

Covid-19 | Some initial corporate and finance considerations

1. MERGERS AND ACQUISITIONS

Over the last few weeks, **virtually all M&A transactions have come to a halt**. In some instances, the parties opted to await the impact of the crisis. In other instances, the financing banks withdrew from the deal, or were only willing to finance with significantly more onerous conditions.

It is beyond doubt that M&A activity will be down significantly during the coming few months. However, it is also the expectation that **the current crisis will create a host of possibilities** as from the second half of the year, if not earlier. Whatever the outcome, the **M&A market will likely be very different** at the other end of this crisis, be it in terms of acquisition structures, multiples (how to calculate, for instance, normalised working capital or EBITDAs in the current circumstances), financing terms and leveraging, and transaction dynamics in general.

For ongoing or future M&A transactions, it will be **key to understand through due diligence, the impact of the crisis on the target's business**. For example, its ability to serve its debts and to comply with its contractual obligations towards suppliers and clients, also in view of the delayed payment obligations that have been approved by the Belgian Federal Government (see chapter 3). In the same vein, it will be important to analyse how the target will have made use of the various measures introduced by the various Belgian Governments, including those measures towards personnel and the (para)fiscal administrations, and the longer-term impact and ongoing obligations thereof.

More than ever, it will also be important to include a **material adverse circumstance clause** in offer letters and SPAs (taking into account that the current crisis is already a material adverse circumstance). It seems also essential, as a purchaser, to include a **financing condition** given the current uncertainties in the market. Furthermore, given the volatility of the market, it seems advisable to work with **closing accounts (in combination with earn-out clauses) rather than locked-box systems**.

Finally, in the unlikely event that you are about to sign or close an M&A deal, current quarantine and travel restriction measures will have an impact on the **logistics of your signing and closing** (especially when a notary public is involved). Alternative measures should be considered, including virtual meetings, execution in counterparts and electronic signature tools.

2. INSOLVENCY AND RESTRUCTURING – JUDICIAL REORGANISATION

The current situation has no peace-time precedents. Inevitably, **many enterprises will soon meet, technically speaking, the bankruptcy criteria**: they will not be able to pay their debts and/or will not have the confidence of their creditors anymore. In the given circumstances, it would be unwise if the courts, once they are again fully functional (at the earliest mid-April), would apply pre-Covid-19 crisis criteria when it comes to declaring bankruptcies. Courts will also have important backlogs when starting up activities again. Both this backlog and a more supple approach to applying bankruptcy criteria could be essential to buy what companies will perhaps need most: time.

Companies will have to be prepared by mid-April for the next steps. It is likely that many companies will have to file for judicial reorganisation (*gerechtelijke reorganisatie / reorganisation judiciaire*). If a court grants such judicial protection, the debtor will enjoy a suspension of its obligations to pay its debts from before the opening of the proceedings and have the opportunity to agree on a debt rescheduling with (most of) its creditors, or organise a restart through a transfer of assets. During this suspension period, creditors will not have the right to execute their claims on the debtor's assets, will not be able to freeze any assets and the debtor can, bar some exceptions, not be declared bankrupt. This will be beneficial to the debtor but will have important knock-on effects for its creditors. Creditors, on the other hand, will need to keep a close eye on their accounts receivable and preserve their rights where necessary.

3. FINANCING

On 22 March 2020, the Belgian Federal Government announced that it reached an agreement with the National Bank of Belgium and the financial sector on a set of financial measures aiming at mitigating the negative impact of Covid-19 on the financial position of companies.

The financial measures are twofold: companies that incur financial difficulties as a result of the Covid-19 crisis may be eligible for (i) a six-month standstill under existing credit agreements and (ii) bridge loans of up to twelve months.

3.1 Six-month standstill

Non-financial companies, small and medium-sized enterprises (**SMEs**) and self-employed persons are eligible for a **standstill on the repayment of principal amounts and interests under existing credit agreements up to 30 September 2020**.

Only companies that can evidence that they are in financial difficulties as a result of Covid-19 and that had no payment arrears on 1 February 2020 and no payment arrears of less than 30 days on 29 February 2020, are eligible for this standstill.

3.2 Bridge loans

In addition, the Government has introduced a guarantee regime for bridge loans for viable non-financial companies, SMEs and self-employment persons up to a maximum of EUR 50 million per group. This guarantee regime is applicable to **bridge loans granted by financial institutions between now and 30 September 2020 with a maximum term of twelve months**. The maximum interest rate applicable to these new credit lines shall be 1.25% (excluding fee, which is capped as well).

The Federal Government has allocated a total budget of EUR 50 billion to guarantee the losses that financial institutions might incur on these new credit lines.

It was also announced that defaults on these bridge loans will be borne by financial institutions up to 3% and between 3% and 5% by financial institutions and the Belgian State, each for 50%. Any defaults on these loans exceeding 5% will be borne by the Belgian State for 80%.

3.3 Other financial and social measures

Earlier, the Government had adopted certain **employment-related measures**, in particular facilitating the use of the regime of temporary unemployment and teleworking (see [our Q&A on employment-related measures of 10 March 2020](#) and [our additional newsflash of 19 March 2020](#)). On 20 March 2020, the Government announced a further simplification of the regime of temporary unemployment based on which all employers who are affected by the Covid-19 crisis can request the application of temporary unemployment for their employees due to *force majeure*. In addition, the Government acknowledged that the Covid-19 crisis is likely to have a significant impact on the cashflow of companies. In order to mitigate this impact as much as possible, the Belgian Federal and Regional Governments announced that they will apply the payment deadlines for **social security contributions, withholding taxes, corporate income taxes and VAT** with more flexibility, and they will even grant a postponement of these deadlines in certain cases.

3.4 Other considerations from a finance perspective

Despite all the above measures, it is clear that the current crisis will have an **impact on cash flows** and require a revision of business models to reflect **new base case and downside scenarios**. In some cases, it may be necessary to incur new debt or sell off assets, even though this would violate operating covenants. Such a default may trigger **cross defaults** in other cases. It may be useful to consider the timing of such defaults, as the timing of covenant reliefs could possibly avoid cross defaults.

Depending on the debtor's situation (including whether the current Covid-19 situation continues to persist), only **targeted relief** may be required, for instance a short-term covenant adjustment to financial covenant levels, while other debtors may require a more **thorough renegotiation of their covenant package** (likely at a steeper cost). Another option is obtaining the relief needed in the short term and reassess later if the crisis persists.

Depending on the situation, borrowers may **offer new guarantees or additional collateral**, new or updated covenants (including restrictions on dividends and investments), call protection, stricter draw conditions under working capital lines or increased information rights for lenders. But it is important to think ahead: collateral given exclusively to one lender is collateral that cannot be given to another lender.

In any case, it is important to maintain an **open communication strategy**. Difficult questions should be answered honestly in order to facilitate lenders' decision-making. Lines of communication should be kept open. Especially for **listed companies**, it will be important to carefully consider any communications to investors and the public.

4. DIRECTORS' LIABILITY

Directors will have important duties in view of the current crisis. Not only will they have a responsibility towards the company's employees and other stakeholders as well as the public at large, but they will also need to **understand and map the risks of the crisis to the company**. It will be the directors' responsibility to come up with strategies to minimise and mitigate these risks, and to be assisted by the right experts.

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It will be essential to assess the viability of the company from a short-term and long-term perspective. It will be important to understand the company's ability to serve its debts and to respect its key covenants. A short and longer-term **liquidity plan** will be required, and it will be essential to **secure liquidity needs**.

In particular, section 2:52 of the new Belgian Companies and Associations Code provides that, if important and coherent facts could threaten the continuity of the enterprise (and the current crisis may qualify as such), the (board of) **directors need(s) to deliberate and decide on the measures to be taken to guarantee the continuity of economic activities for at least twelve months**. Since this is a statutory obligation resulting in objective liability of directors, this obligation will have to be met.

Special attention should also be given to sections XX.225 and XX.227 of the Code of Economic Law, which provide, broadly, for a **personal and possibly joint directors' liability in case of a bankruptcy with deficits**, if it is proven that the directors made a serious fault that resulted in the bankruptcy (the concept of "director" is broadly defined, and includes members of the various managing boards and *de facto* directors). This will be the case if the directors do not properly map the risks posed by Covid-19 or the company's payment obligations and liquidity needs, or proceed with payments and investments without taking duly account of the current situation.

5. CORPORATE HOUSEKEEPING

The travel restrictions and rules on social distancing imposed as a result of Covid-19 are likely to have significant **implications on the organisation of physical meetings of the board of directors and shareholders' meetings**. For many companies, their annual board and shareholders' meetings approving the annual accounts, are scheduled to take place in the next few months. These companies might now be forced to look at alternative solutions.

5.1 Alternatives for physical shareholders' meetings

Companies with a limited number of shareholders might consider replacing their physical shareholders' meeting with the adoption of unanimous **written shareholders' resolutions**.

However, the adoption of unanimous written shareholders' resolutions will not be available for listed companies or companies with a dispersed shareholding structure. These companies may consider allowing shareholders to participate in the shareholders' meeting through **electronic means of communication**.

Alternatively, companies may allow their shareholders to **submit their vote prior to the shareholders' meeting** (for example, by letter or through the company's website or intranet). In order to reduce the number of participants at the shareholders' meeting, multiple shareholders may also consider appointing **one or more proxyholders** to represent the majority of the shareholders at the shareholders' meeting.

Companies may also consider **postponing the shareholders' meeting** to a later date on which an ordinary physical shareholders' meeting can be held. However, the **deadline for the approval and filing of the annual accounts** with the National Bank of Belgium remains within six and seven months, respectively, as from the end date of the previous financial year. The Government has not yet announced measures that allow companies to postpone this deadline.

In relation to extraordinary shareholders' meetings in the presence of a notary public, **all non-essential deeds are currently postponed**. Only urgent extraordinary shareholders' meetings, which are required from a financial perspective (such as capital increases) can be passed. In such cases, the notary publics require proxies to be given to their clerks in order to respect social distancing rules.

5.2 Taking board decisions without a physical meeting

Under the New Belgian Companies and Associations' Code, the board of directors may take decisions by **unanimous written resolutions** unless the articles of association contain restrictions. However, many articles of associations still contain the **old regime for unanimous written resolutions**, *i.e.* only in exceptional cases when the urgency and the interest of the company require written resolutions. These limitations often result in **it being impossible to take written resolutions**, thereby risking (albeit theoretically) the validity of the decisions taken by written resolutions.

Alternatively, companies may consider organising the meeting of the board of directors **by telephone and/or videoconference**. In principle, any (electronic) means of communication that allows the directors to actively engage in deliberations and securely exercise their vote may be considered for this purpose.

5.3 Execution of documents in a digital world

The restrictions on physical meetings and the remote work environment also emphasise the **importance of electronic signatures**. When using electronic signatures, it is recommended to assess which type of electronic signature, *i.e.* the simple, advanced or qualified electronic signature, is most appropriate in view of the purpose of the document, as the different types of electronic signatures have a different legal and evidentiary value.

In addition, in order to facilitate the remote execution of documents, it may be recommended to **execute** resolutions, minutes and agreements **in counterparts**. Each executed version shall in that case be deemed to be an original and all executed versions shall together constitute one and the same originally executed document.

5.4 Next steps

The Government has not yet announced measures that would provide more flexibility to companies to organise their shareholders' and board of directors' meetings remotely.

As a result, each company must assess the different alternative methods and determine which approach is most appropriate in view of its specific needs, its shareholding structure and the circumstances at that time. Furthermore, it must be assessed on a case-by-case basis whether the alternative approach is in line with the company's articles of association.