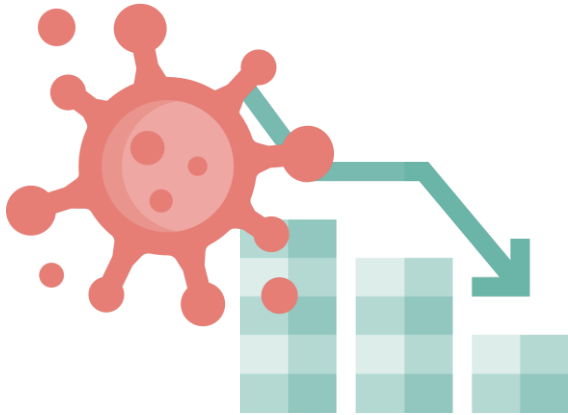



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> M&A


What is the **impact of Covid-19 on M&A transactions ?**

Context





Covid-19 created a **turmoil in capital markets**, which is often a forerunner of what happens next in the real economy

- Obviously, the M&A market is affected by the **deterioration of capital markets and the real economy**
 - The severity of the short-term effects on the M&A market is already evident in the fact that **numerous deals have been pulled or delayed** in recent weeks
- 



- Many companies are likely to postpone their not-yet-announced acquisition plans, owing, for example, to the **financing difficulty and contract negotiation complexity** created by the crisis
- **Legal and practical solutions** are nevertheless available to continue business or adapt your way to implement your external growth





**From a theoretical
situation provided by
contracts to a real
implementation,
discover our **first-aid
toolkit to address the
COVID situation from a
transactional standpoint****



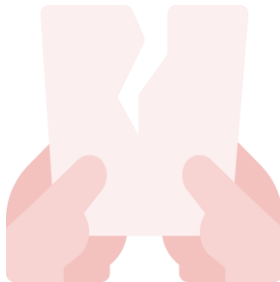
01. Going all the way to your deals



Ongoing Negotiations :

what can be done depends on the situation

- **Non-binding agreement:** adaptation of the terms and conditions to the new situation + possibility to break-off ongoing negotiations (subject to compliance with good faith)





- **Binding agreement:** Covid-19 cannot be used as such to abort a transaction
- **Conditions precedent:** may be difficult to satisfy due to lockdown (financing, antitrust, regulatory, etc.)
 - › best efforts to meet the conditions precedent ASAP
 - › when satisfied, the parties should proceed with signing/closing



Pre-signing / closing period

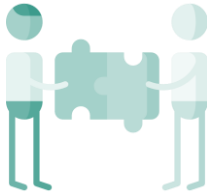
Good faith and collaboration

The parties shall always **perform their undertakings in good faith**

In the context of the completion of an ongoing transaction, **the parties shall cooperate** in order to:

- › extend deadlines when possible
- › mitigate the risk related to any leakage (impact on value, confidentiality) due to a postponed closing





The parties shall **act together** and the seller shall mitigate as much as possible the negative effect on the target company by making the **appropriate decisions** due to the context



Uncertainties as a result of the **update of disclosure schedules** between signing and closing (what are the consequences deriving from such update?)

Digitalization of proceedings

Loosening of formalism during the lockdown period

- **Electronic correspondence**
 - › Convening notices can be sent by email
 - › Online Registered Letters with Acknowledgement of Receipt (e-RLAR) Service can be used





- **Videoconference / conference call**
 - › CSE (social and economic committee) meeting
 - › Shareholders meeting
 - › Board meeting

- **Electronic signature:**
 - › Declarations and acts received by e-mail will be accepted and registered on the condition that they are certified by a lawyer
 - › Electronic signatures (DocuSign)



Enforcement

In case of non-performance of the agreement, the parties could:

- Ask the judge for (may be difficult in practical terms due to the lockdown situation):
 - › Contractual liability / damages
 - › Specific performance (“*exécution forcée*”) of the unfulfilled obligations





- **Withdraw from their own obligations and claim for “non-performance”** (“*exception d’inexécution*”) if the other party does not fulfill its own obligations



02. Backing off deals



Force Majeure event

- The mere fact that an obligation is rendered more onerous as a result of **outside circumstances does not exonerate the debtors from their payment obligations on the basis of force majeure**
- › It cannot however completely be ruled out that French case law will evolve in the future to take into account the extreme situation we are facing



- Possibility to invoke a force majeure event as a reason for not paying, in particular, if the buyer has not been able to:
 - request/obtain financing; or
 - meet a condition precedent of the agreement

- Force majeure event is rarely qualified by the French courts and is difficult to prove



Hardship Clause

- Legal principle (*Article 1195 of the French civil code*): the judge has the power to terminate the contract or revise its clauses if it is established that there is an **unforeseeable change of circumstances** which renders the **performance of the contract too burdensome for a party**



- Parties can **contractually exclude** these judicial powers by providing for **their own rules regarding unforeseeable change** (hardship clause)

A hardship clause should at least provide for:

- > the definition of the imbalance, as understood by the parties, and the modalities of its establishment
- > the various contingencies
- > the practical procedures for invoking a hardship clause
- > the precise effects of the clause: the renegotiation, the time limits for renegotiation
- > the consequences and effects of a failed renegotiation



Exit Provisions / Price Adaptation

MAC (Material Adverse Change) clause

- › MAC Clause is less often used in France than in the UK or the USA
- › MAC clause is usually limited to events or circumstances attributable to the target itself (do not usually cover epidemics) - COVID-19 should not allow to break-off the agreement
- › Judges will base their analysis on the wording of the MAC provision itself as well as on the intents of the parties



Pricing mechanisms



- Investors oriented:

- ↘ locked-box mechanism (fixed price)
- ↗ earn-out / adjustment clause (taking into account the future financial performance of the target)



- Sellers oriented:

- ↗ locked-box mechanism
- ↘ earn-out / adjustment clause



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