

The purpose of due diligence

Criminal lawyers are usually consulted after an investment strategy has been implemented and frequently the request is to make an in-depth analysis concerning several profiles of a recently-concluded acquisition (post-acquisition due diligence).

This sometimes happens when the Judicial Authorities have already issued precautionary measures - with negative consequences for the Client.

In light of my professional experience, I can say that in several cases it would have been possible to intervene in advance, avoiding unpleasant surprises after the operation was closed.

Very often, a criminal lawyer can be decisive before the investment, because he can provide a preventive evaluation of criminal risk inherent in the specific business operation about to be concluded.



Criminal risk factors

- **Risk associated with the characteristics of the other contracting party:** it is very important to know if the contracting party is subject to criminal risk. In particular, its history must be evaluated and it is essential to know if it is really as it appears or, rather, if it is a fictitious screen (for example: one of the contracting parties might be affected by anti-mafia prevention measures or involved in criminal proceedings for money-laundering as well as use of money, goods or utilities of unlawful origin; the other contracting party might simply be a figurehead or may have illicit connections with subjects considered socially dangerous or in possession of criminal records).

- **The risk of bankruptcy:** it is essential to know the “state of health” of a company. Even an apparently healthy company might present excessive debt levels (hidden within the creases of the balance sheet) or run the risk of over-indebtedness, defaulting on payments and bankruptcy (for example: the former administrators may have forged the balance sheets to hide misappropriations and/or

dissipation of corporate assets). Moreover, it is crucial to avoid an apparently inexpensive business operation becoming a ‘boomerang’ for the purchaser: sometimes it is not realised that the transfer of a business unit for a lower price than the market value can represent bankruptcy fraud.

- **Risk of confiscation:** a precautionary seizure of the company’s assets constitutes an alarm that must be taken into serious consideration, especially if it is aimed at the confiscation of goods. According to the Italian criminal law system, in cases where direct proceeds of crime cannot be seized, the State may confiscate an amount of money or other property whose value corresponds to the proceeds of the same crime (art. 19 d.lgs. no. 231/2001; art. 322 *ter* and 640 *quater* c.p.; art. 1, comma 143, l. no. 244/2007; art. 11 L. no. 146/2006). Sometimes, a company can assume a third party position relative to the facts. But even in this case, risk of confiscation of the company’s assets cannot be disregarded (for example, if it represents the proceeds of crime committed by others). That may happen if the company is not able to demonstrate the following: non-involvement in the crime; lack of awareness with regard to the proceeds of the crime; and good faith, which must be interpreted as lack of negligence from which the availability of the asset is derived.

- **Risk associated with authorizations:** it is not always easy to establish whether a business activity is totally licit, especially when the company is subject to an authorization system: in this case, knowing if and how the permit has been issued is essential (for example: the authorization for a wind farm might be the outcome of a bribe; a plant might be installed on

a plot of land subject to environmental or landscape restrictions or where building is not allowed). Very often an anomaly in the authorization procedure is sufficient to alert the Judicial Authority, leading to an investigation to establish if collusion with public officials has taken place.



- **Risk associated with management's behaviour:** A company subject to an acquisition may have to deal with significant consequences because of illicit behaviour carried out by former administrators. The most evident risk is linked to **private-to-private corruption** (for example, the administrators of Company A - subject to an acquisition - may have bribed the administrators of Company B to achieve a competitive advantage). The range of crimes from which a "231" responsibility may arise is quite widespread and includes several crimes: cyber-crimes; unlawful processing of personal data; organized crime; undue pressure to give or promise to give money or other benefits; forgery in various forms; crimes against industry and commerce; market abuses; violations of intellectual property rights; employment of illegal workers, and so on. In these cases, the seriousness of the alleged facts must be evaluated; moreover it must be established if the company adopted suitable organizational models, in order to exclude the entity's liability before the crime has been committed (and it must also be verified if individual employers or

administrators have eluded the model, acting in their own interest or in the interests of a third party).

- **Risks associated with tax law violations:** the problems related to tax law violations are one of the most important types of risk affecting the purchaser, especially if a serious allegation of tax law violation has been raised against the company acquired. Other times, even where is a lack of allegation raised by the Finance Police, it is essential to establish if the systems applied by the company, in order to manage and reduce fiscal costs, are licit and if the same systems entail the risk of criminal prosecution. For example, registering the company in a low-taxation country may be considered as fraud against the Treasury, when business is substantially carried out in our country and the registered office abroad is fictitious. It must also be taken into account that in the last few years the incidence of tax fraud on behalf of organized crime (increased by its international character) is becoming more frequent: in this way the Judicial Authority tries to bypass the legal vacuum of the "231" through the picklock of organized crime.

- **Risk associated with specific business areas:** it is essential to know if the contracting party is operating in areas of the Judicial Authority's interest, i.e. if the Prosecutor's Office has already started preliminary investigations into the same business activity (for example, should the company operate in the energy sector, it must be verified if the Judicial Authority has already opened an investigation in matter of illicit granting of subsidies for solar panels or wind farms).

- **"Geographical risks":** in other words, risks associated with the specific area in which the company carries out its business. These risks may arise from the heavy presence of organized crime in a given area, or from the existence of corruptive systems able to sway decision-making processes (authorizations, licenses, permits); such risks may also derive from the Public Administration's inefficiency or from other social phenomena which are worth taking into account.

- **Environmental risks:** it is indispensable to know if the company under consideration for acquisition respects environmental laws and if, in the past, crimes regarding waste-dumping or pollution have been committed (for example, the Client may be ignorant that the company has contaminated the area, causing the pollution of soil and groundwater; moreover, former administrators may have illegally dumped hazardous waste; the contracting party may be ignorant of the fact that, under the soil where the plant is located, there could be a toxic waste dump).

- **Risks associated with health and safety in the workplace:** the company may be not up-to-date with laws regulating health and safety in the workplace and, in the past, serious workplace accidents may have occurred (in fact, liability, pursuant to Legislative Decree no. 231/2001, can arise from crimes of involuntary injury and manslaughter).

- **Financial risks associated with the specific kind of operation concluded in Italy:** it is essential to know if, according to our juridical system, the procedures used to make specific kinds of investment may be considered licit (for example, the Client may finance several Italian companies from a foreign account without knowing that he's committing the crime of illegal financial activities; the Purchaser may omit to communicate to the Supervisory Authority the required information; the Client may not be aware of committing the crime of insider trading or procuring information for the Press, thereby giving rise to the offence of market abuse; moreover, the investor may risk committing forgery when he shows incomplete prospectuses for offering securities to the public or for the admission to official listing on regulated markets or for public purchases or share exchange offers).



The apparent lack of risk signals is not always decisive

In Italy the phase of preliminary investigations is often carried out in secret and can last for years.

All this time, the person under suspicion may not receive any notification about this. It means that the company may not know that it is under investigation by the Prosecutor's Office. For the purchaser the lack of awareness concerning this circumstance is economically damaging, because the latter may have to deal with the consequences of the actions of others. For these reasons, it is essential to rely on experts in the collection, selection and analysis of complex information, often heterogeneous, but able to disclose in advance crimes that have been committed.

What is the preventive criminal due diligence ?

Risk assessment entails several activities which include: consultation of the documents relating to business accounts or tax arrangements; interviews with management; analysis of the comments from independent auditors; meetings with the seller's external consultants; examining those due diligence reports already in existence; discussions and in-depth analysis with the legal team of the company subject to acquisition; and preventive meetings with the Judicial Authority. Subsequent to the collection of basic information on the company and after having checked the company's shareholding structure, the Law Firm focuses its attention on the criminal proceedings pending, and on the orders of seizure, analyzing the consequences for that same company and also for the entire group to which the company belongs. The examination of the documents and of the reports is essential also in order to reveal violations of criminal law, that have not yet come to light.



The screening of "sensitive" areas

Because of the abovementioned reasons, it is crucial to make a full screening of the company subject to acquisition, taking into account the following issues:

- **Accounting** (clarity of balance sheets; real economic, patrimonial and financial situation; possible symptoms of liquidity crisis; possible omissions in the communication of information required by the law concerning the situation of the company or the entire group; analysis of possible excess with regard to forgery relevance indices).
- **Management** (suitability of internal procedures; examination of contracts and supervision of the adequacy of the principal purchase agreements; situation of the company's patrimony; recognition of conflicts of interest regarding former administrators; identifying suspicious operations, and misappropriations and dissipations; evaluation of insolvency risk);

- *latu sensu* **Legal** (analysis concerning the level of the company's compliance; examination of relationships with the Public Administration; risks associated with the assets, products and distribution of the company; examination of commercial relationships with customers and suppliers in order to identify incorrect procedures; profiles of risk in relationships with competitors; analysis of IT procedures and grades of privacy. In addition, due diligence regarding health and safety in the workplace must be taken particularly into account);

- **Financial** (adequacy of principal investment operations; prevention of laundering phenomena);

- **Fiscal** (scrutiny of tax issues that could cause the end of negotiations)

- **Environmental** (recognition of crimes related to pollution and waste). Environmental due diligence is extremely useful in cases of acquisition or other investment operations, because it can isolate risks pertaining to previous activities. It has several entries: examination of environmental documents and respecting relevant sectoral rules; recognition of possible environmental costs, and consequences of possible criminal offences.

The results of due diligence

After mapping sensitive areas, with the support of sectoral experts, the Firm provides the Client with an objective evaluation of the investment risk, underlining the strengths and weaknesses of the company, and advising possible initiatives in order to contain corporate criminal responsibility issues.

On the basis of the information acquired in the course of the audit and in light of the most recent law cases, the criminal lawyer expresses his point of view on the reliability and legality of acquisition or other investment operations.



Conclusions

Consultancy allows the Client to steer - from this point on - their own choices in a much more informed way: confirming the planned operation; obtaining from the counterparty a reduction on the price; deciding not to close a contract or to ask for a resolution or even to report fraud in negotiations.

The expertise of the Bongiorno Law Firm

The Firm, founded by Attorney Giulia Bongiorno, is particularly focused on rendering advice in matters of preventive criminal law and white collar crime. For this reason, the legal team is able to assist major national and international groups, providing a task force of experienced attorneys, qualified in all branches of corporate criminal law (corporate crime, tax crime, bankruptcy, urban planning crime, legal offences in the energy sector, intellectual privacy rights, and so on), as well as numerous publications to its credit.

The team of criminal lawyers works alongside the best technical consultants to be found in the market, experts in key areas of preventive analysis.

The firm provides assistance in all stages aimed at the acquisition of new assets or at entry in the reference market (preliminary assessment, negotiations, corporate restructuring, relations with the Supervisory Authority and Judicial Offices), ensuring maximum privacy and undisputed professionalism.