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THE MONOPOLIES CHALLENGE

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What happens when international anti-corruption due diligence and Latin American monopolies meet – or clash? Matteson Ellis, special counsel at Miller & Chevalier Chartered, suggests some paths to follow

In a recent discussion with a compliance officer of a US-based food products company expanding reach into Latin America, I was told about the company's difficulties in one particular state in Mexico. The distribution network there was dominated by a monopoly that had been family-owned for generations. Not only was the US company unable to get the monopoly to provide the basic anti-corruption compliance assurances as part of its third party due diligence process, it could not even open up lines of communication with the company's owners, the ones who would need to give such assurances. Over generations, the family members had grown disconnected from the company's management even though they still exercised final authority over company operations.

In Latin American countries like Mexico, monopolies are common. And they present common compliance challenges for companies doing business there and subject to foreign bribery laws like the US Foreign Corrupt Practices Act (FCPA). A recent article in the Atlantic entitled "How Mexico Became So Corrupt" discusses the connection between corruption and Mexico's history with "entrenched power of monopolists." The article explores the ways in which these power structures facilitate, and are supported by, practices like self-dealing, nepotism, and influence-peddling.

Sometimes a Latin American monopoly will be a private company that over years has come to dominate the market. Maybe it did so lawfully. Maybe it received illicit assistance along the way from public officials. Other times monopolies are state-owned or controlled. The state is often dominant in the electricity, telecommunications, energy, insurance and other sectors that provide broad public services.

In either scenario, the prevalence of the monopoly creates problems related to market power. Foreign companies find themselves negotiating with the only game in town.

When a company needs the monopoly partner much more than the partner needs the company, it can be difficult to impose compliance conditions. At the same time, compliance conditions can be essential given the risk that the monopoly could make improper payments on the company's behalf. This risk is more acute in countries and regions where a handful of families dominate both business and politics. In these places, monopolies are often run by politically connected elites who move back and forth between government and business. A father might own a conglomerate and his son might be a senator.

Business relationships with monopolies also have the potential to lead to situations in which the monopoly seeks to use its leverage to extort favors from business partners. Moreover, if the monopoly is state-owned, corruption risks are at their highest. Any payment to the entity, if not made pursuant to proper controls, has the potential to be considered a bribe under the FCPA.

What can companies investing in Latin America do to protect themselves from these types of risks? Here are a few suggestions:

Understand the risks. By understanding the risks and recognising the red flags associated with monopolies, companies, including the sales and other staff who deal directly with monopoly partners, can more effectively mitigate the potential for problems. This means understanding things like the monopoly's ownership, its relationship with government officials, and its business reputation. A monopoly's refusal to sign an anti-corruption compliance certification should raise concerns.

Use local actors, trained in compliance, to interface with monopolies. Monopolies will often be more responsive when engaged by locals. Those who are familiar will be more trusted. It could be a company's salesperson in the region where the monopoly is based. It could be a third party agent with local know-how. Locals can better navigate otherwise complicated systems, such as setting up meetings with hard to reach owners. They can better understand negotiation cues. But local representatives should also be fully trained on FCPA risks and anti-corruption compliance expectations. If they are, they can be your best spokespeople for compliance.

Work with competitors to level the playing field. Some sectors are beginning to establish collective action strategies for compliance. When a monopoly is forced to deal with customers who have entered into integrity pacts, it might have no choice but to embrace compliance standards. This activity also has risks, as communications between competitors must be conducted in a way that does not run afoul of antitrust and competition rules. Such risks can be addressed up front to avoid any actual or apparent impropriety.

Be willing to escalate. If a company confronts a monopoly that is unwilling to cooperate on compliance, shows signs of public corruption, or demands commercial bribes itself, the company should consider escalating these issues. It might choose to share its information with local, national, or federal authorities. It might engage chambers of commerce. Depending on the situation, such action can help establish new avenues for doing business in a compliant way. But these steps should be conducted with appropriate counsel so that any associated risks are fully understood.

Be willing to walk away. If the risks of partnering with a monopoly seem too high, a company should not be afraid to walk from the proposed relationship. This could mean missing promising business opportunities. Then again, given the risks of FCPA non-compliance, that might be the wisest decision to make.