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Compliance implications in M&A transactions

Law No. 2016-1691 on transparency, the fight against corruption and the modernization of the economy of December 9, 2016, commonly referred to as the "Sapin II Law", has provided France with innovative tools *inter alia* to detect, prevent and punish corruption and breaches of probity.

The reinforcement of the legal arsenal to better fight corruption is one of the major pillars of this Law, and the risks associated to breaches of compliance rules can prove to be a deterrent for buyers in the context of M&A transactions.

Article 17 of the Sapin II Law2[1] imposes on the managers/officers of businesses and so-called public industrial and commercial establishments (*établissements publics à caractère industriel et commercial*) that meet certain thresholds an obligation to exercise vigilance and to implement procedures intended to prevent and detect the commission of acts of corruptions and influence peddling in France and abroad. It applies throughout France, but also wherever the organizations likely to be concerned carry out an activity, including abroad.

The Sapin II Law directly targets, in particular, companies with more than 500 employees and revenues of more than 100 million euros.

The French Anti-Corruption Agency (*Agence Française Anticorruption*, hereinafter "AFA") is responsible for monitoring compliance with this obligation.

Mergers and acquisitions are often complex operations and the financial, legal and operational issues at stake place them at the heart of the anti-corruption program. As such, when the French target is subject to the Sapin II law, the buyer must ensure that it has put in place a corruption prevention plan, in accordance with applicable legal provisions.

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For target companies that do not fall within the scope of the Sapin II Law (if they do not meet the thresholds or if they are foreign companies), the potential buyer will have to identify upstream their possible involvement in a case of corruption or influence peddling and to ensure that the compliance program applicable within the relevant targets is compatible with the best standards and the relevant regulations in force.

In order to assist the various stakeholders and their advisors in the performance of anti-corruption due diligence in the context of M&A transactions, the AFA established on January 17, 2020 a Practical Guide, updated on March 12, 2021.[2].

According to the AFA, "*Due diligence improves the company's knowledge of the target in order to properly value it, measure the risks in the case of an acquisition or merger, and prepare for the target's integration into the purchaser's anti-corruption program if the deal is closed*".

In practice, it requires the implementation of so-called "*ethics and compliance*" due diligence, which the buyer must seriously consider performing in order to carry out the contemplated transactions while protecting the interests of the companies involved.

The implications of a compliance audit or integrity assessment are of several kinds and vary according to the chronology of the M&A transaction process.

As such**, from a financial standpoint**, anti-corruption due diligence is likely, prior to the completion of the transaction (either before the signing or between the signing and the closing), to help the buyer and its advisors in valuing the target and to influence the transaction price. This will be the case if the target is under investigation for corruption, with the risk of criminal sanctions and damage to the reputation of the buyer. In addition, the non-existence or inadequacy of an anti-corruption program within the target may generate significant post-acquisition compliance costs for the buyer as well as defense costs in the event of lawsuits or internal investigations.

This pre-acquisition due diligence process will also enable the buyer to identify any risks related to **its legal liability** for acts of corruption or breaches of Article 17 of the Sapin II Law committed by the merged or acquired company before the completion of the relevant transaction.

These legal risks are of several kinds. They may result from sanctions imposed by the AFA following a compliance audit of the target, but also from the civil liability of the buyer due to the target's involvement in acts of corruption prior to the completion of the transaction. Finally, the anti-corruption due diligence can identify possible risks of criminal sanctions incurred by the seller and the buyer, again for acts/actions committed prior to the completion of the transaction.

We will have the opportunity to further elaborate in future articles on these different types of legal liability as well as on their consequences with respect to the target company, its managers and/or the buyer depending on the relevant deal structure (transfer of assets via a merger or absorption, or transfer of ownership of the target's securities).

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It should be noted, however, that the AFA's Practical Guide, drawing the consequences of a decision rendered on November 25, 2020 by the Criminal Chamber of the *Cour de Cassation* (French Supreme Court) , which reversed its jurisprudence on the transfer of criminal liability in the event of a so-called "merger by absorption" (*fusion-absorption* in French) between public limited liability companies (*sociétés anonymes* in French) and joint stock companies (*sociétés par actions simplifiées* in French)[3], specifies that the absorbing company can now be held, subject to certain conditions, criminally liable for acts constituting an offence, committed by the absorbed company prior to the completion of the transaction.

This illustrates the importance of anti-corruption due diligence in the context of mergers and acquisitions and the essential role of the management of the entities concerned in the audit process, a role that the AFA describes as a "*unwavering commitment*" and "*one of the foundations of corruption prevention and detection*".

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[1] https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000033562135 (in French)

[2] https://www.agence-francaise-anticorruption.gouv.fr/files/files/Practical%20Guide%202021%20FUSACQ.pdf (in English)

[3] See article entitled Transfer of criminal liability in merger transactions: A major reversal of case law published on our Blog on February 26, 2021

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