Scope of Review

1. What are the trends you see in your jurisdiction with respect to the scope of the legal due diligence review? Do you see any specific difference in the scope of due diligence review depending on the transaction structure (share or asset deal), the transaction process (structured auction process and its phases or one-to-one deal), vendor or purchaser due diligence? How are the limitations of the scope dealt with in the SPA ?

It should be noted that there are less asset deals than share deals in France. This is due to tax reasons which make asset deals less interesting from a financial point of view. However, in case of asset deals, the scope of due diligence are reduced as it will usually not cover corporate and certain tax aspects. For the remaining, the scope remains the same and our review depends on which work streams the client wants us to highlight.

In one-to-one deals, scopes of due diligence may be narrower than in structured auction process. In the first case, clients sometimes review internally certain aspects of the business together with the legal aspects linked thereto in order to avoid having too much recourse to attorneys-at-law for due diligence exercises.

Vendor due diligences used to have wider scopes than purchaser due diligence. However, this tends to change these days as clients are putting pressure on fees, in such a way that even for vendor due diligences they accept to reduce the scope to the strict minimum, even carving out whole topics to fit in the budget they have allotted to due diligences, if need be.

Such limitations of scopes impact the drafting of the SPA, as warranties needs to be drafted in general terms in order to catch all potential situations of indemnification.

2. Are there any areas of legal due diligence review which are specific to your jurisdiction or which have recently become particularly relevant generally or for certain type of target companies and industries? Is there any regulation relating to the duty of vigilance regarding the prevention of the occurrence of human rights and environmental risks?

The number of regulations linked to the prevention of the occurrence of human rights and environmental risks is increasing. In France for example, the Corporate Social Responsibility ("RSE") policy has significantly changed companies' practices.

More recently, the duty of vigilance of parent and subcontracting companies Act dated March 27th, 2017 aimed at parent and subcontracting companies set up a duty of vigilance regarding these issues towards their subcontractors, subsidiaries and suppliers in order to empower big companies and to prevent the occurrence of human rights and environmental risks. This obligation has been codified in Article L225-102-4 of the French Commercial Code which introduces an obligation to establish a system of vigilance (for companies exceeding the threshold of 5,000 employees in the company and its subsidiaries in France or 10,000 employees in the company and its subsidiaries over 2 financial years) with a reporting obligation over the company and its subsidiaries' activities and enforced through sanctions in case of noncompliance.

3. Do you see any recent trends in setting materiality threshold levels in legal due diligence review? How are materiality thresholds defined and what do they depend on?

In order to limit the costs spent on the due diligence review, the level of materiality thresholds are higher than they used to be. Clients are more and more looking for big risks. The materiality thresholds are defined with the client on a case by case basis and depend on the target's size, the activity or business volume.

4. What type of due diligence report you are more often requested to prepare red flag or full report summarizing documents reviewed? How has this process changed in your jurisdiction in the past 10 - 15 years?

10 – 15 years ago, due diligence reports were very extensive. They described the situation of the company or group of companies from a legal, tax and labour standpoint and indicated the risks when identified.

We now provide clients with red flag reports, only stating the risks identified (potential occurrence and financial consequences for the company - when possible), legal sanction, and recommended ways to remedy the risks or deal with them through the representation and warranties for example.

Not only the length has changed but also the format. Our report changed from Word documents to PowerPoint slide packs presentations summarizing in bullet points, charts or diagrams any concept which may be most easily understood in this form rather than sentences.

5. Due diligence then and now - how has the process changed in your jurisdiction in the past 10 - 15 years? In your experience, to what extent does the due diligence exercise in your jurisdiction differ materially from practices in other jurisdictions, and why?

Data rooms went from physical to virtual and interviews of the management from meetings to conference calls or video conferences. The process is more standardized therefore allowing due diligences review to be organized for group of companies having entities over different jurisdictions with the same process and the results to be obtained quicker.

6. What are some of the pitfalls to watch out fall while doing due diligence in your jurisdiction?

We do not have any particular pitfalls in France. On a general point of view, the most important difficulty is to meet to client expectations (secure the deal and raise main findings) in a very tight time frame with lower fixed fees. Tax and labour law in France are amended on a yearly basis. Even if the client consider due diligence review as a very routine work, this is not the case. Lawyers have to be updated on those changes.

We are not selling documentation but solutions.

7. What is the impact of the business culture in your jurisdiction on the accessibility of information necessary to perform proper due diligence? What steps do you take in order to overcome these barriers in your jurisdiction?

Not relevant for France

8. Are there any specific problems (e.g., occupational safety/health, environmental compliance, corruption) in companies in your jurisdiction that can be particularly damaging to a company's reputation and should be taken into account when conducting due diligence? Is it usual to engage consulting firms to perform non-legal due diligence related to environmental, compliance, tax, etc.?

Corruption, remuneration of the managers and tax issues have been damaging to companies' reputation. However up to recently these reputational damages concerned only big companies.

In the coming years these issues will concern more companies as the same legislation is progressively applying to companies of smaller size. In addition new laws are also being passed in these areas. For example, the Sapin II Act dated December 9th, 2016 has introduced new regulation on corruption and provides for new obligations for companies to implement measures and procedures for detecting and preventing bribery and influence peddling (internal whistleblowing system, risks mapping, accounting procedure disciplinary systems, control mechanisms, internal evaluation, etc.). Compliance with such obligations should be part of our scope of review and as such should be included in our reports.

It is usual in France to engage consulting firms for environmental and health and safety issues. The lawyers of our team specialized in these areas review the legal aspects and work hand in hand with specialized consultants for the technical part of the audit. Technical audits go from a review based on documents (phase I) to the analyses of samples (phase 2).

9. How has the approach of clients and law firms changed to issue of liability for performing the due diligence? What is the approach depending on the type of due diligence performed (vendor due diligence, buyer due diligence, due diligence for ancillary jurisdictions)? What is the position of your firms should the client ask you to amend the VDD i.e. not to disclose certain findings?

Clients want to spend less fees on due diligence reviews. In order to be more efficient and profitable on due diligence reviews law firms tend to limit their review to the documents provided by the seller(s) (whether it be for buyer-side or seller-side deals). Disclaimers become an important part of the due diligence exercise. The risk of this approach is to miss an important issue.

In France, this risk should now be more limited as French law has just been modified recently (contract law reform which came into effect in October 2016) and now imposes on the seller or the buyer to disclose to the other party any fact which would be considered as of ''decisive importance'' within the meaning of article 1112-1.al.1 of the French Civil code ("*The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party*").

Any request by a client to amend the report in order not to disclose certain findings would be turned down. Solutions to remedy the risk may be presented or evaluated, impact on the price may be negotiated but Fidal will not endorse the liability of hiding some information from its report.