

Track Changes

Track Changes

March 2020

M&A in times of Covid-19 – Watch out for new developments

We expect that the world of M&A will look quite different in the coming weeks. Will M&A die down completely? Probably not, even though there might be more pressing things to attend to at the moment than kicking off that hot new transaction. However, deals may have been caught between signing and closing, and the current environment may also provide opportunities nobody thought of just three weeks ago.

Diligence Phase

Market participants should expect several changes to the due diligence phase as a direct result of the current crisis. On the one hand, whenever a W&I insurance is involved, we expect to see that insurers will add specific diligence questions and seek to exclude certain Covid-19 related risks (see below).

Also, deals without W&I insurance will see an expansion of diligence to matters now rising to the top of people's agenda, such as the following, for example:

- whether the company is subject to any governmental shutdown
- disclosure of all agreements which contain force majeure or similar provisions
- any force majeure notices issued or received to excuse non-performance of contractual obligations due to Covid-19; whether any material supplier has notified the company that it will need to modify its relationship with the target
- whether any claims are made or intended to be made to insurance providers due to a cancellation of events or other business interruption resulting from Covid-19
- a brief description of arrangements put in place as a result of the crisis with respect to employees, including policies regarding working remotely

For companies operating in or exposed to the real estate sector, be it as landlord or tenant (e.g. operating retail businesses), the ongoing discussion whether the current situation relieves tenants from their obligation to pay rent will obviously be of particular concern.

Documentation | SPA Phase

During the documentation phase, we expect to see a number of developments largely focusing on the following key areas:

- **consideration:** buyers may seek to back-track on locked box mechanisms and to push for elements of deferred consideration/earn outs
- **reps & warranties:** "material contracts" warranties typically focus on (threatening) (notices of) breach or termination. This is going to be expanded for delivery delays, declarations of force majeure or default and whether a customer/supplier is subject to governmental shutdowns. Other R&W which may be impacted include *inter alia* no insolvency, inventory, conduct of business and accounts receivable
- **MAC:** sellers will aim for a general exclusion of any epidemic, pandemic, disease outbreak or other health crisis or public health event, or the worsening of any such circumstances. If one believes that to constitute a MAC, effects should substantially threaten the overall earnings potential in a durationally-significant manner, everybody will get their shot at whether Covid-19 constitutes a MAC. To address Covid-19 concerns, buyers thus should employ more targeted provisions (e.g. specific conditions on financial indicators, non-closure of particular operations).
- **ordinary course of business covenants:** what was ordinary course, consistent with past practice, no longer holds up to recent developments. Carve-outs may need to address (i) social distancing, shut down, closure or any other law, order, directive, guideline or recommendation by governmental authorities in connection with Covid-19; and (ii) actions taken or not taken in good faith to respond to effects on the business, including changes in relationships with employees, agents, independent contractors, suppliers, customers and other business partners.

Regulatory Approvals | Break Fees

Obtaining regulatory approvals, including without limitation merger control clearance will become more time consuming and may also become more cumbersome.

In Austria, for instance, due to legislative measures staying deadlines in administrative and court proceedings (in force since 23 March), the 4-week Phase 1 review period for new merger filings between 23 March and 30 April only starts on 1 May (and thus expires on 29 May 2020). In case of pending Phase 2 proceedings and for Phase 2 reviews requested prior to 30 April, the 5-month deadline will only (re-)commence on 1 May (and expire on 1 October 2020).

The EU Commission has encouraged parties to a merger to delay notifications until further notice to free up capacities for staff to deal with urgent notifications and has made clear that while a review of mergers will continue, it is likely to be slower in the near future.

Parties should thus evaluate whether existing long stop dates need to be amended and in the case of ongoing negotiations, work towards securing longer drop-dead dates. A

separate discussion may arise around (reverse) break fees triggered in the current situation.

W&I Insurance

Lastly, in transactions involving W&I insurance, parties should anticipate that insurers will seek to propose exclusions for Covid-19 exposures and increase diligence requirements for Covid-19 impacts on a target company's business. Buyers should expect insurance providers to review transaction documents in particular for Covid-19 specific R&W and to exclude coverage for these R&W outright.

Examples of potential exclusions include:

- the insurer will not pay for any Loss arising out of, resulting from or to the extent it is increased by (i) the presence, transmission, threat or fear of a novel coronavirus, including the coronavirus disease (COVID-19) or any evolution thereof, and/or (ii) any mandatory or advisory restriction issued, or action ordered or threatened, by any public authority, regulatory body or government in connection therewith including any federal, state, local or foreign regulation, rule, statute or law.
- arising out of or resulting from the impact of COVID-19 or any variation thereof on the target business or any of its counterparties, including any civil authority measures or restrictions
- the effects of the COVID-19 virus on the target's operations (including factory closures, nonperformance of services, non-fulfilment of production orders, contracts, agreements).

Covid-19 will be with us for a while. Market players should adjust their course of action to the new realities and adapt quickly to new developments to stay on top of things.

About WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna over 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

For more information about our services, please contact:



Florian Kuszniel

Partner

florian.kuszniel@wolftheiss.com

T: +43 1 51510 5590

M: +43 676 8785 5590

This memorandum has been prepared solely for the purpose of general information and is not a substitute for legal advice.

Therefore, WOLF THEISS accepts no responsibility if – in reliance on the information contained in this memorandum – you act, or fail to act, in any particular way.

If you would like to know more about the topics covered in this memorandum or our services in general, please get in touch with your usual WOLF THEISS contact or with:

Wolf Theiss
Schubertring 6
AT – 1010 Vienna

www.wolftheiss.com