Bates Wells

# After Lockdown: Bates Wells Guide

## M&A transactions in a COVID-19 Climate

**The COVID-19 pandemic has changed the way in which we interact on both a personal and business level. Companies and businesses have had to adapt to social distancing requirements, restrictions on travel and remote working and those contemplating private M&A transactions are not immune to these challenges.**

**After an initial slow down, we are starting to see an increase in private M&A activity as this period of economic uncertainty starts to provide opportunities for acquisitions and market consolidation.**

**So how might COVID-19 concerns impact upon private M&A transactions?**

### 1. Due diligence and assessment of risk

COVID-19 related issues identified during the due diligence process may lead to an adjustment in the purchase price or the reallocation of risk under the acquisition agreement (for example, additional warranty protection for the buyer). Specific areas of focus might include:

#### Employees

- Measures that the business has taken to manage the company's workforce. If the company has taken advantage of the Coronavirus Job Retention Scheme (furlough), will further action or a restructuring be required once this temporary scheme has ended?
- Assurances that the business has taken sufficient steps to protect its employees. Are employees able to work remotely and have they been provided with the correct equipment to work from home?

#### Real Estate

- Managing the costs of business premises. Has the business sought to negotiate a rent reduction or a payment holiday with the landlord?
- COVID-19 induced remote working and/or post completion business integration may result in the premises being surplus to requirements. Does the company have the right to terminate or vary the lease?
- Are the premises COVID-19 safe? Travel restrictions and social distancing may prevent a buyer from carrying out a physical inspection of the company's premises.

Bates Wells

### IT and infrastructure

- Business continuity when remote working is the new status quo. Is the IT infrastructure sufficient for the business' current needs? What disaster/contingency plans does the business have in place?
- Government guidance may require a prolonged period of remote working. Will significant new investment be required in these circumstances?

### Confidentiality & data security

- The impact of COVID-19 on the business' ability to comply with its statutory obligations. How and where is the business' information stored, accessed and processed? Has training been provided to employees to ensure that with remote working the business continues to comply with all regulatory requirements?
- An assessment of current systems and procedures. With remote working, are the business' systems and procedures still sufficient to ensure the security and confidentiality of personal and business information?

### Commercial agreements

- Key clients and customers. Does the impact of COVID-19 provide grounds for contract termination? Is there a risk that key clients will default?
- Key suppliers of the business. How dependent is the business on a specific or group of suppliers? Is there a risk that the supplier may cease to trade?

## 2. Valuation and purchase price

COVID-19's current or future impact on the business is likely to have an effect on the purchase price. To ensure the seller receives full value for the business and to provide the buyer with certainty that it is not overpaying, the following may be considered:

- Earn-out: If the purchase price is determined by reference to anticipated future performance, payment of the purchase price could be made in several tranches over time subject to the business performing as expected.
- Escrow arrangements: Part of the purchase price can be placed into escrow on completion to be released at a later date. Monies held in escrow could be used to satisfy any indemnity claim or warranty claim brought under the acquisition agreement.
- Completion accounts: The purchase price may have been agreed based on pre-COVID-19 financial information. A completion accounts mechanism ensures that the price risk passes to the buyer on completion and that the purchase price can be adjusted to reflect any COVID-19 related changes to the business' working capital or net asset positon.
- Specific indemnities: COVID-19 risks and liabilities identified in the due diligence process could be addressed by including specific indemnities in the acquisition agreement.

### 3. Material Adverse Change and the ability to terminate

A buyer may seek the right to terminate in the event that COVID-19 has a significant adverse impact on the business by including a Material Adverse Change ("MAC") provision in the acquisition agreement.

Completion of M&A transactions is often contingent on certain conditions being met, for example, regulatory approval or third party consent to a change of control. In these circumstances, having entered into an acquisition agreement (exchange), the buyer will be contractually bound to purchase and the seller will be contractually bound to sell the business when the last condition has been satisfied (completion).

Whilst the parties will look to minimise the period between exchange and completion, the economic uncertainly caused by COVID-19 may cause a buyer to press for a MAC provision so that it is not forced to acquire a business that is no longer financially viable. A seller is likely to resist the inclusion of any MAC provision on the grounds that it requires contractual certainty that the sale will proceed.

**If you are contemplating an acquisition or an exit and would like to discuss your options get in touch with our Corporate Team.**

## For further information please contact:

**Stephen Callender**
Partner
**T:** +44 (0)20 7551 7620
**E:** s.callender@bateswells.co.uk

**Mark Tasker**
Partner & Head of M&A
**T:** +44 (0)20 7551 7665
**E:** m.tasker@bateswells.co.uk