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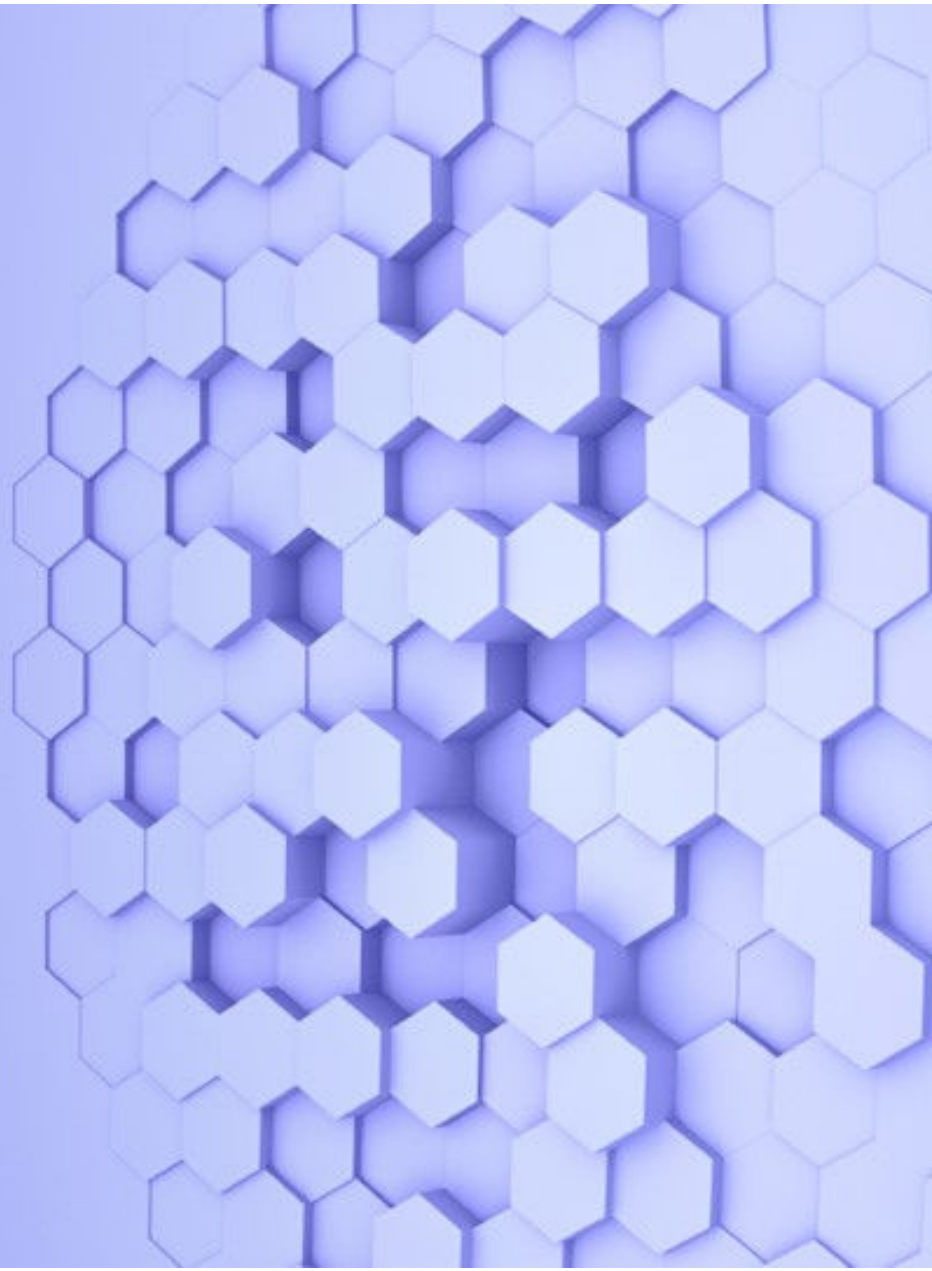

Managing compliance risks in the transactional context

Wednesday 1 May 2024

Speakers

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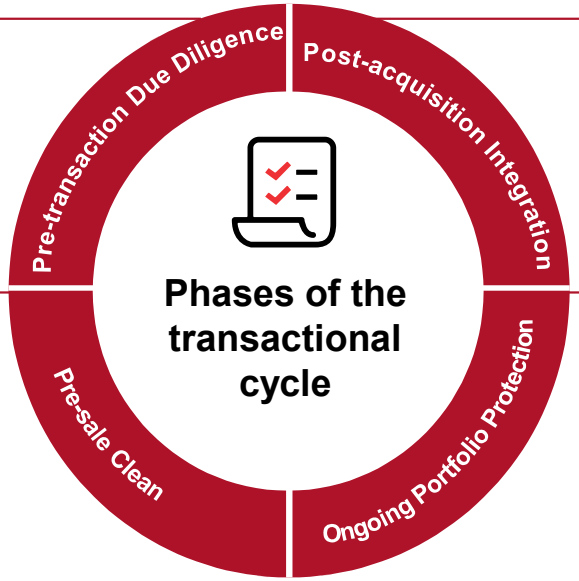
01 Compliance in the transaction lifecycle

Compliance in the transaction lifecycle

Mergers, acquisitions, sales and joint ventures are integral to many companies' growth or consolidation strategies. However, with all of the potential upside of doing deals, there are also risks arising from increased enforcement, the broadening of the jurisdictional reach of compliance laws, as well as the increasingly global nature of investigations and litigation risks. It is important to conduct effective compliance due diligence (DD) in the context of M&A/JV transactions, efficiently assessing risks to avoid acquiring liability. Between transactions you need to consider the clean integration of the target, check for compliance risks in your existing business portfolio and prepare business units for a clean and efficient future sale.

1. Risk Assessment DD: Pre-acquisition due diligence to help companies devise appropriate and proportionate strategies to best mitigate any compliance risks identified.



2. Post-acquisition Integration: Deeper but targeted checks on the acquired business, building off the pre-acquisition DD, to identify and resolve any compliance issues. Integration of the target into the acquirer's existing compliance programme, to ensure that future business operations comply fully with applicable laws and regulations.

4. Pre-sale Screen and Clean: Prepare for the sale process by performing a health check of the relevant business unit, to help avoid unwanted due diligence surprises that could jeopardise your transaction, impact the sale price, or trigger third party reports to authorities.

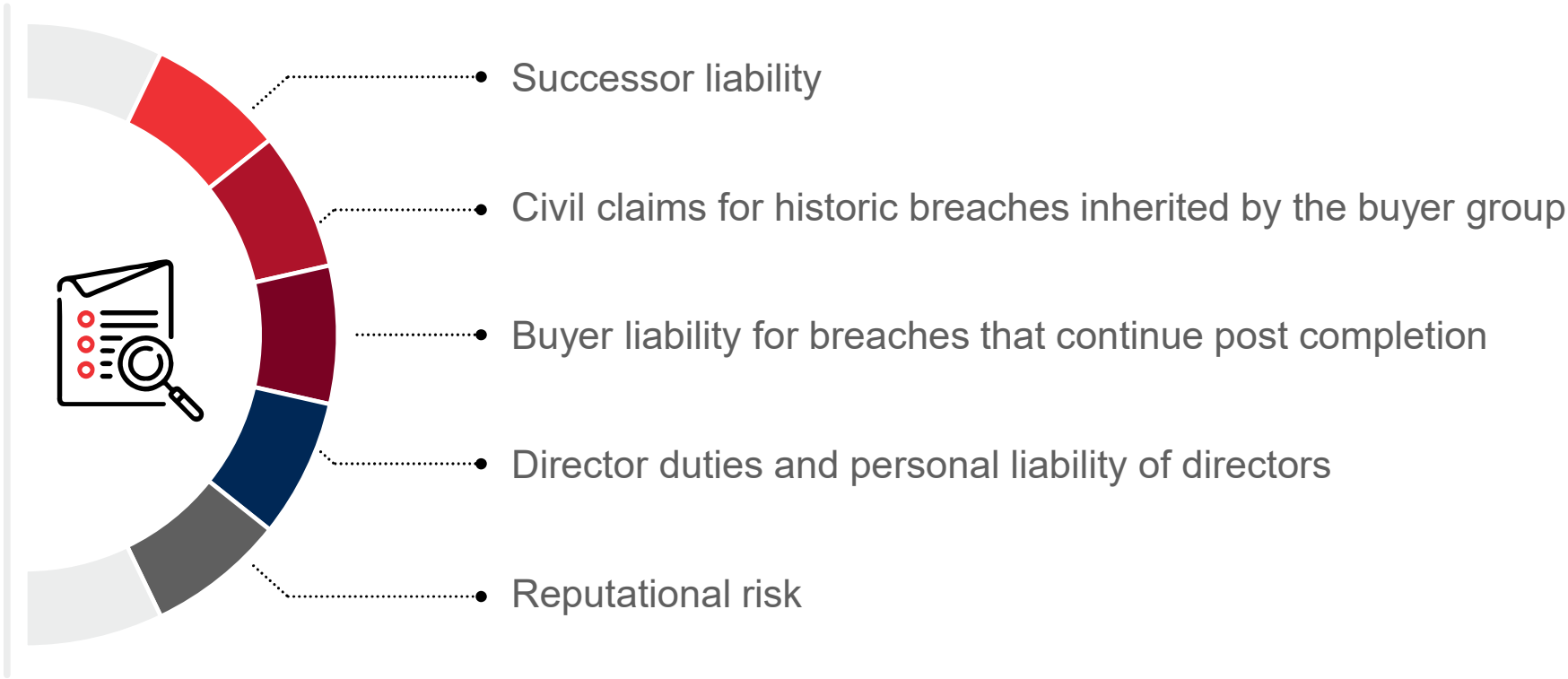
3. Compliance Health Checks and Regulator Defence: Whether a multinational conglomerate or an equity investor with a broad portfolio: identify risk areas, target audits and clean up any compliance concerns. May entail handling internal investigations or responding to a crisis and defending against external investigations by relevant authorities (including responding to dawn raids).

Non-compliance increasingly leads to damaging practical consequences, such as:

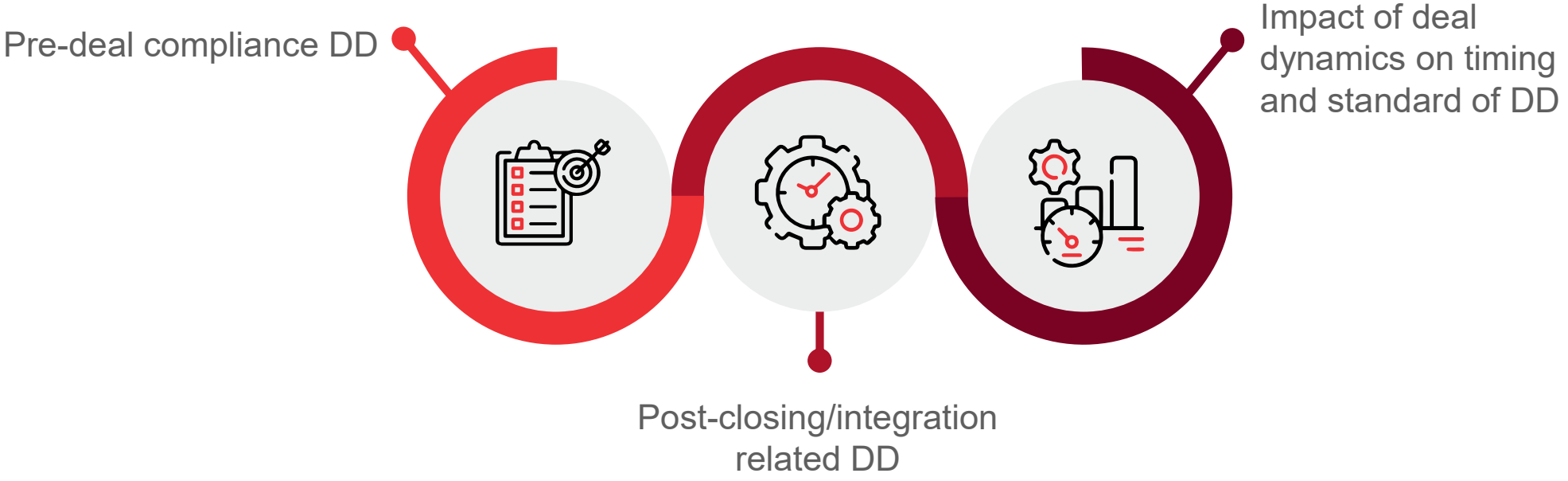
- Abandoned transactions;
- Wasted management time;
- Costly and lengthy investigations, and fines;
- Harm to relationships with business partners;
- Limitations on business activities; and
- Reputational damage.

02 The M&A lawyer's perspective

Why does compliance investigation matter in M&A transactions?



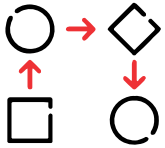
What does good practice compliance DD in M&A look like?



Contractual solutions

So, what are the solutions if a compliance issue is raised during the diligence process?

Call off the deal



Restructure deal perimeter

Remediation of issues

Warranties

Indemnities

W&I insurance

03 Successor and parental liability

EU competition law - infringements by subsidiaries

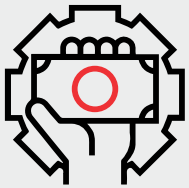
Parental liability

- Parent will be held jointly and severally liable for its subsidiary if it exercises "decisive influence" over it (influence over commercial behaviour, economic, organisational and legal links) – sufficient that influence is restricted to high level strategy
- Where parent holds all or almost all of the capital in a subsidiary, there is a rebuttable presumption that it exercises decisive influence
- It is for the 100% controlling entity to rebut the presumption by showing that subsidiary can act with complete operational and financial autonomy (very difficult)
- Minority stake with de facto control or board representation/strategic veto rights = decisive influence
- Parent may be liable though unaware of infringement

Successor liability

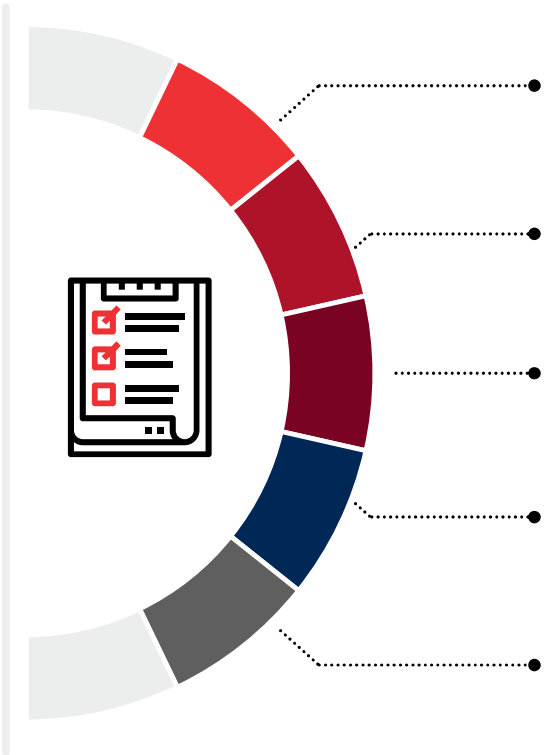
- Ex-parent is liable for the breaches that occurred while it was the owner of the infringing subsidiary
- Buyer of shares/assets can be held liable for pre-acquisition violations if there is no other legal entity to be fined (e.g., where pre-existing legal owner of the business has been dissolved by the seller)

Example: Goldman Sachs



- 2014: Goldman Sachs held jointly and severally liable for EUR 37.3 million fine imposed on ex-subsidiary owned by its PE arm during the period 2005-2009 and which participated in the high voltage power cable cartel (Goldman Sachs had since sold its interest)
- Fine upheld by EU Court of Justice in 2021: GS had exercised decisive control over ex-subsidiary through voting rights (100% for two years) and board representation (ability to revoke members). Court rejected argument that GS = pure financial investor
- GS held the investment for only 4 years, including one year where its equity stake was less than 50%, and did not even know of the existence of the cartel prior to the EC investigation – yet still held liable
- Financial investors with significant stakes in portfolio companies may be exposed to antitrust liability if that portfolio is later found to have violated competition law during the investor's period of ownership:
  - Liability presumed (i) if the investor owns all, or nearly all, the shares in the investment company or (ii) if it exercises all the voting rights, even if it does not hold all the share capital – very difficult to rebut
  - Liability can also arise where the investor exercises decisive influence over the portfolio – Court confirmed that the Commission could rely on factors including the power to appoint board members or propose their revocation, to call shareholders' meetings, the role played in the boards of directors and strategic committee, and the provision of regular updates and reports on the business
  - Liability can arise even if shareholding is less than 50%; the shareholding was only for part of the cartel period; or the financial investor did not participate in, or even know about the infringement

DOJ guidance – successor liability



- Successor company assumes predecessor company liabilities
- If predecessor was not subject to applicable legislation, no retroactive liability – can be prospective
- DOJ/SEC have declined to take action in M&A context where companies voluntarily disclosed and promptly remediated
- DOJ/SEC have pursued enforcement actions in cases involving egregious circumstances where the successor company directly participated in violations or failed to stop the misconduct post-acquisition
- Thorough due diligence can avoid a problematic and costly merger or acquisition

M&A is a key factor in UK enforcement

A number of the SFO's UKBA enforcement cases involved M&A-related issues:

- Deferred Prosecution Agreements arising from M&A activity
  - Standard Bank
  - Sarclad
  - Amec Foster Wheeler
- The UKBA cases to date relating to M&A underline the importance of thorough M&A due diligence, and effective contractual protections from a compliance perspective

SFO serious fraud office

Recent cases arising from M&A acquisitions

Novartis-Alcon (June 2020)

- Alcon Vietnam bribed providers to increase sales of Alcon's intraocular lenses. The payments continued after Alcon merged with Novartis and became an indirect wholly-owned subsidiary.
- Novartis and its local subsidiaries (including Alcon) made improper payments to public and private healthcare providers in Greece, Vietnam and South Korea so they would use Novartis-branded pharmaceutical products.
- SEC charged Novartis with violating the FCPA. Novartis agreed to disgorge $92.3 million plus prejudgment interest of $20.5 million.
- Novartis Hellas paid a criminal penalty of $225 million and entered a three-year DPA with the DOJ. Alcon. paid a separate criminal penalty of $8.9 million and also entered into a DPA.
- Note that for this case, even after the merger and with the knowledge of Novartis, the bribery continued.

Amec Foster-Wheeler (June 2021)

- 2012-2014: Amec Foster Wheeler's UK subsidiary, Foster Wheeler Energy Limited, made improper payments to Brazilian officials in connection with its efforts to win the contract and establish a business presence in Brazil. The bribes were paid through third party agents, including one agent who failed Amec Foster Wheeler's due diligence process, but was allowed to continue working "unofficially" on the project.
- 2017: Energy services giant John Wood Group PLC took over Amec Foster Wheeler.
- Amec Foster Wheeler (now owned by the Wood group) agreed with the DOJ and SEC to pay about $41 million in penalties and disgorgement to resolve FCPA offenses in Brazil.

Safran (December 2022)

- 1999-2015: prior to Safran's acquisition, Monogram and its German subsidiary EVAC GmbH paid millions of dollars to a China-based business consultant who was a close relative of a then-senior Chinese government official to obtain train lavatory contracts with the Chinese government.
- The DOJ **declined prosecution**, citing Safran's timely and voluntary self-disclosure of the misconduct, its full and proactive cooperation and remediation, including terminating and disciplining employees involved, and efforts to enhance its anti-corruption training and compliance program.
- DOJ found the misconduct at Monogram and EVAC had ceased before Safran acquired them, and that Safran identified the misconduct "through post-acquisition due diligence and disclosed it to US authorities."
- Safran agreed to disgorge $17.9 million in profits.

04 Authority expectations and incentives

Essential elements of compliance: Expectations of competition regulators

EU Commission's Four Key Elements for Achieving Compliance	CMA's Core Principles of Competition Compliance	Canadian Competition Bureau Essential Components	US DoJ's' 9 Elements for Evaluating Corporate Compliance Programs in Criminal Antitrust Investigations
A clear strategy	Commitment to compliance (from the top down)	Involvement and support of management	Design and comprehensiveness of the program
Formal staff engagement	Risk identification	Risk Assessment	Culture of compliance within the company
Constant update	Risk assessment	Development of policies and procedures	Responsibility for, and resources dedicated to, antitrust compliance
Monitoring and auditing	Risk mitigation	Training and education	Antitrust risk assessment techniques
	Review	Monitoring, auditing and reporting mechanisms	Compliance training and communication to employees
		Disciplinary procedures and incentives	Monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program
		Evaluation of the effectiveness of the program on a regular basis	Reporting mechanisms
			Compliance incentives and discipline
			Remediation methods

DOJ Policy Updates

Clarity on Cooperation and Self-Reporting Expectations

- New Corporate Enforcement Policy ("CEP") applies to all Criminal Division.
- Absent aggravating circumstances, a company can earn a presumption of a declination if it:
  - Voluntarily self-discloses misconduct;
  - Fully cooperates with an investigation;
  - Disgorges ill-gotten profits; and
  - Timely and appropriately remediates.
- Even with aggravating circumstances, a company can obtain a declination if:
  - Self-disclosure made immediately upon learning of the allegation;
  - Effective compliance program and accounting controls enabled discovery of the misconduct; and
  - Extraordinary cooperation and remediation.

If a company self-discloses, cooperates, and remediates, but doesn't receive a declination, it can obtain between a 50%-75% discount off the low end of the guideline range.

DOJ Safe Harbor Policy

October 4, 2023: Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions:

- To qualify for the Safe Harbor, companies must disclose misconduct discovered at the acquired entity within six months from the date of closing.
- Companies will then have a baseline of one year from the date of closing to fully remediate the misconduct.
- Any misconduct disclosed under the Safe Harbor Policy will not be factored into future recidivist analysis for the acquiring company.
- Failure to conduct effective diligence or self-disclose misconduct at an acquired entity will subject buyer to full successor liability for that misconduct under the law.

Antitrust immunity / leniency regimes

Key trigger of investigations but authorities also have other tools

Extensive cooperation obligations

Can include criminal and administrative immunity

Policy mechanism designed to incentivise self-reporting of serious cartel violations

Originated in the US, now employed by all major competition law jurisdictions

Typically full immunity from fines for information leading to an investigation, leniency reductions for information representing significant added value

US Leniency

Revisions to Leniency program, added new requirement for corporate applicants: **promptness**

Applicants must undertake remedial measures to "'**fully**" remediate harm

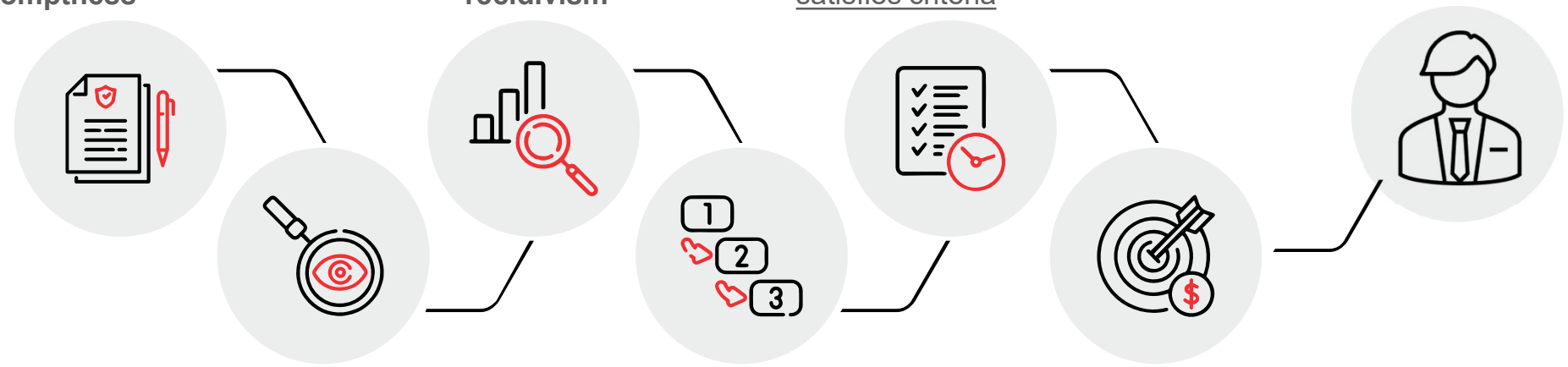
Applicants must improve the company's compliance program using "**best efforts**", and guard against "**risk of recidivism"**

Type A: Available **before** the Division has opened an investigation and not received information about the illegal activity from any other source

Type B: Available **after** the Division has opened an investigation into the illegal activity and corporate applicant satisfies criteria

Revisions Narrow Type B Protections: non-prosecution protection for directors, officers, and employees is **not** guaranteed

Division **stricter on Type B employees**, will assess "relative culpability," and must admit wrongdoing



UK Type A / B leniency

First applicant to come forward with evidence of a cartel

Type A leniency:

- Provides guaranteed corporate immunity, immunity for cooperating individuals, protection against director disqualification
- Available before CMA has started investigation, where CMA does not already have sufficient information to establish existence of the cartel and info gives the CMA sufficient basis for taking forward a credible investigation

Type B leniency:

- Provides discretionary corporate immunity/fine reduction up to 100%, discretionary immunity for some/all individuals, protection against director disqualification
- Available after CMA has started investigation, if docs/info add significant value to the CMA's investigation

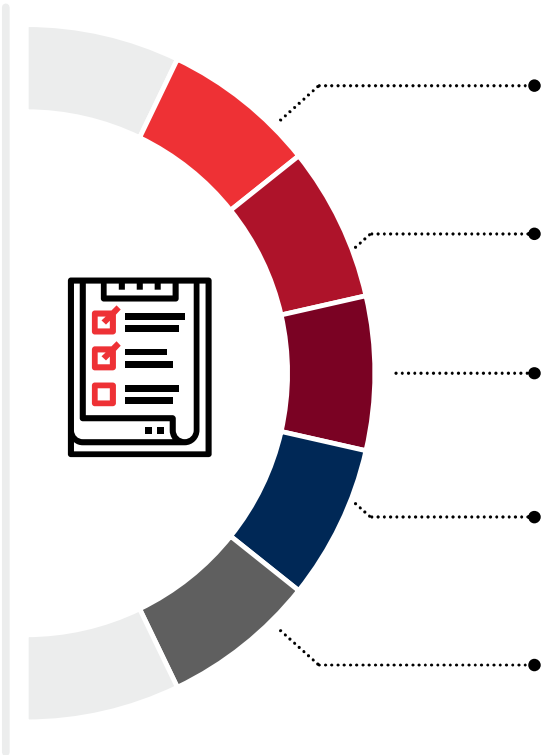
UK Type C leniency

Reductions of up to 50%

- Discretionary. May be available if a business:
  - Is not the first to come forward with information but does so before Statement of Objections, or
  - Is the first applicant but was coercer
- To qualify for a reduction, the business must provide documents / information that add significant value to the CMA's investigation
- Other benefits: discretionary immunity for specific individuals and protection from director disqualification

05 Key take-aways

Key take-aways



- Do deals with your eyes open, to mitigate exposure
- Diligence doesn’t end when you close the deal – follow up on any red flags promptly
- Post-closing, integrate the business into your compliance programme, and incorporate best practices
- Consider periodic risk assessments and healthchecks of your group / portfolio
- Pre-sale, risk assess the business you are selling. What might potential acquirers find?

Questions

Next week

Sanctions and export controls

7 – 9 May 2024

Trade policy response to geopolitical disruption – China and beyond
Tuesday 7 May, 3.00 - 4.00 pm BST | 4.00 - 5.00 pm CEST | 10.00 - 11.00 am EDT

Global strategies for handling sanctions regulators and enforcement
Wednesday 8 May, 3.00 - 4.00 pm BST | 4.00 - 5.00 pm CEST | 10.00 - 11.00 am EDT

Global sanctions and export controls update
Thursday 9 May, 3.00 - 4.30 pm BST | 4.00 - 5.30 pm CEST | 10.00 - 11.30 am EDT

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