

Impact of COVID-19 on European M&A activity

Financial and legal considerations

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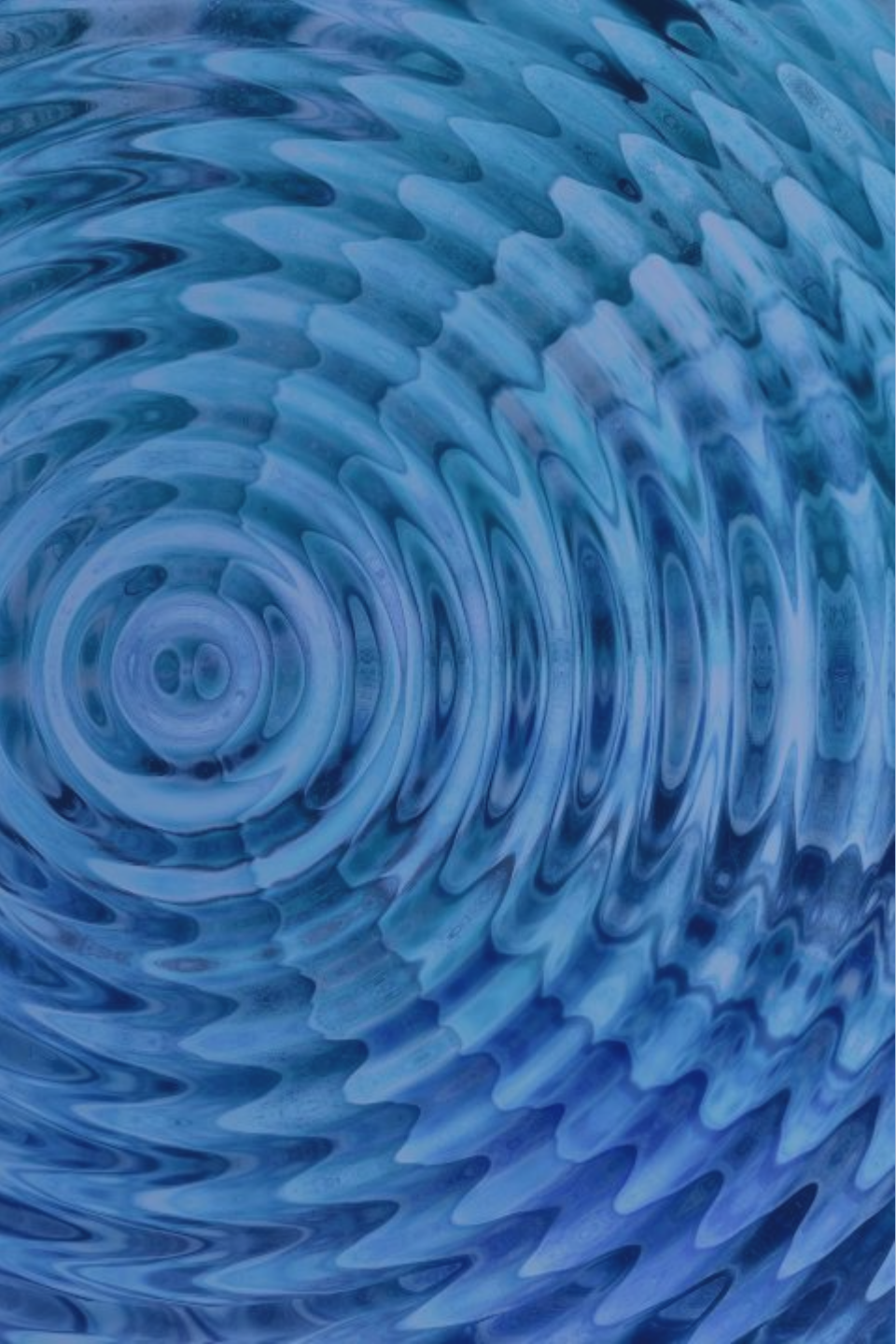
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Credit Suisse and CMS joined forces to analyse the financial and legal implications of the COVID-19 pandemic on M&A transactions in Western Europe. We identified key issues impacting M&A deals, ranging from the possibility to terminate or postpone pending transactions to the impact of several state aid programmes. Although changes are happening on a day-to-day basis, the COVID-19 pandemic also seems to create new opportunities for distressed M&A, strategic buyers, private equity and financial sponsors. This publication aims to identify aspects which should be considered when assessing and negotiating M&A transactions in the COVID-19 era.

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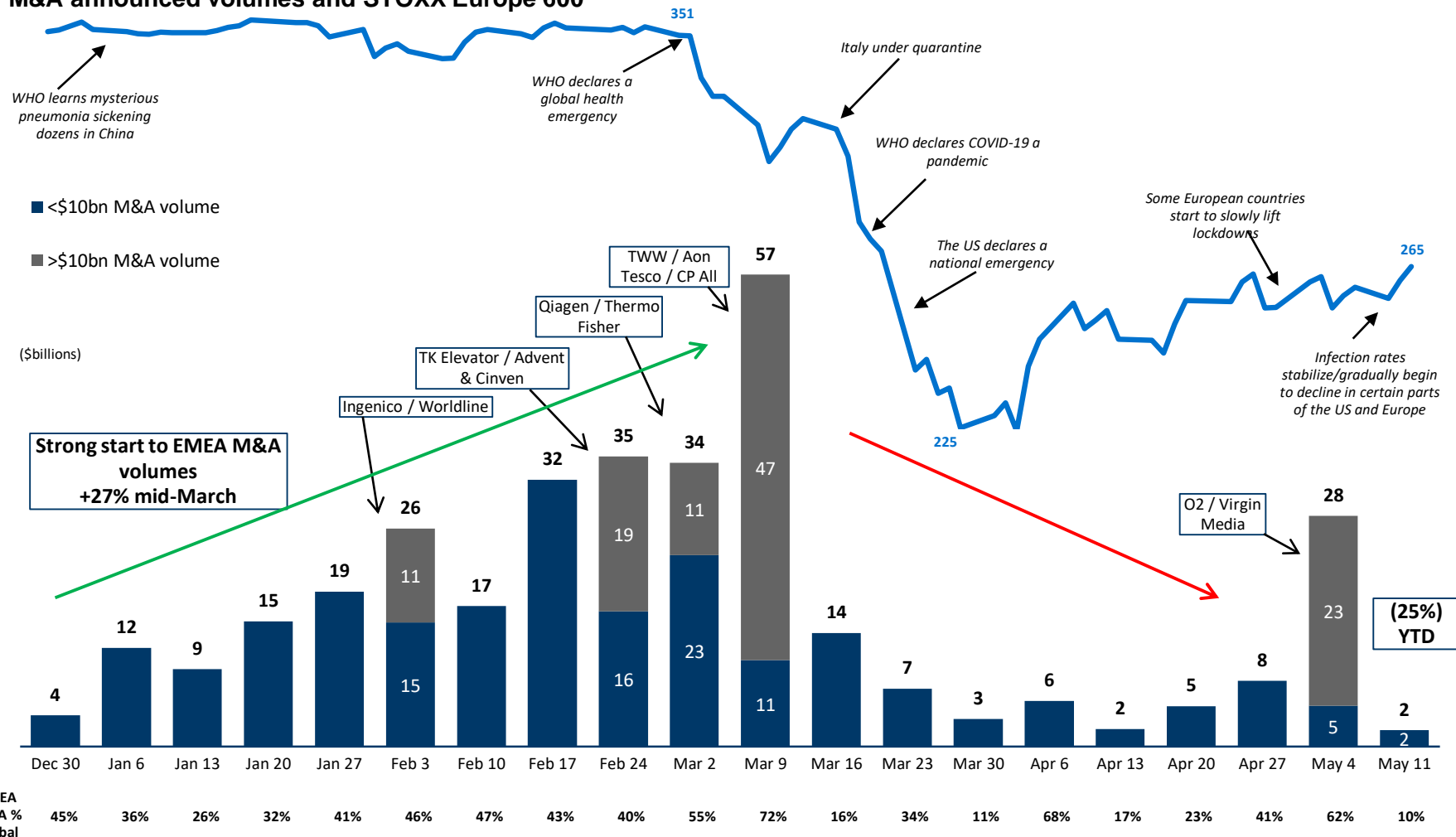
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Summary of COVID-19 M&A impact

- 2020 got off to a strong start with **European M&A volumes in mid-March up 27%** over the same period last year
- However, **M&A volumes dropped significantly towards the end of March and have continued to drop progressively in April** due to the COVID-19 pandemic and the implementation of social distancing measures
- A **number of announced deals are being delayed or cancelled**, such as the sale of PartnerRe to Covea, as firms try to wait out the worst of the downturn or restructure deals
- While in the short term a deterioration in business confidence and uncertain growth outlook will result in declining European M&A activity, prior crises have shown that once confidence returns, M&A activity rebounds strongly
- Assuming the virus can be contained, the **second half of the year could see a recovery in deal activity**, fueled in part by pent-up demand

European M&A volumes remain depressed as the COVID-19 pandemic continues, although the equity markets seem to be improving

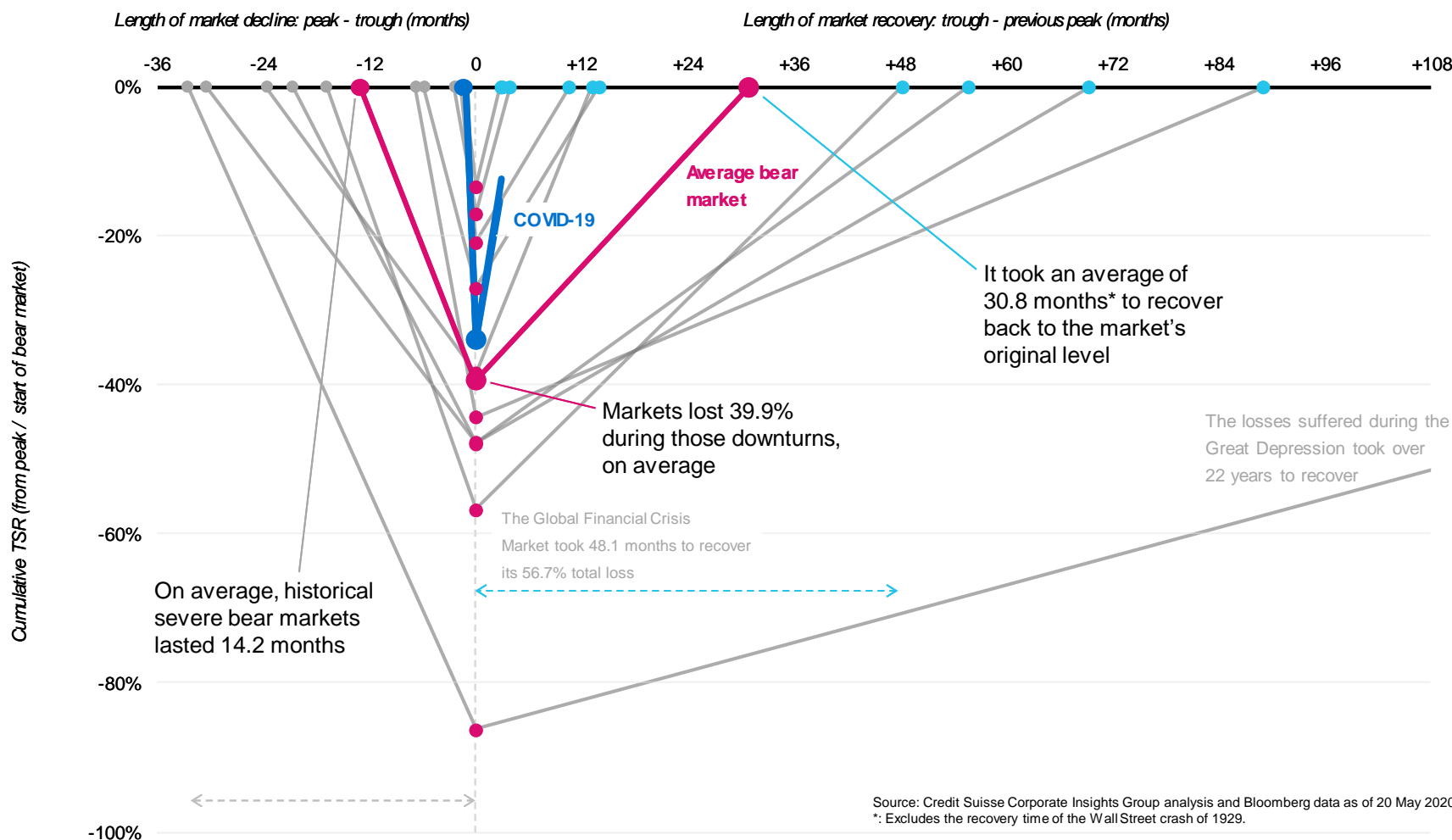
M&A announced volumes and STOXX Europe 600



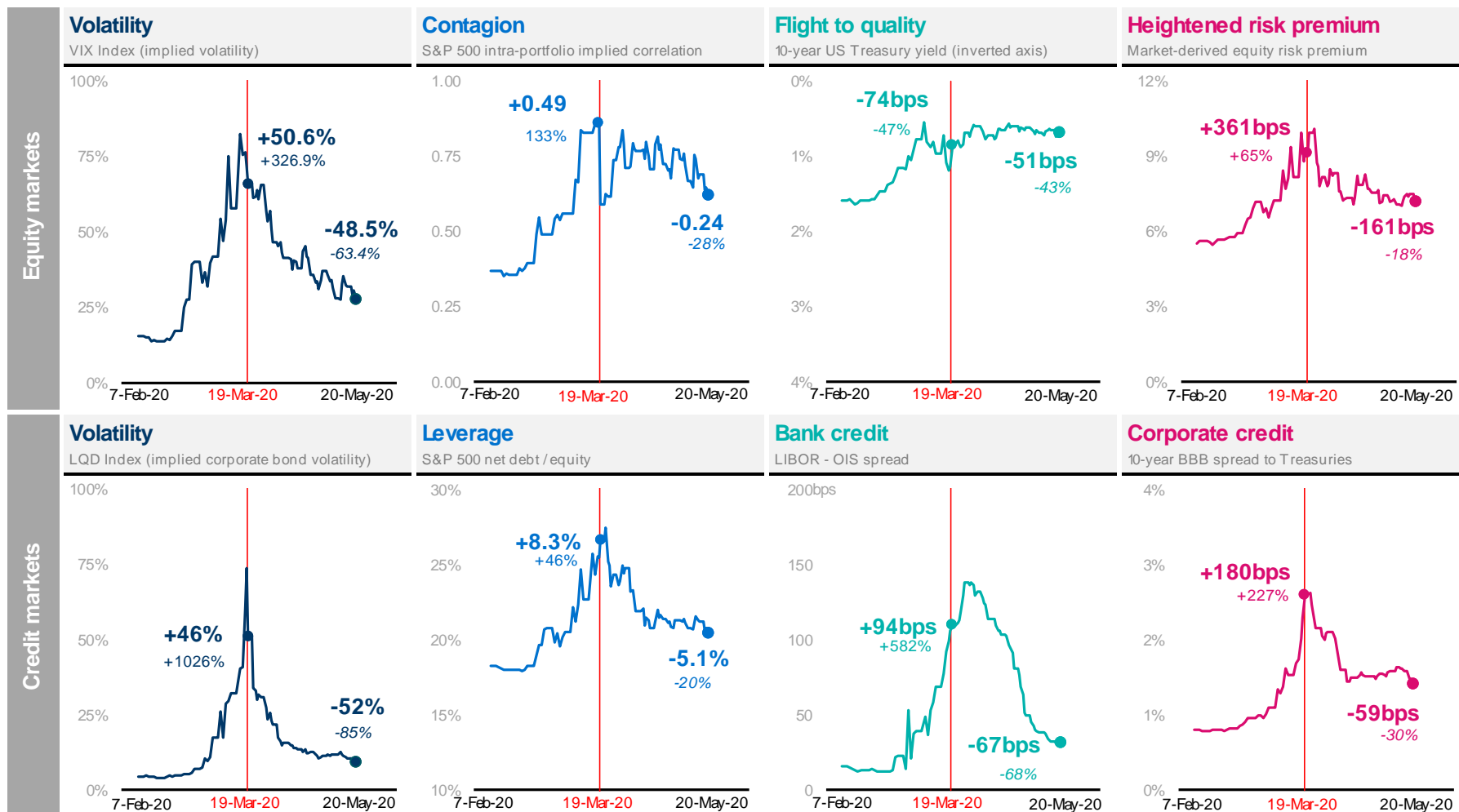
Source: Credit Suisse Corporate Insights Group analysis, Dealogic and FactSet as of 21 May 2020. Note: Indexed at 100, as of 30 December 2019.

We see some evidence that the current market could recover quickly, assuming the worst is over and it avoids falling to further lows

Visualising the magnitude of COVID-19's impact vs. past bear markets



Multiple technical signals indicate that risk sentiment is starting to subside after the market trough around March 19th

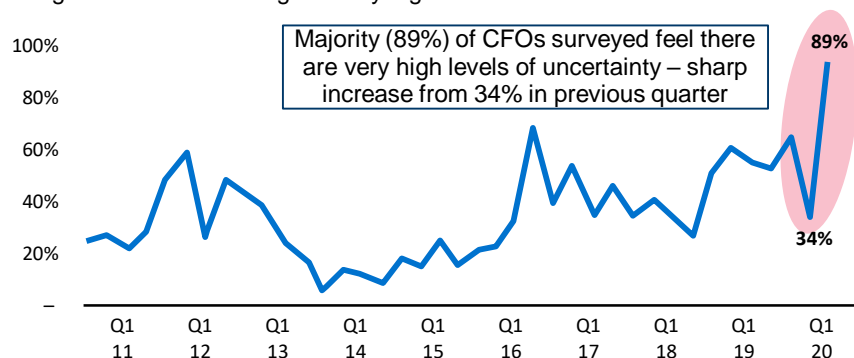


Source: Credit Suisse Corporate Insights Group analysis and Bloomberg data as of 20 May 2020.

Deterioration in business confidence and uncertainty around growth forecasts for the remainder of the year will dampen M&A activity

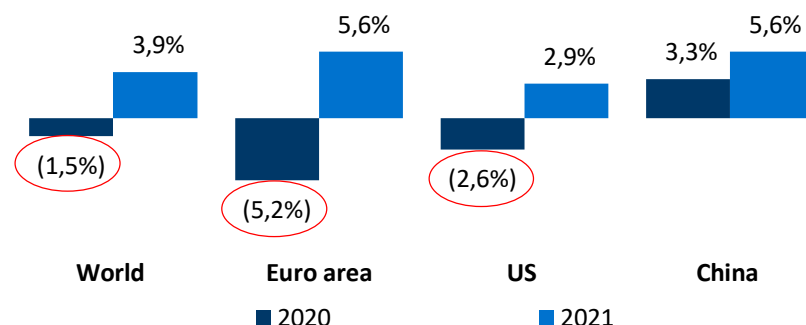
Surge in business uncertainty

% of CFOs who rate the level of external economic and financial uncertainty facing their business as high or very high



Negative growth forecasts for remainder of year

Credit Suisse GDP forecast
Assuming V-shaped recovery



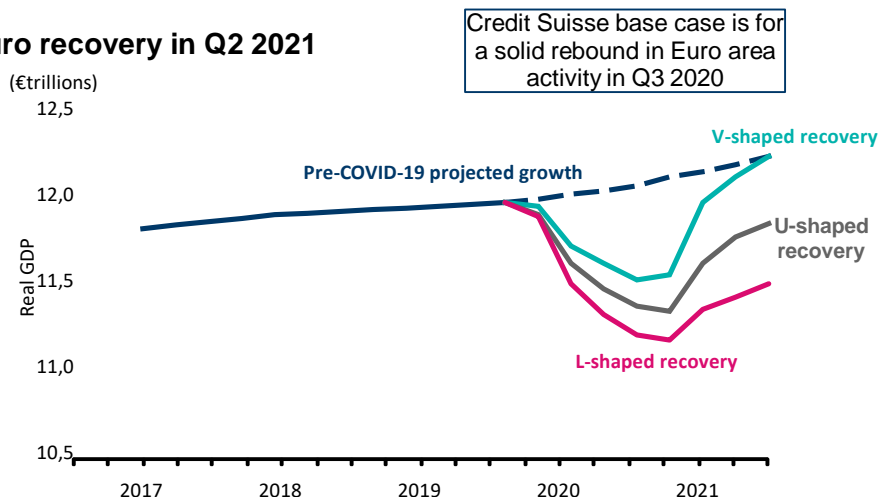
Business optimism down materially

% of CFOs who are more optimistic about the financial prospects for their business than three months ago



Euro recovery in Q2 2021

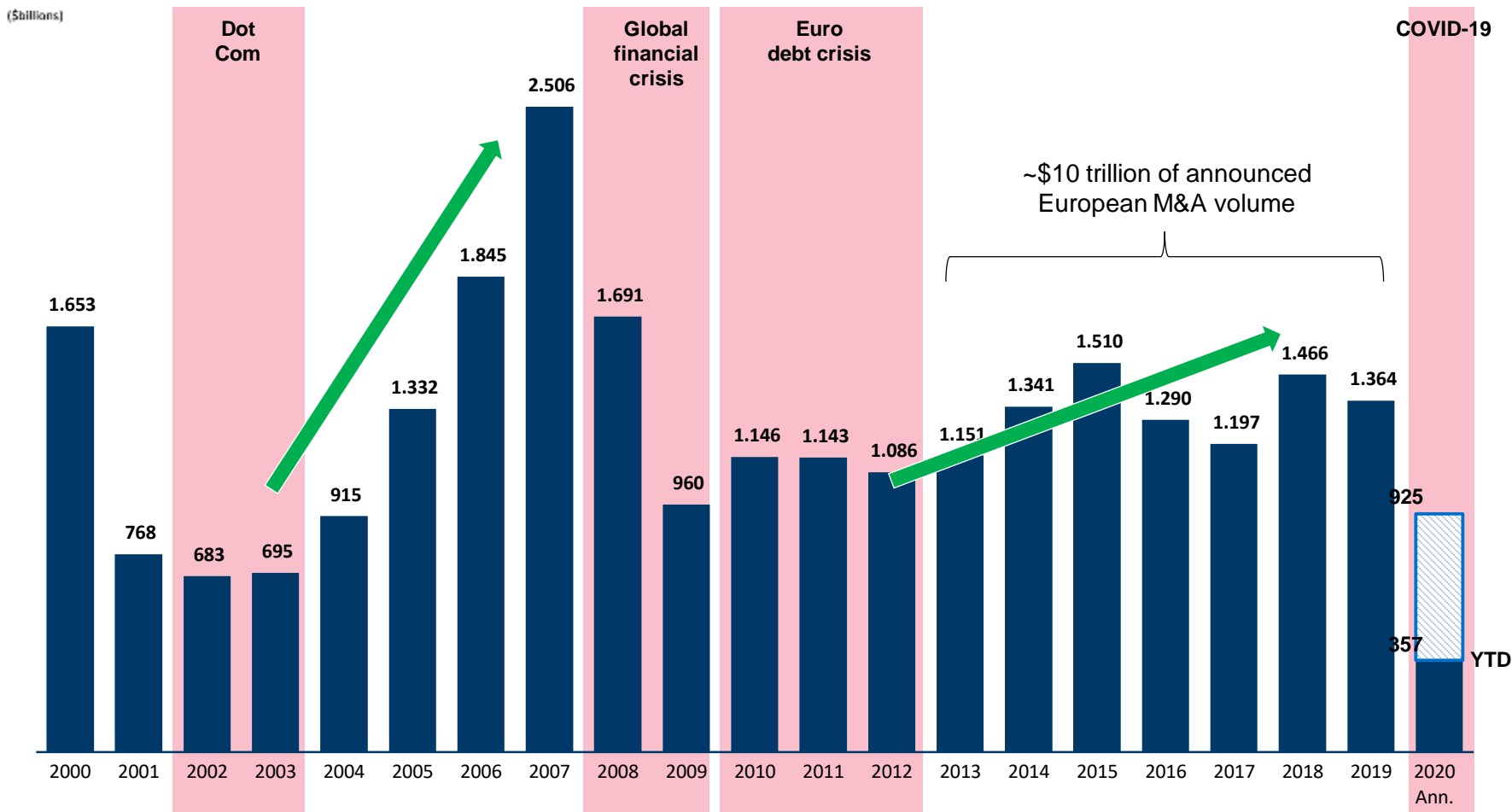
(€trillions)



Source: Credit Suisse Corporate Insights Group analysis, Deloitte CFO survey, Dealogic and FactSet. Note: Based on economist forecasts by 22 and 25 contributors for the Eurozone and UK respectively.

However, European M&A has rebounded strongly from prior crises

EMEA M&A announced volumes

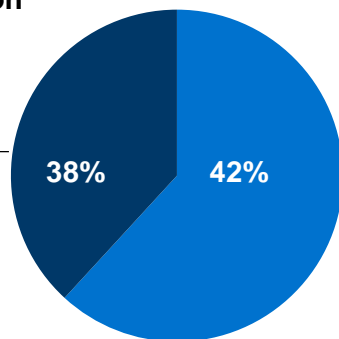


Source: Dealogic as of 21 May 2020.

Many European companies have cut their dividend in the wake of COVID-19 in order to preserve liquidity

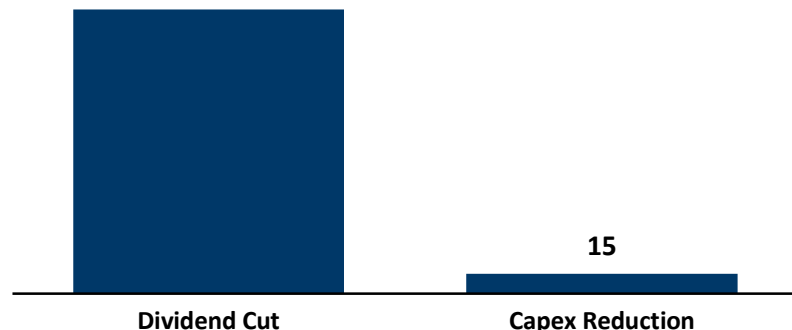
STOXX Europe 600 companies have been announcing dividend cuts and capex reduction

Since the COVID-19 market crash, **nearly 40%** of STOXX Europe 600 companies have announced **cuts to dividends and capex to preserve liquidity**



Number of constituents announcing change to dividend and capex

213



Dividend Cut

Capex Reduction

(24.1%)

(20.5%)

Average change in market value

Companies have been accelerating the pace of dividend cuts and suspensions

- As the market started to fall from late February through March, dividend actions by companies were largely unaffected, with positive announcements outpacing negative news by a significant margin
- By mid-March, it became clear that the impact of COVID-19 would be more far-reaching, and cash-strapped companies began reducing or eliminating their dividend burdens to free up liquidity
- Since the trough in late March, responses to dividend changes have trended more positive. Many liquidity-creating cuts have actually garnered a positive stock market reaction over the last couple of weeks.

Accessing capital and restructuring debt

- Companies across Europe have been drawing down lines of credit as they look to bolster their cash piles as revenues collapse amid the near-shut down of the economy. One of the largest was by AB InBev (\$9bn)
- Europe's most highly-rated corporate bond issuers are turning to the bond market to raise funds. A number of deals include: AB InBev (\$5bn), Airbus (\$2.7bn) and Engie (\$2.7bn)

Source: Credit Suisse Corporate Insights Group analysis, FactSet as of 28 May 2020. Note: Dividend cut and capex reduction announcements from 19 February 2020

The recovery could see an acceleration of M&A as corporates and financial sponsors vie to get ahead of the pack

Digitalisation

COVID-19 has accelerated digitalisation in all areas: retailing, working, medtech, shopping and entertainment, from consumer and corporate angles.



Corporate carve-outs

Potential acceleration in corporate simplification and reorganisation as corporates strive for optimum business models and structures in lower growth environment.



All share deals and JVs

Share deals (which do not require funding) are likely to become more compelling as equity prices fall.

Share deals “neutralise” COVID-19 share price impact on both sides.



Structured transactions

Depressed valuations could provide opportunities for financial sponsors to deploy capital.



Source: Dealogic as of 21 May 2020. (1) 10% stake acquired.

European M&A trends by industry

Industry	5-year average	2018	2019	2020	Impact
Technology	134 5 yr. avg	122 2018	207 2019	137 34 2020	<ul style="list-style-type: none"> The impact varies by vertical and depends on end market exposure <ul style="list-style-type: none"> Software and payments fared well relative to other verticals IT services perceived as more cyclical Certain verticals (e.g. food delivery, remote working software) clear winners Deal activity mostly on hold, with select exceptions (e.g. eBay classifieds) Financial sponsors actively scouting value opportunities
FIG	182 5 yr. avg	199 2018	199 2019	273 68 2020	<ul style="list-style-type: none"> Q1 volumes remain high compared to previous year, and M&A activity and dialogue remain active in the sector during the COVID-19 Consolidation will be the key theme across the sub-sectors NO major solvency impact, but a significant P&L impact - WINNER vs LOSER business models will emerge and this will lead to in market consolidation (Germany, Spain and Italy e.g. Intesa/UBI) Flexibility on regulation will allow for cross-border consolidation to kick off in 2021/2022
Industrials	253 5 yr. avg	241 2018	187 2019	303 76 2020	<ul style="list-style-type: none"> Impact from COVID-19 outbreak varies by vertical and end market exposure Aerospace, auto and energy-related sectors have been hit the most Building technology and industrial automation segments have proven to be more resilient Companies focused on preserving and accessing additional liquidity After an initial disruption of supply chain, a significant demand shock is expected in Q2 Near-term deal activity to mostly involve consolidation of supply chain (either horizontally or vertically) and divestiture of non-core assets
ETI	220 5 yr. avg	246 2018	173 2019	130 33 2020	<ul style="list-style-type: none"> In Oil & Gas, COVID-19 negatively impacting the demand side at the same time as the Saudi/Russia disagreement causing supply discipline to disappear Shell announced its first cut to its dividend since 1945 Transport one of the worst-impacted sectors with airlines, airports and other transport players operating at close to zero load factors in April Strong interest remains from financial sponsors in ESG opportunities with stable and predictable cash flows (e.g. operating renewables or power networks)

Source: Dealogic as of 29 April 2020. Note: 2020 FY volumes annualised as of 31 March 2020.

European M&A trends by industry (cont'd)

Industry	5-year average	2018	2019	2020	Impact
Consumer & Retail	183 5 yr. avg	128	139	86 22	<ul style="list-style-type: none"> Impact of COVID-19 highly variable across sub-sectors and channels – food vs non-food retail, online vs offline, etc. Significant bankruptcy for most exposed players (department stores, apparel retailers, restaurant chains, etc) Focus on maintaining liquidity for the most impacted corporates, including equity raises in certain cases (e.g. ASOS, WH Smith) Large FMCG players less impacted and have held up well (e.g. Nestlé, Unilever, RB) – continue to look for acquisition opportunities although COVID-19 likely to have some negative value impact
Healthcare	153 5 yr. avg	216	138	61 15	<ul style="list-style-type: none"> Services companies experiencing significant volatility with providers having greatest exposure (e.g., non-urgent / elective visits have declined sharply) Attention has shifted to liquidity management (with many drawing on lines of credit) Pharma has demonstrated willingness to deploy capital towards licensing deals, but whole company M&A transactions have not emerged post-COVID-19 Mid- and small-cap biotech primarily focused on securing access to capital to fund future trials but acknowledge that strategic interest and opportunistic buyers could emerge
Telecom & Media	126 5 yr. avg	216	116	45 11	<ul style="list-style-type: none"> Telecom and broadband companies appear to be at least partially insulated from the negative effects of the economic slowdown. Investors appreciate the utility characteristics of this sector Active M&A - Virgin / O2 mega deal is a clear demonstration. Infra activity continues, driven by motivated sellers and long-term investment horizon Media B2C and events have been hard hit, as a result of a drop in advertising and social distancing, respectively. Information services relatively insulated, given its subscription model
Real Estate	87 5 yr. avg	82	98	66 16	<ul style="list-style-type: none"> Crisis has hit a number of the verticals particularly hard, including casinos, hotels, shopping centres and mall REITs Despite the environment, majority of publicly-traded companies have significant liquidity M&A unlikely to be a priority in near term, but some investors may invest in real estate as an inflation hedge in response to possible inflationary impact of unprecedented stimulus actions

Source: Dealogic as of 29 April 2020. Note: 2020 FY volumes annualised as of 31 March 2020.

European M&A trends by country

Country	5-year average	2018	2019	2020	Impact
UK	339	429	254	342	<ul style="list-style-type: none"> The anticipated resurgence in UK M&A volumes, following the UK General Election and the resulting large Conservative majority, failed to materialise in early 2020 COVID-19 was clearly a further negative for UK M&A sentiment, with deals being announced in sectors that are relatively unaffected by the current situation: notable announced transactions include: <ul style="list-style-type: none"> sale of Pennon's waste-to-energy business, Viridor, to KKR combination of O2 and Virgin Media
France / BeLux	217	155	216	206	<ul style="list-style-type: none"> French Q1 20 dealmaking was impacted by the COVID-19 crisis leading to the country's lowest quarterly deal count since Q3 14 <ul style="list-style-type: none"> 8 deals valued above €500m were announced in the quarter, yet only two were recorded in March 2 deals (Worldline / Ingenico and MBO of Ceva Sante Animale) contributed to c.60% of total quarterly deal value worth €24bn The French Government announced amendments to fiscal policy postponing tax payments/social contributions and issued a €300bn state guaranteed loan facility (12% of GDP) to banks in order to sustain credit to businesses <ul style="list-style-type: none"> Also confirmed its opposition to dividend payment in light of current crisis which implied c.70% of CAC 40/SBF 120 cancelling or changing their planned dividend payment during Q2 20 Significant economic uncertainty with c.85% of CAC40/SBF120 companies lacking guidance for 2020 as of May 20
Germany / Austria	169	163	164	177	<ul style="list-style-type: none"> Q1 saw the continued theme of large corporate carve-outs and the acquisition of highly strategic assets as evidenced by the announcement of the sale of ThyssenKrupp Elevators and the acquisition of Qiagen Focus in the second quarter was on balance sheet health and liquidity with a number of companies suspending buybacks and dividends Economy Stabilisation Fund Act put in place and liquidity support provided through KfW The Federal Government resolved a draft law to amend the Foreign Trade and Investment Law ("AWG") which is expected to come into effect before the summer; effectively the new amendments will strengthen the Federal Ministry of Economic Affairs and Energy's ability to block transactions

Source: Dealogic as of 29 April 2020. Note: 2020 FY volumes annualised as of 31 March 2020.

European M&A trends by country

Country	5-year average	2018	2019	2020	Impact
Switzerland	67	72	85	44	<ul style="list-style-type: none"> Q1 activity was marked by the announcement of the first acquisition of a Swiss-based company (Global Blue) by a SPAC (Far Point Acquisition Corp), as well as an ownership simplification transaction by the Frère and Desmarais families through an exchange offer for Pargesa shares via GBL shares Q2 to April 2020 saw corporates focus on preserving liquidity and balance sheet management, with no notable transactions announced during the period In light of depressed valuations of Swiss corporates, the Swiss parliament also initiated a discussion on how to protect strategically-relevant Swiss companies from foreign takeover
Nordics	99	123	98	44	<ul style="list-style-type: none"> Q1 activity declined some 75% year on year and ground to a near complete halt in March as some sale processes were paused April and May have seen increased activity but with predominately small- and medium-sized transactions Corporate focus has been on liquidity and preserving funds while an active public debate took place about reduced or cancelled dividends Notable deal announcements included the sale of Glycom to Royal DSM, the sale of Takeda assets to Orifarm Generics and the spin-off of Electrolux Professional to shareholders
Iberia	72	108	67	31	<ul style="list-style-type: none"> Q1 M&A activity was significantly weaker than Q1 last year on the back of COVID-19, despite having a good start to 2020, with a strong January particularly on the number of deals announced April YTD has been slow, although some relevant transactions have been announced during the lockdown and the pandemic (i.e. Acciona Energia, Brisa, NOS Towers); all have the common denominator of being infra-like businesses, which proves that infra assets are being more resilient to the current downturn Protective measures on foreign-relevant investments have been implemented in this period, for buyers outside EU and EFTA, to protect Spanish targets in light of the valuations dislocation seen in most sectors

Source: Dealogic as of 29 April 2020. Note: 2020 FY volumes annulised as of 31 March 2020.



M&A negotiations and contracting in the COVID-19 era

M&A negotiations and contracting in the COVID-19 era

Contractual implications

- Material Adverse Change (MAC) clauses: not commonly used in the EU (prior to the COVID-19 era); see the [CMS European M&A Study 2020](#).
- Pandemics are typically excluded from MAC as they have a market-wide effect. Sellers may include a general MAC clause excluding pandemics in transaction documentation.
- Buyers may try to use other transaction conditions to terminate/end transactions. Examples of these clauses: breach of (business-vital) warranties or covenants between signing and completion, obtaining financing (term also important considering potential breach of warranties), back-door MAC, other deal conditions (e.g. regulatory).
- Buyers may also wish for pre-completion covenants to be included in transaction documentation on maintenance and management of working capital, liquidity and debt levels, which are typically not included in pre-completion covenants.
- Sellers may further consider limiting or expanding possibilities to rescind, amend, renegotiate or cancel contracts under applicable law.

Frequency of MAC Clauses

SECTOR	2010 – 2018	2018	2019
BANKING & FINANCE	20%	29%	32%
HOTELS & LEISURE	13%	14%	13%
ENERGY & CLIMATE CHANGE	14%	15%	13%
CONSUMER PRODUCTS	11%	8%	24%
TECHNOLOGY, MEDIA & COMMUNICATIONS	13%	8%	15%
INFRASTRUCTURE & PROJECTS	9%	50%	22%
LIFE SCIENCES & HEALTHCARE	17%	26%	14%
REAL ESTATE & CONSTRUCTION	15%	13%	12%
INDUSTRY	15%	9%	17%
BUSINESS (OTHER SERVICES)	13%	13%	15%
CMS AVERAGE	14%	14%	16%

100% = all evaluated transactions of the respective industry

Source: CMS European M&A study 2020, p. 71 and onwards on use of MAC clauses.

M&A negotiations and contracting in the COVID-19 era

Contractual implications

- No established case law on COVID-19, but first cases on (cancellation of) M&A deals in the COVID-19 era are brought to court.
- Expected increase of turnover-based earn-out and earn-in clauses to share the risk and benefit of uncertain future business performance.
- Impact on all levels of due diligence; accessibility of key information/people. Focus on material contacts, employees, IT infrastructure financing and trading impact.
- Disclosures: liquidity, solvability, support programmes.
- Valuation impact: increased need for additional/up-to-date financial information and projections and enhanced warranties.
- Extended warranties being sought, e.g. access to existing financial or government support, secure material commercial contracts and supply chain, business continuity and insurance, employee and property restructuring liabilities.
- Buyers may also seek greater visibility and level of control between signing/completion at the same time insisting on full repetition of warranties.
- Warranty & Indemnity (W&I) insurance still available with pricing competitive for continuing transactions. In a buyer's market, movement likely on warranties/cover sought from sellers, increased deductibles and sell-side policies.

M&A negotiations and contracting in the COVID-19 era

Legal possibilities to amend, cancel, postpone or renegotiate deals

- Unforeseen circumstances, force majeure?
- Important to demonstrate concrete impact of COVID-19 in the specific transaction framework.
- Purchase price (adjustment) may continue (or be reopened) throughout the negotiation process.
- Deal uncertainty inevitable; parties' appetite/ability to progress being carefully reassessed. Particular impact on auction or other complex/multi-party processes.
- For controlled auction negotiations: freezing a deal with a (specific) bidder to be considered.



Key COVID-19 themes in M&A

Key COVID-19 themes in M&A

Competition law approvals and other regulatory aspects

- Consider potential **delay in competition authority filings and approvals** in transaction timelines as e.g. market consultation by authorities is more difficult. Long stop dates should be considered carefully. In certain jurisdictions the delays seem to be minimal. European Commission assessment of various second phase mergers is back on track.
- Merger assessment may be performed more swiftly in **financial distress scenarios** (e.g. UK: Amazon/Deliveroo). **Dispensation from standstill period** may be obtained. **"Failing firm" defence** (creating or reinforcing dominant position instead of bankruptcy target) likely to be invoked more often.
- Global interest for **"killer acquisitions"** is increasing, also in the wake of Covid-19. Merger control thresholds are likely to be adjusted in e.g. China, Netherlands.
- Global trend of ever-increasing **Foreign Direct Investments (FDI) scrutiny** is likely to continue. FDI Regulation enters into force in October 2020. EU White book on Foreign Subsidies Screening scheduled for June 2020: possible game-changer for investment by non-EU state-backed companies. Meanwhile, European Commission has called for closer scrutiny of foreign (non-EU) investment and encourages other forms of state intervention (e.g. acquisition of 'golden shares' by states).
- Antitrust principles are loosened in specific cases related to COVID-19. Various authorities, including the European Commission, are prepared to provide informal guidance on antitrust matters for certain business cooperation initiatives. For an extensive overview, please see our [CMS Expert Guide to Competition Law During COVID-19](#).
- Post COVID-19: competition authorities have warned companies not to take advantage of COVID-19 circumstances. In-depth cartel investigations are expected. Thoroughly documenting all actions on cooperation initiatives advised.

State Aid & Support Programmes

- Supporting measures have been announced by nearly all EU member states. For an extensive overview of these measures, please see our [CMS Expert Guide to State Aid During COVID-19](#).
- First supporting measures were aimed at quick support. Now, a growing list of conditions and limitations is attached to the receipt of such state support, e.g. **restrictions on payments of dividends** and bonuses and the possibility to buy own shares. This may be of particular concern for multinationals and PE portfolio companies and should be considered in due diligence and strategic decision-making processes.

Key COVID-19 themes in M&A

Corporate Restructuring & Distressed M&A

- Check contractual obligations; breaches under (financial) covenants?
- Significant bankruptcies may be expected after support programmes end.
- Consolidation expected in sectors which are affected the most.
- Smaller and mid-cap companies may have issues raising liquidity in debt markets; capital provided by large corporate or financial sponsors could provide for an alternative. This may lead to transactions being financed with small or no debt in order to solve liquidity issues. More vendor or shareholder loans?
- Expected increase of business and asset sales (in or outside insolvency) instead of share sales?
- Introduction of (financial) restructuring plan outside formal insolvency in order to avoid uncontrolled insolvency (expected next year).
- Important part of buyer due diligence will be a review of third-party consent clauses, as issues may arise on such third party (e.g. governmental) consent.
- Challenges may further stem from carve-out operations taking more time due to capacity issues.

Directors' Liability

- Liability position for directors to be considered, especially when suspension of payment or a bankruptcy scenario is expected.
- Risks that transaction can be nullified should be mitigated, especially when suspension of payment or a bankruptcy scenario is expected.
- Carefully documenting directors' actions recommended to substantiate efforts to mitigate risks.
- For more on directors' liability, see the [CMS Expert Guide for Directors of Companies](#).

Key COVID-19 themes in M&A

Lessons learned from the financial crisis: How will the deal points develop?

- The popularity of MAC clauses did not increase during the financial crisis and we expect the status quo to remain in the COVID-19 era.
- Liability caps increased and became more buyer-friendly during the financial crisis. However, we anticipate that this will not happen to the same extent given the increased use of W&I insurance coverage. We expect that W&I insurances will be taken out more often to protect the buyer.
- The use of escrow accounts as security for a buyer's warranty claims increased during the financial crisis. However, given the increasing use of W&I insurances to protect the buyer and to secure its warranty claims, we do not anticipate a similar development in the COVID-19 era.
- Purchase price adjustment mechanics became less popular during the financial crisis. This trend has continued since the financial crisis and we expect this to continue.
- Since the global financial crisis arbitration clauses had become less popular but this had already changed in the pre-COVID-19 era and we expect that arbitration clauses will be as popular as they used to be in the past.



Country-specific COVID-19 M&A comments

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Austria	Prior to signing, renegotiation or break-up of negotiations as a result of COVID-19 will almost always be possible and claims for damages under pre-contractual obligations based on Austrian legal doctrine (culpa in contrahendo) will usually not be justified.	Austrian law includes predominantly buyer-friendly statutory provisions for risk allocation between signing and closing, which may allow a buyer to walk away if more than half of the value of the purchased company is lost between signing and closing, or if the purpose of the transaction is very seriously disrupted in an unforeseen manner. However, these provisions can be (and often are) explicitly excluded in M&A agreements.	Support measures for companies include: <ul style="list-style-type: none">• EUR 15 billion assistance fund to support companies experiencing large decrease in revenue, via government guarantees for loans and non-repayable grants.• Tax prepayment reductions and payment extensions.• Deferring of social security contribution payments.• Short-time work: working time of employees can be reduced by up to 90% for a period of 3 months, with government reimbursing the employer for a large part of the compensation attributable to non-working time of that employee.	<ul style="list-style-type: none">• Insolvency of buyer or seller does not trigger right to rescind of other party, and respective contractual provisions would be void. Insolvency of target can, however, be agreed as triggering right to rescind.• Insolvency administrator of buyer or seller may (on a case-by-case basis) be able to challenge a purchase agreement, if concluded prior to insolvency and certain additional criteria apply.

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Belgium	<ul style="list-style-type: none"> Similar as to the Netherlands (see below). Due diligence process: extend timeline and cover additional points regarding key contracts (e.g. force majeure clauses; undue performance; financing etc.). Consider a MAC clause that specifically addresses COVID-19 (or, more generally, epidemic/pandemic situations). Adjustment of the seller's usual representation and warranties. Likely increased use of post-closing earn-outs. 	<ul style="list-style-type: none"> No case law known to date in connection with enforcement of M&A transactions during COVID-19 crisis as Belgian courts have not been operating normally due to confinement measures and social distancing The <i>exceptio non adimpleti contractus</i> principle entitles a party to a contract to suspend the performance of its obligations, as long as its co-contracting party remains in default of performing its own obligations. The common view is that <i>force majeure</i> would be difficult to trigger to walk away from a transaction, for those deals that were signed but not closed when the pandemic started. 	<p>Various federal and regional support programmes introduced such as:</p> <ul style="list-style-type: none"> government credits and guarantees. loan and interest moratoriums. tax and social security extensions. moratoriums on bankruptcies and seizures/attachments until 17 June for those companies which were not insolvent as at 18 March. unemployment measures support. adjustment on the rules applicable to the holding of annual general meetings and board meetings. no measures however taken to relax directors' and management's liabilities. 	<ul style="list-style-type: none"> New Royal Decree in consideration by the Government, introducing new tax relaxation measures which are conditional upon the beneficiaries not distributing dividends or not being affiliated to a tax paradise.

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
France	<ul style="list-style-type: none"> Freedom of contract and good faith principles; expectations of reaching agreement may lead to non-justifiable cancellation of negotiations resulting in liability (Cass. com., 18 Jan. 2011, no. 09-14.617). Wording of certain provision should be checked more carefully in view of the current situation (<i>Force majeure</i>, Hardship, MAC). Reckon on additional time for due diligence since travel and meeting restrictions may complicate site visits. Provide for longer than usual long stop dates in view of fulfilment of condition precedents (Consultation process, Financing, Regulatory Approvals). 	<ul style="list-style-type: none"> Precedingly, <i>force majeure</i> has been refused by French courts for epidemic outbreaks (H1N1, SRAS) and has been denied for payment obligations (Cass. com., 16 Sept., 2014, no. 13-20.306, Bull. civ. IV, no. 118). <i>Force majeure</i> will have to be appreciated on a case-by-case approach, researching if the enforcement of a particular contract is made impossible by the pandemic or not. It has been noted that the Hardship legal regime is not applicable to transfers of securities unless expressly stated in the contract (since April 2018). Mandatory freeze of all contractual early termination or penalty provision for late payment from 12 March to 23 June included. Legal freeze of rent payment for very small companies. Enforcing contractual obligations: from 11 May onwards, gradual resumption of judicial activity via the use of videoconference and conference call, following a period between 16 March and 11 May of drastically reduced activity with all non-essential hearings being postponed to a later date. 	<p>Several support programmes introduced, such as:</p> <ul style="list-style-type: none"> COVID-19 state guarantee of loans granted by credit institutions, financing companies (sociétés de financement) and crowdfunding intermediaries between 16 March 2020 and 31 December 2020 to non-financial companies registered in France, within the limit of an aggregate amount (principal, interests) of EUR 300 billion (the COVID-19 State Guarantee). Bpifrance has been appointed to manage this state guarantee deferral of payment obligations under credit facilities in certain cases, tax and social security payment extension and, in certain cases waivers of tax and social security payments for the lockdown period specific emergency plan to support small and mid-sized companies voluntary measures taken by the French Banking Federation (FBF) and Bpifrance apply to many types of financing. <p>French Government issued a number of guidelines relating to the right for companies benefiting from state-aid to distribute dividends or complete a share buyback in 2020.</p> <p>Informal guidance available from French Competition Authority to assess antitrust implications of contemplated cooperations with competitors to address the COVID-19 situation.</p> <p>A strengthening of foreign investment control regime has also been announced.</p>	<p>Insolvency:</p> <ul style="list-style-type: none"> various adjustments to the law governing companies in difficulty in view of the current health crisis which relate to the specific time period within which the opening of French insolvency proceedings must be requested. <p>Merger control:</p> <ul style="list-style-type: none"> derogation to Standstill obligation may be granted under certain conditions 'failing firm' argument is more likely to be accepted by the French Competition Authority ADLC to prevent bankruptcy of the target.

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Germany	<ul style="list-style-type: none"> Parties are in general free to terminate M&A-negotiations due to COVID-19. Only in certain exceptional circumstances (e.g. agreed break-up fee or specific basis of trust) claims for compensation can be asserted. Carefully consider risk allocation clauses in (pre-)contractual negotiations (e.g. break-up fees, fulfilment of conditions in domain of one of the parties). Special focus on COVID-19 related DD items (e.g. short-time work, disruptions in the supply chain, apply for state aid). 	<ul style="list-style-type: none"> Carefully consider if the M&A-agreement contains a MAC-clause and if this covers adverse effects due to COVID-19. Claims for contract adjustment or withdrawal/ termination rights based on statutory provisions (force majeure and / or unforeseen circumstances) are unlikely to be successful in typical M&A-transactions. 	<p>Several support programs introduced, such as:</p> <ul style="list-style-type: none"> Establishment of an economic stabilisation fund (<i>Wirtschaftsstabilisierungsfonds</i>) to support medium and large companies of the real economy for a limited period of time. A company must meet two of the three conditions in the last two financial years: (i) balance sheet total of more than EUR 43 million, (ii) more than EUR 50 million sales revenues and (iii) more than 249 employees on an annual average. Companies applying for a measure must not have met the EU definition of "companies in difficulty" by end of 2019. Small and medium-sized enterprises can apply for the new "KfW Quick Loan" for investments and running costs. The loan is 100% secured by a guarantee of the Federal Government. Protective screen for goods traffic for the year 2020. Further government credits and guarantees, in particular on a state level. Deferral of tax payments. Adjustment of advance tax-payments. The enforcement of overdue tax debts can be waived until the end of the year. <p>Further measures are considered and to be announced.</p>	<ul style="list-style-type: none"> Temporary suspension for the duty to file for insolvency unless the insolvency is not caused by the COVID-19 pandemic or there is no prospect of a turnaround. Relaxation of certain provisions in insolvency law (<i>Anfechtungsrechte</i>) allowing distressed deals outside of an insolvency procedure. Change of Insolvency Law allowing shareholders to grant loans which are not automatically subordinated. Rules allowing more flexibility in refinancing of a company

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Italy	<ul style="list-style-type: none"> Clarity and good faith in the negotiations to avoid potential liabilities. Insert specific COVID-19 MAC clauses for future unforeseen effects. Consider risk allocation clauses in pre-contractual negotiations (e.g. conditions precedent or condition subsequent, increase of earn-out, etc.). Make reference to the most recent emergency legislation at state, regional and municipality level (i.e. often not the same for all the industry sectors). Negotiate higher flexibility with regard to some contractual terms (e.g. closing date, payment of purchase price, etc.). 	<ul style="list-style-type: none"> MACs and <i>force majeure</i> clauses applicable only for unforeseen events. In contracts requiring deferred performance, when the performance of the contract become excessively onerous for one of the parties due to extraordinary and unforeseeable events, the party suffering such situation can request the termination of the contract. In such case, the other party, to avoid such termination, can offer to modify, equitably, the conditions of the contracts (i.e. renegotiation/amendment). Lacking an agreement, the contract is terminated. The situation which justifies the termination of the contract will be strictly evaluated on merit by the Italian courts in case of litigation. 	<p>Several support programmes introduced, such as:</p> <ul style="list-style-type: none"> government subsidies and guarantees (e.g. (i) state guarantees issued to banks and other authorized entities which grant loans to companies; (ii) intervention of the Central SME Guarantee Fund with a series of financial support measures; and (iii) setting up of government-management fund or designated asset for subscription of companies' financial instruments, bonds, capital increases and purchase of shares listed on the secondary market) tax payment extensions and reductions enforcement of government's golden powers (veto powers) in transactions related to companies operating in specific/strategic sectors access, at the occurrence of certain conditions, at the Ordinary Temporary Layoff Benefits Fund ("C/GO") no dismissal of workers for economic reasons until 17 August 2020. 	<ul style="list-style-type: none"> Suspension of recapitalisation obligations of companies in case of losses until 31 December 2020. Suspension of bankruptcy proceedings until 30 June 2020. Extension of the terms to fulfill restructuring agreements. Potential involvement of institutional investors in the restructuring of financially troubled companies (under discussion).

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Netherlands	<ul style="list-style-type: none"> Freedom of contract and good faith principles; expectations of reaching agreement (agreement on key terms?) may lead to non-justifiable cancellation of negotiations resulting in liability. Carefully consider risk allocation clauses in (pre-)contractual negotiations (e.g. abort fees, fulfilment of conditions in domain of one of the parties). Reinforced duty to inform (disclose) and investigate? Take into account NOW terms for subsidy in (pending) negotiations as of June 2020 onwards. 	<ul style="list-style-type: none"> Dutch courts generally reluctant to invoke MACs, <i>force majeure</i> and unforeseen circumstances to renegotiate, modify or terminate agreements. Netherlands Commercial Court case of 29 April 2020 on abort fees and the Amsterdam District Court case of 14 May 2020 ordering a buyer to proceed with signing of the sale and purchase agreement (SPA). 	<p>Several support programmes introduced, such as:</p> <ul style="list-style-type: none"> Temporary Emergency Bridging Fund (NOW): a subsidy for wages that under circumstances is subject to commitment by the Dutch parent company of the group and the applying company of no payment of dividend/bonus over 2020 and of no buying back of shares until annual accounts of 2020 are adopted in 2021 government credits and guarantees tax payment extensions. accelerated tax repayment facility (e.g. set-off losses against 2019 profits by including Corona provision) preliminary tax assessments may be reduced new measures are considered and to be announced. 	<ul style="list-style-type: none"> New bill on corporate rescue in consideration with Dutch Parliament (<i>Wet homologatie onderhands akkoord</i>), introducing a pre-bankruptcy extrajudicial restructuring procedure for financially troubled companies (court approval required to be binding for creditors and shareholders). Entry into force expected Q3 2020.

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Portugal	<ul style="list-style-type: none"> Freedom of contract and good faith principles may lead to non-justifiable cancellation of negotiations resulting in liability for <i>culpa in contrahendo</i>. Under the law, when entering into a contract, parties must comply with a good faith duty, which corollaries comprise a duty of protection of the counterparty, a duty of loyalty and a duty to inform. As this duty is case law- and scholarship-based it may be deemed to be reinforced as a result of the COVID-19 pandemic. 	<ul style="list-style-type: none"> Portuguese law has strict rules to terminate agreements based on <i>force majeure</i> or unforeseen circumstances. Portuguese Supreme Court of Justice has held that in determining whether an event qualifies as a “<i>force majeure event</i>”, the following criteria must be satisfied: unpredictability, irresistibility, and externality to the will of the parties. Termination of agreements based on unforeseen circumstances must be grounded on fairness and good faith principles. Contractual implications will have to be assessed on a case-by-case basis. 	<p>Government created several credit lines to assist businesses with working capital and cash flow requirements such as:</p> <ul style="list-style-type: none"> Credit Facility Funding (Capitalizar) 2018 – COVID-19, mostly directed to small- and medium-sized enterprises (SMEs) Credit Facility for Micro-companies in the Tourism Sector (60ME) Credit Facility for Restaurants and Related Sectors (600M) Credit Facility for Travel Agencies, Tourist Animation, Event Planning and Related Sectors (200ME); Credit Facility for Companies in Tourism Sector (including tourist complexes and tourism accommodation) (900ME) Credit facility for industry - textile, clothing, footwear, extractive industries and wood sector (1,300ME) Government has enacted a moratorium, under which companies benefit from: (i) a prohibition imposed on credit institutions from terminating credit facilities or loans for as long as the moratorium is in force; (ii) extension for a period corresponding to the moratorium period of payment dates of capital and interest payments; and (iii) suspension until the end of the moratorium of the obligation to pay capital and interest Government has also approved measures in respect of public incentive schemes as follows: (i) advance payments of public incentives to companies; (ii) deferral of maturity of reimbursable incentives, within the public programmes QREN, PT2020, and Wine and Vineyard Institute; and (iii) assessment of the effects of COVID-19 on the agreed objectives, there being no penalty for insufficient measures or goals achieved due to COVID-19. Within PT2020, costs borne with events cancelled or postponed are eligible for these measures Other measures were taken such as the deferral of payment of rents on rental agreements. 	<ul style="list-style-type: none"> No specific restructuring/insolvency measures have been enacted as a result of the COVID-19 pandemic. However, the deadline to voluntarily file for bankruptcy has been suspended until such time as the exceptional situation of prevention, containment, mitigation and treatment of the epidemiological infection by SARS-Cov2/COVID-19 has terminated.

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Spain	<ul style="list-style-type: none"> Material Adverse Change (MAC) clauses are likely to recover importance due to COVID-19. The increased volatility in the value of companies may discourage the use of the Locked Box by buyers, who may be reluctant to set an immovable price months before the closing date of the transactions. Earn-out provisions likely to gain force due to the will of the buyers to share the risk post-closing as much as possible. In principle parties are free to withdraw from negotiations, provided that they do it in good faith (otherwise liability for "<i>culpa in contrahendo</i>" may be imposed). 	<ul style="list-style-type: none"> The principle of autonomy of will governs in Spanish law, so exit due to COVID-19, or breach waiver due to <i>force majeure</i>, will only be possible insofar as the <i>force majeure</i> clause of the contract provides for the exit due to pandemic. Change in the conditions might be possible by the application of the doctrine of substantial change in circumstances (i.e., <i>clausula rebus sic stantibus</i>), but its application is extremely exceptional in Spain. 	<p>The Spanish Government suspended the regime of liberalization of foreign investments in Spain in certain strategic sectors, such as critical infrastructure, critical technologies, energy, media, and sectors with access to sensitive information. Therefore, authorisation from the government is needed for foreign investments in such sectors.</p> <p>Additionally, several support programmes were introduced, such as:</p> <ul style="list-style-type: none"> Official Credit Institution (ICO) line of guarantees. financing lines for different sectors (tourism sector companies, agricultural companies, international non-listed companies, aids for digitalization of small and medium-sized companies, sanitary sector, etc.) deferral of tax payments for small and medium-size companies simplification of the procedure to carry out a collective temporary suspension of employment contracts (ERTE) and reduction of social security contributions for the company relaxation of corporate procedures deferral in the payment of rent for commercial premises suspension of certain public contracts under certain circumstances limitation of redundancies due to <i>force majeure</i> deferral of the reimbursement of credit granted by certain public institutions (IDAE, General Secretary of Industry and Small- and Medium-sized Companies, Tourism Official Secretariat, etc.) deferral in the payment of social security contributions easing of supply contracts. 	<ul style="list-style-type: none"> Suspension of the obligation for insolvent companies to initiate their own insolvency proceeding for the duration of the State of Alert. Also, no admission of third-party applications for the initiation of an insolvency proceeding of a different company during the State of Alert and during the following two months. Temporary release of the directors' obligation to take action in order to dissolve companies when there is a mandatory dissolution cause, such as financial disbalance. Release of directors' liability for such circumstance for the period of the State of Alert. New insolvency act published on 7 May, which systematises and develops the bankruptcy legislation in force up to now. In summary, this new Insolvency Act: <ul style="list-style-type: none"> Develops the common insolvency procedure; Introduces much more detailed regulation of pre-bankruptcy proceedings, and Introduces a chapter on private international law rules. <p>The new Insolvency Act will be in force as from 1 September 2020, but certain provisions will enter into force when the Implementing Regulation is published. This is a milestone in bankruptcy law, since the new law has three times as many articles (752) as the previous one (242).</p>

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
Switzerland	<ul style="list-style-type: none"> Parties are in general free to terminate M&A negotiations due to COVID-19. Only in certain exceptional circumstances (e.g. agreed break-up fee or specific basis of trust) claims for compensation can be asserted. Due diligence process: extend timeline and special focus on COVID-19 related DD items (e.g. key contracts: <i>force majeure</i> clauses, undue performance; financing etc.). Detailed discussions regarding the management of the interim period between signing and closing (i.e. clarify what is "normal course of business" in the context of COVID-19). Carefully consider risk allocation clauses in (pre-)contractual negotiations (e.g. break-up fees, fulfilment of conditions in domain of one of the parties). Consider a MAC-clause that specifically addresses COVID-19 (or, more generally, epidemic/pandemic situations). Adjustment of the seller's usual representations and warranties. Likely increased use of post-closing earn-outs. 	<ul style="list-style-type: none"> Carefully consider if the M&A-agreement contains a MAC clause and if this covers the adverse effects due to COVID-19. Trying to terminate or amend the M&A-agreement on the basis of the principle of <i>clausula rebus sic stantibus</i> (i.e. occurrence of a serious imbalance as regards the performances of the parties). The event that triggers the imbalance must be unforeseeable and unavoidable and the change in value must significantly exceed the fluctuations in value that arise during the normal course of business. Unclear whether the Swiss courts qualify a pandemic like COVID-19 as an unexpected change. 	<p>Several support programmes introduced, such as:</p> <ul style="list-style-type: none"> government credits and guarantees government credits are linked to a dividend ban Interest-free payment deferral for social security contributions payment deferral for provisional tax invoices and adjustment of preliminary tax assessments simplified requirements for the application of short-time working compensation (i.e. reduction of the waiting period; extension to fixed-term employment relationships, trainees and other persons in a position comparable to that of an employer) development of a special guarantee scheme for start-ups Switzerland considers state control of foreign investments: the Swiss Parliament recently requested the government to prepare a draft bill on direct foreign investments. The outcome of this bill is uncertain and - for the time being - Switzerland remains open for foreign investment. <p>Further measures are considered and to be announced.</p>	<ul style="list-style-type: none"> Temporary release of the board of directors from the obligation to notify the court of an impending over-indebtedness. Implementation of a temporary COVID-19 deferment for small- and medium-sized enterprises (i.e. a maximum deferment of six months for existing creditors' claims, except for wages).

Country-specific COVID-19 M&A comments

Country	Negotiations	Contractual implications	Government action	Distressed M&A
United Kingdom	<ul style="list-style-type: none"> Deal structuring; drive from buyers to stagger or defer consideration notably by way of earn-outs. A balanced and informed approach to assessing and adjusting appropriate performance metrics is key. Any deal conditionality has become only more sensitive. Acquisition financing impact. Sellers seeking cash unless equity delivery and performance risk can be mitigated. Need to factor in added practical difficulties of remote employee consultations (on business/asset sales) where TUPE 2006 applies Completion formalities, including virtual execution arrangements, should be addressed early. 	<ul style="list-style-type: none"> Sellers should be more resistant of anything forward-looking. Likely increase in MACs specifically related to COVID-19. Buyers will need to draft these carefully in light of the UK Commercial Court ruling in the Ipsos case (2015). Takeover Panel ruling (May 2020) in relation to Moss Bros/Brigadier suggests the high regulatory hurdle remains for bidders looking to trigger a MAC for COVID-19 and to lapse a public company offer. Spike in W&I claims also anticipated. 	<p>The UK Government has implemented new legislation and other measures since March to address:</p> <p>Business liquidity</p> <ul style="list-style-type: none"> a facility (CCFF) of more than £20bn of central funding, by way of commercial paper, made available to businesses previously of sound financial standing a UK large business government-backed loan scheme to make available from accredited lenders up to £50m a UK smaller business government-backed scheme for business interruption loans of up to £5m <p>Tax reliefs</p> <ul style="list-style-type: none"> deferral arrangements relating to business PAYE and VAT commitments IR35 extension to the private sector delayed to 2021 corporation tax instalment adjustments permitted in light of 2020 forecasting variations <p>Employees</p> <ul style="list-style-type: none"> Coronavirus Job Retention Scheme in place since March and to run to end October offering government grants to employers to meet 80% of furloughed employees' wages, subject to a cap per head relaxation of Working Times Regulations concerning carrying over of annual leave entitlement guidance on health and safety and data protection 	<p>The Corporate Insolvency and Governance Bill (CIGB) was presented to Parliament on 20 May, introducing temporary business relief measures as well as more permanent UK insolvency law reforms, which may affect distressed M&A outcomes:</p> <ul style="list-style-type: none"> CIGB will prevent statutory demands (e.g. by landlords) served between March and June from leading to business winding up petitions CIGB also alleviates the spectre of wrongful trading/personal liability on directors in this period CIGB also addresses issues for companies holding shareholder meetings and filing accounts etc. <p>More permanently the Bill introduces new rescue and restructuring procedures:</p> <ul style="list-style-type: none"> a simplified and free-standing moratorium (similar to Chapter 11) offering protection from creditors/insolvency proceedings for a minimum of 20 business days a new 'cross-class' scheme of arrangement for restructuring, that may be effected more easily as a result of relaxed class approval requirements a restriction on insolvency-based termination or acceleration provisions in supplier arrangements.



Credit Suisse & CMS Contacts and Deal Highlights

Credit Suisse M&A Contacts

Credit Suisse (EMEA)

Cathal Deasy

+44 20 7883 1678

cathal.deasy@credit-suisse.com

Credit Suisse (EMEA)

David Krap

+44 20 7883 0028

david.krap@credit-suisse.com

Credit Suisse (Switzerland)

Marco Superina

+41 44 333 3128

marco.superina@credit-suisse.com

Credit Suisse (Switzerland)

Brice Bolinger

+41 44 333 2893

brice.bolinger@credit-suisse.com

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Advisor of choice to blue-chip companies

- Trusted advisor to some of the most well-known companies in the world
- Providing deep domain expertise to deliver differentiated advice to clients globally

Aon

USD 80bn
Merger with
WillisTowersWatson **WTTW**
Acted as sole financial advisor to Aon plc 2020

Nestlé

CHF 10.2bn
Sale of
Nestlé Skin Health
Financial Advisor 2019

Bayer

USD 7.6bn
Sale of Bayer's Animal Health business unit to **Elanco**
Financial Advisor 2019

ABB

USD 11.0bn
Sale of 80.1% stake in ABB's Power Grids division to **HITACHI**
Financial Advisor 2018

vantiv

USD 12.0bn
Recommended offer for **worldpay**
Financial Advisor 2017

Unparalleled Corporate Finance expertise

- Combines industry, product and regional expertise to deliver innovative solutions for our clients
- Proven expertise in structuring complex cross-border transactions

DUPONT

USD 26bn
Nutrition & biosciences merger with **IFF**
Through a reverse morris trust
The undersigned acted as Financial Advisor to DuPont 2019

inmarsat

USD 6.1bn
Recommended all-cash offer by **Apax** **WARBURG PINCUS**
Financial Advisor 2019

Atlantia

USD 39.8bn
Atlantia signed an agreement with ACS and Hochtief for joint investment in **abertis**
Financial Advisor March 2018

Merger of **DR PEPPER SNAPPLE** with **KEURIG GREEN MOUNTAIN**

~ USD 23bn
plus a 13% stake in the combined company
Financial Advisor 2018

PRAXAIR

USD 70bn+
Merger with **THE LINDE GROUP**
Financial Advisor 2017

Leading capital markets franchise

- Strong expertise in contingency planning, liquidity needs analysis
- Ability to structure tailored solutions around financing requirements, currency and hedging

HEINEKEN

EUR 1.4bn
Dual-tranche Senior, Unsecured
Joint Bookrunner March 2020

CALISEN

GBP 378m
IPO
Joint Global Coordinator February 2020

SGS

CHF 2.3bn
ABB
Sole Bookrunner February 2020

upc

USD 1,140m TLB (USD/EUR split TBD)
Lead Left (EUR) and Joint Bookrunner (USD) February 2020

FRONERI

EUR 5.7bn
equiv. Term Loan B and RCF
Sole Physical Bookrunner (USD) & Joint Physical Bookrunner (EUR) January 2020

Defence and activism expertise

- Leading and differentiated Activist Defence practice
- Proven track record of preparing management for investor dialogue
- Helping develop and execute a public response strategy

Scout24 / **RIEGL**

USD 3.2bn
Sale of **Auto Scout24** to **H&F**
Financial Advisor 2020

ALEXION

Defense advisor following shareholder activism by Starboard Value
2018

Mellanox

Defense advisor following shareholder activism by Elliott
2018

UBM

USD 6.3bn
Recommended offer by **informa**
Financial Advisor January 2018

QZPG

USD 3.4bn
Recommended all-cash offer by **SILVERLAKE**
Financial Advisor May 2018

CMS Contacts

CMS Austria

Peter Huber

+43 1 40443 1650

peter.huber@cms-rrh.com

CMS Belgium

Vincent Dirckx

+32 2 74369 85

vincent.dirckx@cms-db.com

CMS France

Jean-Robert Bousquet

+33 1 4738 5500

jean-robert.bousquet@cms-fl.com

CMS Germany

Thomas Meyding

+49 711 9764 388

thomas.meyding@cms-hs.com

CMS Germany

Ernst-Markus Schuberth

+49 211 4934 202

ernst-markus.schuberth@cms-hs.com

CMS Italy

Pietro Cavasola

+39 06 4781 51

pietro.cavasola@cms-aacs.com

CMS Netherlands

Mark Ziekman

+31 20 3016 413

mark.ziekman@cms-dsb.com

CMS Portugal

Francisco Xavier de Almeida

+351 21 09581 00

francisco.almeida@cms-rpa.com

CMS Spain

Carlos Peña Boada

+34 91 4519 290

carlos.pena@cms-asl.com

CMS Switzerland

Stefan Brunnschweiler

+41 44 285 11 11

stefan.brunnschweiler@cms-vep.com

CMS UK

Mark Bertram

+44 20 7067 3464

mark.bertram@cms-cmno.com

CMS Corporate/M&A headline deals

ABB

Advised ABB on the acquisition of all shares in Cassantec Ltd, a software company operating out of Zurich and Berlin.

Acciona

Advised Acciona on its EUR 912m acquisition of a further 10% stake in German company Nordex and the subsequent takeover bid.

Advent International

Advised Advent and its portfolio company Zentiva on the acquisition of Alvogen's CEE business.

Blackstone

Advised Blackstone on the acquisition of a stake in US investment fund FRS Capital.

Colgate-Palmolive

Advised Colgate-Palmolive on its EUR 1.5bn acquisition of Laboratoires Filorga Cosmétiques.

CTS EVENTIM

Advised CTS EVENTIM on negotiations with FNAC DARTY on strategic ticketing partnership in France. Further, advised on all legal aspects of the acquisition of the majority stakes in Gadget Entertainment and wepromote.

Ei Group

Advised Ei Group on its GBP 3bn acquisition by Stonegate Pub Company Limited.

Mercedes-Benz Automobil AG

Advised Mercedes-Benz Automobil AG on all legal aspects of the acquisition of Austrian company Wiesenthal Handel und Service GmbH, a total of six branch locations and the service and fleet management provider "Mo'Drive". Further, advised Mercedes-Benz Automobil AG on the sale of locations in central Switzerland.

x+bricks and SCP Group

Advised the bidder consortium formed by x+bricks AG and SCP Group on the acquisition of real,- Group from Metro AG.