M&A DUE DILIGENCE: ENSURING DATA RISK DOESN'T DERAIL THE DEAL

Technology has become an essential part of managing risk across high-stakes M&A

Companies in Ireland and across Europe are facing an economic climate unlike any downturn in modern history. As start-ups strategise and develop their post-Covid survival strategy, and large corporations refocus on their highest-performing functions, M&A activity is shifting to centre on strategic divestitures and mergers that will bolster business resilience. With this shift, due diligence over data risk (including IP, privacy, legal and other exposures) is becoming an increasingly critical element of strategic and informed M&A decision-making and risk mitigation.

As part of any M&A checklist, assessment of good data governance is a must, with consideration of the data in the possession of the target company, the data held by third parties and protections needed after a transaction closes. In the haste of getting a transaction over the line, companies might not be aware of privacy, security or regulatory risks. But the board maintains the expectation that counsel has suitably assessed any risks that may create problems in the future as a result of the merger or divestment. This poses a dilemma: evaluate massive volumes of information and thoroughly assess risk or skip the technical assessment so a deal's value can be achieved quickly. Balancing these expectations requires the use of advanced analytics tools designed to automate the detection of insights from large datasets.

Data risks in M&A

Data protection regulations such as GDPR, and high-profile data breaches, have increased M&A risk. In 2017, the deal value of a high-profile technology acquisition dropped by £250m+ (7 per cent of the original price) as a result of a data breach. More recently, in a prime example of the implications that can result from oversights in data due diligence, a large financial services organisation has been exposed to the potential risk of more than $800m (£624m) in fines and liabilities due to alleged GDPR violations within a firm the company recently acquired.

Data-sharing practices among target companies and their third parties present significant risk for acquiring companies. Counsel must consider variables including the granular details of the information-sharing ecosystem and whether data is being sold or traded in violation of stringent data protection laws.

IP is another area where counsel should conduct a data audit to surface any instances of improper use of IP, leakage of proprietary information or other IP-related risk. Contracts should also be vetted, to understand variables that may impact the business' long-term viability and liabilities.

Acquirers are learning that assessing data risks earlier in the deal life-cycle is crucial to containing M&A costs, preserving deal value and avoiding unexpected post-closing legal and regulatory liabilities.

Understanding and leveraging AI

AI technologies and advanced analytics have emerged to accelerate data due diligence in M&A, making it possible for counsel to fully understand and mitigate critical data risks and streamline asset acquisition under tight deadlines. Analytics tools like predictive coding can scale strategic decisions about a transaction (i.e. what data needs to be retained or re-mediated ahead of the deal) and drive faster outcomes for data inventory and review.

Recently, our team leveraged analytical review to help a client remediate corporate IP in a divestiture. Using a bespoke analytics application, the team determined the content of a massive universe of information residing on servers, laptops and other corporate applications, and ultimately remediated 1.3 million files. The strategic use of analytics enabled the team to protect corporate IP ahead of the divestiture, significantly reduce risk and move the deal forward in less than three months, all without disrupting business operations.

Strategic expertise

Technology offers tremendous potential for expediting high-stakes M&A due diligence and reducing risk, surfacing red flags that may compromise deal terms and pricing. But the tools today are not a silver bullet. Guidance from experts who can conduct robust technical examination of systems, and guide the application of analytics, is critical.

Alongside counsel's expertise, technology can provide deeper insights about data, drive efficient and informed decisions and ultimately deliver more profitable, long-term outcomes.

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