

# M&A – Beyond the Sniffling, Snuffling & Sneezing



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M&A in Belgium, like everywhere else, is obviously impacted by the uncertain global economic landscape. Some sectors are weathering the storm better than others, but it is fair to say that there will be lasting changes and fundamental shifts across the M&A board. This Strelia M&A Series aims to guide companies to properly anticipate, prepare and plan for some of these changes so that they can tap into their full potential and increase the likelihood of closing a deal successfully.

### *Consider Alternative Transaction Structures*

In times of uncertainty and just as in the financial crisis, companies should consider deal structures that present benefits of M&A transactions without the full set of downsides. These could be structures that focus on investing or cooperating rather than straightforward acquiring (see also our Strelia M&A Series of April 2019 – Strategic Alternatives to M&A in the Spotlight). Given the potential delays in obtaining regulatory approvals especially at this time, companies may prefer structures involving the least regulatory interference.

Companies are therefore inclined to make minority stake investments, enter into long-term partnerships in different forms, and be on the lookout for distressed M&A opportunities. In fact, we expect the number of distressed M&A transactions to increase as they may offer a silver lining for both buyers and sellers.

### *Bridge Valuation Gaps*

Target valuation is complex in general, and ever more so now in midst of the pandemic. To cut through this, parties should look for structures that mitigate the risk and bridge the valuation gap. These structures involve completion accounts-based price adjustments, earn-outs and deferred payments. On the same note, and if suitable, companies may also consider paying with shares to prevent their own cash flow from being affected.

### *Consider Alternative Debt Funding Sources*

It seems likely that traditional lenders in current times will not hold on to their aggressive leveraging strategy they had before and will tend to take a more conservative approach nowadays. Companies should therefore actively consider additional private debt funding alternatives to avoid transactions that would eventually cause them to give up equity in the business. These alternatives should be scrutinized, as they come not only at a higher cost but also from varying providers that usually have a short history. For the companies that are willing to give up equity in their business, we do see PE firms increasingly optimizing the pandemic-induced downturn by moving in—and doing so quickly and decisively—to fill that need. In these scenarios, careful due diligence should help companies to select the right PE partner.

### *Re-value Due Diligence*

Scope-setting has always been an integral part of due diligence. It ensures that risk areas are adequately addressed, but sometimes due diligence has turned into a ‘box-ticking’ exercise. Returning to the fundamentals of due diligence and re-focusing, even with a different pair of eyes, can offer useful insights for companies in times of crises. Indeed, companies must ask different questions in terms of how the crisis impacts current operations, finances, customers, supply chain, IT, insurance, and workforce.

We see the scope of due diligence broadening, the focus shifting and the entire due diligence process taking more time.

### *Manage Gun-jumping Risk*

Uncertainty can cause a party’s position to gain leverage and polarize negotiation positions. For example, we see buyers wanting to have more control over the business between the deal’s signing and closing. In view of competition law compliance, parties should manage gun-jumping risks and reassure buyers through other ways during the interim period. For example, drafting in greater detail what parties understand by operating in the ‘ordinary course of business’ in the interim period can be useful.

### *Limit Litigation-breeding Issues*

In this economic haze, litigation will likely surge. You only need a little imagination to see how the above could develop into litigation-breeding issues. Companies should therefore plan ahead for the worst and have clear and well-defined transaction documentation. Illustrative examples in earn-outs prove to be helpful as earn-out disputes are infamous for their ability to mature into litigation.

Parties are certainly spending more time and effort in assessing risks and stipulating risk allocation in greater detail in contractual documentation.



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