

NKF Client News

22 APRIL 2020

M&A Transactions in Times of Corona: Legal Due Diligence during and after COVID-19

The purpose of legal due diligence was, is and will be identifying legal risks in connection with the target company – independent of the SARS-CoV-2-Virus or Coronavirus (COVID-19). COVID-19 and its consequences, however, lead to new (focal) points in legal due diligence.

The following overview is a range of legal due diligence aspects which already had to be considered in the past (*in black letters*) and new aspects relating to COVID-19 (*in red letters*). The points covered herein are to be considered as a starting point for a due diligence and must be, depending on the findings, followed-up in the course of the transaction.

Topic	Legal Due Diligence Aspects
Commercial	Provisions on non-competition, exclusivity, contractual penalties, minimum purchase quantities/minimum delivery quantities, price agreements (e.g. regarding resale prices), fixed terms of more than 3 years, unfavorable notice periods (very short/very long, in particular more than 12 months), restrictions on disposal, change-of-control, unusual jurisdiction/choice of law clauses
	<ul style="list-style-type: none"> — Effects on agreements with suppliers and customers (e.g. contractual price adjustment/renegotiation clauses vs. force majeure, <i>clausula rebus sic stantibus</i>) or on their respective rights and obligations; effects on (foreign) legal systems of suppliers and customers — Effects on contractual rights and obligations of the target company (meaning its agreements) — Effects on ongoing negotiations — Maintenance of supply chains or availability of alternative suppliers/alternative sources of supply — Compliance with written form/notification requirements
Lease	Provisions on unusual termination dates and periods, extension options, dismantling obligations, prior notice in the land register, change-of-control
	<ul style="list-style-type: none"> — Officially ordered closures (if so: end of lease during closure) — Unauthorised reduction or even suspension of rent payments — Payment deadlines according to art. 257d para (1) CO or art. 2 COVID-19 Ordinance regarding Rent and Leases and any threats of termination that have already been issued — Use of COVID-19 credits — Mutual agreements between the parties regarding deferral, rent reduction or rent remission

	<ul style="list-style-type: none"> — Provisions in lease agreement on force majeure, turn-over dependent rent, narrow or broad definition of the purpose of use, shell rent, obligation to operate, partial areas not affected by closure (e.g. office, warehouse etc.), guarantees/collateral surety as security — Business interruption insurance
Employment	<ul style="list-style-type: none"> — Provisions on severance payments (<i>Golden Parachutes</i>), contractual notice periods of more than 3 months (or fixed-term contracts without the possibility of termination), non-competition (with or without contractual penalties), bonus provisions, intellectual property clauses — Overtime/excess hours regulation, recording of working time — Cases of illness — Freelancer/consultant (employment law/social security law risks relating to the qualification as employee)
	<ul style="list-style-type: none"> — Implementation of reduced working hours program (e.g. which parts of the target company and which groups of employees and to what extent) and effects — Compensation for parents, persons in quarantine, self-employed persons — Announced or planned redundancies (effectiveness; mass dismissal/social plan if necessary) — Implementation of "home office" (secure data connections/secured individual access mechanisms)
Employee benefits	Comprehensive insurance, partially or fully autonomous insurance
	Effects on payments of social security contributions and concrete implementation at the target company (deferral of payments)
Finance	Contractual provisions on change-of-control, cross-default, unusual termination periods, amortisation, collateral
	<ul style="list-style-type: none"> — Effects on financing agreements and obligations (potential defaults; consequences, e.g. default interest, option of the lender to terminate, break costs etc.) — Measures taken (e.g. waiver requests regarding amortisation obligations and the obligation to pay interests, covenant holidays, etc.) in relation to the financing agreements and obligations and their status — Use of COVID-19 credits (if so: eligibility under existing financing agreements); examination of the relevant COVID-19 credit documentation, including with regard to the planned transaction (COVID-19 credit documentation contains in different jurisdictions e.g. distribution restrictions, prohibition on intra-group lending etc.) — Risks arising from the granting of upstream loans may be accentuated in case the financial situation of the target company deteriorates

Data protection/ GDPR	<ul style="list-style-type: none"> — Organisational and technical backup of data — Location(s) of the servers, i.e. where is data stored — Appointed internal data protection officer/in case of EU involvement, appointed EU representative
	<ul style="list-style-type: none"> — Increased collection and processing of employee health and travel data by the target company (necessary information vs. unnecessary information and continuous deletion) — Adaption of the privacy policy — Reporting health and travel data collections to the FDPIC — Review whether a data protection impact assessment has been carried out in accordance with the GDPR (if applicable)
Corporate	<ul style="list-style-type: none"> — Ownership of shares (complete chain of title since incorporation vs. assignment to seller/share certificate provides for seller) — Indications on liabilities/issues in minutes (of board of directors, management, shareholders' meeting), audit reports, lawyers' letters
	<ul style="list-style-type: none"> — Decisions taking by the board of directors, management and shareholders' meeting (e.g. convening, participation) in accordance with the law, articles of association and organisational regulations — Effects (restrictions) on (proposed) payments of dividends — Effects on pending restructuring measures — Availability of commercial register offices and notaries for pending/planned transactions
Intellectual property	<ul style="list-style-type: none"> — Rights (patents, trademarks, domain names, know-how, copyrights to IT infrastructure and software) necessary for the target company (licensed or owned) — Contractual regulation of the rights to inventions (in employment agreements)
	Additional intellectual property created in connection with a reorientation of operations as a result of the COVID-19 (e.g. know-how for the production of protective masks)
Litigation	Open, threatened or expected proceedings
	Impact on pending proceedings (e.g. extension of deadlines)
Insurance	Insurance coverage of COVID-19 effects (already made/planned claims against insurance companies (e.g. due to cancellation of events, business interruptions)

If you have further questions or comments on this topic, please reach out to your regular NKF contact.

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