

# POST-ACQUISITION REFLECTIONS MAY UNEARTH CORRUPTION EXPOSURES

15 December 2015 | Global, London, Africa, Asia Pacific, South America  
Legal Briefings - By **Daniel Hudson**

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Multinational companies doing [mergers and acquisitions](#) need to be conscious of greater regulatory scrutiny. The tough new UK Bribery Act targets commercial organisations that carry on all or part of their business in the UK, irrespective of where a [bribe](#) is paid and for the new corporate failure offence, regardless of where they are incorporated.

Fines are likely to be high or even unlimited; individuals risk up to 10 years' imprisonment; shareholder value will undoubtedly suffer and corporate reputations will be on the line. The full ramifications are yet to emerge as the Act addresses only bribery and corruption events that took place after it came into force in July 2011. The first few cases are coming to light now, but expect more organisations to be subject to investigation.

Among them may be companies with merger and acquisition ambitions in jurisdictions and sectors with heightened bribery and corruption risk, where inducements are considered "normal" business practice. Included are some countries in Africa, South East Asia and South America. Extractive industries and [oil and gas](#), where government officials are typically involved in rubber stamping the transfer of assets, are also prone to corruption.

Under the Act, a company or its representatives can be held liable for:

1. offering, promising or giving a bribe
2. receiving a bribe

### 3. bribing a foreign public official

A commercial organisation can also be held liable for failing to prevent bribery by persons acting for or on behalf of the organisation.

## HOW TO AVOID BEING CAUGHT OUT IN M&A

A company that acquires another, without checking it out for bribery and corruption irregularities, could end up criminally liable if it becomes complicit in the activity.

In the UK, an acquirer can mount a defence (if not complicit in bribery itself) under the Act where it can demonstrate that it had adequate anti-bribery and corruption (**ABC**) procedures in place. Evidence of adequate procedures, according to the UK Ministry of Justice, includes:

- proportionate procedures
- top-level commitment
- risk assessment
- due diligence
- communication and training
- monitoring and review

To demonstrate compliance, anti-bribery and corruption checks must be factored into the overall due diligence exercise, particularly in high-risk jurisdictions. Pre-acquisition, advisers will be alert to red flags, such as large or unexplained payments, lavish gifts or entertainment and inflated expenses claims, notably those relating to government officials. Records, including policies, procedures and training, should be reviewed. Accounting or invoicing discrepancies should be explored to identify whether money coming in matches money going out of the business. Relationships and contracts with agents and third parties, and commission-based structures, in particular, demand close inspection.

Between exchange and completion of the sale, the buyer should monitor the target and put in place indemnities and warranties as a safeguard.

Post-acquisition, the diligent buyer will have opportunities to unearth "skeletons" that may not have been evident before the sale. Any company with a UK exposure will only be held criminally liable if it turns a blind eye to the target's antics and becomes complicit by encouraging or assisting corruption. The target can be pursued by the UK authorities. The new parent company, saddled with an asset with depleting value, will pick up the financial exposure as a result of any fine.

Any company with a US exposure will be subject to the Foreign Corrupt Practices Act and could incur successor liability for the pre-acquisition behaviour of its target.

As a precaution, the seller itself might consider running shadow due diligence prior to opening its dataroom doors and allowing buyers to inspect a target's books.

Bribery and corruption is a regulatory priority and carries severe penalties. Potentially a bigger risk, however, is not criminal liability but reputational harm. Even where bribery and corruption take place before the change in ownership, mud may stick. Companies can expect share price damage and loss of goodwill as customers and stakeholders distance themselves from the tarnished entity.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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