

## Compliance Due Diligence in M&A Transactions

The fight against corruption in Brazil gained momentum in recent years, with many investigations launched by the Prosecutors' Office ("*Ministério Público*") and the Federal Police ("*Polícia Federal*"), among which Operation Car Wash ("*Operação Lava Jato*") is the most prominent example. Furthermore, the enactment of the Anti-Corruption Law (Law No. 12,846, of August 1st, 2013), which is in line with foreign legislation, such as the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, as well as Brazil's Supreme Court's ruling to enforce jail sentences after a second instance order is issued – rather than waiting for a final non appealable decision – also helped to dramatically change the corporate and business environment in Brazil.

Brazil's legal system sets forth strict civil and administrative liability rules for the performance of corrupt practices in Brazil or abroad. Affiliates of legal entities involved in corrupt practices and companies belonging to a *consortium* (pursuant to the terms and conditions of the consortium contract) involved in such practices shall be jointly and severally liable for the performance of acts in breach of law; the liability of such entities shall be restricted to the payment of fines and full indemnification for damages. Applicable legislation imposes several penalties for breach of law to companies and their affiliates, shareholders and managers (officers and directors), such as restrictions to operations, imposition of fines, the compulsory dissolution of the companies or the suspension of their activities, and the freezing of assets. These may also affect their reputation and credibility. In this context, conducting a compliance due diligence in the context of M&A transactions can ensure fair trade and legal certainty to the parties.

Compliance due diligence in the context of M&A transactions needs to first consider the activities of the target company, including its exposure to interactions with governmental bodies, through contractual or informal relationships. Verification of the corporate relations of the target company is also relevant since Brazilian Law ascribes liability to affiliates and a due diligence may be extended to other companies belonging to the same corporate group.

The verification of documents made available during the due diligence (e.g., contracts), jointly with interviews with target company's personnel having some degree of exposure to governmental authorities, may provide the buyer with information on contingencies associated with past practices and the risks of previous breaches of anti-corruption laws by the target company and its affiliates.

The due diligence also has the purpose of verifying whether or not the target company has put in place integrity programs, contemplating incentives to the report of irregularities and effective implementation of an ethics code, policies and rules aiming at identifying and remedying frauds, irregularities and illegal acts<sup>1</sup>. Effective anticorruption policies reduce the likelihood of breaches of law, show the adoption of good corporate governance practices and may reduce fines in case of violations of law<sup>2</sup>.

Results of the compliance due diligence are key in the negotiation of M&A transactions and, depending on the uncovered facts, may create additional elements in the allocation of risks to be treated in the definitive transaction documents. It could also subject closing to the implementation of certain conditions precedent, establish conduct of business provisions pending closing, covenants, or lead to walk away rights for the buyer. Corporate reorganizations prior to closing must be carefully designed, since segregation of risks associated with acts in breach of law of the target company may be held ineffective in case of fraud or sham<sup>3</sup>.

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<sup>1</sup> For the assessment of integrity programs, please see Article 42 of Decree No. 8,420, of March 18, 2015.

<sup>2</sup> Article 7, subsection VIII, of Law No. 12,846/2013 and Article 18, subsection V, of Decree No. 8,420/2015.

<sup>3</sup> Article 4, first paragraph, of Law No. 12,846/2013.