Cross-Border M&A:

How General Counsel Can Manage Demand, Deliver Quality and Articulate Value

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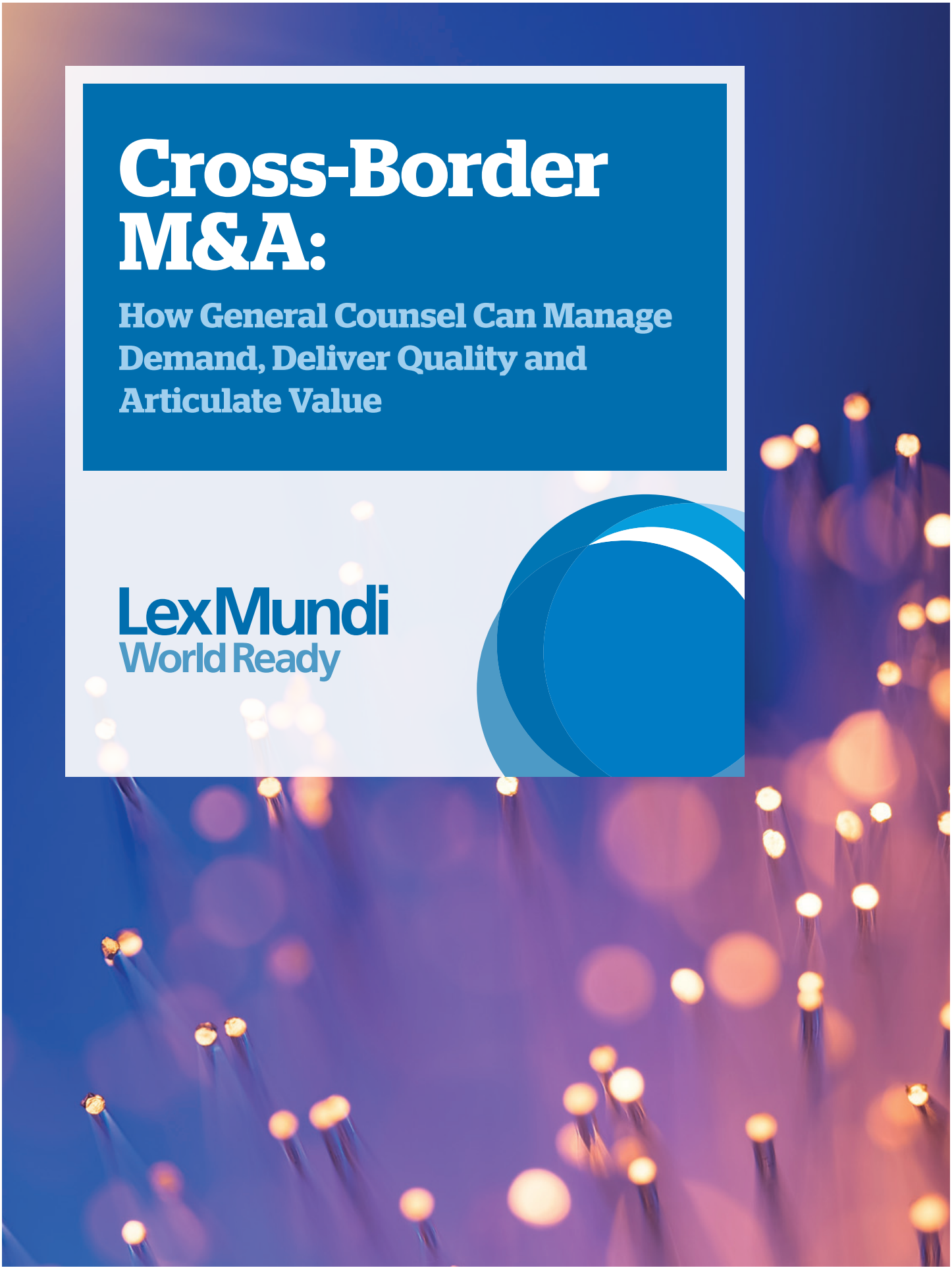

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About This Report

M&A activity is re-approaching 2007 levels, but the involvement of general counsel and corporate legal departments in deal activity has changed significantly since the last peak. Much of this change has been a result of dramatic shifts in the operating environment, which are driving large scale mergers and shaping new approaches to due diligence, negotiations and realization of post-merger synergies. Increased political and regulatory scrutiny, rising standards of corporate conduct and governance, and greater exposure to shareholder activism are all just part of 'new normal' conditions. As a consequence, general counsel have had to adapt and innovate in order to manage increasing demands from a diverse group of stakeholders, deliver quality legal counsel to company decision makers and boards, and articulate the value they add to M&A.

This report analyzes best-practices shared by general counsel participants during the Lex Mundi Summit in Amsterdam focused on how general counsel can manage demand, deliver quality and articulate value in cross-border M&A. During the interactive panel discussions and break-out sessions, four critical disciplines came to light that make the difference between more and less successful M&A outcomes:

(i) effective and proactive **relationship management** with local regulators and internal stakeholders;

(ii) careful **communication and influence** across the organization;

(iii) a common sense approach to **process and project management** to maintain efficiency; and, not least,

(iv) a relentless focus on **post-merger implementation** from the onset of the transaction.

The following report elaborates on each discipline and provides examples of how they can be fostered in the organization.

We extend our thanks and appreciation to the general counsel participants, Lex Mundi member firm lawyers and our guest speakers for their contributions to the program and their active Summit participation.

We hope you find this analysis beneficial and look forward to welcoming you to the next Lex Mundi Summit.

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How General Counsel Can Manage Demand, Deliver Quality and Articulate Value in Cross-Border M&A:

Organizational Challenges and Best Practices

This report is a summary of the proceedings of the Lex Mundi Summit which focused on how general counsel can manage demand, deliver quality and articulate value in cross-border M&A. Cross-border transactions involve general counsel in a myriad of challenges, among which are regulatory risks and pressures, asymmetries between the acquirer and target, greater shareholder activism and post-merger integration.

In recent years there has been an increase not only in regulatory breaches, but in the number of companies held liable for violations that take place prior to acquisition. For example, data gathered in 2015 demonstrated that, in the U.S., ninety-nine percent of the Foreign Corrupt Practices Act (FCPA) enforcement fines have occurred since 2005 (out of the previous forty years) with the size of these penalties becoming significantly larger. Despite a plethora of rules, regulations and guidance globally, corporate scandals are becoming more prominent. Compounded with time-consuming involvement by competition authorities, who have extensive powers and tools to review mergers, getting it wrong, or acquiring a company without fully understanding all of its liabilities, can lead to significant claims. In one case, a Lex Mundi Summit participant discussed a merger being reviewed long after closing and integration was underway, despite the acquiring company having taken all appropriate steps with the antitrust authorities.

Asymmetries between the acquiring company and jurisdiction or the target company and jurisdiction provide for another set of obstacles. For example, the acquirer may be dealing with a target or a jurisdiction that does not have sophisticated management or experienced regulators. However, the lack of experience or sophistication does not temper the ambitions and activism of regulators, which confounds negotiations and the necessary approvals. One lesson shared by a Summit participant cautioned not to overwhelm counterparties in developing countries with requests for information or demands for compliance with company procedures and policies. These expectations are often unrealistic and can result in an immobilization of the transaction.

Furthermore, shareholder activism continues to rise. Management should be wary of being on the receiving end of a claim as well as aware of schemes to gain influence over the board or extracting value from proposed takeovers. A well-constructed legal firewall and strategy can help mitigate any adverse impact these contingencies may have on the bottom line. In addition, the general counsel can serve as arbiter between shareholders and management, an "honest broker" pre- and post-transaction to facilitate the deal.

> ***Summit participants were, not surprisingly, unanimous that the real – and perhaps the most difficult – work begins on day one of the new combined entity.***

Last, but not least, is the task of bringing the two organizational cultures together to ensure the promised synergies of the transaction are delivered. Much of the legal advice focuses on putting the deal together. However, Summit participants were, not surprisingly, unanimous that the real – and perhaps the most difficult – work begins on day one of the new combined entity. This time is crucial for extending policies across the organization and refocusing the approaches taken by the legal teams to serve the new business. Sound policies and processes are essential, but it is ultimately the attitudes and behavior of individuals that determine whether there is adherence.

In response to the above interrelated challenges, Summit discussions brought to light four disciplines that general counsel and their legal teams should skillfully apply in order to deliver value to their company's cross-border M&A deals: 1) relationship management; 2) communication and influence; 3) process and project management; and 4) post-merger implementation. These disciplines are mutually reinforcing in that effectiveness in one area can help advance the others.

I. Relationship Management

Relationship building within the organization and with external stakeholders is a task that must be undertaken prior to the onset of any M&A transaction. Strong relationships between senior management and in-house counsel, in-house counsel and their external counterparts, and between companies and regulators are essential for cross-border mergers to run smoothly. The lack of these strong relationships can

lead to breakdowns and delays in the process because the foundation that allows the company to address problems and steer through solutions is missing.

In this context, the Lex Mundi Summit participants focused on the need to manage the expectations of the acquirer's senior decision makers, especially when regulatory sophistication in a foreign jurisdiction is in question. Most general counsel recognized a certain tension between the company's "enablers" (corporate dealmakers) and its "gatekeepers" (lawyers), with some emphasizing the struggle to persuade management of the need for patience. Protecting the company from avoidable risk can test even the best relationships with internal decision makers.

Relationship building takes a consistent investment of time and a demonstrated interest in the role others play in the M&A process. While it may be easy to overlook the importance of this discipline, relationship management is a core component to the success and effectiveness of the in-house counsel role.

Participants discussed the following best practices for managing relationships:

1. At the outset of the deal, take a general inventory of the quality of key relationships to detect areas of potential difficulty and identify proactive steps.

2. Cultivate local relationships with regulators and/or legal counsel on the ground in order to anticipate the behavior of counterparties and regulators as well as appropriately allocate time and resources. One in-house counsel recounted a time when his company wasted twelve months of management time and money by fighting the wrong battle instead of addressing the appropriate regulatory concerns.

3. Designate a main point of contact either within the legal department or elsewhere in the organization to be responsible for the overall relationship with regulators. For those companies with a government relations function traditionally responsible for this role, participants thought it best to integrate this function with the legal function. If the government relations function sits elsewhere in the organization, it must be carefully determined who is responsible for the relationship with regulators.

4. Proactively communicate the deal rationale and the steps taken to ensure success to (institutional) shareholders. This practice will head off any suspicions of being out of the information loop and will help cultivate advocates for the deal who can argue its merits.

5. Instill in the in-house team a sense of being part of the business and an integral means of providing objective input. As an extension, the in-house team should see themselves first and foremost as business people with legal expertise. For example, members of the in-house team can be seconded to business functions or units to familiarize themselves with business dynamics.

II. Communication and Influence Across the Organization

Closely allied to the discipline of relationship management is the importance of strong communication skills on the part of internal and external counsel. Lawyers often act as the lynchpin between shareholders, management, regulators, employees and business partners. They are stewards of the company's message and brand identity, simplifying technical issues so those issues can be acted upon in an efficient and effective manner.

Most major transactions will need a mix of in-house corporate counsel who know the business and the personalities as well as external expertise based on sector or jurisdictional knowledge. Establishing a system of strong communication policies will facilitate a better working relationship with internal and external counsel, contributing to the overall success of the M&A transaction.

Summit participants attributed positive results to the best practices for communication below:

1. Invest in business training for the in-house team either through business schools and external programs or through workshops with other business functions and divisions.

2. When establishing teams to support an M&A transaction, identify early on who will act as ultimate decision maker.

3. Set expectations as to whether internal and external legal advisers are to be decision makers or simply to provide input. Most Summit participants felt that even when lawyers are not making decisions, they should be offering recommendations and not simply analysis.

4. Work with management to provide communications guidance about what should and should not be said.

5. Maintain a neutral stance between management and shareholders in order to play the role of aligning interests.

6. Work with the investor relations function and top management to create a public relations template to ensure consistency in how the corporate strategy is communicated as well as how individual acquisitions advance the company strategy. The template can be adapted to each deal.

7. Establish what deliverables are expected before providing legal advice. In other words, in-house counsel felt it could be costly to draft memos, emails, documents and other communication without discussing the need and purpose for the information in advance.

III. Process and Project Management

In transacting M&A deals across borders, in-house counsel can save time and resources by using standardized processes provided these are 1) tested and 2) used as templates to be tailored to each deal and jurisdiction. Equally important is the need to review the M&A process with all parties involved in the transaction, preferably along the way, and certainly afterwards, to identify improvements for future deals. Such "post-mortem" exercises can save considerable time and money in future transactions.

In each situation, the general counsel and in-house team first need to assess what can be done internally and what external advice will add value to the process. Few general counsel have the luxury of a well-resourced internal team or a limitless spend on external counsel. Therefore, they need to adopt a number of other strategies to ensure pre- and post-deal risks are properly addressed and ensure effective project management procedures are in place.

Participants considered some of the best practices below:

1. Limit the size of the team managing the overall transaction. One general counsel thought a team of seven was the right maximum size, anymore and it becomes unwieldy.

2. Conduct a full risk assessment of target companies and their record of compliance to prevent and prepare for anti-corruption enforcements. One company engages independent advisers for this purpose who are able to coordinate the effort across borders.

3. Plan for and implement comprehensive post-closing compliance measures such as incorporating the target into internal controls, compliance programs, training and audits.

4. Develop standard processes for M&A transactions, but allow for flexibility to adapt to specific situations and jurisdictions. Most Summit participants rely on such processes to varying degrees of success, but acknowledge the need for better organization on the part of both in-house and external counsel.

5. Review previous M&A deals to identify best practices and improvements. One panel member, as a matter of policy, reviews previous deals over a two-year period. Once a standard process is deemed effective, it is adopted as a template for future matters.

6. Support standard processes by having clear checklists on what needs to be done, by when and by whom.

7. Hold a kick-off meeting with internal stakeholders and external advisors to discuss the deal rationale and goals, predict legal pitfalls, manage expectations and set a schedule for progress checks.

8. Assign a project manager to the operation, which may be a member of the legal team but need not be. Ensure the project manager is an excellent influencer whether dealing with management, external counsel, regulators or the rest of the team.

9. Do not over-engineer the project management approach, but, as one participant put it, keep it "stupidly user-friendly." The focus should not be on the tools or technology, but on the methodology – communication, deadlines, budgets and collaboration.

10. For major cross-border deals, participants tended to agree that it is best to have one external law firm to coordinate with local counsel and take overall responsibility for deadlines and quality control. If done effectively, this coordination role can help avoid duplication of work and unnecessary mistakes in the timing of filings and communications.

11. Ensure legal experts are involved in the process early on to avoid pitfalls such as triggering regulatory scrutiny from poor draft documentation or overlooking liabilities and compliance issues that may adversely impact negotiations.

IV. Post-Merger Implementation

Finally, keeping a view on post-merger integration during the negotiations, including preparing detailed plans for implementation and following through on execution, is crucial to guarantee that the acquisitions deliver value. As one panelist insightfully shared, a material challenge is to ensure that extending the acquirer's corporate polices and standards to the newly acquired target does not "saw off the branch the new company is sitting on." In other words, while regulators may wish a company to impose their corporate standards, general counsel must ensure it is done in a way that does not destroy the value that attracted the company to the target acquisition in the first place.

Summit participants found the following best practices helpful for post-merger integration:

1. Learn from the past. One general counsel felt that spending four hours to identify what worked and what did not after a deal is complete could save the company weeks of time on the next merger.
2. Have a post-merger integration template which can be tailored to each particular transaction.
3. Set up a project management office (PMO) or team which either leads the deal or supports in-house lawyers to manage the deal. The examples given were of centralized functions looking after integration issues including branding, marketing, operations, legal and compliance.
4. Set up a 100-day plan for integration. One company's example was to put in place a plan to "transfer the culture or DNA to the new company" by focusing on "key metrics (sales, costs, etc.) that make it a good deal."
5. Undertake a full and reasoned assessment of the target's law firms by involving the target company's legal team before making any decisions about which trusted advisors to stop using.
6. Address retention and other career related concerns of the target company's legal team early on in order to maintain institutional knowledge and morale as well as be able to quickly shift focus to integration priorities.

Industry consolidation can be seen in the unprecedented size and number of mergers taking place in various sectors, meaning M&A transactions are encompassing a very large number of jurisdictions at a time when regulators around the world as well as shareholders are increasingly more active.

Conclusion

It took eight years for the M&A global marketplace to return to pre-crisis levels. However, this return is to a very different market than previously experienced, requiring the role of the general counsel and the in-house legal team continually to adapt and innovate. Industry consolidation can be seen in the unprecedented size and number of mergers taking place in various sectors, meaning M&A transactions are encompassing a very large number of jurisdictions at a time when regulators around the world as well as shareholders are increasingly more active. In response to a more difficult risk environment, major corporations have expanded in-house legal capabilities and are finding smarter ways to work with internal and external stakeholders to add value to M&A deals.

The Lex Mundi Summit discussions revealed four key disciplines and a number of related best practices that general counsel and their legal departments are developing to support corporate strategy: relationship management, communications and influencing, process and project management and post-merger integration. By fostering these skill sets, general counsel are better able to manage the growing demands upon the legal function, identify more effective ways to deliver quality advice to the business and articulate compellingly their value across the organization.

Global M&A Landscape – Assessing and Avoiding Anti-Corruption Risk

A distinctive aspect of the 'new normal' environment in which M&A activity has returned to pre-crisis levels is the degree of attention acquiring companies must now devote to the anti-corruption compliance of target companies.

Not only has there been a dramatic increase in the number of anti-corruption cases and the size of penalties imposed in the last decade, but the exposure to liability can extend beyond the target company itself. An especially large area of vulnerability is third-party activity, which has given rise to at least ninety percent of FCPA violations since 2010. The purchase of a company with corruption problems can lead to a range of issues, including financial penalties, reputational damage, suspension and debarment, civil lawsuits and loss of investment value. To underscore the overall severity of enforcement risk, sentences of up to fifteen years have been imposed on senior executives for violations of FCPA.

Nearly forty years ago the United States was the only country to have a law against foreign bribery. Today more than forty countries including China, Brazil, Mexico and Russia have some measure of anti-corruption laws. Furthermore there are numerous international conventions requiring signatories to enact foreign bribery legislation, including the OECD Anti-Bribery Convention and the UN Convention Against Corruption. Like the UK Bribery Act, the FCPA has ramifications outside its home jurisdiction putting foreign companies at significant risk. Three-fourths of the top twenty-five penalties recently imposed under the FCPA have applied to non-US companies, and eighty percent of the top ten largest FCPA penalties in history involve non-U.S. companies.

Acquiring companies can face successor liability and future liability.

As the seminal example of an anti-corruption law with broad extra-territorial reach, the FCPA underscores the importance of companies properly assessing and mitigating risks when undertaking cross-border mergers and acquisitions. Acquiring companies can face successor liability and future liability. The acquiring company may be liable for violations committed pre-acquisition, even if there is no evidence of knowledge of, or involvement in, the prior improper activity. Future liability can be incurred when improper practices, if undiscovered, do not cease post acquisition. The "corrupt" record of the target company becomes that of the acquirer. For example, an acquiring company can find itself in violation if the US Department of Justice (DOJ) can prove a mere "awareness of a high probability" of corruption by a third party and/or an intent to bribe, even if actual payment did not change hands.

What practices are deemed effective during due diligence? In addition to general target information (sector, jurisdictions, clients, ownership, directors), companies should inquire about the following areas of business conduct, among others: criminal, civil and regulatory history; government contacts; anti-corruption programs and internal controls; accounting verification; past issues; and third party involvement. Additional measures should include document requests, interviews with key personnel, site visits, independent research and testing of books and records.

However, as addressed earlier in this report, the above due diligence efforts can be complicated in cross-border situations, e.g. when target companies are based in emerging market jurisdictions where compliance procedures and policies are not standard or where there is a lack of management sophistication. As for post-closing integration, obvious practices include prompt training on the acquiring company's policies as well as remedial measures to address any issues identified during due diligence. Other mitigating steps acquiring companies should take include obtaining anti-corruption representations and warranties and/or indemnification provisions from the target company.

As enforcement trends demonstrate, cross-border mergers and acquisitions depend increasingly on thorough anti-corruption compliance, including appropriate due diligence and effective post-closing integration plans.

In the end, regulators do want good companies to buy troubled companies and fix them. As a result, companies should not shy away from a deal just because the target company may have had problems in the past. Nevertheless, companies should proceed with a concrete plan in place that is implemented as soon as practicable. That plan should include a robust post-acquisition compliance integration plan (e.g., implementing policies and procedures, providing training, require certification, performing a

risk assessment, and testing with internal audit). This will help establish a compelling compliance narrative so that if there ever is an issue that comes to the attention of regulators, it will be clear that it was taken seriously, integration was pursued diligently, and all problems were addressed expeditiously and effectively. Doing this will provide important insurance against the risks posed by cross-border M&A transaction.

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Additional Resources

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M&A Legal Services Integration Checklist

This M&A legal services integration checklist is intended to assist you in streamlining the integration process with a target company that has operations in multiple jurisdictions. These questions identify high level information and issues that should be addressed at the onset of every M&A transaction conducted by your company. It is recommended that you review the responses with both your internal and external M&A deal team members and identify associated action steps.

Country:

Respondent Name: **Email:**

Internal Legal Support

- Do you have any in-house lawyers in your legal entity? ☐ Yes ☐ No
- If you do not have in-house lawyers, who do you call for legal services?

- Do you have contract managers or anyone performing a comparable function? ☐ Yes ☐ No
  (i.e. someone in your legal entity who reviews contracts)
- If there are internal lawyers, where do they report to (functionally)?

- If there are internal lawyers, please confirm if they are moving over as part of the transaction. ☐ Yes ☐ No
- What other areas or functions are part of the legal function?

- If there is no lawyer in your legal entity, who provides **internal** legal support to your region or country?

- Where are the members of the [*Target*] legal team for your region or country located?

- What type of legal support is provided by the [*Target*] legal team to the business internally?

- If a new lawsuit is filed against your legal entity, who do you communicate with and what action steps are taken?

- Do you have a corporate allocation for the use of [*Target*] legal team? ☐ Yes ☐ No

- Please provide an organizational chart for anyone who provides a legal function that is transferring in the deal or, if not transferring, the position that would be left open.

External Legal Support

- Please provide a list and primary contact information for any outside legal firm in your country/region.

- What type of legal support is provided by each law firm?

- Who manages the law firms? *(who is responsible for directing them and paying their bills)*

- Is there a budget for legal spend in your legal entity? ☐ Yes ☐ No
- In general, are legal fees established at hourly rates, fixed fees or both? ☐ Hourly ☐ Fixed ☐ Both
- How do you process payment of legal fees?

- Who decides what law firms to use?

Distribution and Contract Legal Support

- Do you have pre-approved distribution contract templates? ☐ Yes ☐ No
- Do you have pre-approved commercial contract templates? ☐ Yes ☐ No
- Do you have pre-approved purchasing contract templates? ☐ Yes ☐ No
- For any question answered yes above, please provide copies.
- Who is responsible for reviewing contracts?

- Do you have a process for appointment of distributors? ☐ Yes ☐ No
- What is the contract review process that you follow?

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- Does your legal entity do contracts with the government? ☐ Yes ☐ No
  If yes, are there registration requirements with any authority, portal or service in order to bid for government contracts and whom within your legal entity is authorized or registered to do so? Please also indicate whether they are transferring in the deal.

Legal Entity Corporate Matters

- Who manages the corporate books for the legal entity?
- Where are the corporate books for the legal entity kept?
- Who manages the powers of attorney and board of directors meeting minutes for the legal entity?
- If a new power of attorney is needed, who approves issuing a new power of attorney? Must the new power of attorney be registered or filed with any authority, regulatory body or court in your legal entity's jurisdiction?

Labor and Employment

- Who provides labor and employment support for your legal entity?

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