



Six important legal M&A considerations during the global pandemic

RESPOND – A global COVID-19 response for Legal leaders

The M&A market has been hit severely by the COVID-19 crisis. Even though it is far from clear how long the crisis will last and what effects it will have, it is already possible to identify changes and foresee certain developments:



M&A market is drying up

Transactions are either cancelled or postponed. In the current environment, the parties are questioning the economic success of the planned transaction or would like to wait for further developments. In addition, the downward trend is being exacerbated by practical problems. We are increasingly seeing transactions failing because decision-makers are not allowed to travel or important original documents cannot be transported quickly. A number of multinational entities have instituted travel bans and countries have tightened their borders. From a practical perspective, the restrictions on movement (domestic and across borders) would slow down or even halt negotiations.



New transactions are being postponed

In the current environment, new transactions are usually postponed because the effects of the crisis on the business plan cannot be foreseen and a reliable purchase price calculation becomes more difficult. For potential buyers, the question arises whether available liquidity can be used for acquisitions or is required to secure the existing business. In running transactions buyers struggle with their pre-crisis valuations of targets and re-open price negotiations. The COVID-19 crisis has highlighted the fragility of supply chains. However, strong market participants will try to bring important procurement channels under their own control through acquisitions or to drastically shorten supply chains at the expense of globalization. This can particularly stimulate the M&A market. Consolidation within the hardest hit sectors could be expected as well. We also assume that if the crisis persists there will be an increase in debt-to-equity swaps again. Special situations funds are already looking out for possible targets in order to be able to strike at the right moment.



Due diligence content is changing

The content of due diligence will also change. The security of supply chains, possible crisis-related special termination rights in important contracts and other issues that were considered low-risk in times of economic growth will become more important.

Transactions continue to be financed

Regarding transaction financing, only a few cases have so far occurred in which the financing commitment was withdrawn because of "market disruption". To date, we have not seen any cases in which banks have cancelled acquisition financing already provided with reference to the crisis. The extent to which the crisis will affect the future availability of acquisition financing cannot be predicted to date.

Filings are being postponed

Government officials and civil servants have been compelled to work remotely, thereby potentially slowing the pace of considering and granting necessary consents/approvals, e.g., antitrust clearance, or approvals required under the foreign investment acts. Parties will have to factor this in when evaluating the overall timing of a transaction, but specifically also when determining the long stop date. For example, Austria has decided, as a reaction to the COVID-19 pandemic, to postpone the "start of the clock" for merger control filings (which are pending or filed prior to 30 April 2020), to 1 May 2020.

Contracts are adapting

M&A-related contracts will adapt very quickly to the new circumstances. The times of a very seller-friendly market are presumably gone. Rising risks mean that buyers have an increased need for security. We believe that the relevance of Material Adverse Change (MAC and MAE) clauses in M&A contracts in those markets where this instrument was rarely agreed (e.g. Belgium or Germany) will increase and COVID-19 will serve as an example in future negotiations.

Foreign trade law may become more strict

Once the COVID-19 crisis is over in political terms, we expect to see a discussion about the transfer of core industries to the public sector, and about stricter rules in foreign trade law. Conversely, many states will hold interests in businesses after the crisis, but will not be interested in a long-term investment. The move away from a shareholder value orientation, towards a broader approach, and thus the acquisition of companies that already have a corresponding focus, will also gain further momentum. Discussions on these issues have already begun, but are currently hardly noticeable among the crisis-related daily news.

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