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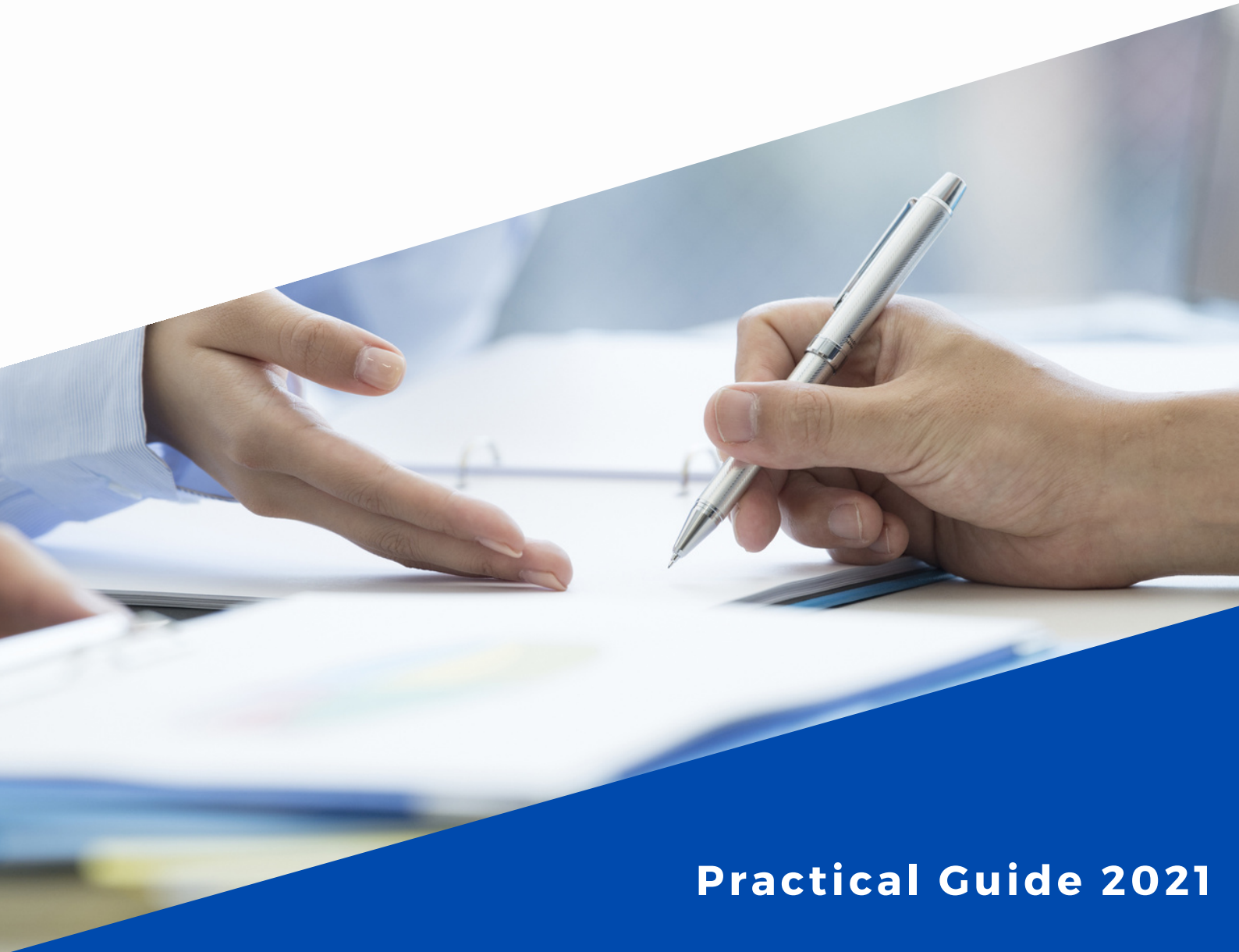
ANTI-CORRUPTION DUE DILIGENCE FOR MERGERS AND ACQUISITIONS



Practical Guide 2021

- Private Sector Support Department (D2AE) –

INTRODUCTION

Mergers and acquisitions are complex transactions that differ from other commercial transactions in that they transfer ownership of capital shares or transfer assets, depending on the case. These naturally complex transactions call for different expertise found in and outside of the company if they are to be successful.

Article 17 of Act 2016-1691 of 9 December 2016,[1] which requires certain companies to conduct due diligence on certain third parties, does not require due diligence on a company considered for an acquisition or absorption.

Nevertheless, as specified in the French Anti-Corruption Agency's (AFA) guidelines[2], it may be useful to include in the due diligence other categories of third parties with which the company wishes to enter into a relationship, including its acquisition targets. Mergers and acquisitions involve specific risks that could have significant financial, legal and operational impacts if they were to materialise. It is therefore advisable to conduct certain checks, called "anti-corruption due diligence" in this guide, before conducting the transaction.

This due diligence can be defined as the action taken to:

- Determine whether the target company, hereinafter referred to as the target, is implicated in a case of corruption or influence peddling[3] or, if it has been convicted of such acts, to find out what sentence and/or fine it was given;
- Check that the target company has an anti-corruption programme and, where possible, assess its quality.

In this guide, the definition of:

- A "merger" is the transaction through which a company transfers its assets to an existing company (hereafter "absorption") or to a new company which they form;[4]
- An "acquisition" is the transaction through which a company acquires the capital of another company, which remains a separate legal entity following this transaction.[5]

This guide does not cover acquisitions of minority interests or partial business transfers, but similar anti-corruption due diligence can be performed on these transactions proportional to their risks.

This guide is complementary to the aforementioned guidelines issued by the AFA, it is the result of a public consultation, it is not legally binding nor does it create any legal obligation for those to whom it is addressed. It suggests courses of action that the senior management of the companies concerned by the merger or acquisition transaction is free to adopt and take.

[1] The Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
[2] See Notice on the French Anti-Corruption Agency Guidelines to help Public and Private Sector Entities to Prevent and Detect Bribery, Influence Peddling, Extortion by Public Officials, Illegal Taking of Interest, Misappropriation of Public Funds and Favouritism.
[3] For the sake of convenience, this guide generally uses the term of corruption, but influence peddling should also be included in anti-corruption due diligence.
[4] See the first paragraph of Article L. 236-1 of the French Commercial Code.
[5] In this case, the purchaser controls the acquired company under Article L. 233-3 of the French Commercial Code.

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I. Anti-corruption due diligence considerations

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 programme if the deal is closed.

I.1. Financial considerations

Anti-corruption due diligence can reveal elements that might affect the setting of the transaction price.

Firstly, if the target is under investigation for corruption, it could be subject to criminal sanctions in France or abroad following its acquisition:[6]

- A fine, sometimes for an immense sum (hundreds of millions of euros);
- The costs associated with the obligation to introduce a compliant anti-corruption programme, under the oversight of a supervisor, where appropriate.

There could also be the additional costs of conducting an internal investigation and paying for external advisors hired following the acquisition if the criminal investigation continues after the transaction.

Moreover, media coverage of a corruption scandal implicating the target prior to the transaction could damage its reputation and, in some cases, affect its economic value. After the transaction, the purchaser could find its own reputation affected by a knock-on effect.

Secondly, if the purchaser falls within the scope of the obligations stipulated in Article 17 of Act 2016-1691 of 9 December 2016 following the transaction, [7] a non-existent or dysfunctional anti-corruption programme will generate what could be substantial upgrading costs.

If the seller is subject to Article 17 of Act 2016-1691 of 9 December 2016, it may be in its interest to conduct anti-corruption due diligence on the target, such as an audit, to be able to show companies interested in buying it, where appropriate, the quality and effectiveness of its anti-corruption programme.

I.2. Legal considerations

Anti-corruption due diligence can be used by the purchaser to assess the risk of its legal liability for corruption or breaches of Article 17 of the act of 9 December 2016 committed by the target before the transaction.

I.2.1. Transfer of corporate administrative liability and application of sanctions stipulated in Article 17 of the act of 9 December 2016

In the event of breaches found by the AFA during an audit on the target before the transaction, the question arises as to which companies are liable for sanctions by the AFA Sanctions Commission ruling after the transaction. There are two possible situations, at the discretion of this commission and, where appropriate, the administrative court.

[6] See, Part 1.2.3. of this guide for the case of mergers in France.
[7] Due to reaching the act's stipulated turnover and staff number thresholds.

1) In the case of the acquisition of the target

Pursuant to the provisions of paragraph I of Article 17 of the act of 9 December 2019, when the parent company draws up the consolidated accounts, the obligation to implement an anti-corruption programme concerns this company and all of its subsidiaries. Consequently, if breaches attributable to the target are found by the AFA before the transaction, this company and the seller (as well as its management) could be held accountable to the Sanctions Commission for these breaches after the transaction.

Even if, in such an event, its liability cannot be sought on the basis of Article 17, it is in the acquiring company's interest to find out, before the transaction, whether an audit has been conducted by the AFA. Depending on the nature and extent of the breaches of which the target might be accused, the purchaser may need to take measures aimed at improving the target's anti-corruption programme after the transaction.[8]

2) In the case of the absorption or merger of the target

Only the absorbing company or the company formed by the merger (and its management) can be sanctioned by the Sanctions Commission, since the absorbed target company will have legally disappeared.

However, according to Conseil d'Etat (French Supreme Administrative Court) case law (see blue box below), although the absorbing company or the company formed by the merger are, where applicable, answerable to the Sanctions Commission for breaches committed by the dissolved company before the transaction, the principle of the individual nature of penalties prevents it from receiving any sanction other than a fine.

With respect to the sanctions provided for in Article 17 of the act of 9 December 2016, this case law is such that the absorbing company or the company formed by the merger could not be ordered to adjust its compliance procedures nor could the judgement concerning the said company be published.

As the Conseil d'Etat has stated in another matter, it is therefore the absorbing company's responsibility, "when conducting the merger-absorption transaction, to collect all useful information on the situation of the company" absorbed.[9]

Among the cases of administrative sanctions pronounced for breach of the financial market regulations, the Conseil d'Etat ruled on a number of occasions that the principle of the individual nature of penalties did not prevent the French Financial Market Authority (or the Conseil des Marchés Financiers before it) from fining the absorbing company for breaches committed by the absorbed company.[10] It applied the same reasoning to tax fines.[11]

However, it considered that this same principle prevented a reprimand from being pronounced against the absorbing company[12] and prevented the administrative authority from ordering the publication of the fine imposed on the absorbing company for breaches committed by the absorbed company.[13]

[8] Whether the director sends a warning to the target company's representatives or refers the case to the Sanctions Commission.
[9] CE 30 May 2007, Société Traditions Securities and Futures, No. 293423.
[10] CE Sect. 22 November 2000, Société Crédit Agricole Indosuez Cheuvreux, No. 207697 ; Sect. 6 June 2008, Socitété Tradition Securities and Futures, No. 299203.
[11] CE 4 December 2009, Société Reuil Sport, No. 329173.
[12] CE Sect. 22 November 2000, Société Crédit Agricole Indosuez Cheuvreux, No. 207697.
[13] CE 17 December 2008, Société Oddo et Cie, No. 316000.

I.2.2. Transfer of civil liability

The purchaser may, in certain cases, be held civilly liable for the target's involvement in acts of corruption before the transaction. There are three possible situations.

When a company acquires a target without absorbing it, the target remains a legal entity distinct from the purchaser. Consequently, if the acquired company has been involved in committing acts of corruption before the acquisition transaction, it alone will remain civilly liable,[14] irrespective of whether it is rendered liable before or after the transaction.

When a company acquires and absorbs a target that has committed acts of corruption before the transaction, the target's universal transfer of assets[15] to the purchaser effectively integrates into the purchaser's assets the debt incurred or that might be incurred due to a sentence to pay damages for acts of corruption or a settlement providing for such compensation. In disappearing, the acquired company transfers its civil debt to the purchaser, which will be held solely responsible for it.

Thirdly, when companies form a new legal entity from a merger, the universal transfer of their respective assets to the new legal entity formed effectively transfers to this new entity any civil liability they may have incurred for acts of corruption committed before the merger. The new entity alone will be held accountable, where necessary, for this civil liability.

In all three situations, anti-corruption due diligence would enable the purchaser to gauge the risk of having to pay compensation for acts of corruption committed by the target before the transaction.

I.2.3. Transfer of criminal liability

Anti-corruption due diligence could serve a purpose for both purchaser and seller in determining the risk of criminal sanctions for each party due to acts committed by the target prior to the transaction.

It is important to note that French criminal legislation and the criminal legislation of other countries can apply concurrently to natural persons or legal entities implicated in acts of corruption (e.g. the Foreign Corrupt Practices Act and the UK Bribery Act). Yet the conditions governing the criminal liability of a person or entity can differ enormously from one piece of legislation to the next. Anti-corruption due diligence should therefore take into account all the applicable legislation when considering a cross-border transaction in order to correctly gauge the abovementioned risk of criminal sanctions.

Under French law, persons and entities can only be held criminally liable for their own conduct.[16] The French Constitutional Council has endorsed the constitutional value of this principle.[17] The French Court of Cassation also excludes holding criminally liable any natural person or legal entity that has not taken part in the acts in question. Nevertheless, a distinction is made according to the type of transaction.

[14] The same applies, for the same reason, to its criminal liability. See Part I.2.3 of this guide.
[15] Article L. 236-3 of the French Commercial Code: "I. – The merger or demerger shall lead to the dissolution without winding-up of the companies that are disappearing and the universal transfer of their assets to the receiving companies, in their current state at the date when the operation is finally carried out. (…)."
[16] Article 121-1 of the French Penal Code.
[17] "No one is criminally liable except for his own conduct." (e.g. Decision 2018-710 QPC of 1 June 2018).

1) In the case of the acquisition of the target

Where the purchaser has not taken part in acts of corruption committed by the target prior to the transaction, its criminal liability cannot subsequently be sought. Only the target will remain criminally liable.

Following the transaction, the purchaser could use anti-corruption due diligence performed to launch an internal investigation to determine the nature and extent of the acts of corruption committed by the target. On completion of this action, the purchaser could, where applicable, put an end to the misdemeanours and avoid being held criminally liable for such acts or for concealment or laundering of the proceeds of corruption as provided in Article 121-2 of the French Penal Code.

If the seller is aware of acts of corruption committed by the target before the transaction, it would also be in its interest to conduct an internal investigation to find out whether it could be implicated as an accomplice or for concealment or laundering of the proceeds of this offence. Where appropriate, the seller could consider reporting itself to the public prosecutor in advance of any report of these acts by the purchaser.

2) In the case of the absorption or merger of the target

In accordance with the principle of personality of criminal liability, the Criminal Division of the French Court of Cassation considers that the criminal liability of an absorbing company cannot be sought for acts committed by the absorbed company prior to the transaction.[18] This solution can be extended to the company formed by a merger. **In both situations, the absorbed or merged companies that have legally disappeared can be neither prosecuted nor sentenced.**

Naturally, if acts of corruption continue after the absorption or merger, the absorbing company or the new company formed by the merger may respectively be held liable pursuant to Article 121-2 of the French Penal Code.[19]

Similarly, when applying the principle according to which fraud corrupts everything, a merger-absorption transaction carried out in fraud of the law, namely with the aim of evading the criminal liability of the absorbed company, makes it possible to prosecute the absorbing company for the acts committed by the absorbed company.

Taking into account the positions of the Court of Justice of the European Union[20] and the European Court of Human Rights[21], the Criminal Division of the French Court of Cassation in its decision dated 25 November 2020[22], removed the obstacle stemming from the legal personality of each company, on which its case law had hitherto been based on to refuse to hold the absorbing company criminally liable for acts committed by the absorbed company. It thus considered that in the case of a merger-absorption between public limited liability companies (*sociétés anonymes*) or simplified joint-stock companies (*sociétés par actions simplifiées*), **the absorbing company could be criminally sentenced to a fine or a confiscation for acts constituting an offence, committed by the absorbed company prior to the merger or absorption transaction.**

[18] See, for example, Cass. crim. 20 June 2000, n99-86742 ; Crim. 9 September 2009, 08-87.312 ; Crim. 14 October 2003, 02-86.376 ; Crim. 18 February 2014, 12-85.807 ; Crim.25 October 2016, 16-80366.
[19] "Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives (…)."
[20] CJEU, 5 March 2015, Case C-343/13, Modelo Continente Hipermercados SA.
[21] ECtHR, 24 October 2019, Carrefour France c. France, n°37858/14
[22] Cass. Crim., 25 November 2020, n°18-86.955

This departure from previous case law only concerns cases of merger-absorption:

- Of a company by another company falling within the scope of Council Directive 78/855/EEC of 9 October 1978 on the merger of public limited liability companies (*sociétés anonymes*), as last codified by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 ;
- Concluded after 25 November 2020 in order "not to undermine the principle of legal foreseeability" according to the French Court of Cassation in its decision.

Criminal liability of natural persons in the case of a merger-absorption

The merger-absorption has no effect on the conditions governing the criminal liability of natural persons, including the management of the absorbed or merged companies, who have taken part in acts of corruption before the operation.

Consequently, if these natural persons have taken part in criminal offences before the absorption or merger, their criminal liability may still be sought after the transaction, subject to the statute of limitations for public action.

I.3. Operational considerations

Firstly, anti-corruption due diligence can lead the purchaser to abandon the transaction if due diligence finds major risks.

Secondly, if the purchaser discovers acts of corruption, it can swiftly put an end to them following the conclusion of the transaction and take the necessary corrective measures for the future.

Thirdly, this due diligence places the purchaser in a situation of making preparations for the integration or adjustment of the target's anti-corruption programme following the transaction.[23]

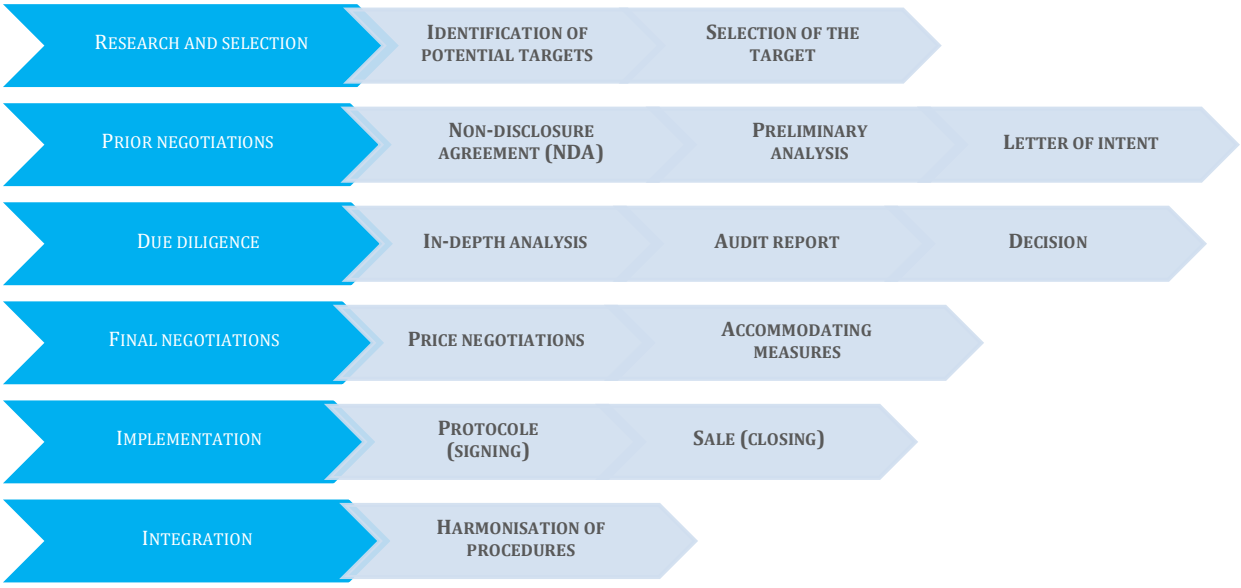
On the seller's side, anti-corruption due diligence gives the seller the possibility to more easily and accurately answer requests for information from companies interested in the target. Better knowledge of the target's anti-corruption programme can improve transparency during the negotiations.

[23] See Part III of this guide.

II. Anti-corruption due diligence performance

The merger-acquisition project steps

Anti-corruption due diligence is part of a complex process made up of different operations. It can be summed up as follows:



The length of time taken for due diligence varies depending on different parameters:

- The merger-acquisition environment (bilateral or competitive process, friendly or hostile transaction);
- The planned transaction implementation date;
- Accessibility of information on the target.

Accessibility of the information required for due diligence will depend on a number of elements, including:

- The nature of the merger-acquisition project (hostile or friendly transaction, bilateral or competitive process between companies interested in the acquisition, acquisition of a majority or minority interest, etc.), which conditions the purchaser's ability to collect information from the seller;
- The target's situation based on whether it is listed, since listed companies are required to publish certain information prior to certain transactions;
- Whether the transaction is transnational.

Anti-corruption due diligence is supposed to be completed before closing the merger-acquisition deal. The purchaser may perform an additional audit after closing the deal[24].

[24] See Part III of this guide.

The nature and thoroughness of the due diligence and the information to be collected as part of the anti-corruption due diligence are appropriate and proportionate to the factors involved in the transaction (e.g. size of the target company) and to the target's extent of exposure to the risk of corruption.

A series of indices upstream of the transaction will provide an idea of this level of exposure: e.g. where the company has operations, the use of intermediaries, its interactions with the public authorities, etc.

Risk scenarios are indeed likely to occur at all stages of the transaction.

For example:

- In the context of pre-transaction negotiations:
    - A target's intermediary or employee approaches a potential purchaser in order to provide him, in exchange for a fee, with confidential information relating to the proposals of other candidates for the takeover and enables him to adapt his offer accordingly;
    - A target's management or shareholder offers a potential purchaser the benefit of exclusivity in the negotiations in return for a fee;
    - A purchaser's staff member offers a bribe to the target or its shareholders in order to favour his offer;
    - A target's staff member offers a fee to the purchaser's staff in charge of anti-corruption due diligence to conceal certain shortcomings or reprehensible practices observed within the target.
- In the context of anti-corruption due diligence between the signing and the closing:
    - A purchaser's staff member offers a fee to a representative of an administrative authority to approve the transaction
    - A target's staff member offers a fee to the purchaser's staff charged with assessing the lifting of the conditions precedent in order for him to keep silent on certain elements likely to prevent it.
- In the integration phase (after the closing):
    - A purchaser's staff member requests from the seller a bribe to conceal some irregularities that could enforce the asset/liability guarantee or to falsify documents for the same purpose.

II.1. The anti-corruption due diligence officer

- **Senior management's commitment in the context of anti-corruption due diligence**

Within the framework established by the French Anti-Corruption Agency Guidelines to help Public and Private Sector Entities to Prevent and Detect Bribery, Influence Peddling, Extortion by Public Officials, Illegal Taking of Interest, Misappropriation of Public Funds and Favouritism[25], the senior

[25] The English version of the guidelines is a courtesy translation, only the French version of the guidelines published on 12 January 2021 in the Official Journal of the French Republic ("*Journal officiel de la République française*") is the authentic text for interpretation by AFA and the organisations that refer to it.

management's commitment to a merger-acquisition transaction that is free from any corruption is essential to its successful completion.

This commitment is manifested in particular by the allocation of appropriate resources to carry out anti-corruption due diligence. Senior management may appoint an anti-corruption due diligence officer while ensuring that he or she has the human and financial resources necessary to carry out his or her duties.

The anti-corruption due diligence officer presents the findings of his or her work and the risks identified in this framework to senior management so that it can make an informed decision on whether or not to carry out the transaction.

The officer may also report on its due diligence to the board of directors or a committee reporting to the board (e.g. an audit committee) at its request.

- **Appointment of the anti-corruption due diligence officer**

Senior management may appoint a person in the company, e.g. the compliance officer, or an external service provider to conduct this due diligence. In the latter case, the external service provider's work will be overseen by the company's in-house due diligence officer.

In accordance with the AFA's aforementioned recommendations, it is important that the compliance officer becomes involved in the implementation of strategic projects and in the making of structural decisions for the company in the context of a merger-acquisition for example.

As such, if the appointed anti-corruption due diligence officer is not the compliance officer or is from another department, it is recommended that he or she regularly informs the compliance officer of the progress of the anti-corruption due diligence carried out and their outcome.

- **Involvement of the anti-corruption due diligence officer in the project**

Although the confidentiality of merger-acquisition negotiations justifies limiting the number of people involved in the transaction, it is important to involve the anti-corruption due diligence officer as soon as possible in the project. Late involvement by the anti-corruption due diligence officer could delay and even compromise the performance of anti-corruption due diligence.

Anti-corruption due diligence officers must coordinate their work with that conducted by other functions involved in the transaction (legal affairs and financial departments, other compliance areas, human resources department, etc.). This coordination will give senior management a comprehensive overview of the potential risks associated with the target. Management may decide to set up a dedicated multidisciplinary team for the merger-acquisition project to support this coordination.

- **The role of the anti-corruption due diligence officer**

In short, the appointed officer conducts or oversees due diligence consisting of gathering and analysing information on the target collected by questionnaires, interviews, open-source documentary searches, etc. Officers may be assisted in their performance of this due diligence by their counterpart in the seller's company and, where possible, in the target company.

Officers may be tasked with integrating the target into the group's anti-corruption programme once the transaction has been conducted.

II.2. The anti-corruption due diligence procedure

Each company defines its anti-corruption due diligence procedure. In practice, these procedures vary depending on the steps involved in the transaction:

- First, before concluding the contract (*signing*), whereby the purchaser and the seller commit to implementing the transaction subject to certain conditions precedent;
- Second, between signing the contract and, once all the conditions precedent have been fulfilled, signing the legal documentation to close the deal (*closing*).

II.2.1. Anti-corruption due diligence in the pre-signing period

At this stage, anti-corruption due diligence is limited in detail by the uncertainty hanging over closing the deal. The seller may refuse to provide certain information requested by the potential purchasers in order to protect the target's trade secrets. It is only once the seller has received assurance of the genuine nature of the approach made by the interested company that it will provide more information on the target.

It is important to note that the information exchanged on the target company must satisfy the requirements of good faith, in accordance with the provisions of Article 1112 of the French Civil Code.[26] Moreover, pursuant to the first paragraph of Article 1112-1 of this code, "The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party."

In general, during the negotiations, a letter of intent signed by the seller and the interested company formalises their will to see the transaction through to completion, setting out the conditions to close the deal such as they have been negotiated up to that point. Although this letter does not constitute a definitive contract, it helps structure the framework of the negotiations and acts as protection for the parties by;

- Subjecting the potential purchaser to a non-disclosure obligation;
- Imposing on the seller an exclusivity provision to prevent the seller from negotiating with another party for a defined period.

A balance also needs to be found between the seller's legitimate protection of information on the target and the purchaser's necessary access to this information.

- **Purpose of anti-corruption due diligence**

At this stage, the purpose of anti-corruption due diligence is to:

- Understand the target's history, activities and its economic environment (competitive, regulatory, geographical or the context leading the seller to carry out the transaction);
- Know about its shareholding structure, its management and its ultimate beneficial owners;
- Identify the key third parties with whom it may have a relationship;
- Determine any links with politically exposed persons and the extent of the target's interactions with public servants;

[26] "The commencement, continuation and breaking-off of pre-contractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith."

- Secure knowledge of the main elements of its anti-corruption programme (e.g. existence of a code of conduct and an anti-corruption policy, corruption risk mapping, etc.);
- Where applicable and subject to the availability of information, identify corruption cases in which the target may have been implicated (ongoing legal action);
- Check for current sanctions to which the target may have been sentenced by a French or foreign authority (e.g. ongoing French, US or UK deferred prosecution agreement).

- **Information collection**

Once the anti-corruption due diligence officer has drawn up what the officer feels to be the list of necessary information, that officer can then seek the information:

- In open sources, e.g. by consulting free or paid public databases;
- By asking the seller, in particular by sending a questionnaire and a list of documents to be provided.

The purchaser and the seller jointly define the arrangements for the provision of the information requested. To this end, the seller may set up a data room. Access to the most sensitive information may be restricted to persons bound by a non-disclosure obligation.

The anti-corruption due diligence officer may also consider conducting interviews with the seller or, where possible, with the target.

The seller will be in a better position to answer certain questions put by the interested company if it has already conducted an anti-corruption compliance audit on the target. Doing so will enable it to show its knowledge of the target's risks and to establish, where applicable, that they have been contained.

Listed company transactions

Transactions for listed companies whose shares are admitted to trading on a regulated market or through a multilateral trading facility are subject to quite an extensive and binding public information obligation. Two situations are possible depending on the type of transaction:

i **Hostile transaction**: Information, aside from public information, is not accessible since it cannot be collected from the target without management's participation in the process; the public documentation review therefore forms the majority of due diligence that can be conducted;

ii **Friendly transaction**: Access to non-public information is made possible by the target management's participation. Nevertheless, steps should be taken to ensure that access to information deemed useful, but where the regulations do not provide for its being made public, does not constitute a breach of the French Monetary and Financial Code (e.g. insider dealing). For this reason, if the seller believes that the information provided to the interested company is inside information[27], it is the seller's responsibility to make it public as soon as possible.

[27] Inside information under Article 7 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse is defined as, "Information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments (…)"

With respect to the provision of inside information by means of a data room, the French Financial Market Authority (AMF) recommends[28] :

- Restricting to large transactions only the use of data rooms giving rise or potentially giving rise to the disclosure of inside information;

- Providing access to inside information only if such access is strictly necessary for the participants' information and for the needs of the transaction concerned;

- Reserving access to the data room to the signatories of a letter of intent attesting to their intention to conduct a financial transaction and the genuine nature of their project, in particular their capacity to finance the project.

II.2.2. Anti-corruption due diligence between signing and closing

In order to prepare for the integration of the target into the purchaser's anti-corruption programme, the anti-corruption due diligence officer needs to produce a more detailed analysis of the target, if possible within the timeframe. To this end, the officer could ask the seller for information on the maturity of the anti-corruption programme, regarding especially:

- High-risk third parties (customers, suppliers and intermediaries) as judged from the corruption risk mapping;
- Accounting controls, especially those regarding transactions at risk, gifts and invitations as well as philanthropy and sponsorship activities;
- The effectiveness of the internal whistleblowing system (e.g. handling of recent whistleblowing reports on suspected corruption).

III. Integration of the target into the acquiring or absorbing company's anti-corruption programme

Whatever the level of anti-corruption due diligence performed prior to closing the deal, an audit needs to be conducted to assess the quality and effectiveness of the target's anti-corruption programme, if it has one. If the anti-corruption due diligence conducted before closing or the audit find any suspicion of corruption, an internal investigation could be launched.

III. 1. Audit and harmonisation of the target's anti-corruption programme

[28] Guide on Ongoing Information and Management of Inside Information, DOC-2016-08 (available in French only).

III.1.1. Conducting the audit

The main purpose of the audit is to:

- Identify dysfunctions in the target's anti-corruption programme ;
- Ensure that its anti-corruption programme is appropriate for its specific risks;
- Identify the corrective actions to be taken for each of the eight measures stipulated in Article 17 of the act of 9 December 2016.

The anti-corruption programme audit could consist of:

- Reviewing the corruption and influence peddling risk map, if there is one;
- Using accounting and financial tests to check a sample of transactions identified from the target's corruption risk map;
- Analysing the whistleblowing reports received and their handling by the target;
- Examining the management of third parties considered to be at risk (selection process, reviews of tenders and contracts, analysis of payments made, etc.).

The effectiveness of the procedures used by the target could also be tested by random or targeted sampling. For example, staff training and awareness could be examined, in particular those who are most exposed to the risk of corruption (teaching materials, audiences targeted and actually trained, frequency of sessions, updates, knowledge tests, etc.).

III.1.2.Harmonising the target's anti-corruption programme

Depending on the target's situation, it is the purchaser's responsibility as parent company to set up an anti-corruption programme in the target company and update it or extend its own system to the target with the necessary adjustments.

If the purchaser and the target each had an anti-corruption programme before the transaction, it might be necessary to harmonise their respective procedures and adjust their information systems accordingly. Certain best practices deployed by the target may be taken up by the purchaser with the necessary adjustments made.

In any event, it is important to define the priority actions to be taken in the target company following the anti-corruption due diligence and the audit, such as developing or updating the risk mapping of the target's own risks and training staff to create or consolidate an anti-corruption culture.

Similar steps should be taken in the case of a merger, since the anti-corruption programme needs to cover the entire company formed by the transaction.

III.2. Detecting and handling suspicions of corruption in the target company

When the anti-corruption due diligence or audit on the target finds suspicions of corruption, a full internal investigation may be launched. If the suspicions appear to be founded following this investigation, it is important to put an end to these misdemeanours as soon as possible and subsequently take all necessary corrective measures.

Disciplinary action could also promptly be taken against the persons implicated. It might be pointed out that corruption, a criminal offence, also needs to be prohibited by the target's code of conduct, itself part of the target's rules of procedure.

There is also the question of the target or purchaser reporting these acts of corruption to the public prosecutor. Although it is not incumbent on a company's management to report such acts to the legal authority, it may be in its interest to do so with a view to settling the company's criminal situation by concluding a deferred prosecution agreement (DPA).

The deferred prosecution agreement: an instrument to settle corruption proceedings

Articles 41-1-2 and 180-2 of the French Code of Criminal Proceedings based on Article 222 of Act 2016-1691 of 9 December 2016 provide for the possibility for the public prosecutor to conclude with a legal entity implicated or under judicial investigation for corruption, influence peddling, tax evasion, laundering the proceeds of this offence, or for related offences an agreement comprising one or more defined obligations, whose performance terminates the prosecution proceedings.

These obligations are as follows:

- Payment of a public interest fine whose sum is capped by law, based on the target's turnover and determined by negotiations with the legal entity;
- Performance of a compliance remediation programme under AFA supervision for a maximum duration of three years

Unlike sentencing by a criminal court, the deferred prosecution agreement does not entail a declaration of guilt and has neither the nature nor the effects of an adverse criminal judgment. In addition, it does not exclude the company from French public procurement contract procedures. The deferred prosecution agreement is applicable to acts predating the act of 9 December 2016.

The guidelines published on 26 June 2019 by the National Financial Public Prosecutor's Office and the AFA on the implementation of the deferred prosecution agreement procedure[29] present the advantages of this agreement and the terms of its negotiation.

When the acts of corruption have an international dimension, the company's management may consider reporting the acts to the foreign legal authorities, if they have jurisdiction therein,[30] in addition to the French justice system. These authorities, mandated to examine the same acts, may, if they so deem advisable, coordinate the criminal response they intend to make.

[29] https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf

[30] For example, for the US Department of Justice's criminal proceedings policy for merger-acquisition transactions, see "A Resource Guide to the U.S. Foreign Corrupt Practices Act by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission", November 2012, p.62.

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