

# Descriptive Legal Due Diligence in Asset Recycling

## Full Description

### Overview

Descriptive due diligence outputs are focused on describing the current legal aspects relevant to the Relevant Authority and the asset as at the review date. This description is without regard to any potential remediation, mitigation, alteration, structuring or restructuring activities (collectively, Project Structuring) which may be undertaken/implemented after due diligence is completed.

### **Box 3: Descriptive Legal Due Diligence**

#### Illustrative Enquiry – Descriptive Due Diligence – Asset Recycling Transaction Legal Due Diligence

- What types of internal corporate level approvals at the Government/ Relevant Authority are required to implement the asset recycling transaction?
- Which existing subsidiaries, affiliates, or joint ventures of the Government/Relevant Authority (if any) will be potentially involved in or will affect the asset recycling transaction?
- Does a subsidiary, affiliate or joint venture own the Asset, the project site and/or related supporting infrastructure and equipment?
- Does a subsidiary, affiliate or joint venture have contractual rights that involve or affect the Asset, the project site and/or related supporting infrastructure and equipment,

*Note: This part of Asset Due Diligence involves identifying which members of the Government/Relevant Authority are relevant to the Asset transaction, rather than reviewing the contents of the intra-group contracts themselves. These intra-groups contracts may include commercial and/or financing agreements which impact the asset recycling transaction.*

- If relevant, what types of internal corporate level approvals any subsidiaries, affiliates or joint ventures of the Government/Relevant Authority will be required to implement the asset recycling transaction?
- In the case of joint ventures, identify the relevant joint venture partner and whether approval by the joint venture partner will be required to implement the asset recycling transaction or otherwise alter the existing arrangements relating to the asset recycling transaction. Does a member of the Government/Relevant Authority have the right to buy out the joint venture partner?
- Does the Government/Relevant Authority hold the correct business level licenses, permits and approvals to own, operate and maintain the asset recycling transaction in its current state?

## Illustrative Enquiry – Descriptive Due Diligence – Asset Project Due Diligence

- Does the Government/Relevant Authority hold the correct specific licenses, permits and approvals to own, operate and maintain the Asset in its current state? When do these licenses, permits and/or approvals expire? What are their terms, conditions, and requirements? Can they be transferred, sub-licenced or surrendered and reissued in favour of the SPV?
- Are there any specific legal or regulatory constraints that would affect the way the asset could be structured?
- Who owns the project site for the Asset? Does the project site require rights of way or rights of access across properties owned by third parties? How does the Government/Relevant Authority access the project site (i.e., lease)?
- Are there any liens, encumbrances, or security over the Asset?
- What are the commercial contracts that affect the Asset?
- Which of these contracts are intragroup contracts (i.e., contracts between members of within the Government/Relevant Authority)? Which of these contracts are with other Government/Relevant Authority? Which of these contracts are with other third parties?
- When do these contracts expire and whether these commercial contracts contain any penalties, liquidated damages or contingent liability exposure for early termination or cancellation?

### **Scope of Descriptive Legal Due Diligence**

The precise scope of descriptive legal due diligence will vary depending on the Relevant Authority and asset involved. Nevertheless, certain areas are expected to be covered in the typical project preparation activities for an asset recycling transaction.

The table below provides an **illustrative scope** of descriptive legal due diligence to be conducted by the Relevant Authority:

Table 4: Scope of Descriptive Legal Due Diligence

- 1 Formation and governance structure of the Relevant Authority

  - Review of constitutional documentation of the Relevant Authority holding asset.
  - Number and composition of the board of directors and board of commission
  - Protective provisions or reserved matters regime, including for material asset disposal or lease, entry in material contracts or financings, formation of subsidiaries, affiliates or joint ventures, and other relevant matter.
  - Other relevant aspects – date of establishment, corporate objectives, etc.
  
- 2 Scoping relevant aspects of the Relevant Authority (and its corporate group – “Relevant Authority”)

  - Identification of any subsidiaries, affiliates or joint ventures of the Relevant Authority with ownership interest in the asset, the project site and related supporting infrastructure and equipment.
  - Identification of any subsidiaries, affiliates or joint ventures of the Relevant Authority which have entered into contractual relationships involving or affecting the asset, the project site and related supporting infrastructure and equipment.
  - Number and composition of the board of directors and board of commission
  
- 3 Formation and governance structure of the Relevant Authority (subsidiaries, affiliates) or joint ventures identified above)

  - Protective provisions or reserved matters regime, including for material asset disposal or lease, entry in material contracts or financings, formation of subsidiaries, affiliates or joint ventures, and other relevant matter.
  - Other relevant aspects – date of establishment, corporate objectives, etc.

4 Business level licenses, permits and approvals for Relevant Authority and each relevant member of the Relevant Authority (subsidiaries, affiliates or joint ventures identified above)

- Identify and confirm legal approvals (or notification, as applicable) for de establishment, articles of association and any amendments.
- Identify and confirm receipt and validity of enterprise-wide business activ licenses (excluding licenses relating to a specific asset, location, property or equipment).
- Identify and confirm completion of relevant tax registrations.
- Identify and confirm completion of other relevant enterprise-wide filings, registrations and approvals.

5 Financing agreements not specifically related to the transaction (bond indentures, credit agreements and facility documents) which may affect the ability of the Relevant Authority to carry out the transaction

- Covenants / undertakings which restrict disposal or transfer of material ass
- Covenants / undertakings which restrict entry into contracts above a certai or not in the ordinary course of business.
- Other financing agreements with a similar effect.

6 Commercial agreements not specifically related to the transaction which may affect the ability of the Relevant Authority to carry out the transaction

- Shareholding agreements, joint venture agreements and/or cooperation ag with third parties.
- Covenants / undertakings not to compete with certain companies or enter i arrangements with a certain company's competitors.
- Exclusivity or preferential arrangements with certain companies.
- Other commercial agreements with a similar effect.

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| 7 | Licenses, permits and approvals for the Asset                   | <ul style="list-style-type: none"><li>• Location permit(s).</li><li>• Approval of Environmental Impact Assessment.</li><li>• Building Approval(s).</li><li>• Operational Permit(s) and Licenses.</li></ul> |
| 8 | Documentation relating to ownership and use of the project site | <ul style="list-style-type: none"><li>• Land title documentation / certificates.</li><li>• Lease agreement, rights of way or other cooperation agreements relating to building or site usage.</li></ul>    |
| 9 | Financing agreements specifically related to the Asset          | <ul style="list-style-type: none"><li>• Bond indentures, credit agreements and facility documents.</li><li>• Any related security arrangements (encumbrance or assignment of rights).</li></ul>            |

- Intellectual property licenses and warranties.
  - Fuel supply and feedstock arrangements.
  - Offtake agreements / usage agreements.
  - Maintenance contracts.
  - Technical assistance agreements.
  - EPC / construction / project management agreements for any ongoing projects and/or for completed projects (or which are still under warranty).
  - Marketing and sales arrangements.
  - Transportation contracts.
  - Facilities maintenance or maintenance contracts.
  - Subleases and sublicences.
  - Performance bonds and guarantees from subcontractors and service providers.
  - Any secondment arrangements.
  - Any other material agreements.
- 10 Commercial agreements specifically related to the Asset
- Asset register relating to the asset.
  - Any title documentation and warranties.
- 11 Equipment and other Project Assets (excluding the project site)
- Any other materials relating to owned equipment for aspects relevant to other aspects of legal due diligence noted above, such as arrangements for spare parts, service arrangements/contracts, maintenance/repair history, etc.

(Note: primary responsibility for this aspect of review will be covered in the technical due diligence).

- Review list of staff employed by the Relevant Authority that work directly on the asset, including position held and date hired.
- Review terms and conditions of employment for each tier of staff.
- Review status of social security or welfare registration and payroll documents for each tier of staff.
- Work permits and other required documentation relating to any foreign staff (where applicable).

## 12 Staffing

(Note: Staffing review will be conducted with a view towards (1) understanding the extent existing staff of the asset can be seconded or transferred to the private partner (where applicable), and (2) what the severance liabilities would potentially be if the transaction gives rise to staff redundancies).

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*The Guidelines have not been prepared with any specific transaction in mind and are meant to serve only as general guidance. It is therefore critical that the Guidelines be reviewed and adapted for specific transactions. To find more, visit the Guidelines to Implementing Asset Recycling Transactions [Section Overview](#) and [Content Outline](#), or [Download the Full Report](#).*

