

Corporate Finance/M&A - Austria

New trends in M&A due diligence process

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April 25 2012

[Introduction](#)
[Examples](#)
[Comment](#)

Introduction

While the legal due diligence process has become an essential component of various types of transactions (eg, M&A transactions and finance transactions), corporate budgets for external legal consultants have continually decreased over the years. This has substantially influenced the extent and scope of due diligence exercises. The reluctance of many clients to expend resources on legal due diligence is understandable, as the results it produces are often of marginal importance or limited use.

The ever-increasing importance of compliance matters - in which the term 'compliance' is understood to mean a company's obligation to ensure the fulfilment of its legal obligations - also brings new responsibilities for M&A lawyers. The acquisition of a company that does not comply with these obligations may result in substantial legal risks and costs, and could even lead to personal liability on the part of the acquirer's management. The only way to assess this risk is to conduct a 'compliance due diligence'. Whereas a conventional legal due diligence scrutinises whether a potential target complies with all of its legal obligations, the focus of a compliance due diligence is on whether the potential target's officers and key employees are aware of the importance of compliance matters and have implemented procedures that ensure compliance.

Examples

Two European Council regulations (2580/2001 and 881/2002) established an embargo list through which access to the international banking system and other economic resources were cut off for certain blacklisted persons alleged to have been involved in terrorist activities. Among other things, these blacklisted persons are restricted from receiving any payments. In order to comply with the embargo, companies must continually screen their customers (through so-called 'compliance screening').

In such cases, conventional due diligence would focus on whether the target entertains commercial relations with a person on this list. This task is not only time-consuming, and therefore costly, but it does not guarantee that commercial relations were not conducted in the past (but are no longer listed) or will not be carried out in the near future. In contrast, compliance due diligence would examine:

- who within the target is responsible for performing the compliance screening;
- how often such screening must be performed;
- who is responsible for keeping track of changes in relevant legislation and jurisprudence; and
- who is responsible for supervising the entire process.

Similar procedures must also apply with regard to other compliance matters. When attempting to identify potential risks within the target, it is not sufficient merely to review contractual documents and summarise their respective content.

Comment

The only way to uncover structural problems and reveal organisational weaknesses (in particular, in contract management) is by evaluating a company's internal compliance system. In order to serve clients' needs in a timely and cost-efficient manner, M&A lawyers must therefore shift their attention to compliance matters while due diligence is

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being conducted. In doing so, M&A lawyers should always bear in mind that the exact scope and extent of the compliance due diligence is largely dependent on the potential target's business sector.

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