



Eyes wide shut?

Anti-Bribery and Corruption (ABC) Due Diligence Services for M&A transactions

Mergers and acquisitions (M&A) are a key enabler for businesses seeking to grow and expand in the marketplace, both existing and new ones. At the same time, global reach and increased complexity of many M&A transactions can entail unique risks, requiring careful consideration, including foreign and domestic governmental regulations on potential bribery and corruption exposures.

In addition, the markets that are foreseen in the report to see bigger deals in the current year and beyond, albeit with a pre-COVID-19 lens, are life sciences and healthcare, financial services and energy and resources. All of these, to varying degrees, entail multiple interactions with government agencies and regulators. As such, the bribery and corruption exposure is high.

A report published by Deloitte “The state of the deal—M&A trends 2019” shows that the investment appetite for M&A deals is not limited to a small number of markets but rather widely spread, including a continued focus on emerging markets. However, the political and very often “complex” local business environments present key challenges for those looking to do deals in these markets.

Increased scrutiny and enforcement by major jurisdictions

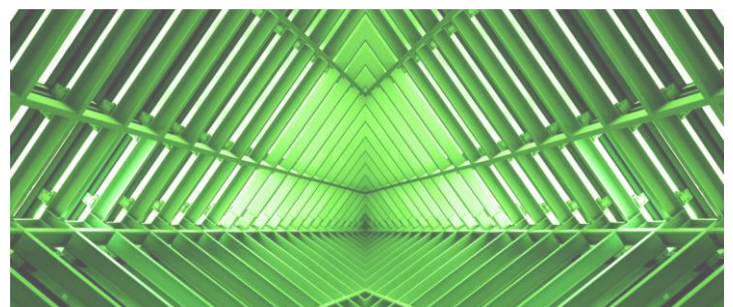
The resultant increased scrutiny of various European governments (through for example the UK Bribery Act and the French Sapin II.) and the US (Foreign Corrupt Practices Act (FCPA)) requires businesses looking to acquire or sell a business to be aware of the specific bribery and corruption exposure as part of any broader analysis of compliance-related risks.

It is important to keep in mind that any such risks do not necessarily relate just to the jurisdiction in which the various parties of the transaction operate themselves, but that there is also potential exposure outside these borders. A common misconception is that in case a target company does not have international locations, it is not subject to regulations outside their jurisdiction. However if the target has customers or suppliers in foreign jurisdictions then additional non-domestic regulations can be triggered.

Businesses pursuing M&A opportunities are often restricted in their ability to assess in detail the Target’s bribery and corruption risk and exposure, in particular during the pre-deal due diligence phase. What is important though, even in these circumstances, is the expressed position of certain authorities (e.g. The US Department of Justice (“DOJ”), French Anti-Corruption Authority, etc.) that to not do anything in respect of such risks in the context of an M&A opportunity is not considered acceptable and may result in regulatory sanctions.

A recent matter highlights this very issue: in September 2019, the US Securities and Exchange Commission (“SEC”) announced that a UK based global oil and gas services company (formed through a merger in 2017) agreed to settle FCPA charges and pay USD 5.1 million in addition to improving its compliance procedures. The SEC alleged that the predecessor of the newly created company after the merger made over USD 794,000 in payments to a third party consultant based in Monaco, which used at least some of those funds to pay bribes to Iraqi government officials to procure business with Iraq state-owned oil companies¹.

It is therefore key that businesses are aware and respond to the fact that both domestic and non-domestic anti-bribery and corruption laws might be applicable to a certain M&A situation and that the potential compliance related risks are properly evaluated.



¹<https://www.sec.gov/litigation/admin/2019/34-87055.pdf>

Essential benefits of ABC due diligence:

ABC Due Diligence needs to be part of the standard due diligence process in M&A and start alongside financial, tax and legal. Here is why:

Successor liability in some jurisdictions as US: ABC Due Diligence can be particularly crucial for any buyers exposed to successor liability, under which they may be held liable for pre-acquisition bribery and corruption violations by the Target. Moreover, if the illegal conduct by the Target continues post-acquisition, the acquirer can be held directly liable, even if it had no knowledge of, or participation in the violation.



In March 2019, the US DOJ issued a revision to its FCPA Corporate Enforcement Policy², which provides guidance on voluntary self-disclosure, cooperation, and remediation in FCPA matters. Previous advice on successor liability matters was provided in the DOJ Opinion Paper 08-02 known as the “Halliburton Opinion”³ and the 2012 “Resource Guide”⁴ from the DOJ. However, the 2019 revision clarifies certain aspects of this topic and mentions that the DOJ may decline to prosecute an acquiring organisation that “[...] uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts [...]”. As a result, the ability to demonstrate a genuine commitment to identifying and preventing anti-corruption legislation violations may lead to a more lenient approach by the regulators if issues should surface post acquisition.

Sales Purchase Agreement adjustments: A major advantage of performing an Anti-Bribery and Corruption Due Diligence is that any identified findings would help the parties involved in the process to negotiate mitigating terms within the indemnities and warranties regime to be included in the Sales Purchase Agreement.



Expedited Day 1 integration: All parties involved are able to handle any potential anti-corruption legislation violations uncovered by the diligence in a more systematic, efficient and faster way once the ownership of the target is transferred post-acquisition.



How Deloitte makes a difference

Deloitte has established a global network of specialists who can support you in addressing anti-bribery and corruption challenges at every stage of an M&A transaction. In addition to our local specialists with long-standing experience covering a wide range of industries, we deploy our advanced analytics and technological capabilities to such situations in order for our clients to get maximum insight at every step of the process. Where an exposure is identified, our specialists will stay on board and assist in developing and executing mitigating actions.

Pre-acquisition			Post-acquisition
Transaction planning	Due diligence process	Negotiations and execution	Post closing activities: Investigations or compliance reviews
<ul style="list-style-type: none"> Risk profiling and compliance program review; Fraud/ABC Due Diligence Business Intelligence and Transaction analysis 	<ul style="list-style-type: none"> Assess impact and mitigation of identified risk and Negotiate appropriate indemnities, warranties and certificates 	<ul style="list-style-type: none"> Assist with anti-fraud/ABC compliance programs Post-closing risk assessment, compliance and monitoring Use data analytics to scan acquired business, once buyer has complete access to individuals and data and Fraud/ABC investigations 	

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²<https://www.justice.gov/criminal-fraud/file/838416/download> | ³<https://www.justice.gov/sites/default/files/criminalfraud/legacy/2010/04/11/0802.pdf>

⁴<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>

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