

COVID-19
Effects on M&A transactions

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Introduction

The COVID-19 pandemic dominates our daily lives. It has plunged the global economy into a deep crisis within a very short time. The associated legal issues are manifold and go far beyond legal issues of labour law, possible effects on supply chains, compliance with data protection regulations or the obligation to file for insolvency. Not even M&A transactions have been spared from the effects of the COVID-19 pandemic: Due to the danger of a worldwide recession, companies and entire industries are increasingly being put into an economic predicament. Not only financing is being put to the test also approvals from committees or authorities are no longer being granted. This results in investment decisions being postponed and ongoing projects being suspended or even cancelled. The M&A market is hit hard by the COVID-19 crisis. This briefing highlights the main effects of the COVID-19 pandemic on M&A transactions.

Influence on the due diligence process

The possible effects of the Covid-19 pandemic and the resulting potential legal consequences affect all (legal) areas to be typically examined in a due diligence. The assessment in the course of a legal due diligence should

therefore cover questions such as: Is the target company dependent on suppliers or customers and are there potential legal disputes in connection with unfulfilled or terminated contracts? How does the crisis affect the profitability of the target company in a medium and long run? What consequences do interruptions in production and delivery have on the overall business of the purchaser or the target company? Are there any threats of plant closures, introduction of short-time work, dismissals for operational reasons or continued payment of wages despite employees being absent from work? Do any official directives make business operations impossible and does the risk coverage of the business interruption insurance maintain in the COVID-19 crisis? And last but not least, are data protection regulations still being observed?

In addition, there are also very practical problems due to travel or exit restrictions, as companies can no longer be visited on site and personal meetings with management can no longer take place. In times of COVID-19, the composition and cooperation of due diligence teams can also become a technical and personnel challenge for the execution and completion of a due diligence process.

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Negotiation and interpretation of sales contract clauses

Special attention is required to the possible consequences of the COVID-19 crisis in the context of negotiations of sale and purchase agreements and in particular on the guarantees section: Can the seller be held liable for termination or breach of material contracts of the target company due to the COVID-19 crisis? Can a balance sheet guarantee be given for provisions not formed without restriction? Can the seller take measures outside the normal course of business between signing and closing if such measures are required due to the COVID-19 crisis, and is the purchaser obliged to give his consent in this case?

For sale and purchase agreements which have already been concluded, similar questions should be carefully examined.

The Renaissance of the Material Adverse Change (MAC) Clause

MAC clauses are provisions, which grant the purchaser a right of rescission, if circumstances arise between signing and closing which seriously affect the key business figures of the target company to be acquired. In order to cover a large number of cases, MAC clauses are mostly formulated in abstract terms at the factual level. Typically, MAC clauses cover natural disasters (earthquakes, bush fires, volcanic eruptions, tsunamis, storms), military conflicts or other events that have a serious impact on the industry of the target company. This raises the question to what extent COVID-19 can be deemed as a "natural disaster" - which, however, depends on the wording of the individual MAC clause (is the case of a pandemic explicitly covered?) and the assessment in the individual case.

In case a MAC clause exists and the corresponding sale and purchase agreements are negotiated, it needs to be considered - in addition to extending the circumstances when a MAC event occurs - to also include the wider economic environment (e.g. suppliers) of the target company into the scope of a MAC clause.

In case the sales and purchase agreement does not contain a MAC clause, but is subject to German law, a purchaser may argue that the company's business ceased to exist in order to be released from contractual obligations. However, the assessment of the prospects of success depends on the concrete individual case; bearing in mind that German courts have high demands on such right of withdrawal.

Resolutions and voting outside of meetings in person

Social distance is effective to slow down the spread of the virus. Currently, contact bans are in force in most countries, some of which prohibits meetings of more than two people in public in general.

In order to avoid shareholders' meetings being held in presence, all shareholders must waive the form for convening and holding a shareholders' meeting in a written procedure or by means of telephone or video conference. The law on mitigating the consequences of the COVID 19 pandemic in Germany (which came into force on 27 March 2020) now introduces various facilitations for holding virtual general meetings by using communication. The regulations apply to all general meetings, i.e. both the ordinary meetings. This applies to annual general meetings as well as extraordinary general meetings. Taking into account the risks the COVID-19 pandemic is associated with, it is urgently recommended to refrain from holding face-to-face meetings and to switch to means of distance communication if the approval of a committee is required.

Powers of attorney for signing and closing

If power of attorney shall be granted for signing and/or closing of the transaction, nowadays, it must be taken into account that obtaining such power of attorney can take an incalculable amount of time. Persons may be de facto prevented from granting powers of attorney effectively (e.g. if notarial certification is required). Longer processing times can also be expected with authorities, e.g. German district courts which are responsible for issuing an apostille.

Delays in closing

Delays may also occur on the closing of the transaction: companies have to expect longer withdrawal periods in the context of merger control procedures. Various competition authorities have already announced delays in the examination of merger control. Hence, both the German Federal Cartel Office and the European Commission are asking to reconsider whether it is absolutely necessary to submit proceedings and to postpone notifications in context of M&A transactions as far as possible. Rapid merger clearance of pending cases is therefore very unlikely.

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Your contact persons for questions on M&A transactions in times of COVID-19



Dr. Patrick Halfpap

Partner | Dusseldorf

+49 (0)211 950 749 26

+49 (0)162 207 9843

patrick.halfpap@fieldfisher.com



Jan Hartmann

Partner | Dusseldorf

+49 (0)211 950 749 25

+49 (0)173 630 32 39

jan.hartmann@fieldfisher.com



Kai-Oliver Krüger

Partner | Frankfurt

+49 (0)69 204 342 153

+49 (0)162 1061 028

kai.krueger@fieldfisher.com



Daniel Marhewka

Partner | Munich

+49 (0)89 620 30 6211

+49 (0)179 326 39 41

daniel.marhewka@fieldfisher.com



Dr. Florian Streiber

Partner | Hamburg

+49 (0)40 87 88 69 8 202

+49 (0)176 1878 8902

florian.streiber@fieldfisher.com