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Do intensive due diligence to avoid successor liability, say speakers on M&A compliance

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Credit: MARCOS MESQUITA

The ramifications of Operation Car Wash in Latin America have made successor liability one of the key aspects to consider when buying or selling in the region, making intensive due diligence top on the to-do list for M&A deals, heard delegates at Latin Lawyer's ninth annual M&A conference in São Paulo last week.

As a result, the risk of successor liability is now forefront in the minds of buyers targeting assets in countries across Latin America. This has made

checking target companies are compliant with anti-corruption legislation among the first port of call for companies investing in the region. In Brazil – home of Operation Car Wash – the Clean Companies Act imposes successor liability for fines and damages on purchasers of targets that have committed corruption.

In Peru, deals involving the purchase of targets found to have committed bribery face full-scale investigations on all sides. “The seller will be investigated and there would be fines for the buyer,” said Fernando Molina, a partner at Rodrigo, Elías & Medrano Abogados in Lima. For targets that have public contracts with the government, there’s no way for buyers to escape the consequences of successor liability. “There’s no mechanism where they could go to the concession that issued the sale to plead their case. Whoever buys the company, also buys its contingencies.”
In Uruguay, according to Ferrere partner Martín Cerruti, buyers commonly take the initiative to check local targets are compliant even though it isn’t required by law. “We aren’t required to perform due diligence, but we encourage clients to do it,” he explained. “Criminal liability rests with whoever is buying.”
Compliance due diligence is being conducted throughout the M&A process; at the negotiation stage, during integration post-closing (through the implementation of codes of conduct, training and controls) and at the risk-mapping stage.

For companies implicated in corruption scandals, M&A deals can be made more complicated by the presence of external auditors. For example, a string of corruption scandals linked to aviation company Embraer has meant an external auditor has been present in the company since 2017, and is likely to stay for another year. Embraer’s proposed joint venture with competitor Boeing – under which Boeing will buy an 80% in Embraer’s commercial and services arms – has raised questions about how the newly merged company will move forward from the scandal. “We were expecting to close the transaction at the end of this year, but the monitor is concerned about the divested company. Will they replace some of the products in our compliance programme with theirs, for example?” said Fabiana Leschziner, executive VP, GC and CCO at Embraer.

Mitigating the risk of corruption on the M&A landscape is changing. Earlier this year the DOJ adjusted its FCPA Corporate Enforcement Policy (CEP), providing new incentives for target companies to self-report misconduct to

ease the M&A process. The policy includes criteria on individual liability if companies report wrongdoing promptly. “If the company cooperates fully and remediates properly, the DOJ won’t go after the company, but the individuals,” said Lisa Alfaro, partner at Gibson, Dunn & Crutcher, who moderated the panel. But she raised concerns about how clear the new legislation was for companies selling their assets in Latin America. “What does promptly mean? To what extent do companies have to collaborate?”

By taking strides to make sure target companies have robust anti-corruption compliance programmes in place, buyers avoid implicating themselves in scandal further down the line.

But family-oriented business culture in Latin America can mean sellers are not receptive to this. “I’ve had a lot of US companies come to buy large Brazilian companies that are family owned,” said Alfaro. “But it’s difficult to talk to them about corporate governance, they think you are accusing them of something.”

Others point out that companies can be reluctant to self-report because of the reputational risk. “Civil society doesn’t look at companies that have reformed and have good compliance programmes and give them another chance; they call for them to pay for what they’ve done,” said Jorge. As a result, “there is a big problem with companies coming forward to admit their issues, so it’s up to the people in this room to find a better way,” said Jorge.

The conference was chaired by Francisco Müssnich and Monique Mavignier of BMA - Barbosa, Müssnich, Aragão, and Paola Lozano and Paul Schnell from Skadden, Arps, Slate, Meagher & Flom. Coverage of the conference will continue in the following days.