

We are being asked with increasing frequency by companies whether, in the context of coronavirus disease 2019 (COVID-19) lockdowns, their business counts as an “essential service”. This note gives a little background to what we see of governments’ approaches to this question so far, and suggests an approach companies and organisations can use to navigate this issue.

What Are Governments Trying to Achieve?

Governments broadly have two main objectives underlying their actions:

- To minimise exposure to COVID-19 and slow its spread, so that public health systems are not inundated beyond their capacity
- To keep as much of the economy going as possible, and retain the fabric of the economy so that recovery, when it comes, can be more rapid and avoid prolonged recession

It is important to keep in mind that, while these two objectives conflict with each other, they are equally important. Lockdowns, remote working, etc. are intended to deliver the first; the announcements of massive financial support and other interventions are intended to deliver the second.

How Are Governments Trying to Achieve This?

Although different European countries are at different stages of the virus pandemic, the basic elements of response have many common elements. Some countries are proceeding through advisory measures, some through legal compulsion (and some trying advisory and then moving to compulsion). For some, the underlying message is “stay/work at home if you can,” for others (particularly if resorting to legal compulsion) it is “do not leave home unless you have a necessary reason to do so”. They are trying to promote “social distancing”, and, therefore, discouraging/banning non-essential gatherings: restaurants, bars, theatres, cinemas, stadiums, universities, schools; and non-essential travel: work remotely if you can.

Governments are not typically trying to define what “essential services” are – beyond stressing the obvious importance of food, pharmaceuticals and healthcare. There are probably two reasons behind this. First is that their second objective is as important as the first – they want as much of the economy as possible to keep functioning, so they are defining what should stop, not defining what must continue. Second is that it would be extraordinarily hard to do effectively. Supply chains are now so interconnected that you would have to look at every single company and organisation to work out whether it was contributing part of an essential service or not – there is simply neither time nor capacity to do this.

Is There a Legal Definition of “Essential Service”?

This will vary from country to country. And it is important to distinguish between what is an essential service during a pandemic, and what is usually described as critical national infrastructure. There is, however, a great deal of overlap. One legal definition of essential services is contained in the [Network and Information Security Directive](#) (NIS Directive), Annex II, which lists essential services as energy (electricity, oil and gas), transport (air, rail, water and road), banking, financial market infrastructure, healthcare (hospitals and clinics), drinking water and digital infrastructure.

Some elements of essential service are being defined in some countries, as part of decisions about prioritisation of medical supplies, about provision of childcare when schools are closed, about who can cross closed borders, and so forth. These are very varied, and encompass some of the categories listed in the NIS Directive, and can also include some activities such as delivery drivers and those in the food supply chain. As supply in the economy inevitably tightens, this is likely to be a fast-moving area. Governments are taking on emergency powers, which are typically very wide-ranging, so that they can then define application of those powers very rapidly by secondary legislation.

How Can I Prepare My Organisation to Deal With This?

You need to take local advice on what is required according to local law. Across most countries, employees are encouraged/required to work from home if they can. This may cover the whole of your organisation, or only parts of it. Subject to requirements of local law, we recommend that you produce a description of the activities your organisation or company undertakes site by site, and how those activities contribute to essential services, and ensure that every employee has a copy. Where governments – as, for example, in France – require employers to certify that certain activities of employees cannot be performed remotely, we would recommend, if possible, to include the description of the company’s activities and how they contribute to essential services within the certificate. It is also important as an employer that you are conscious of the duty of care you have for your employees.

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