

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 may be covered by insurance policies.

Companies should:

- ✓ 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) and determine whether these losses are covered.
- ✓ Assess the impact of force majeure on insurance arrangements.



Antitrust and competition

While you should consider all appropriate and necessary measures to protect your business against COVID-19 related risks, you should continue to determine your commercial behavior independently, and in a manner that remains in full compliance with applicable antitrust laws. Antitrust authorities across the globe are already targeting commercial behavior triggered by the COVID-19 outbreak. For example, you should not collude or exchange information with your competitors about:

- ✓ changes to your commercial policies in response to the COVID-19 outbreak, e.g. changes to or waivers of cancellation policies and booking modifications, changes to loyalty programs, price promotions/discounts for specific products etc.
- ✓ changes to your employment terms (e.g. salary freezes, compulsory unpaid leave periods, etc.)
- ✓ measures to reduce capacity/maintain prices for products for which demand has slumped ("crisis cartels")
- ✓ limitation of supplies to customers/price hikes for products where demand exceeds available supplies

Companies whose business is severely impacted should check the availability of government aid measures and packages with their respective local, regional and national governments. Check whether any available aid has been properly notified to and cleared by the European Commission (to avoid any claw backs in the future).



Data privacy

For many CG&R companies, data privacy is already a top compliance obligation, particularly for those companies that have taken their businesses online. Many companies are now having to make urgent decisions to keep their workforce safe and ensure business continuity, which may involve some additional data processing because of the crucial role that data plays in containing the spread of the virus. However, not all data processing can be justified on that basis. A balance must be found between protecting public health and personal privacy. Employers will need to assess whether or not certain data processing they are considering will comply with data privacy regulations.

- ✓ Assess whether data privacy regulations allow you to lawfully collect and process from employees or visitors, certain personal, and sometimes sensitive data, such as body temperature and travel information.
- ✓ Check if your local data privacy regulator has issued any guidance either permitting or restricting the collection of personal data for the purposes of identifying COVID-19 cases.
- ✓ Assess, under both data privacy and employment legislation, whether as an employer you may establish information channels requiring employees to notify certain COVID-19 information about themselves or colleagues to HR or line managers.
- ✓ Ensure any teleworking strategy you design and implement minimizes the related cybersecurity and data privacy risks that arise, for instance, because you open up usually restricted systems for remote access, you allow employees to use personal devices for accessing organization systems and resources, or malicious actors leverage COVID-19 to attack organizations.



Digital

As consumers avoid frequenting busy spaces like bricks and mortar stores and shopping centers, brand owners and retailers should prepare to respond to a switch from in-store to online consumer purchases. Those that are flexible and can nimbly adapt to shifting consumer shopping habits online will be better placed to meet demand and maintain customer confidence as the situation evolves.

- ✓ Consider increased investment in online sales channels as part of an omnichannel distribution strategy.
- ✓ Review online sales capacity, and work with logistics partners to prepare to meet increased online delivery demands.
- ✓ Monitor consumer shopping habits through an analysis of customer data patterns and social media commentary, in order to pre-empt any shifts in consumer preferences.



Corporate governance and tax

COVID-19 also raises issues for corporate governance and decision-making, which in turn affects business continuity.

- ✓ COVID-19 related travel restrictions, general advice not to travel and public health warnings to avoid large gatherings will have implications for corporate decision making, particularly in jurisdictions that require board members to be physically present at board meetings and where board members may live or be temporarily in different countries. Evaluate the need for physical board meetings and consider whether they can instead be held by remote means.
- ✓ However, check that any changes to your normal corporate decision-making practices will not have any knock-on effects, such as for holding companies in jurisdictions with economic substance requirements that require directors' physical presence at board meetings.
- ✓ Similarly, annual general meetings will be affected by travel restrictions and public health concerns. Review the applicable requirements and consider whether postponing meetings or virtual attendance is permitted, and monitor any guidance or temporary relaxation of requirements issued by corporate registries in response to COVID-19.
- ✓ At the parent company level, when taking group-wide decisions such as about business travel restrictions for the group, remember that subsidiaries will need to comply with their own local entity governance rules before taking certain decisions, and local law directors' duties will apply.
- ✓ When making decisions about losses incurred due to supply chain disruptions, be mindful that a decision taken in relation to loss by one entity in the group which is in a different country to where the loss was actually suffered, may impact on the tax deductibility of that loss.



For more information, please contact one of our team members below:



Alyssa Auberger
Global Chair
+ 33 1 44 17 53 61
alyssa.auberger
@bakermckenzie.com



Kurt Haegeman
Europe, Middle East & Africa
+81 3 6271 9460
kurt.haegeman
@bakermckenzie.com



LokeKhoo Tan
Asia Pacific
+ 852 2846 1970
lkt
@bakermckenzie.com



James Wilson
North America
+1 202 452 75004
james.wilson
@bakermckenzie.com



Renata Amaral
Latin America
+55 11 3048 6927
renata.amaral
@trenchrossi.com



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