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Anti-corruption due diligence in M&A – the role of POCA

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Anti-corruption due diligence in the context of private M&A transactions is a necessary step to protect a purchaser post-acquisition. This is the case for companies exposed to potential liability under the US Foreign Corrupt Practices Act (FCPA) or the UK's Bribery Act, and other anti-corruption statutes.

More than a third of all recent FCPA enforcement actions have involved post-M&A successor liability where the purchaser has been financially liable for the target's actions. In 2011 alone there were six separate settlements of FCPA charges involving successor liability. The two examples from the UK to date, which involved civil recovery by the SFO of £7m and £4.8m respectively, show that the UK takes a similar view on successor liability. (See MW Kellogg Ltd to pay £7 million in SFO High Court Action, SFO Press release dated 16 February 2011, and DePuy International Limited ordered to pay £4.829 million in Civil Recover Order, SFO Press Release dated 8 April 2011.)

Let us take a hypothetical M&A transaction in which the lawyers acting for the purchaser discover documents in the dataroom that show or suggest business and profits were won through the payment of bribes. Under the UK's Proceeds of Crime Act 2002 (POCA), those profits could well be 'criminal property'. A person who transfers, possesses, acquires or uses 'criminal property' commits a money laundering offence. As the target's books contain the profits from corruptly-won contracts, law enforcement may well take the view that the purchaser is committing a money laundering offence simply by its acquisition of the target company, or by the use of the target's bank accounts.

The significance of this is that transactional lawyers (i.e., those acting in 'the regulated sector' to use POCA's language, and in particular the Money Laundering Reporting Officer (MLRO) for a firm, have an obligation to make a Suspicious Activity Report (SAR) to SOCA where they have suspicion or knowledge of a money laundering offence. Not making an SAR could involve the commission of the offence of failing to report.

An SAR is a request for consent to the proposed activity (e.g., the transfer or acquisition of the 'criminal property'). SOCA has seven days to give or deny consent. Silence is deemed consent. If consent is denied SOCA has a further 21 days in which to take further steps. It will be deemed consent if SOCA takes no further steps. These 28 days are the 'moratorium period' during which the reporting lawyers must effectively have 'pens down'.

In many ways this regime is largely limited to M&A or arm's-length transactions. This is because POCA has a statutory privilege regime, such that if the information leading to the requisite suspicion or knowledge is communicated to the lawyer 'by the client', the obligation to make an SAR does not arise. In the context of M&A, however, where the damaging information will almost always come via a dataroom, or from a third party, that protection will not arise.

The view of the SFO as regards an SAR is that: "We will assume in those circumstances that the corporate has chosen not to self-report. The chances of a criminal investigation leading to prosecution are therefore high" (SFO's Approach to dealing with Overseas Corruption, at paragraph 25).

Not only might the transaction run into serious difficulty during the moratorium period, but the purchaser may lose its ability to decide on whether and how to self-report. Further it may be treated as if it has actively not self-reported, not least because it may have been the lawyers, and not the company, who made the SAR.

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There are two options for those facing this predicament.

The first is to simply rely on the ECJ decision in *Ordre des barreaux francophones et germanophone v Council of Ministers* [2007] ECJ Case C-305/05. This case found that at the point in time when lawyers acting in a transaction are called on to advise "as to the manner of instituting or avoiding judicial proceedings", the lawyers become exempt from the obligation to make an SAR. An English court is yet to follow this case, and it is not cited in the Law Society's Guidance. This last point is of potentially critical importance as compliance with a professional body's up-to-date guidance is a defence under POCA.

A risk-averse MLRO might prefer an alternative option. One is available.

Lawyers who are not 'assisting in the planning or execution' of the transaction are not in the 'regulated sector' and so will not be obliged to report in the first place. A client that instructs separate lawyers from those performing the transactional and corporate work to conduct its FCPA/Bribery Act due diligence will be instructing lawyers who are protected from the need to make an SAR. In addition consideration should be given to having a section of the dataroom that is discrete to issues of FCPA/Bribery Act due diligence, and from which the transactional lawyers are excluded.

In that situation the client will retain its discretion as to whether to clean up the target company without self-reporting or, where the circumstances demand it, to engage with the authorities. All available credit for self-reporting should flow to the purchaser. After all under the previous SFO Director the publically-stated policy was that: "society benefits if an ethical corporation takes over and sorts out a corporation that has corruption problems. It is something I am keen for the SFO to promote, so far as we legitimately can" (R. Alderman, Speech to the Anti-Corruption Summit, 5 October 2011). ■

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