M&A and financial crime

Leading specialists from Greenberg Traurig answer questions on the state of the market and key financial crime developments in the mergers and acquisitions space

Paul, what is the state of the US/UK M&A market and what are your predictions for 2020?

2019 has continued to throw up challenges for the cross-border M&A market, from the continued uncertainty over BREXIT in the UK and Europe to the retrenchment of the US and growing protectionism seen in regulatory regimes worldwide. That said, the UK/US M&A market continues to be active – a recent EY report confirmed that the US and UK continue to be each other's top outside investor and destination for investment. Our own experience supports this analysis and we have completed many transactions for UK plcs investing in the US this year.

While not all smooth sailing, it looks as though the deal making upcycle will continue into 2020. Companies continue to see M&A as the fastest way to accelerate growth and compete with start-ups and we expect to be continuing to advise our key corporate clients on cross-border bolt-on acquisitions.

Barry, what are the most striking developments in M&A from a criminal/regulatory perspective which you have seen?

Several come to mind as significant. In broad terms there has been a steady encroachment on the part of law enforcement into corporate boardrooms over the last 20 years coupled with an increasingly US approach to law enforcement in the UK. Accordingly, many companies now factor in the risk of criminal liability in a way that was not so just a few years ago.

More specifically, in the US M&A activity has frequently been a catalyst for unearthing suspected misconduct and the same phenomenon has emerged in the UK. The recent Serious Fraud Office (SFO) bribery conviction and imprisonment of a seller of a company following the discovery by the buyer of a contract obtained via bribery is a good example and underscores the importance of good due diligence and specialist advice.

A good example of how this has translated into corporate deal making on a day-to-day level is that there has been a marked shift in perceptions and expectations of parties to transactions. In the late 90s lawyers working in a US firm making a request for a Foreign Corrupt Practices Act (FCPA) warranty from a UK seller would often be met with resistance, and might be negotiated away from such a request. Today that type of resistance would be a red flag.

Frequently money laundering, fraud, bribery and sanctions laws are key issues. Identifying problems early ensures that criminal risks can be minimised without jeopardising deals or overpaying for an asset.

Importantly under UK anti-money laundering laws companies risk committing a criminal offence for failure to report if they know or suspect a transaction 'facilitates… the acquisition, retention, use or control of criminal property by or on behalf of another person'. The wording is widely drawn and the suspicion threshold is low. If pre-sale diligence identifies possible criminal misconduct, for example fraud, bribery, sanctions and/or licensing issues etc. then UK money laundering laws and reporting requirements need to be considered by those working on the deal. Failure to report when the notification requirement has been triggered can bring someone else's criminal problem to your own front door. Specialist advice in this area is essential. Over the years we have advised numerous clients (including other law firms) in this area and helped them close the deal without a hitch.

Anne-Marie, you worked on the other side of the fence before going into private practice, what tips do you have for companies considering M&A deals?

We have advised buyers in circumstances where issues were identified during due diligence, which subsequently led to enquires from law enforcement, as well as advising sellers who were under investigation by law enforcement authorities at the time of a potential sale.

Prosecutors in the UK and the US recognise that, as a result of M&A activity, companies sometimes inherit problems that are not of their own making. They will not judge a company on that historical conduct but rather they will be assessing when and how an acquiring company becomes aware of a problem and how it then deals with it.

Lawyer profiles

Barry Vitou

Barry Vitou established Greenberg Traurig's London white collar defence and special investigations practice in 2018 and is co-chair of the firmwide global white collar criminal defence practice. Barry is a seasoned white collar defence lawyer. While Barry originally qualified as a corporate lawyer he cut his teeth on white collar and investigations matters in Russia in the early noughties. He advises clients on law enforcement investigations and prosecutions as well as internal investigations all over the world. Barry has represented and defends clients under investigation by various law enforcement agencies including the first company prosecuted by the SFO under the Bribery Act. Barry, has advised numerous companies and advisers on navigating the associated criminal and regulatory risk in M&A transactions whether they themselves are under criminal investigation or buy or sell a business which is under investigation. Barry regularly appears on television and radio, discussing the topics of corruption, money laundering, and the UK Bribery Act.

Anne-Marie Ottaway

Anne-Marie Ottaway joined Greenberg Traurig in 2018 and focuses on white collar and economic crime and government and internal investigations. Acknowledged for her criminal defence work, Anne-Marie provides clients with advice on all aspects of investigations relating to allegations of fraud, bribery, and corruption, as well as providing advice in respect of the implementation of effective anti-fraud, bribery and corruption compliance programmes and related anti-money laundering issues. Formerly Anne-Marie was a prosecutor at the UK's SFO. Anne Marie also served as SFO representative on the cross government strategic group for PEP money laundering and the law enforcement co-ordination group on overseas corruption and recently served as specialist adviser to the House of Lords select committee on the Bribery Act.

Paul Maher

Paul Maher serves as a vice chair of Greenberg Traurig. Paul concentrates on corporate law, particularly cross-border public and private mergers and acquisitions. He advises a wide range of domestic and international clients in numerous sectors, including chemicals, pharmaceuticals, life sciences, financial services, information services, retail and communications.

Michael X Marinelli

Michael X Marinelli has wide-ranging experience advising clients on the federal regulation of international transactions. He focuses his practice on the Foreign Corrupt Practices Act (FCPA), as well as US export control regulations, including the EAR, the ITAR, and the economic sanctions regimes enforced by the Office of Foreign Assets Control (OFAC). Michael's practice includes providing advice on individual transactions and relationships to evaluating compliance in the context of mergers and acquisition. It also includes assisting clients in the development and implementation of FCPA and export control compliance programmes.

Kara Bombach

Kara Bombach assists companies to lawfully export goods, technology and services around the globe. She counsels clients on the US Foreign Corrupt Practices Act (FCPA), export control laws (EAR and ITAR), anti-boycott laws, and special sanctions (embargoes) maintained by the US Government (OFAC and other agencies) against various countries, entities and individuals. She has deep experience advising national and multi-national companies on best practices in the development and delivery of compliance policies and procedures, training, and risk assessments, as well as executing cross-border export, sanctions and anti-corruption due diligence in mergers and acquisitions, targeted internal risk assessments, and compliance investigations.

Maura E. Miller

Maura E. Miller has substantial experience representing US and non-US corporations and financial institutions in large regulatory and internal investigations both domestically and internationally involving, among other entities, the US Department of Justice, the US Securities and Exchange Commission and the board of governors of the Federal Reserve System. She has worked on many sensitive matters involving allegations of Office of Foreign Assets Control sanctions violations, violations of the Foreign Corrupt Practices Act, money laundering violations, and securities fraud. Maura also counsels clients on GDPR compliance and other international data privacy issues.

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That is why appropriate due diligence is so important both prior to acquisition and/or as part of effective post acquisition integration.

Not only does pre-acquisition due diligence identify potential problems but it will also give the acquiring company an opportunity to evaluate the potential cost of remediation and – in extreme cases – provide the acquiring company the opportunity to renegotiate price or terminate the transaction in the event that the identified risks are too high.

If the due diligence is insufficient or flawed this can lead to misconduct not only going undetected but also allows it to continue thereby causing the acquiring company itself to be held accountable for that ongoing conduct.

Even where thorough pre-acquisition due diligence is not possible there is still a possibility of avoiding liability for any inherited problems if an acquiring company conducts thorough post-acquisition due diligence as part of its integration process. This may include conducting post-acquisition audits and the timely roll out across the new business of the acquiring company's internal controls and compliance programme.

Michael, you've been engaged for many years advising companies on their anti-corruption compliance programmes and assisting companies integrating newly-acquired businesses. What recommendations do you have for companies?

Regardless of the specific type of transaction being undertaken, the FCPA enforcement cases make clear that 'thorough risk-based FCPA and anti-corruption due diligence' should be conducted on acquisition targets. The scope and depth of the due diligence will necessarily vary depending on the nature of the transaction. Thus, in each case a specific due diligence plan should be developed as early as possible. Purchasers should execute as much of the diligence plan as possible before the transaction is completed. Of course, circumstances may arise when extensive pre-acquisition anti-corruption diligence is not practicable for reasons beyond the purchaser's control, or the pre-acquisition diligence is limited in scope or duration for legitimate regulatory or business reasons. In these circumstances, the company should plan for and then conduct anti-corruption due diligence immediately following the acquisition.

In conducting anti-corruption due diligence, purchasers should focus on those areas that represent corruption risk in almost all industry sectors. Among the more important topics are:

- The degree to which the target uses third-party intermediaries. A study by Stanford University found that 90% of FCPA cases involved bribes paid through third parties.
- Whether a government entity, government-owned entity, or government official has a significant ownership position or otherwise stands to benefit from the transaction.
- Whether the entity provides gifts, travel, hospitality and entertainment and, if so, the frequency and value of the benefits involved.
- The nature and scope of the target's donations to charitable and other organisations, including government and government-affiliated organisations.
- Whistleblower activity, hotline reports, and internal and external investigations.
- Review of government enforcement actions, investigations, prosecutions or other administrative or criminal proceedings.
- The adequacy of and conformance with financial controls in high-risk areas.

If the target has an anti-corruption compliance programme, the diligence should include the following tasks and topics:

- Assessment of the target's compliance programme documentation, including the target's code of conduct, statement of ethics or similar documents and the clarity of roles and responsibilities within the programme.

- Assessment of the target's programme, including the operational structure, management support, content and use of procedures and their alignment with identified risks. For example, in the US the SEC has brought cases where a model plan reads well, but was not effectively implemented.

- Review of the target's internal audits of the anti-corruption programme.

Kara, you have worked in the sanctions arena for a number of years, what have your experiences been from an M&A perspective?

Companies (whether target or acquirer) engaged in international trade should include economic sanctions compliance in the diligence process. From a US standpoint, acquirers have successor liability for economic sanctions violations of companies they acquire. And even in instances where the target of acquisition wasn't subject to US law prior to the acquisition, prior conduct if continued, can create liability and violations for the acquirer immediately post-closing.

For example, US jurisdiction for the Iran and Cuba sanctions programmes applies to even wholly-foreign subsidiaries of US companies. We have successfully identified sanctions risk areas in M&A diligence and counseled on remediation or termination of activities that would create liability post-closing. In some instances, it may even be necessary to seek and obtain 'wind down' licenses from the US Office of Foreign Assets Control (OFAC) in order to cease or terminate operations involving certain sanctioned countries or individuals.

The landscape has become even murkier with the increasing risk of so-called secondary sanctions that may cause an entirely non-US entity (even with no US parent or acquirer) to become a target of OFAC sanctions or enforcement action based on substantial or material dealings with certain sanctioned persons or countries. On top of secondary sanctions risks, OFAC's Framework for Compliance Commitments, which it published in May 2019, makes clear that OFAC expects even non-US entities to implement economic sanctions compliance programmes if they are engaged in transactions that could trigger US jurisdiction (such as US dollar-denominated transactions or trade involving foreign made items with *de minimis* US content). All of this taken together means that economic sanctions compliance is no longer an 'optional' topic in M&A due diligence.

Maura, what mistakes do you see companies making regarding due diligence compliance from the US perspective?

Despite the messaging from various US and non-US regulators focusing on compliance and implementation of effective compliance programmes, we still see corporations that have issues with 'tone at the top.' Regulators around the world want to ensure that a corporation has a genuine commitment to compliance, and that that commitment is embodied by its most senior executives and communicated clearly throughout the organisation. Unfortunately, we still see executives not fully committed – financially or culturally – to compliance. Good compliance is good business, but it can sometimes be difficult to see its benefits in the short term, and if a company is only looking at short term gains, compliance may be sacrificed.

Making the investment in a solid compliance function provides a company with a better opportunity to properly and quickly assess an issue when it arises. If there is a real problem that must be investigated further or reported to the appropriate government agency, a corporation that takes a proactive, considered approach to investigation and compliance will be able to move forward with the process more efficiently and effectively. ■