



Flash Covid-19 - Corporate M&A Team

THE LEGAL CONSEQUENCES OF COVID-19 ON M&A TRANSACTIONS

- ANALYSIS & PRACTICAL CONSIDERATIONS -

What legal consequences will Covid-19 have on ongoing and future M&A transactions? How to address the current situation in our agreements?

1. COVID-2019 AND M&A PROCESS

- **Prior to signing:** prior to signing, neither party is legally bound subject to any preliminary agreements which were already potentially signed. Parties therefore keep the right to assess the consequences of the current context on whether to consume the transaction. The only limit will be the requirement of “good faith” which must govern relations between parties, including during the “pre-contractual/negotiation” period in accordance with article 1104 of the French Civil code.
- **Between signing and closing:** in such case, the parties are legally bound by the stipulations of the share purchase agreement. The situation is therefore more complex and requires an analysis of the relevant clauses, in particular those relating to the management of the target during the so-called “interim” period (“*interim covenants*”) and the possible existence of interim management clauses (conditions precedent or subsequent), obtaining approvals from authorities in regulated areas, prior information or authorization of the buyer, etc.), exit clauses (“*MAC Clause*”, exclusion or not of hardship under article 1195 of the French Civil code or mechanisms to update reps&warranties and schedules of the share purchase agreement).
- **Dealing with conditions precedent:** it is undeniable that the current “shutdown” has an impact on the satisfaction of potential authorizations from third parties, particularly in regulated areas. These third parties’ authorizations - we are referring notably to antitrust or financing authorizations - are governed by procedures which, until now, have generally involved physical meetings within the competent authorities and the respect of deadlines.

The parties could decide, pursuant to an amendment agreement, to suspend the exercise period of these conditions precedent by excluding the “shutdown period” in the calculation of the deadlines.

French Ordinance n°. 2020-306 of 25 March 2020 on the extension of the time limits during the period of health emergency and the adaptation of procedures during that period will allow to set forth specific rules on a case by case basis.



2. Due diligence

It will probably not be unusual, in the context of M&A transactions, to now conduct an analysis of the target's exposure to "health risks" as part of the due diligence process.

In particular, the purchaser may inquire on:

- as a general matter, the measures taken by the target to adapt to the pandemic;
- the measures taken by the target to protect the health of its employees;
- the possibility of conducting its business - remotely or not - namely via remote working for its employees;
- supply chain and subcontracting risks;
- target's exposure to public markets in light of recent positions taken by French public authorities on the concept of force majeure in this area;
- the ability of the target and its counterparties to perform material contracts;
- the risks related to the possibility for the target and its counterparties to invoke force majeure or hardship;
- the extent of the coverage of insurance policies purchased by the target;
- the risks associated with regulatory changes resulting from government actions;
- the existence of a business continuity plan ("BCP") to deal with a new shutdown.

3. Impact on the drafting/interpretation of share purchase agreements

- **Force Majeure / MAC Clause / Hardship:** Does the Covid-19 outbreak constitute force majeure? Hardship? Or a situation triggering a potential "MAC Clause" provided for by the agreement?

Whether Covid-19 constitutes force majeure cannot be definitively and clearly decided as French case law on epidemics was rendered in circumstances that were apparently different from the systemic pandemic we are facing.

Article 1195 of the French Civil code relating to hardship, which allows, as the case may be, a renegotiation, or even the termination of the contract in the event of a change in circumstances unforeseeable at the time of the conclusion of the contract, could be a legal basis, it being specified that article 1195 of the French Civil code is generally expressly excluded in share purchase agreements governed by French law.

MAC Clauses, which were not - at least until now - a common practice in share purchase agreements subject to French law, will have to be construed, namely based on how broadly they are defined.

No comprehensive answer can be formulated and only a fact-based analysis is possible.

- **Purchase price mechanisms:** whether a "locked box" or a net financial debt or working capital adjustment at closing is referred to in the share purchase agreement, the current situation will raise many difficulties as to the relevance of the financial aggregates used at a given date.
- **Management of the target between signing and closing:** usually, share purchase agreements list the significant transactions which are subject to the prior approval from the purchaser as they do not fall within the "normal course of business", within the limit of the "gun jumping" imposed by antitrust law. In practice, we shall probably recommend sellers to notify the purchaser of the consequences suffered by the target's business as a result of the ongoing epidemic.



- **Conditions precedent relating to the newly enacted “state of health emergency”:** French Act n°2020-290 dated March 23th, 2020 on urgent measures to deal with Covid-19 pandemic introduced a new legal framework for the measures adopted by French public authorities and created a “state of health emergency” in the event of a health disaster which threatens health of the population by its nature and seriousness (article L. 3131-12 of the French Public Health code).

Some may be tempted to now introduce exit clauses, for current or future transactions, as soon as a “state of health emergency” is again declared by the French authorities.

- **Representations and warranties:** as mentioned above, due diligence operations will probably now have to review how the target considers the health/sanitary risks (*i.e.* implementation of a business continuity plan in case of “shutdown”).

The representations and warranties in purchase agreements should therefore, in our opinion, be adapted accordingly.

For ongoing transactions (*i.e.*, between signing and closing), the seller will try to update the disclosure schedules in connection with new elements which affect its business in the current context. Such updates of the disclosure schedules between signing and closing are regularly a matter of disagreement in negotiations.

Altana’s M&A team is mobilized and is at your side during this period. Health emergency.

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