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Prescriptive Legal Due Diligence in Asset Recycling

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Overview

Prescriptive due diligence outputs are primarily focused on describing the legal aspects of structuring options in relation to the descriptive due diligence outputs.

The output of the prescriptive due diligence will highlight how current legal aspects can be better conformed to (a) relevant legal and regulatory requirements, (b) legal aspects of industry best practice, and (c) (to the extent possible) legal aspects of recommendations resulting from the technical and financial due diligence.

As a result, prescriptive due diligence outputs should be prepared:

- after the descriptive due diligence has been completed (or at a sufficiently advanced stage), and
- in alignment with technical and financial due diligence activities and (if possible) any preliminary market sounding activities (for purposes of gathering feedback on industry best practice) for the relevant asset class.

Scope of Prescriptive Legal Due Diligence

Prescriptive legal due diligence is typically scoped in accordance with the outputs of the descriptive legal due diligence. This is because the required transaction structuring is typically remedial in nature. In addition, prescriptive legal due diligence outputs can address the legal related issues identified in the technical and financial due diligence work streams. The national legal counsel and/ or international legal counsel (foreign qualified with relevant sector expertise) will be responsible for prescriptive due diligence outputs. The role of international legal counsel in this aspect is to ensure that industry best practice is applied to create bidder interest.

Impact on Asset Selection

It is possible that the findings from the descriptive legal due diligence highlights issues that may adversely affect the asset recycling transaction. This may be because issues will make it difficult, expensive to complete transaction/asset preparation, or because the asset has legal characteristics that would make it unappealing to bidders.

In these cases, the findings from undertaking prescriptive legal due diligence should indicate the possibility that, under then current circumstances, the project preparation would not proceed further on this basis. In this situation, a fundamental change in the legal/regulatory framework affecting the asset may be required before the transaction can proceed.

Box 4: Prescriptive Legal Due Diligence

Illustrative Areas of Enquiry - Prescriptive Due Diligence

- Is the asset appropriate for asset recycling? Do the results of legal due diligence indicate that it would be particularly difficult, expensive or time consuming to prepare the transaction for tender?
- Do the licenses, permits or approvals of the Relevant Authority need to be amended or altered in connection with the preparation to implement the transaction?
- Does the Relevant Authority need to obtain additional or different licenses, permits or approvals in connection with the preparation to implement the transaction?
- Does the Relevant Authority need to create a new subsidiary or affiliate to implement all or part of the transaction?
- Does any joint venture partner of the Relevant Authority identified need to be included as a stakeholder in the transaction preparation (for example, on the basis that the joint venture partner's consent will be required to transfer an interest in the asset or to amend or terminate a contract relating to the asset)?
- Alternatively, should the Relevant Authority buy out any joint venture partner during the transaction preparation stage, or plan on buying out the joint venture at a later stage?
- Does the Relevant Authority need to seek consent under, amend or prepay/repay any existing financing agreements identified in the descriptive due diligence?
- Whether some or all of the commercial contracts that affect the asset have terms and conditions that permit the potential structure of the transaction?
- Does the Relevant Authority need to seek consent under, amend or terminate any existing commercial agreements identified in descriptive due diligence?

Related Content

- [The PPPRC Asset Recycling Section](#)
- [Executive Summary: Asset Recycling](#)
- [Asset Recycling Projects](#)
- [Asset Recycling Programs](#)

- [Table of Contents for Asset Recycling](#)

Additional Resources

- [PPP Sector Specific Checklists](#)
- [PPP Reference Guide - PPP Framework](#)

This section has not been prepared with any specific transaction in mind and are meant to serve only as general guidance. It is therefore critical that the content will be reviewed and adapted for specific transactions.

This is a new section of the website and is currently in draft form. For feedback on the content of this section or to suggest additional links or materials, please [contact the PPP Resource Center](#) using the feedback form.

