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Expert advice on carrying out due diligence

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As we begin to embrace the prospects of a new year, a lot of businessmen will be thinking about making the decision to purchase their competitors before their competitors decide to purchase them.

If this sounds like you, then congratulations! You have the idea and the courage to move forward. You've done your research and you know what needs to be acquired. Now you need to put your plans into action. The first step in a successful acquisition is carrying out due diligence check. So, you need lawyers.

Pre-deal checks are often time-consuming, laborious and costly, but it is the only way to avoid nasty surprises.

Buyers need to carry out a thorough examination of the company accounts, legal issues and also the compliance procedures. Companies need to learn what kind of liabilities they are taking on before the deal is done.

The aim of the due diligence process is always the same: to avoid nasty surprises that the target is liable to pay environmental fines, labour compensation agreements, late tax bills and other charges derived from mistakes or illegal acts perpetrated by the previous owners.

The due diligence check should be carried out by lawyers specialising in the field of M&A. There is a saying : *“if you think it is expensive to hire a professional, wait until you hire an amateur”*.

Typically, the first problem lawyers face when they start the due diligence examination is the lack of robust data from the seller. The sellers often do not want to disclose too much information in order to avoid additional questions from buyers.

Sometimes it is a part of the sellers' tactics, sometimes it could be an attempt to hide problems. Lawyers must be tough on this point because collecting all documents is of paramount importance. Lawyers must be sure that they have robust data on a target company and that they can fully analyse the situation from the legal and tax point of view. Remember that there is no "one size fits all" answer and lawyers must be really flexible.

On a deeper level, buyers should also take a closer look at the programmes in place to deal with bribery, corruption, human rights abuses and many other governance issues not directly linked to the commercial side of the operation. Companies based in the United States, for example, will always have in mind that they work under Foreign Corrupt Practices Act regulations, which enable authorities to pursue alleged breaches of American law anywhere in the world. UK companies at home and abroad, and overseas businesses operating in the UK, face similar requirements and stringent penalties under the 2010 Bribery Act.

But the preoccupation with checking everything is justified not only from a legal point of view, as a strong element of reputational risk also comes into play. Reputation must be protected at all times so buyers need to be aware that undisclosed data can be really harmful.

As our in-house legal and tax teams are busy assisting clients in various acquisitions, I must confess that carrying out a good and effective due diligence is not an easy task, especially in Poland where checking compliance programmes requires often going back to the era before the fall of communism. But there is no other way to draft a strong and waterproof acquisition contract. So, go ahead!

