



CHECKLIST | M&A ASPECTS AND CORONA

Non-comprehensive checklist for aspects of M&A to be considered in the time of the Corona-crisis. This checklist is work in progress and subject to change and will be updated by BUREN's M&A team as a result of further insights while the Corona-crisis continues and evolves. Please contact us for an updated version of this checklist.

1. Legal due diligence

Impact of COVID-19 on the target's business:

1.1 Corporate:

- Was decision-making of its corporate bodies (management board, supervisory board, shareholders' meeting) in conformity with internal procedures (convening, (digital) attendance of meetings, quorum), compliant with articles of association and corporate law? If not, has this been addressed properly?
- Domicile may also be an issue to consider, in case the international travel restrictions are maintained.

1.2 Employment:

- Possibilities to terminate employment contracts or (further) suspend work.
- Implementation of health and safety procedures within the workplace, adequate compliance with relevant government health guidelines.
- Have pension contributions been fully paid during the Corona-crisis?
- For Dutch targets: has the target applied for the NOW-regulation (Temporary Emergency Measure for the Preservation of Jobs) and was it granted to the target?

1.3 Finance:

- Strength and financial condition of (major) counterparts, suppliers and customers.
- Ability to control operating costs (flexibility of underlying contracts; see also under Contracts below).
- Has the target already made use of emergency funding and is it compliant with the terms and conditions thereof? If it has not made use of it, is the target still eligible to receive emergency funding?
- Compliance with existing financing obligations and status of COVID-19 measures taken with respect thereto (temporary release of repayment obligations).

1.4 Contracts:

- COVID-19 will make it difficult to analyse international contracts affected by the operational limitations of the parties. Particular emphasis will have to be placed on the rights of suppliers to terminate contracts because of the exceptional situation of COVID-19. Could the target claim or face damages claims as a result?
- Do force majeure clauses cover COVID-19 pandemic?
- Possibility of contractual price adjustments / renegotiation clauses. Risks of litigation (see also: Litigation).

1.5 Intellectual Property Rights:

- Deadlines for filing of IPR complied with?

1.6 Real Estate:

- Delay in rent payments?
- Possibilities to renegotiate lease terms?

1.7 Environment and public procurement:

- Consequences of work stoppage on permits. No missed deadlines for filing of required information under permits?
- Possibilities of re-opening existing tenders or new tenders.

1.8 Regulatory and legal compliance:

- Exposure regarding licensing and data privacy implications as a result of remote working arrangements.

1.9 Insurance:

- Coverage under the target's insurance policies for any losses stemming from COVID-19; business interruption policies.

1.10 Litigation:

- Status of pending proceedings and likelihood of new proceedings on breached contracts.

1.11 Tax:

- Have tax payments been deferred in accordance with the applicable COVID-19 regulations?

1.12 Practical:

- Possibilities for the buyer to visit the target's premises in connection with the due diligence / management interviews?

2. Contract negotiations

2.1 General remarks

- From sellers market to buyers market, with distressed M&A.
- Allocation of risk is likely to turn in favour of buyers.

2.2 Purchase Price adjustment mechanisms

- Locked Box, the most used mechanism for determining the purchase price, will increasingly be replaced by the more traditional closing accounts mechanism, with a traditional working capital adjustment provision to lessen the damage that comes with the possibility of a decrease in the working capital.

- COVID 19 will require the application of new elements to calculate the real value of the target's working capital, and, in particular, the assessment of the target's plausibility to collect outstanding accounts, pay current obligations and the existence of penalties associated with possible breaches of contracts. Debate around the appropriate target working capital level, in particular whether adjustments need to be made to historical average working capital levels to reflect short-term COVID-19 impacts.
- Earn-out clauses as a mechanism to bridge a pricing gap. The terms and conditions should be carefully negotiated with due consideration of the "uncertainty" factor, as no one is able to predict the extent and duration that COVID-19 will impact the financial performance of businesses.

2.3 Regulatory approvals

- Parties negotiating deals that involve regulatory approval may also take into account potential delays, which could be significant, as governmental agencies may face temporary shutdowns or limited operations as a result of the Coronavirus.

2.4 Termination rights

- Termination right that is specific to the Coronavirus? For example, upon a specific number of employees becoming infected with the Coronavirus or a certain number of locations or manufacturing facilities being temporarily closed due to the virus.
- Buyers should consider limiting any such walk-away rights of the seller in situations where harm to the target company is not disproportionate to others in comparable industries, or given the nature of the pandemic, in the same geography.
- What would be a realistic long-stop date taking into account the current uncertainties to be challenged up to closing?

2.5 Interim (operative) covenants

- "Virtual" visitation rights for the buyer?
- Sellers will need an exemption from these covenants to be able to take "emergency" measures, outside of the ordinary course of business, to preserving the business to be sold without seeking purchaser consent. In this regard, it may be beneficial for sellers to review their Coronavirus contingency plan with a buyer prior to signing the acquisition agreement to obtain pre-approval for activities outlined in the plan.



2.6 Material Adverse Change

- Parties should consider to include or exclude from the definition of MAC “disease outbreaks,” “pandemics,” “epidemics,” “international calamities” and/or “public health events” and the worsening of existing conditions due to the crisis in geographic areas in which the target operates or the world in general, or to find a compromise formulation specifically picking up the effects of the COVID-19 outbreak to the extent disproportionately impactful on the target’s business relative to other industry participants.

2.7 Representation and Warranties

- Buyers should consider seeking additional representations and warranties relating to the target business’s emergency protocols, contingency planning, business continuity processes, potential lawsuits due to liabilities associated with the effects of COVID-19, the satisfactoriness of supply chain and inventory, status of material contracts and feasibility of recovering accounts receivable, liquidity for the payment of accounts payable and other negative consequences.
- Sellers should disclose as much as possible in the disclosure schedules about the impact or potential impact of the Coronavirus on the target business and its effects or potential effects to ensure adequate defenses in the event of a claim.
- The adverse economic effects of COVID 19 will certainly affect most companies, so the representations and warranties given to Sellers must be concrete and plausible.
- Sellers should consider ring-fencing their representations and warranties to protect against buyers having the ability to make Coronavirus-related claims across the entire suite of representations and warranties.

- Where a W&I insurance applies, parties should consider exclusions of such insurance coverage as a result of COVID-19. In particular, parties should analyse whether the insurance taken out will be valid in case of problems with the supply chain and other adverse effects.

3. Signing and closing

- Buyers will seek to have all risks associated with COVID-19 at sellers’ risks as long as possible and may thus aim to sign and close transactions on one day Buyers may seek to extend exclusivity with the seller until closing, instead of signing.
- No physical signings and closings, but effectuation of a deal on the basis of powers of attorney to be granted by the parties and the target.
- Formalities with respect to the legalisation of powers of attorney and other documentation might take more time than pre-COVID-19.

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