

GUIDELINES

on Third Parties
Anti-corruption
Due Diligence





*AmCham Romania warmly thanks
the following Corporate Governance Committee members
for their contribution to the elaboration
of the Guidelines on Third Parties Anti-corruption Due Diligence:*

Association for Community Relations (ARC)

Dentons

Siemens

Telekom Romania Communications

Vodafone

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grounds

Grounds

A

Third party anti-corruption due diligence activities are performed by companies - in all industries - in order to know their business partners and the potential corruption risks raised by any third party that has a business relationship with a certain company. Therefore, before entering into relationships with third parties, companies should take a few active steps to ensure that potential corruption risks flowing from these relationships are responsibly evaluated and managed.

Under many laws, including Romanian Criminal Code, companies may be held liable for acts of corruption perpetrated by their business partners. Thus, conducting adequate such a due diligence may help companies decrease or even avoid the risk of criminal liability for their third-parties corrupt behavior.

The extent of the anti-corruption due diligence (a lighter version or a more detailed evaluation) is to be defined by observing the recommendations set forth in Section D, below.

purpose

Purpose

B

These good practice guidelines are designed to help any company conduct third party anti-corruption due diligence in order to mitigate the risk of becoming involved in corruption cases through third parties with which they have business relations.

The guidelines are relevant to all types of companies engaged in business activities, being aimed to cover both commercial corruption (between private persons) and bribery towards public officials perpetrated through a long chain of subcontractors/agents/intermediaries, etc.

Given the resources available to every company interested in conducting such due diligence activities, a risk-based approach is necessary. Such approach helps management to allocate resources accordingly.

1

C

Which kind of business relationships may pose a risk?

Cooperation with business partners is the very heart of the business; however, certain business relationships may draw, in certain circumstances, liability and reputational risks to the companies engaging the business partners. A standard and, if needed, an extended anti-corruption due diligence helps the company understand and know the business partner, before taking any commitment to engage in a business relationship.

From international practice of multinational companies and international companies' guides of best practices, an anti-corruption due diligence is recommended to be **performed on all potential business partners they get in contact with, including without limitation: agents, consultants, government affairs consultants and other types of intermediaries and suppliers.**

D

Principles and recommendations for performing third parties anti-corruption due diligence

Rather than applying the guidelines on third party anti-corruption due diligence rigidly, these should be used flexibly, in the sense that the risk assessment procedure should be adjusted based on a series of criteria relating to:

- The magnitude of the contract;
- Strategic importance for the company;
- Public visibility;
- Previous experience with the business partner (previous experience is not a license for not conducting an anti-corruption due diligence at all).

data privacy issues

E

Storing and handling personal data may be inevitable in the anti-corruption due diligence process and may fall under the provisions of the data privacy laws in Romania and also, in perspective, of the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) of the European Commission.

Before starting any complex due diligence, it is recommended that adequate consideration is given to the mandatory safeguards that must be in place for personal data processing, such as consent from the respective legal entity/natural persons or filings with the relevant authority.

Examples of red flags in case of third party anti-corruption due diligence activity

F

As a first step in order to perform effective anti-corruption due diligence activities, it is crucial for every company to identify the main categories of third parties and which ones should be subject to anti-corruption due diligence (as an example, sales intermediaries - agents/distributors and suppliers - are the ones exposed more to corruption acts). The below categories of risks and examples provided are not exhaustive. As mentioned previously, the extent of such a due diligence is to be determined case by case, following a risk based approach grounded on the criteria set forth in Section D.

All of the below examples are red flag indicators, but they are not show stoppers!

In research, one of the criteria for judging the quality of a measure is “face validity”: whether the measurement appears to measure what it is supposed to be measuring. However, this criterion alone is NEVER enough for judging a measure. For example, the appearance of the lack of capability should not be enough for judging a business partner. Length of time in business may be a necessary, but not sufficient, indication of experience, etc.

Therefore, make sure that when performing assessment of capabilities this is done together with experts from your company or clarify together with the respective business partner how it is intended to overcome the lack of previous experience or to cover sufficiently the activities with its existing resources.

1. Examples of reputational risks

- The transaction or the third party is in a country known for widespread corruption, as measured by the Transparency International Corruption Perceptions Index (<http://www.transparency.org/cpi2015>), or other similar indices.
- The third party has a history of improper payment practices, such as prior or ongoing formal or informal investigations by law enforcement authorities or prior convictions (How to check this? Troublesome payment behavior may be checked via a Coface, a Dun & Bradstreet Report, public authorities' websites and press releases, such as: www.pna.ro, www.diicot.ro, etc.).
- The third party has been subject to criminal enforcement actions or civil actions for acts suggesting illegal, improper or unethical conduct (Where to look? Public reliable sources such as: portal.just.ro).
- The third party has a poor business reputation (How to assess this? In order to have an idea, you may ask the business partner to obtain two or three business references from its own business partners.).
- Allegations that the third party has made or has a tendency to make prohibited payments or it facilitated payments to officials.
- Allegations related to integrity, such as a reputation for illegal, improper or unethical conduct.

2. Examples of risks pertaining to government relationships

- The third party shareholders or representatives have a family relationship with a public official, foreign official or government agency.
- The third party has a business relationship or association with a public official, foreign official or government agency.
- The third party shareholders or representatives previously worked or otherwise have been involved with the government or in a public agency relevant to the work he/she will be performing.
- The third party is a company with an owner, major shareholder or manager who is a public official.
- There is rumor that the third party has an undisclosed beneficial owner.

- A government official requests, urges, insists or demands that a particular party, company or an individual be selected or engaged, particularly if the official has discretionary authority over the business at issue.

3. Examples of risks pertaining to insufficient capabilities

- The third party appears to lack sufficient capability or staff qualifications to provide the services or goods for which it is being engaged.
- The third party lacks experience (i.e. it has not been in business for very long) or was only recently incorporated.
- The third party does not have offices or staff, or lacks adequate facilities or staff, to perform the work. The address of the third party's business is a mail drop location, virtual office or small private office that could not hold a business the size that is claimed.

4. Examples of risks pertaining to type and method of compensation

- The third party wants to work without a contract or with an insufficiently clear contract.
- The third party requests an unusual advance payment or cash payments.
- The total amount to be paid for goods or services provided appears to be unreasonably high/low or above the customary or arm's-length amount.
- The fee, commission or volume discount provided to/by the third party is unusually high/low compared to the market rate (for example, low rates, if unjustifiable, may reveal a dumping strategy which places the activities in the field of competition law).
- The third party offers to submit or submits inflated, inaccurate or suspicious invoices.
- The third party requests an invoice to reflect a higher amount than the actual price of goods provided.
- The third party requests payment in a jurisdiction outside its home country that has no relationship to the transaction or the entities involved in the transaction - especially if the country is an offshore financial center.
- The third party requests that payment be made to another third party or intermediary.
- The third party requests that payments be made to two or more accounts.

- The third party shares compensation of the contract with others whose identities are not disclosed (i.e. hidden subcontractors).
- The third party requests an after-award services contract that it does not have the capacity to perform.
- The third party requests that a donation be made to a charity.
- The third party refuses to properly document expenses.
- The third party requests sponsorships that were not subject to prior commercial agreement.
- Unusually high success fees always pose a risk because the business partner is driven to push for the success of a business by any methods to fulfill the scope of the contract and cash in the payments.

5. Other examples of red flags

- Communication with the business partner is difficult for no apparent reason - the business partner refuses written communication, prefers oral communication.
- The business partner insists on vague description of the services in the contract.
- The data concerning beneficial owners or company registration data do not match the information that was provided to you.
- The business partner promised the success of a business deal even though standard bid procedures would not guarantee a win (i.e. in a public tender).
- The third party could not provide an anti-bribery/anti-corruption policy or procedures that clearly prohibit the giving and receiving of gifts and hospitality to influence conduct inappropriately.
- The third party's employees and contractors do not undertake anti-bribery awareness training.

General comments on the above examples of risks

Adverse results on reputational risks, for example allegations, have to be carefully checked, from trusted sources, such as the ones suggested above in Section F.I. In addition, allegations in the media, or from the official communications of the enforcing authorities on the start of any investigation, for example, should be clarified with the business partner, if possible.

The Better Business Bureau, based in the U.S. is a nonprofit company that is not affiliated with any governmental agency and which collects and provides free business reviews. Although a Romanian equivalent is not yet

available, the BBB website (www.bbb.org) can still be used as a reliable resource in the case of companies listed in its database.

We point out that any risk assessment should be based on reliable information.

When looking, for example, at the structure of a company, specialized companies may be engaged for this purpose. These companies are able to perform an extended “know your customer” process and to provide you with an extensive overview of the ownership structure. Another way is to ask the business partner to disclose in writing its ultimate beneficial owner.

Special attention must be paid to cases of relationship with government companies or public officials.

Public official generally means any person that holds a legislative, administrative or judicial office (either appointed or elected); any person exercising a public function, including for a public agency or a public enterprises (i.e. a state owned enterprise); any official or agent of a public international organisation (Source: OECD, Annual Report on the OECD Guidelines for Multinational Enterprises: Conducting Business in Weak Governance Zones, OECD, Paris).

This includes: person holding legislative, administrative, military or judicial office for any country, person exercising a public function for any country, government or governmental agency, employee of a government-owned or controlled enterprise, official or agent of a public international company, political party or official of a political party.

For the applicable definition of the public official, please search for the applicable laws from the respective jurisdiction.

The identification of a red flag does not mean that a company cannot go ahead with the third party business relationship, but rather that no red flag should be left unaddressed or unresolved. Companies should implement mitigating measures that reflect the level of seriousness of the red flag(s) identified, such as the recommended anti-corruption and compliance contractual clauses (Annex I).

General identification attributes	Name of the business partner	
	Official address	
	Trade registry identification numbers	
	Legal representatives (first name and last name)	
	Registered social capital	
	Bank account	
	Contact details: address, phone, email, website	
	Description of company profile	
	Registered social capital	
	Cross check the data with public information from the Trade Registry or their official website. If there are inconsistencies, did the business partner provide you with plausible explanations?	yes/no
Conflicts of interest	Ask the business partner to provide you with relevant internal anti-corruption/anti-bribery policies or procedures that clearly prohibit bribery.	
	Who is responsible for selecting and monitoring the business partner from your company?	
Context in which the business partner has been chosen	If there is an actual/apparent conflict of interest, did you take appropriate steps inside the company to properly document how the situation is handled?	yes/no
	If it is an imposed business partner by the end customer, is it one who is equally imposed and publicly communicated to all prospective business partners of the end customer?	yes/no
Resources and relevant business related information on the business partner	Which services will be performed by the business partner?	
	Is the selection of the business partner in line with your procurement policy (in case of a supplier)/in line with your business strategy?	yes/no

Resources and relevant business related information on the business partner	Is there need to employ this business partner?	yes/no
	Does the business partner seem to have appropriate resources to perform the services?	yes/no
	Does the business partner have necessary permits, sufficient manpower, experience or other resources to perform the services?	yes/no
	In which country is the business partner supposed to perform services?	
	Document information about the compensation structure.	
	Check commercial and financial references if possible.	
	Check the business partner's reputation for integrity and ethical business practices from public sources and document if there are any red flags.	
	Clarify with the business partner any red flag resulting from the above actions. Is the answer satisfactory?	yes/no
	If it is the case, clarify with the business partner any publicly known governmental relationships the business partner has.	
	Ask the business partner to disclose if it has any key employees in public office or are connected with public officials, who are able to influence the awarding of business. Cross check as much as possible the answer of the business partner to this question on public search engines. Document your results.	
Anti-money laundering related questions (optional)	Ask the business partner to provide you with official documentation on the identification attributes listed at the begging of the questionnaire.	
	Ask the business partner to provide you with a declaration concerning Ultimate Beneficial Owners.	
	Do you have a clear understanding of the structure of the company, its owners, financial resources, etc.?	yes/no

H

recommended next steps

After finishing the due diligence, it is recommended to:

- Keep the questionnaire as a proof of documentation.
- Document, preferably in writing, any clarification obtained pertaining to any identified red flag in the course of performing the anti-corruption due diligence (meaning any question highlighted in red and answered with "NO").
- Add "Anti-corruption and compliance clauses" to the contract.
- Foresee in the contract that the counterpart has to hand over to you detailed documentation of the services provided before issuing the invoices.
- Perform a periodic monitoring of the business partner.
- Make all payments to the business partner only to the bank account stated in the contract.
- Add to the contract audit rights in relation to the performance of the services.

Annex I

RECOMMENDED ANTI-CORRUPTION AND COMPLIANCE CLAUSES

I. The Parties acknowledge that compliance with all applicable laws, rules and regulations, in particular applicable corporate compliance and anti-corruption laws (including, but not limited to the Romanian Criminal Code and special laws on prevention and sanction of money laundering, prevention, discovery and punishing of corruption acts, tax evasion, data protection, competition and whistle blowing requirements), is essential for each of them, and therefore, agree and undertake to each other that each party shall:

- (a) Perform its duties and obligations under or in connection with this Agreement in compliance with all applicable laws, including any applicable anti-corruption laws;
- (b) Not make, give, authorize or offer, or promise to make, give, authorize or offer any financial or other advantage (including any payment, loan, gift or transfer of anything of value), directly or indirectly, to or for the use or benefit of any government official (or to another person at the request or with the assent or acquiescence of such government official), or any other natural or legal person, in improperly obtaining or retaining business or in securing any improper advantage (including, but not limited to improperly obtaining or retaining any governmental licenses, permits or other kinds of approvals), or influence any decision or induce, secure or reward the improper performance (whether by act or omission) of any duty or obligation;
- (c) Not engage in, facilitate or accept any other activity, practice or conduct that would violate any applicable corporate compliance and anti-corruption laws;
- (d) Keep in place internal policies, procedures or guidelines on the prevention of corruption including gifts, invitations and business entertainment, on compliance with competition law, data protection, anti-money laundering, terrorism financing as well as on relationships with business partners in general and including purchase and sales in particular, as well as internal policies with regard to the careful selection, instruction and taking-care of third parties including agents, consultants and other intermediaries including distributors, together with afferent trainings and efficient internal control systems.

2. In furtherance of the above *[the name of the services provider]* (i) represents and warrants to *[the name of the Company]* that it never had any interest which directly or indirectly conflicted with its proper and ethical performance of this Agreement and has complied with and (ii) undertakes to comply with all applicable laws, rules and regulations, in particular applicable anti-corruption laws, in relation to the *[object of the activity/services performed]* as set forth in this Agreement (including, but not limited to any tender process (whether conducted by any governmental body or any other natural or legal person) and the obtaining or retaining of any governmental licenses, permits or other kinds of approvals in relation thereto.
3. *[the name of the services provider]* shall ensure that all transactions under this Agreement are duly recorded in all material aspects on its books and records and each document upon which entries in such books and records are based is complete and accurate in all material aspects. *[the name of the services provider]* must maintain a system of internal accounting controls in order to ensure that it maintains no off-the-book accounts.
4. *[the name of the Company]* shall have the right to conduct an investigation and audit of *[the name of the services provider]*'s activities under this Agreement to monitor compliance with the terms of this clause. *[the name of the services provider]* shall cooperate fully with such investigation or audit, the scope, method, nature and duration of which shall be at the sole reasonable discretion of *[the name of the Company]*.
5. Should there be a breach of any anti-corruption laws and regulations, the breaching party shall immediately make full disclosure of such to the other party, the latter having the right to make full disclosure of related information or even of its belief at any time and for any reason to any competent government bodies and its agencies, and to whomsoever it determines in good faith has a legitimate need to know.
6. A party (for the purpose of this Section 5, a breaching party) shall indemnify and keep indemnified the other party (for the purpose of this Section 5, a non-breaching party), all members of a non-breaching party's group and hold each of them harmless (on and after tax basis) against any and all losses suffered or incurred by the non-breaching party, any member of the non-breaching party's group, arising out of or in connection with (in each case whether directly or indirectly) any breach of Sections 1, 2, 3 or 4.
7. The non-breaching party shall also be entitled to terminate this Agreement immediately on written notice to the breaching party. The breaching party shall have no claim for compensation for any loss of whatever nature by virtue of the termination of this Agreement.



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