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# King & Spalding: transatlantic business crime and investigations July 2022 column

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King & Spalding's Special Matters and Government Investigations team shares its views on developments in transatlantic business crime and investigations.

## Anti-bribery issues in cross-border acquisitions: successor liability, potential pitfalls and managing due diligence

### Introduction

Recent cases have highlighted more than ever the complex legal and compliance issues arising from corporate acquisitions from an anti-bribery perspective. Last year, John Wood Group plc (Wood) agreed to meet the liabilities of Amec Foster Wheeler plc (AFW) (the company it had acquired just under three years before) in its deferred prosecution agreement (DPA) with the Serious Fraud Office (SFO). As acknowledged by Edis LJ in his judgment approving the DPA, Wood was also "put to substantial costs by dealing with the investigation and the DPA."

On the other hand, without the acquisition, there would have been no DPA: Edis LJ also made clear that Wood's role as an innocent party that would "carry the can" for the wrongdoing was a "very important factor in ... deciding that a DPA [was] in the interests of justice".

In this article, we consider how to navigate anti-bribery issues in corporate acquisitions on both sides of the Atlantic: the contrasting legal frameworks to successor liability in the US and UK, the importance of pre-acquisition diligence, and what to do if you identify an issue before an acquisition goes ahead.

## US position on successor liability for FCPA violations

In the US, as a general principle a successor company inherits the liabilities of the predecessor company or companies. This rule forms the basis of successor liability for FCPA violations, but the application of the rule in practice is more nuanced. The Department of Justice (DOJ) has issued guidance on successor liability in the FCPA context in its FCPA Resource Guide (2nd Ed) which, when read alongside DPAs, NPAs, and settlements with DOJ and the Securities and Exchange Commission (SEC), as well as Opinion Procedure Releases on the subject, forms a picture of when DOJ and SEC will impute liability to the acquiring company, and when they will not.

Successor liability will not create liability for FCPA violations where none existed before. For example, if an American company subject to the FCPA acquires a foreign company that before the acquisition was entirely outside FCPA jurisdiction, the acquisition will not create liability for historical conduct by the acquired company that would have amounted to a violation of the FCPA had the acquired company been subject to the FCPA. However, even where the acquired company would have been liable under the FCPA, DOJ and SEC tend to take action against the acquiring company on the basis of successor liability only in extreme circumstances, such as instances of severe and long-running misconduct by the acquired company, or where the acquiring company has in some way contributed to the misconduct, whether by omission, that is, failing to stop the misconduct post-acquisition, or by active participation in the misconduct.

In the absence of involvement or culpability by the acquiring company, DOJ and SEC take into account several factors when considering what type of enforcement action to take and against which party or parties. With respect to the merger or acquisition process, they will look at the thoroughness of the pre-acquisition due diligence with respect to anti-corruption compliance issues. Where pre-acquisition due diligence was not possible for legitimate reasons, such as in a hostile takeover, in a competitive bid situation with a short timeline, or if the seller was unwilling to provide sufficient information, DOJ and

SEC will then look at how quickly and thoroughly the acquiring company conducted post-acquisition due diligence. In both scenarios, DOJ and SEC will evaluate the implementation of compliance enhancements and efforts to integrate the acquired company with the acquiring company's compliance programme. The more robust the diligence, remediation, and integration efforts are, the more likely it is that DOJ and SEC will decline to bring an enforcement action against an acquiring company for the acquired company's conduct.

An additional, and critical, element is voluntary disclosure. DOJ's FCPA Corporate Enforcement Policy states that "where a company undertakes a merger or acquisition, uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct" and undertakes other actions consistent with the policy such as timely implementation of an effective compliance programme, "there will be a presumption of a declination" to prosecute.

In its Evaluation of Corporate Compliance Programs guidance, DOJ underscores the importance of effective due diligence when it comes to negotiating the outcome of an investigation. Looking at the importance of M&A due diligence from the angle of assessing a corporate's compliance programme when determining whether to bring charges or negotiate a plea or other resolution, DOJ indicates that the sufficiency and robustness of an acquiring company's due diligence on a target is representative of the effectiveness of the acquiring company's compliance programme as a whole. In other words, an established practice of thorough due diligence on target companies is a factor in and of itself which weighs in favour of a declination or a deferred or non-prosecution agreement.

## English law on successor liability and potential pitfalls

Unlike in the US, there is no established principle of successor liability under English law, that is, a parent company will not generally be held criminally liable for the actions of an acquired subsidiary, and it is notable that the UK government did not take the opportunity to introduce such a principle in the Bribery Act 2010 (BA 2010). However, there can still be serious ramifications if bribery and corruption pre-dating the acquisition is identified post-acquisition: as is the case in the US, the purchased entity itself can still be subject to investigation, and ultimately the acquiring group will bear the burden of the associated costs, penalties and reputational impact. There may well also be significant costs involved in updating and improving the acquired company's compliance programme to ensure that wrongdoing will not occur again in the future.

The fact of an acquisition may determine the outcome of an investigation into the acquired company. Under the joint SFO and CPS Deferred Prosecution Agreements Code of Practice, factors weighing against prosecution (and in favour of a DPA) include if the offending is not recent and the company in its current form is "effectively a different entity from that which committed the offences - for example it has been taken over by another organisation" and if the "management team has completely changed" (as is likely to be the case where an acquisition has taken place). Edis LJ made clear that Wood's position as an innocent purchaser "twice removed" from the wrongdoing through acquisitions was an important factor in approving that DPA.

Self-reporting is another important factor weighing against prosecution, albeit not essential (in the Rolls Royce DPA, the company's "extraordinary cooperation" was taken into account by Sir Brian Leveson QC in approving the DPA without a self-report). Companies may be encouraged to self-report bribery identified in the pre-acquisition period in the hope of obtaining a DPA however, unlike in the US, there is no specific policy of granting declinations where a company has self-reported and implemented an effective compliance programme post-acquisition.

Another important question is whether any wrongdoing has continued post-acquisition on the purchaser's "watch". In both the UK and US, a purchaser is at risk for ongoing bribery in the acquired business from day one of acquisition. However, this risk is arguably greater in the UK given the nature of the section 7 BA 2010 offence of "failure to prevent" bribery by a commercial organisation. Under this offence, a purchaser could be strictly liable for failing to prevent the bribery of an associated person (depending on the factual matrix, this could potentially include the acquired company itself or one of its employees, agents or other third parties) unless there are "adequate procedures" in place designed to prevent the bribery. It's therefore critical to ensure that the purchaser's procedures are immediately integrated with, and applied to, the acquired company. Moreover, diligence is one of the six guiding principles for assessing adequate procedures as set out in the Ministry of Justice's statutory guidance issued under section 9 of the BA 2010. The guidance specifically states that "a relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another". This principle is quoted in the SFO's guidance on Evaluating a Compliance Programme. Therefore, in determining whether there are adequate procedures in place in relation to an offence associated with the acquired company, the authorities are likely to consider whether the purchaser undertook sufficient due diligence during the purchase process to flush out and remediate any issues.

## What should due diligence entail?

Diligence may include the following:

- Open source research and review of deal documents to get a sense of the scope of the business, whether it is a publicly traded company, where it operates, and other big picture facts.
- Collecting and evaluating documents such as anti-bribery compliance policies and procedures, codes of conduct, whistleblower policies, training programmes and attendance registers, and due diligence and agreements for relationships with third party intermediaries such as sales agents, distributors, consultants, or joint venture partners.
- A due diligence questionnaire with questions focusing on areas of exposure (for example, use of third party representatives, operations overseas particularly in any jurisdictions with a high risk of corruption, touchpoints with foreign government officials), any past bribery issues and investigation and the current anti-bribery compliance programme.
- A call with personnel at the target best placed to flesh out the risk areas, and personnel able to discuss the compliance programme and its implementation in greater detail. Potential participants might be the CEO, COO, CFO, GC, CCO, and other compliance or legal staff.
- If any issues are identified, follow up enquiries and investigations to determine the nature and extent of the issues. Enquiries and investigations may entail obtaining a third party due diligence report on specific individuals, interviewing key personnel, and/or reviewing additional documentation.
- In some cases, systemic compliance issues or serious bribery concerns will make a transaction too risky to pursue. If the potential issue identified is potentially criminal in nature, then the purchaser must decide whether it still wants to proceed with the transaction. Factors to consider will include:
  - the risk of exposure to prosecution;
  - reporting the issue to the relevant enforcement authorities;
  - how to remediate the issues and post-transaction integration of the compliance programme;
  - potential costs for legal fees, remediation, and penalties; and
  - possible reputational damage and exposure to debarment.

  On the other hand, if the issues identified are not criminal violations but rather deficiencies in the target's compliance programme, the acquiring company can take steps to mitigate the risks and remediate the compliance programme. In the US, a purchaser also has the option of seeking advice from DOJ directly via the opinion procedure, which previously has been used in the mergers and acquisitions context.
- If the acquiring company chooses to move forward with a transaction involving bribery concerns or compliance issues, factor the cost of remediating them and the risk of prosecution into the purchase price.

## Managing due diligence: top tips

- **Training: even before a particular acquisition is being discussed.** It is important to have procedures in place which build due diligence into the business's acquisition process. Make deal teams aware through training and communications that anti-bribery due diligence needs to be factored in.
- **Bring in experts.** Ensure deal counsel has the necessary expertise to diligence anti-bribery issues or, if they do not, instruct separate counsel for this work.
- **Start early.** The earlier document requests and questionnaires on anti-bribery issues are sent out, the earlier any potential issues can be identified and investigated, reducing the chance anti-bribery diligence will hold up the transaction.
- **Do not turn a blind eye if an issue is identified.** While bribery issues may seem minor in the broader context of the transaction, they can have an outsize impact. From a liability risk perspective, often the first issue identified is just the tip of the iceberg; violations are usually a symptom of an inadequate compliance programme, which makes a systemic issue more likely. From a commercial perspective, the potential costs stemming from an investigation or prosecution and the attendant reputational damage can be significant. It is therefore best to face the issue head on and find out as much about it as possible to equip the purchaser to make decisions about whether and how to proceed.
- **Build protection into the purchase agreement.** Include representations and warranties in the purchase agreement regarding the target's past compliance with applicable anti-bribery laws, and the adequacy of its compliance programme. Ensure that representations and warranties insurance, or an

indemnity in the purchase agreement itself, will cover costs to the buyer arising out of the breach of these representations and warranties.

- **Have a post-closing plan.** Know where to dig deeper and make sure management is ready to prioritise compliance enhancements and integration with the purchaser's compliance function from day one.