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Our Perspective

China gives with one hand, and takes away with the other. This is the impression given in recent weeks, with the crackdown on pharmaceutical companies in China, accompanied by announcements of flagship Chinese investments in the UK in the shape of a new nuclear plant in western England and a business district at Manchester airport. GSK's loss is the UK's gain, especially if visa application rules for Chinese tourists are relaxed so that 'UK plc' wins a greater slice of China's multi-billion dollar expenditure on overseas travel.

But recovery from the global recession is likely to be led by exports as much as inward investment from China and other cash-rich countries. Companies from the EU, the US and elsewhere are all targeting 'higher risk, higher reward' markets to offset the slowdown at home and in more established markets. This has sizeable implications in the wake of the UK Bribery Act (UKBA), the growing reach of the US authorities outside the US, and the need for governments to be seen to be tackling corruption - witness the crackdown in China on pharmaceutical companies, for example.

One response to the the spread of US extra-territorial jurisdiction, and the UKBA's demand for 'adequate procedures', is the establishment of a programme of thorough and demonstrable due diligence into third parties such as distributors and resellers, agents and intermediaries, and customs brokers. Such research often underpins global security and compliance programmes. This 'enhanced due diligence' also can yield valuable insights, and inform decision-making, in the context of potential joint ventures, mergers and acquisitions.

So what constitutes enhanced due diligence, and what is best practice? Equally, what are the limitations on such research, in terms of the ethical and physical availability of information? It can be helpful to set out how the information your business may rely on is gathered, and what data can and cannot be obtained. The aim is to help you to mitigate risk and manage internal expectations - and also to assist and reinforce commercial decision-making prior to trade or partnership agreements.

What constitutes enhanced due diligence?

The Oxford English Dictionary defines due diligence:

'reasonable steps taken by a person to avoid committing a tort or offence' or *'a comprehensive*

appraisal of a business undertaken by a prospective buyer, especially to establish its assets and liabilities and evaluate its commercial potential'.

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Enhanced due diligence can give companies the benefit of:

- Compliance with regulatory statute (US FCPA, UKBA etc.)
- Competitive advantage
- Stakeholder engagement
- Reputational management

What are the potential penalties of not carrying out enhanced due diligence?

The consequences of not carrying out adequate due diligence can be catastrophic - to a company's reputation as much as to its finances. Falling foul of the US Department of Justice, for example, has meant civil and criminal sanctions, imposition of an onerous and expensive monitoring process, and debilitating amounts of management time soaked up in 'fire-fighting'. In some cases it has meant a bar to M&A activity, and even to being bought by anyone else. On a personal level, careers can be blighted from the boardroom to the branch office.

What information constitutes enhanced due diligence?

The key focuses of any enhanced due diligence research into companies and individuals are: links to bribery and corruption; any political exposure and connections; any hidden or undisclosed beneficial ownership; criminal issues; litigation and bankruptcy; and any conflicts of interest. It can also reveal other issues that may be cause for concern and help form a commercial judgment, such as lack of appropriate experience and track record, and falsehoods or embellishments on the 'corporate CV'.

What are allowable and prohibited sources of information?

As providers of corporate intelligence we supply our clients with information that is openly asked for and freely given following a code of ethics that includes confidentiality, professionalism, protecting our clients' interests, and preventing corruption by providing our services in a lawful manner.

It is worth noting that, if you commission business intelligence reports from an agent, you are liable for the actions of that agent.

Types of information from publicly available sources include:

- 🌐 Corporate filings
- 🌐 Litigation records
- 🌐 Bankruptcy & insolvency reports
- 🌐 Credit ratings
- 🌐 Lease/mortgage/financing arrangements
- 🌐 Financial statements
- 🌐 Internet - while bearing in mind that anyone can post information there
- 🌐 Media reports
- 🌐 Tax information
- 🌐 Real estate records

Examples of prohibited sources include:

- 🌐 Confidential or proprietary data
- 🌐 Some government records (such as law enforcement, diplomatic and trade)
- 🌐 Competitor and client records

What are the potential limitations on enhanced due diligence?

There are various limitations on the outcome of gathering business intelligence, ranging from your own budget and timescale to local external factors in the region where the information is being obtained. Such factors include the accuracy and availability of public records, cultural and political attitudes, conflict and political instability, local data protection legislation, and opaque offshore structures.

What are the desired outcomes?

Through enhanced due diligence we hope to achieve a balanced and proportionate view of a subject, using information that can be reasonably obtained by you or your competitors. The goal is to satisfy regulatory requirements and highlight any aspects that may be considered potential 'red flags' or issues to be managed or avoided.

Formed in 2005, Kasalana performs due diligence investigations globally on behalf of clients from industries including services, finance, technology, medical, construction, mining, retail, manufacturing, automotive, legal and telecommunications. Our clients include FTSE-100 and Forbes 500 corporations, global financial institutions and leading private equity houses.

Prior to forming Kasalana Sam Pope was Head of Business Intelligence, Deputy Director of Corporate Investigations and EMEA Director of Fraud & Forensic Services for a leading global security risk management company, where he led a team of 40+ investigators. A former defence journalist, Sam has extensive experience of investigating fraudulent activity including asset misappropriation, bribery and corruption, intellectual property fraud, false accounting, securities and investment fraud, regulatory and anti-trust violations. He frequently works in close collaboration with clients' other professional advisers. He is a member of the *American Society for Industrial Security* and the *Association of Certified Fraud Examiners*.

Gareth Crooker joined Kasalana in 2010 after working as Director of Corporate Investigations, South-East Asia, for a leading global security risk management company. He has been a business risk consultant for more than 20 years and specialises in pre-investment and compliance-driven due diligence and business intelligence. Gareth has also conducted bespoke strategic research and analysis into the political, commercial and security risk environment in Europe and the Former Soviet Union. As well as his native English, Gareth has near-fluent French and Spanish, together with basic Italian and Dutch.

Consultation meetings

If you would like a free consultation to discuss these issues in more detail, please email info@kasalana.com quoting reference OP1C.