



Lex Mundi Environmental Toolkit: Considerations During the Life of an M&A Deal

This two-part toolkit is designed for clients to use in partnership with their Lex Mundi member firm lawyer to assess, from an environmental perspective, pre-transaction considerations and to prepare for the integration of business units following such transaction. It is designed to be flexible and adaptable to different situations in multiple jurisdictions.

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Disclaimer

This toolkit was created collaboratively with input from the Lex Mundi Environmental and Cross Border Transactions Practice Groups and their clients based on their unique experiences. However, it is not intended to serve as a comprehensive guide nor legal advice on the matters covered herein. It is by no means intended to be exhaustive. Legal advice should always be sought from the appropriate Lex Mundi member firm.



I: Pre-Transaction Considerations

General Overview

A. Transaction Structure	
1.	<p>What are the consequences of the transaction structure on the environmental risks identified through due diligence? Consider whether the transaction is to be structured as:</p> <ul style="list-style-type: none">• acquisition of assets• acquisition of shares• merger• restructuring• split deal• spin-off• spin-off of sole-proprietor company <p>Depending on the jurisdiction and environmental issues involved, a transaction structured as a sale of assets could be advantageous for the purchaser because it will be able to identify assets involving environmental risks and determine whether those should stay with the seller. Note, however, that a purchase of assets may in practice mean further administrative burdens on the parties if additional transfers of permits to the purchaser are necessary.</p>
2.	<p>Are there any significant environmental risks which would require amendment to the transaction structure or other pre-transactional action?</p> <ul style="list-style-type: none">• Carve-out (separation) of selected assets <p>In some instances, the target company (Company) may own assets (e.g. real estate) involving environmental risk (e.g. contamination) which are not indispensable to the business. In such case, the transaction structure may involve a separation of such asset to another entity before the transaction completes.</p> <ul style="list-style-type: none">• Pending court proceedings with environmental topic <p>If the Company is a party to certain court proceedings, the purchaser may mitigate the risk of adverse rulings through specific drafting in the transactional documents. For example, the purchaser may seek to assess the financial risk of an adverse decision and require that part of the consideration equal to such amount be held in escrow. In the event of an adverse ruling against the Company, the purchaser will be entitled to withhold the amount deposited in the escrow account. On the other hand, if the final ruling is in favour of the Company, the purchaser will be obliged to pay the escrow amount to the seller.</p>
3.	<p>Will the transaction involve more than one jurisdiction?</p> <p>If yes, the transactional documents may have to address matters that are of importance to specific jurisdictions.</p>
B. Pre-Transaction Auditing	
4.	<p>Was the environmental due diligence limited to a recent review of environmental matters by lawyers or were environmental consultants involved (e.g. a Phase I environmental site assessment)?</p> <p>What was prepared:</p> <ul style="list-style-type: none">• Phase I environmental site assessment?• Phase II environmental site assessment?• Environmental compliance audit?• Custom audit?• Inspection by authorities?• Internal review?

	<p>By whom:</p> <ul style="list-style-type: none"> • Authorities / governmental agency, etc.? • External consultant retained by a transaction party? • Employees? <p>In what scope:</p> <ul style="list-style-type: none"> • Contamination / pollution? • Environmental compliance? • Did it include all relevant areas? • What was omitted? • Were risk thresholds adequate? <p>The answer to that query is essential to drafting appropriate representations, warranties and indemnities. If environmental due diligence is limited to a formal review by counsel, the purchaser may not have sufficient information to assess whether the Company has in fact complied with the permits and whether they are adequate for the business activities of the Company. Further, depending on the author of the review and whether they provide reliance on their report, a different level of credibility may apply.</p>
5.	<p>Has there been any environmental audit (e.g. re ISO-certification) conducted recently at the site by an independent environmental consultant?</p> <p>If yes, the parties may elect to limit the scope of the environmental warranties or to abandon commissioning additional pre-transactional environmental assessment. If not, conducting such assessment with results satisfactory to the purchaser may be included as a condition precedent to closing.</p>
6.	<p>Have any environmental policies or management systems (e.g. ISO 14001) been developed and implemented at the Company level or otherwise integrated into strategic planning?</p> <p>Does the Company perform any specific reporting and disclosure, or allow stakeholder engagement, in respect of business sustainability?</p> <p>Note that the Company’s approach to sustainability could have a significant impact on future operations and environmental compliance, and ultimately the consideration to be paid for the Company by the purchaser.</p>

Transactional Document Considerations

C. General

7. **Do the transactional documents refer to the baseline condition?**
The acquisition of a business usually means continuation of the same or very similar activity. When environmental harm occurs, it may be difficult to determine whether it was caused before or after closing. The point in time when the harm occurred may be decisive for allocating liability under the transactional documents. In order to mitigate the potential for future disputes, the parties may decide to conduct an environmental site assessment which will determine the environmental condition of the site at signing or closing.

D. Representations and Warranties

8. **Do the warranties include the following:**
- a. confirmation that no claims of any kind have been made or threatened against the Company by any third party (including, without limitation, neighbours, tenants or administrative bodies),
 - b. confirmation that no agreements or contracts have been entered into by the Company in respect of environmental matters (i.e. with waste managers) or imposing obligations on the Company to pay the cost of removing contamination,
 - c. confirmation that soil or above- or ground-water has not been contaminated and that no events have occurred which may cause contamination,
 - d. confirmation that the Company is not subject to any fines, payments or other restrictions or sanctions in respect of the use of the environment, water intake, discharge of sewage, waste management, removal of trees or bushes, etc.,
 - e. confirmation that current Company activity is not a breach of any environmental laws, permits, consents, assessments or notifications,
 - f. confirmation that all environmental permits, consents, notifications, assessments that are required by the Company to perform its business activities have been obtained, are valid and in conformity with current legislation (i.e. the BAT, Seveso), that no permit alterations are expected in the near future and that no investigations into their compliance are pending,
 - g. confirmation that no nature protection areas (national parks, *Natura 2000* areas, *Endangered Species Act*, etc.) and/or archaeological sites could hamper further development or limit current use of the Company's real estate,
 - h. confirmation that no change in environmental laws is to be expected that will require material investments (> [...] EUR) from the Company within the near future,
 - i. information in respect of expected necessary investments or expenses concerning climate change (including the acquisition of allowances),
 - j. confirmation that no other conditions exist that could hamper further development or limit the current use of the Company's real estates (such as possible archeological sites, landfills, cemeteries, etc.),
 - k. confirmation that there are no and have not been any above ground or underground storage tanks present on sites operated by the Company,
 - l. confirmation that the Company has not conducted operations on any other real estate,
 - m. confirmation that building material in buildings on properties operated by the Company does not contain hazardous substances subject to restrictions or limitations,

	<ul style="list-style-type: none"> n. confirmation that no decisions or resolutions of public authorities have been made requiring the Company to remove contamination or to pay the cost of removing contamination, o. confirmation that there are no restriction or limitations on transfer of ownership in the Company due to contamination pursuant to environmental laws, p. confirmation that the Company holds respective financial coverage for environmental liability as required by law, q. confirmation that no waste is stored or located on the real estate or offsite, r. confirmation that the seller has disclosed all environmental reports, audits and reviews relating to the Company’s business and properties, and s. confirmation that the Company complies with all obligations to provide written reports on a regular basis to the authorities as required.
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E. Specific Clauses

9.	<p>Period of limitation of claims Is the period of limitation of claims under the transactional documents sufficient with respect to environmental risks?</p> <p>Does the transaction require a specific limitation period for environmental claims? Usually, the transactional documents will include certain limitations on the time-frame in which either party will be entitled to make claims against the other. Often, different limits are set for tax claims, material warranties, and other claims.</p>
10.	<p>Liquidated damages, specific indemnities Is the liability (incl. liquidated damages, specific indemnities) regulated sufficiently? There are two specific features of environmental risks: (1) the potential maximum amount of liability is impossible to determine or even roughly assess at the date of negotiating the transactional documents; and (2) once occurred, the amount of loss as a result of environmental harm is often difficult to assess. In both instances, provisions on liquidated damages, specific indemnities, may prove useful.</p>
11.	<p>Environmental conditions and covenants Are there any environmental conditions or covenants necessary? Should the parties agree on any actions related to environmental matters in the interim period between signing and closing? The acquisition of industrial facilities may require the satisfaction of specific regulatory requirements by the purchaser.</p> <p>It may be advisable to agree on the transfer of permits (in respect of, for example, waste, water and emissions) to ensure the smooth and uninterrupted takeover of business separation of permits in case of a separation of assets.</p> <p>If the environmental site assessment has not yet been conducted, parties may agree to conduct this in the interim period between signing and closing. The parties may also include provisions in the transactional documents to address the possible outcomes of the assessment (for example, conditions precedent to closing).</p> <p>Purchasers should consider including a list of prohibited actions of the seller during the interim period, including actions which could result in new environmental consequences.</p>

12.	<p>Ongoing litigation Are there specific provisions on ongoing litigation? If the seller disclosed the existence of ongoing litigation in respect of environmental matters, consider including a provision governing how to address such litigation post-closing.</p>
13.	<p>Third party guarantee in respect of the seller's obligations to satisfy the purchaser's claims Does the seller have sufficient economic standing to be able to satisfy the purchaser's possible claims against the seller associated with the occurrence of the environmental issues after the closing? If an environmental issue occurs after the closing, the purchaser may have a claim against the seller (arising from the contractual documentation or the applicable law) to provide a compensation to the purchaser. However, the amount of such a purchaser's claim may be significant (especially if the purchaser is found liable for damage to health, if the purchaser is ordered to restore the soil polluted by leakage etc.) and may exceed the seller's economic capability to satisfy such a claim. Therefore, it is advised to consider whether e.g. a third party's guarantee should not become a part of the contractual documentation to secure that the purchaser will eventually be compensated.</p>
14.	<p>Monetary limitations Are monetary limitations (whether specific or general) affecting environmental liability applied in the transaction documents? It is common practice that the parties specify monetary limitations of liability with respect to the transaction in general or e.g. certain warranties. It is important to assess how possible environmental claims might be affected by such limitations and whether specific monetary limitations should apply for environmental matters (see also 8).</p>
15.	<p>Definition of environmental laws and regulations Have "environmental laws" or similar regulative framework been defined in the transaction documents? Environmental regulation is usually complex and may be scattered in a number of different acts, decrees etc. If such regulation has been defined in the transactional documents (particularly in an exhaustive way), the coverage and implications of such a definition should be considered against the identified environmental issues.</p>

II: Post-Transaction Integration Checklist

Step One: Identify the type of transaction involved (merger, asset sale, other acquisition)

A. General		Internal Comments
1.	With which entity do environmental liabilities remain post-transaction?	
2.	Are there express provisions in the agreement relating to the retention of environmental liabilities?	
3.	Are there provisions in the agreement relating to environmental actions (such as soil investigation and remediation)?	
4.	Are there indemnification provisions that may relate to environmental liabilities?	
5.	Are there representations and warranties that may relate to environmental liabilities?	
6.	If so, what deadlines are imposed for the environmental actions and under the representations and warranties? Apart from the deadlines for imposing environmental actions, it is also important to define the consequences for not abiding in accordance with the set deadlines for the environmental actions pursuant to agreements or consent orders, including such as stipulated penalties.	
7.	Are there insurance provisions with respect to environmental issues and liabilities?	

Step Two: Identify the jurisdiction(s) in which the integrated entity will operate

B. General		Internal Comments
8.	United States (Federal Jurisdiction) Authorities: (Identify relevant state agencies with jurisdiction) Other:	
9.	State or States: Authorities: (Identify relevant state agencies with jurisdiction) Other:	

Step Three: Review of disclosures provided during negotiation of the transaction

C. General		Internal Comments
10.	Identify key personnel at acquiring and acquired entities with knowledge of environmental conditions, responsibility.	
11.	Coordinate with human resources department of surviving entity to ensure that key personnel are retained.	
12.	Was any environmental testing (e.g. Phase 1 environmental site assessment) performed as part of the negotiation of the transaction?	
13.	Determine whether “safe harbours” or reporting requirements apply in the appropriate jurisdictions that relate to any environmental issues identified by the environmental testing performed.	
14.	Review any disclosures from the acquired company as they relate to environmental liabilities and permits.	
15.	Ensure that all existing permits are up to date, transfer requirements have been (timely) fulfilled, and identify all deadlines and requirements for renewal (regulatory compliance).	
16.	Identify recent enforcement actions, claims and complaints, administrative violations, review if any of those are still open and sufficiently follow-up on them.	
17.	Coordinate with IT staff to ensure that appropriate data can be transferred within newly integrated unit.	
18.	Identify all outside professional (attorneys, engineers) with responsibility for environmental compliance for the integrated entity (make sure they have been paid).	
19.	Make sure all outside professionals have submitted all required reports and have them provide a schedule and budget for when upcoming reports are due.	
20.	If non-compliances were disclosed in the agreement: start taking actions to remediate the contingencies.	
21.	Identify the real estate of the target company (identify real estate which could cause eventual environmental risks).	
22.	Identify the legal status of the target company (incl. scope of activity, management structure, etc.).	
23.	Prepare overall material business overview (concluded material contracts, incl. related party agreements, consultancy agreements, rules for business coordination, risk assessment, etc. – if any).	
24.	Compile a list of all findings identified during the due diligence process and, if feasible, establish an action plan for each separate finding.	

Step Four: Budgeting

D. General		Internal Comments
25.	Make sure you have detailed budgets from both internal personnel and outside professionals for upcoming environmental compliance responsibilities.	
26.	Identify risks based on the disclosures and environmental testing performed prior to closing and ensure appropriate reserves.	
27.	If personnel are to be let go as part of the integration, budget for possible consulting arrangements for key personnel.	

Step Five: Record Keeping and Reporting

E. General		Internal Comments
28.	Inventory all record keeping and reporting requirements for environmental, health and safety issues.	
29.	Create a schedule for record destruction that complies with requirements.	
30.	Inventory the prepared pre-transactional due diligence.	