



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:

- Decision-making of a company's corporate bodies (management board, supervisory board, shareholders' meeting) in conformity with internal procedures (convening, (digital) attendance of meetings, quorum).
- Compliance with articles of association and corporate law (If not, has this been addressed properly?).
- Applicability of the COVID-rules re corporate decision-making.
- Domicile, especially in view of the international travel restrictions.
- Compliance of dividend policy with requirements of subsidies and distribution test.

1.2 Employment:

- Travelling policies for business trips and holidays.
- Sickness percentages and insurance policies.
- Possibilities to terminate employment contracts or (further) suspend work.
- Adequate implementation of health and safety procedures within the workplace and adequate compliance with relevant government health guidelines, including traveling restrictions and quarantine rules.

- 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 and paid to the target? Carefully check which version of the NOW-regulation was applied for and which conditions apply and whether the target is compliant with the NOW-regulation.

1.3 Finance:

- Has the target 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:

- Strength and financial condition of (major) counterparts, suppliers and customers.
- Ability to control operating costs (flexibility of underlying contracts; see also under Contracts below).
- COVID-19 can affect international contracts based on operational limitations of the parties. Particular emphasis will lie on the rights of

suppliers to terminate contracts because of the exceptional situation. Investigate possibilities for the target to claim or face damages claims as a result.

- Applicability of force majeure clauses to pandemics.
- 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.
- Possibilities to early termination of leases.

1.7 Environment and public procurement:

- Consequences of work stoppage on permits.
- Compliance with deadlines for filing of required information under permits.
- Possibilities of re-opening existing tenders or new tenders or challenging granted tenders.

1.8 Regulatory and legal compliance:

- 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 due to delays in courts.
- Likelihood of new proceedings on breached contracts.

1.11 Tax:

- Compliance with deferral of tax payments in accordance with the applicable COVID-19 regulations.
- Reduction of the 2019 and 2020 provisional corporate income tax assessments.
- COVID-19 tax reserve in the 2019 corporate income tax return? application of the temporary COVID-19 wage tax rules i.e. increase of the discretionary margin under the work-related costs scheme (*werkkostenregeling, WKR*) and customary wage (*gebruikelijk loon*)?
- Unblock the g-account of seconded employees.

- VAT refund: has a request been filed to file VAT returns on a monthly basis instead of on a quarterly basis?
- Settlement of wage tax due with a refund of VAT.

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

- Note: 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.
- Note: COVID-19 will require the application of new elements to calculate the actual 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 impact. Consider 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 party is able to predict the impact, extent and duration that COVID-19 will ultimately have on 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 COVID-19.

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 preserve the business 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 (depending on their positions) 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 Representations 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 by 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 virtual meetings or 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.

[Last update | January 2021]

Key contacts



Paul A. Josephus Jitta

Partner

E p.josephusjitta@burenlegal.com

T +31 (0)6 2061 8755



Friederike Henke

Senior associate

E f.henke@burenlegal.com

T +31 (0)6 4758 2658