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M&A Transactions During the COVID-19 Crisis: Due Diligence Considerations

by **Jennifer McGuire**

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Following on from our previous article on the challenges for M&A transactions in the current environment, this article takes a more detailed look at the particular due diligence considerations that parties to M&A transactions should consider in greater detail and the additional contractual protections that may be sought.

Due Diligence Considerations

It is important that a due diligence investigation is tailored to the target company or group in the context of the COVID-19 pandemic. Specific issues such as those listed below should be borne in mind, and the parties must be mindful of the ever-changing legal landscape in light of recent emergency legislation.

Compliance with New Legal Requirements

Has the target been, and is it currently, following applicable guidelines? Specific industries are being treated differently, with some permitted to open whereas others have been forced to shut. As the Irish government's Roadmap for Reopening progresses, there have been regular updates on timing for the stages of reopening, with detailed healthcare guidelines being frequently updated. Consideration should be given to COVID-19 emergency legislation such as the Emergency Measures in the Public Interest (Covid-19) Act 2020.

In due diligence, it will be important for the parties to understand the applicable legal and regulatory framework, monitor the changing government restrictions and guidelines, and review the target's conformity to them, as well as analysing the associated costs and implications for the target.

In addition, international businesses will be subject to regulation from different governments, which vary significantly between countries. The parties will need to understand the differences between the restrictions in Ireland and the restrictions implemented in other relevant jurisdictions.

COVID-19: Specific Issues to check in Due Diligence

Government Schemes: Has the target company availed of any of the Irish government schemes in place such as the Government Temporary Wage Subsidy Scheme or the Credit Guarantee Scheme for Covid-19 and what are the effects this may have, or has already had, on the business?

Contract Performance: Force majeure provisions in the target company's key contracts should be reviewed to see if they are affected. Has performance of the obligations arising from these contacts been affected and are there any existing breaches to date as a result of Covid-19?

Employees/HR Issues: Does the target have the ability for employees to work remotely, can the workforce be restructured, e.g. split teams or shift rotation? If the employees are currently physically present in the

workplace, are they permitted to go to work under the government guidelines? To what extent has the workforce been, and is likely to be, affected by temporary lay-offs, terminations, or salary reductions?

Health and Safety: What protocols have been or need to be introduced to ensure a safe working environment to tackle the spread of COVID-19, and what costs and consequences for profitability are associated with these? The National Standards Authority of Ireland has issued a practical guidance document to manage business continuity during the COVID-19 pandemic. This includes implementing a strategy to minimise the spread of infection which may include training on how to reduce the risk of infection and the sanitisation requirements that should be implemented in the workplace such increased handwashing, provision of sanitisation equipment and practicing physical distancing.

IT Infrastructure: Are there any IT performance issues relating to a remote workforce? Have there been any associated risks to business operations? Will capital expenditure be required to be able to meet the need for a more robust IT infrastructure? Can the company successful continue to adhere to cybersecurity requirements?

Supply Chain Management: A buyer should familiarise themselves with the target's level of dependence on various suppliers. If there have been disruptions, have alternative sources of supply been identified or implemented? Has the target company received supplies and services in the same way since the outbreak of the pandemic?

Data Privacy Measures: Buyers need to ensure that the target is complying with its confidentiality and GDPR obligations when examining and dealing with COVID-19 issues (particularly with processing and controlling health-related and personal information arising out of the pandemic and doing so in a safe way, which may now be happening outside the workplace if those responsible are working remotely).

Insurance Cover: The scope of the target company's insurance cover should be analysed as to whether COVID-19 related issues are included within the policies, and if any further cover is required to be implemented post-completion.

Business Continuity and Contingency Plan: Business impact analysis and risk assessment should be carried out as part of the buyer's financial due diligence.

Solvency Issues: It is important to evaluate the target's financial position, its level of debt, and its ability to service this debt, particularly in light of recent cash-flow analysis: discovering that a target is unable to pay its debts as they fall due may require restructuring of the transaction, or prevent it all together.

Warranty and Indemnity Insurance

When considering Warranty and Indemnity insurance, parties should be cognisant of the fact that the underwriters will try to exclude known crystallised liabilities from the policy cover. Such existing liabilities may include issues relating to COVID-19 discovered during the due diligence process. As such, Warranty and Indemnity insurance should not be viewed as an alternative to adequately addressing and, where possible, preventing recognised Covid-19 risks.

As part of their underwriting decision-making, the insurer may require a more detailed due diligence investigation to be carried out so that they can thoroughly examine the situation, and the steps taken so far to mitigate the risks associated with COVID-19.

Final thoughts

It is difficult to predict the lasting impact which the COVID-19 outbreak will have on the global economy. We expect M&A activity will remain steady as parties find opportunities for investment and divestment within the current market and adapt to the current circumstances.

If you would like to discuss the potential impact that COVID-19 may have on your transaction, please contact a member of our Corporate Department.

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The cross-disciplinary business crisis advisory team at LK Shields are available to provide practical advice and legal insights to employers, business owners, directors, insurance providers, compliance officers, HR professionals and decision-makers faced with a crisis.

If you would like to discuss this further, please contact crisis-advisory@lkshields.ie or any member of our business crisis advisory team. To subscribe to our crisis advisory news and insight please click here.

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