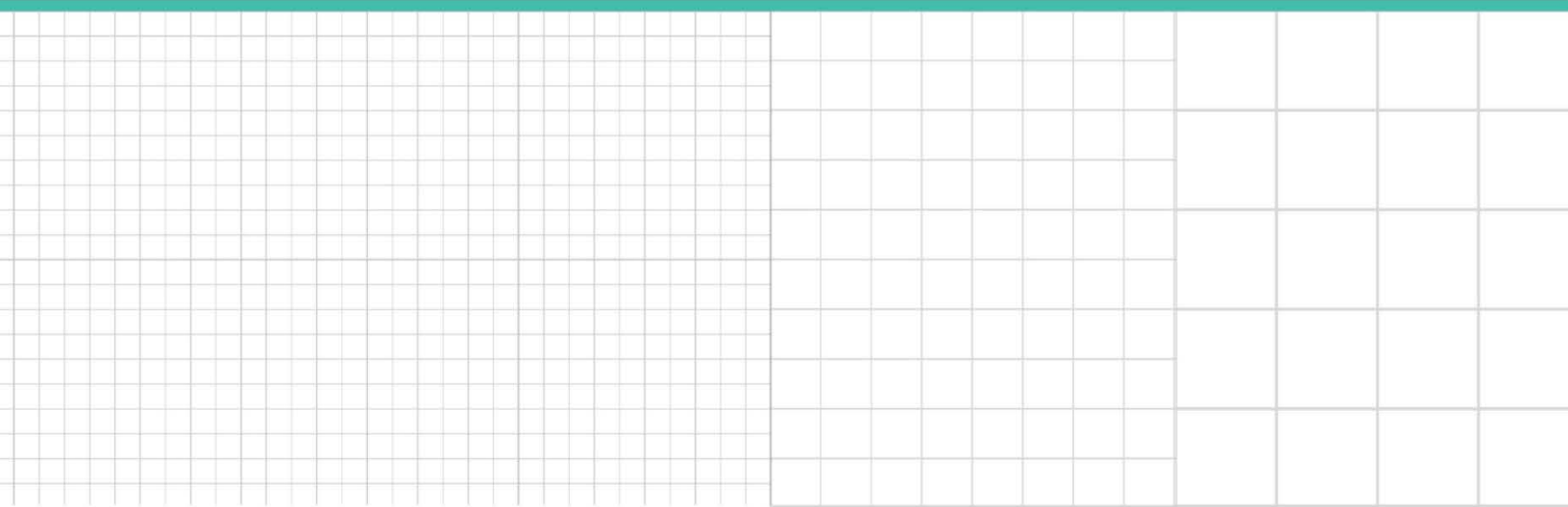


Checklist

EU Fintech Issues During the Pandemic

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EU Fintech Issues During the Pandemic

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Editor's Note: This checklist summarizes some of the key practical legal considerations that U.S. fintech businesses should think about as they manage the impact of the Covid-19 pandemic for their European business and operations.

For further discussion of the issues identified here, please see [Finance, Overview - Doing Business in Europe During the Pandemic—Key Legal Issues for U.S. Fintech Businesses](#).

Monitor Regulatory Compliance

1. If you are a regulated business, continually monitor guidance and statements from your regulator at European Union (EU) and/or national member state level.

International regulators have been actively issuing guidance and updates in relation to a broad range of regulatory issues including, the following:

- a. Prudential requirements, including capital and liquidity requirements
- b. Governance and internal controls
- c. Data protection
- d. Conduct of business requirements
- e. Consumer protection
- f. Money laundering, terrorist financing, and other financial crimes
- g. Business continuity
- h. Market integrity

This guidance is regularly being updated in light of the evolving situation and you should continue to monitor and observe any updates.

2. Consider specific pandemic-related issues that may present challenges for meeting regulatory compliance obligations.
 - a. Practical and logistical difficulties of working from home (WFH)
 - b. The need for “wet ink” signatures
 - c. Closure of registries and regulators
 - d. Heightened risk of fraud and other threats from bad actors seeking to capitalize on coronavirus-driven vulnerabilities
 - e. Impacts of employee absence
3. Determine impacts of straitened cash flow, including:
 - a. Constraints on meeting liquidity thresholds
 - b. Potential supply chain failures
4. Review business continuity planning.

While some international regulators have indicated that they may take a relaxed position in relation to certain aspects of regulatory compliance, they have emphasized that vigilance must nevertheless be exercised, particularly in relation to consumer protection and business continuity measures.

5. Engage with regulators early on if issues are anticipated.

Ensure Board Oversight of EU Operations

1. Determine directors' duties under EU and member state law.
 - a. Confirm the applicable board oversight requirements with local counsel
 - b. General requirements, in particular around transparency and disclosure
 - c. Adequate board oversight, evidenced by holding (and documenting) regular board meetings
 - i. Most European jurisdictions allow for virtual meetings and/or written board decisions
 - ii. With travel bans currently in place across the globe, it is important to consider the tax impact, if any, that may arise from directors not being able physically to attend international board meetings
 - iii. If regulated, consider any guidance from regulators around virtual meetings

Manage EU-Based Employees

1. Continually monitor and review government orders regarding employer obligations in any EU member states in which you have employees.
2. Assemble a coronavirus response team on the ground in the EU who can help to monitor and implement such orders, and respond to any issues, on a timely basis.
3. If employees will continue to go to work during a stay at home order, determine whether this is permitted under the relevant government order:
 - a. In particular, determine whether the business may qualify under an essential services exemption. Most EU jurisdictions regard at least some forms of banking and financial services as essential services, which may be needed for fintech businesses that require a skeleton staff onsite in order to ensure business continuity.
 - b. Identify which employees are needed on-site and permitted to work
 - c. Identify requirements that employees must meet in order to fall within the exception. (For example, in Ireland, essential employees are required to carry an employer identification or letter from their employer designating them as essential employees, together with a second form of ID).
 - d. Put in place adequate safeguards to reduce the risk of essential employees or customers (if applicable) contracting Covid-19
 - e. Insurance policies should also be reviewed to confirm coverage and potential exposure in the event of an infection linked to the continued operation of the business (especially where the categorization of the business as essential may have fallen in a "gray" area)
4. Consult with local counsel prior to implementing layoffs or furloughs—and remember there is no employment at will in Europe.
5. At the end of any stay at home orders, consult with local counsel prior to employees returning to work to confirm any requirements that apply to the return to work and identify potential areas of liability and related mitigation measures.

Manage EU Cybersecurity Risk

1. Implement appropriate measures to mitigate heightened cybersecurity risks associated with WFH.

The European Central Bank has recommended that regulated entities falling within its remit should:

- a. Proactively assess and test the capacity of existing IT infrastructure, also in light of a potential increase of cyber-attacks and potential higher resilience on remote banking services
- b. Assess risks of increased cyber-security related fraud, aimed both to customers and to the institution via phishing mails etc.

- c. Enter into a dialogue with critical service providers to understand whether and to ascertain how services continuity would be ensured in case of a pandemic
2. Evaluate the applicability of obligations of the EU General Data Protection Regulation, and continually monitor any related guidance issued by the European Data Protection Board and/or by national data protection agencies.

Assess Critical Supplies and Contractual Options

1. Assess the fintech business's ability to deliver on supply arrangements given the constraints imposed by Covid-19.
2. Begin a dialogue with key suppliers needed for critical supplies in order to meet new business commitments.
 - a. Confirm that suppliers have measures in place to ensure uninterrupted supply
 - b. Review contractual arrangements to confirm options in the event of supply failures
 - c. Review new contracts to ensure that they contain appropriate provisions around allocation of risk for supply chain failures, force majeure, impossibility, and change of law, etc.

Review E-Signing Rules

1. Determine the categories of documents where a simple e-signature will not be sufficient in key EU jurisdictions.
 - a. An example of the type of document that may require additional execution formalities is a document that transfers an interest in real property (which could be relevant, for example, for some online marketplace lenders that facilitate secured loans or mortgages).
2. Reach out to local counsel in any key markets to determine any restrictions on e-signing that may cause delays in closing new business deals, and confirm available workarounds, if appropriate.

Ensure Conduct Meets EU Antitrust Standards

1. Examine cooperative relationships with competitors and trade associations to determine whether they run afoul of EU or local rules (some of which may have been relaxed in the context of the pandemic) involving:
 - a. Price fixing
 - b. Limitation of sales/output
 - c. Sharing of markets/sources of supply
 - d. Other actions which have as their object or effect the restriction of competition
2. Avoid sharing competitively sensitive information (e.g. around pricing and marketing plans) with competitors.
3. Refrain from any form of price-gouging or similar practices that take advantage of a dominant position.

Attend to Anti-Money Laundering (AML) & Know Your Customer (KYC) Rules

1. Continually monitor guidance from applicable regulators around AML and KYC.
2. Ensure appropriate digital processes are in place that permit new customer identity checks to be secure and efficient.
3. Ensure that whatever method used to gather and hold any personal data in this way is secure and compliant with the [General Data Protection Regulation](#) (GDPR).

Manage Capital and Liquidity

1. Carry out a detailed assessment of current and projected financial position, including cash conservation and maximization strategies.
2. Consider entity as well as group level operations in the context of the board oversight process mentioned previously.
3. Document measures being taken.

4. Carefully consider any cash repatriation strategies, in conjunction with legal and tax counsel, and take into account regulatory restrictions, if applicable.
5. Consider what, if any, government financial assistance may be available to support the EU business at EU or local member state level.

In a Wind-Down, Attend to All Phases of Consultation & Compliance

1. In the event a United States fintech business decides to exit the EU, there are several factors to bear in mind.
 - a. Unlike in the U.S., EU member states do not recognize the concept of employment at will. To the extent a fintech business has employees in the EU, there will be employee consultation and notification processes that must be observed in order to lawfully implement redundancies. Where terminations are envisaged, consult local counsel in each EU jurisdiction in which the employees are located as early as possible to confirm what local processes must be complied with.
 - b. To the extent that a U.S. fintech has incorporated a subsidiary or branches in the EU, these will need to be wound down. Again, the process to unwind these will vary from member state to member state; seek advice from local counsel in the relevant EU jurisdiction.
 - c. If the wind-down happens in insolvent circumstances and the local entity is unable to pay its debts as they fall due, fintechs will be subject to the insolvency laws that apply in the relevant EU jurisdiction.
 - d. Most jurisdictions impose some form of personal liability for directors of insolvent companies who are found to have knowingly carried on the business of the company in a reckless or fraudulent.
 - e. Hold and document regular board meetings and ensure the board maintains an oversight role with respect to international as well as domestic matters, particularly as cash flow issues begin to escalate.
2. For regulated businesses, engage with the local regulator prior to formally ceasing business.
 - a. Regulators will seek to ensure that customers are not adversely impacted or disadvantaged by the closure, particularly where customer assets such as deposits, other funds, or financial instruments, are held and need to be returned.