



Managing Risk in capital market: Is Your Securities Compliance Program Effective?

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Market Abuse Directive (MAD)

“**MAD**, bad and dangerous
(not to) know:

The new market abuse
regime”

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Securities law environment and risks associated

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Shareholder meetings compliance

Shareholders meetings issues usually arise from lack of knowledge of the legal framework and observance of additional formalities imposed by the law related to statutory decisions. Moreover, the legal framework related to corporate governance is spread in various normative deeds (Companies Law, Capital Market Law and the secondary legislation issued by the former National Securities Commission (currently ASF).

Reporting compliance

Listed companies have various reporting obligations related to their business, financial indicators, corporate governance, etc. The implementation of a comprehensive and customized internal framework to ensure the transparency of the respective issuer's activity and observance of the regulatory obligations would result in a better image offered to investors on the potential of the company and could represent a safety net for the company and its management as regards the possible sanctions to be applied by the regulatory authorities.

Market abuse compliance

In the last years the public authorities, including the Prosecutor's Office, have developed capabilities in identifying, pursuing and sanctioning market abuse practices. A better acknowledgement of the prohibited practices and the implementation of internal norms regarding the information flux inside the company and, if applicable, the investments and trading with listed securities is a must in order to avoid the possible application of criminal sanctions, not to mention the related image damages. Damages could be caused in some cases unintentionally, merely by lack of proper knowledge and understanding of specific regulatory requirements.

Market abuse is regulated by complex regulatory framework

What is market abuse?

Insider dealing and market manipulation

There are several types of behavior which can amount to market abuse

Insider dealing

General situation

- When an insider deals, or tries to deal, on the basis of inside information.

Improper disclosure

- Where an insider improperly discloses inside information to another person. Improper disclosure and misuse of information are kinds of insider dealing – see below.

Misuse of information

- Behavior based on information that is not generally available but would affect an investor's decision about the terms on which to deal.

Current E.U. regulatory framework giving member states the liberty to impose criminal sanctions for market abuse (cont'd)

What is market abuse?

Insider dealing and market manipulation

There are several types of behavior which can amount to market abuse

Market manipulation

Manipulating transactions

- Trading, or placing orders to trade, that gives a false or misleading impression of the supply of, or demand for, one or more investments, or which fixes/raises the price of the investment to an abnormal or artificial level.

Manipulating devices

- Trading, or placing orders to trade, which employs fictitious devices or any other form of deception or contrivance.

Dissemination

- Giving out information that conveys a false or misleading impression about an investment or the issuer of an investment where the person doing this knows the information to be false or misleading.

Distortion and misleading behavior

- Behavior that gives a false or misleading impression of either the supply of, or demand for, an investment; or behavior that otherwise distorts the market in an investment.

Current E.U. regulatory framework giving member states the liberty to impose criminal sanctions for market abuse (cont'd)

Complex regulatory framework

At EU level the following acts regulate market abuse

- Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)
- Also known as “MAD” (Market Abuse Directive)
- [Commission Directive 2003/124/EC](#) of 22.12.2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation
- [Commission Directive 2003/125/EC](#) of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest
- [Commission Regulation \(EC\)2273/2003](#) of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programs and stabilization of financial instruments
- Moreover, CESR (Committee of European Securities Regulators) (currently ESMA – European Securities and Markets Authority) has issued three guidelines (recommendations) that regulate market abuse
- CESR Guideline: Market Abuse Directive – Level 3 – first set of CESR guidance and information on the common operation of the Directive
- CESR Guideline: Market Abuse Directive – Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market
- CESR Guidelines: MAD Level 3 – Third set of CESR guidance and information on the common operation of the Directive to the market

In light of MAR and New MAD, these guidelines shall be changed. Also, as regards market manipulation, the market manipulative practices were inserted in MAR as an appendixes

How did the EU Member States sanction market abuse?

Mainly through fines and criminal sanctions

Based on CESR's "*Report on Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive (MAD)*" dated 17 October 2007, out of EU 27 (Croatia was not a member at that moment) + 2 (Iceland and Norway), only in Bulgaria, market abuse was not subject to criminal sanctions, also in Slovenia market manipulation was not subject to criminal sanctions

The criminal sanctions imposed in the said member states could reach up to 12 years of imprisonment (Italy)

New MAD shall impose minimum thresholds of the maximum limits of the criminal sanctions (imprisonment)

The specific novelties of the proposal voted by E.U. Parliament

Future E.U. regulatory framework increase focus on criminal sanctions

Which are the EU legal acts that will address market abuse? (cont'd)

Recently the EU legislators adopted and voted

- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (the “**Market Abuse Regulation**” (“**MAR**”))
- Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (“**New MAD**”)
- Entrance into force: From 3 July 2016 except for the obligations of national regulators to cooperate with ESMA and the latter’s duties to prepare technical standards which shall apply on 2 July 2014
- The new framework will ensure regulation **keeps pace with market developments by**
 - Strengthening the fight against market abuse across commodity and related derivative markets
 - Reinforcing the investigative and administrative sanctioning powers of regulators
 - Harmonizing certain key elements while reducing administrative burdens on SME issuers where possible

The novelties of the new framework

Which are the novelties regarding the scope of the EU legislation? (cont'd)

The Market Abuse Regulation (MAR)

MAR ensures that market abuse legislation keeps pace with market developments

MAR extends the scope of the market abuse framework to apply to any financial instrument admitted to trading on an MTF or organized trading facility, as well as to any related financial instruments traded OTC which can have an effect on the covered underlying market. **Case C-248/11 - Nilas and Others – which determined that RASDAQ is not a regulated market within the meaning of MiFID**

This is necessary to avoid any regulatory arbitrage among trading venues, to ensure that the protection of investors and the integrity of markets are preserved on a level playing field in the whole Union, and to ensure that market manipulation of such financial instruments through derivatives traded OTC, such as credit default swaps (CDS), is clearly prohibited.

Manipulation of benchmarks (such as LIBOR) and benchmarks methodologies will be prohibited by MAR. On BVB it is difficult to determine benchmarks which could have a meaning to be manipulated however, the methodologies for creating the benchmarks are also subject to market abuse rules.

The novelties of the proposal voted by E.U. Parliament

Which are the novelties regarding the scope of the EU legislation? (cont'd)

MAR strengthens the administrative sanctions that can be imposed for market abuse.

For natural persons there are three levels of fines. For the offences of insider dealing and market manipulation a fine of at least €5 million should apply, and fines of €1 million and €500 000 for the other offences.

For legal persons there are also three levels of fines. For the offences of insider dealing and market manipulation a fine of at least €15 million or 15% of annual turnover should apply and fines of €2.5 million or 2 % of its total annual turnover €1 million for the other offences MAR with Member States being free to exceed these limits.

Currently in Romania the thresholds as regards the administrative sanctions for market abuse deeds are as follows:

- Between half and the total value of the transaction
- Between RON 10,000 and RON 100,000 in case no transaction was performed

The novelties of the proposal voted by E.U. Parliament (cont'd)

Liability for legal entities as regards market abuse

Legal persons can be held liable for the market abuse offences committed legal entities will be liable for criminal offences if it is committed for their benefit by a person holding a leading position in the company. In addition the criminal liability of legal entities could be engaged for criminal offences committed by more junior employees **if there is a lack of supervision and control by a person in leading position, i.e. senior management**

In a *per a contrario* interpretation in case the persons in leading position proves the existence of high level control tools and supervision the liability of the legal persons should not be engaged. This should work hand-in-hand with the provisions regarding implementation of adequate internal procedures for tackling market abuse which are regulated under MAR as legitimate behaviours.

It worth mentioning that as in the case of the Romanian law regarding the liability of legal persons, such liability shall not exclude criminal proceedings against individuals involved as perpetrators, inciters or accessories.

The novelties of the proposal voted by E.U. Parliament

Liability for legal entities as regards market abuse (cont'd)

Legitimate behavior under MAR

It shall not be deemed from the mere fact that a legal person is or has been in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal, where that legal person has:

- a) **Established, implemented and maintained adequate and effective internal arrangements and procedures that effectively ensure that neither the natural person who made the decision on its behalf to acquire or dispose of financial instruments to which the information relates, nor another natural person who may have had an influence on that decision, was in possession of the inside information; and**
- b) **Not encouraged, made a recommendation to, induced or otherwise influenced the natural person who, on behalf of the legal person, acquired or disposed of financial instruments to which the information relates.**

Possible solution for exemption to apply: Implementation of a securities compliance program

Why implementing a securities compliance program?

Why implementing a securities compliance program?

Risks can be managed through a securities compliance program

Reputational risk

Non-compliance with securities regulations undermines investors' trust in publicly traded companies

Delays/Blockage of the implementation of shareholders' resolutions

Breaches of corporate governance rules can lead challenges of the shareholders' resolutions, suspension of their implementation and even annulment

Personal liability of the board representatives

- Fines
- Criminal liability

Companies liability

Fines (can be a percentage of the companies' turnover/ or the value of the transaction/s)

Collateral costs

Disturbing the day-to-day activity of key management persons during the investigation periods

Why implementing a securities compliance program? (cont'd)

Do's and don'ts when implementing a securities compliance program

You should

Have management commitment for compliance

Tailor the compliance program to suit each company's needs

Dedicate sufficient resources to avoid/
minimize risks

Provide securities law training at all relevant levels

Have written procedures and document adherence of staff to compliance program

You should not

Have a "form over substance" approach

Implement a "one size fits all" model

Create a program which is not credible in terms of efficiency

Limit training access without proper justification

Evaluate efficiency of the program solely based on proof of acknowledgements

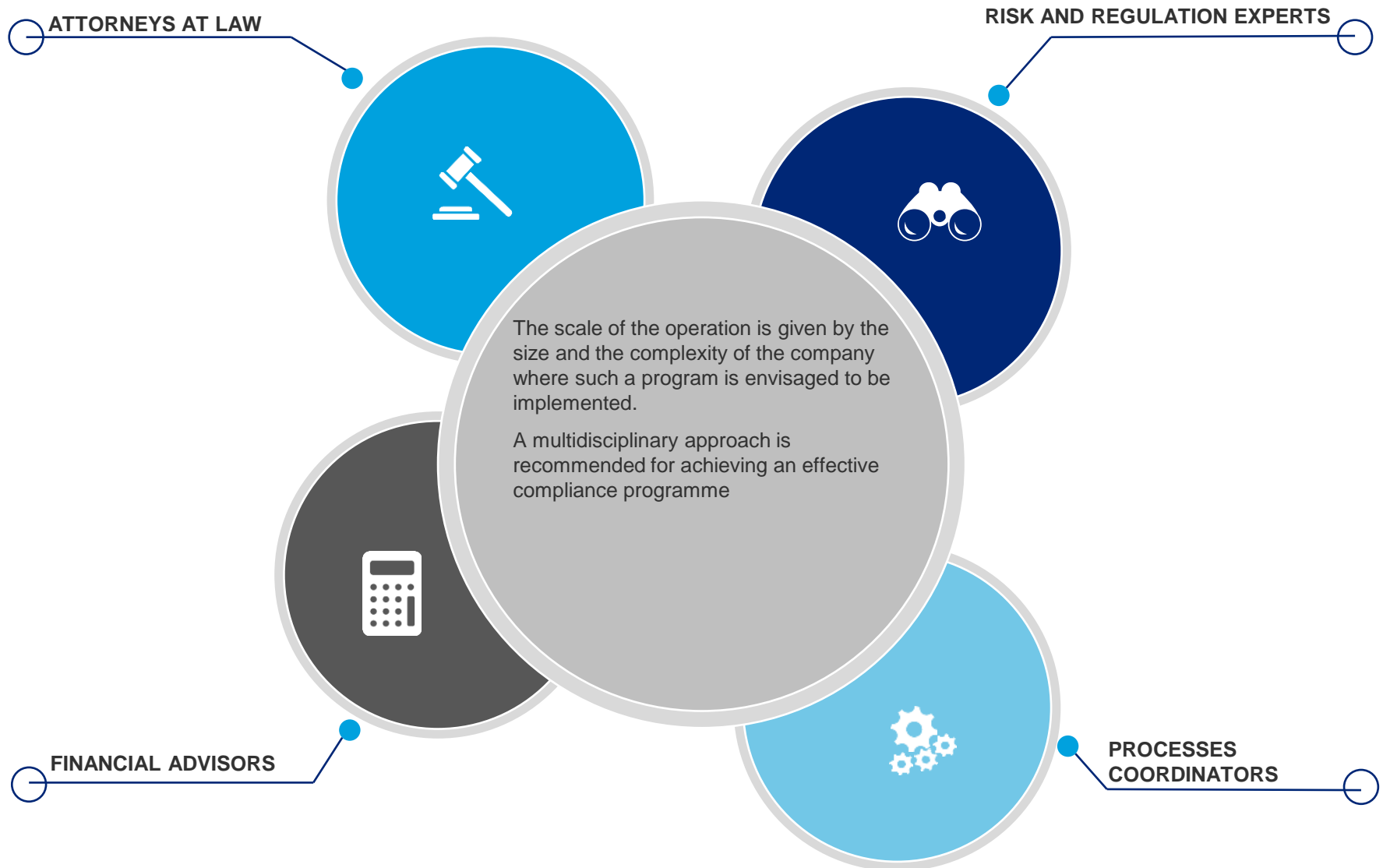
Principles for an effective compliance program

Principles for an effective compliance program



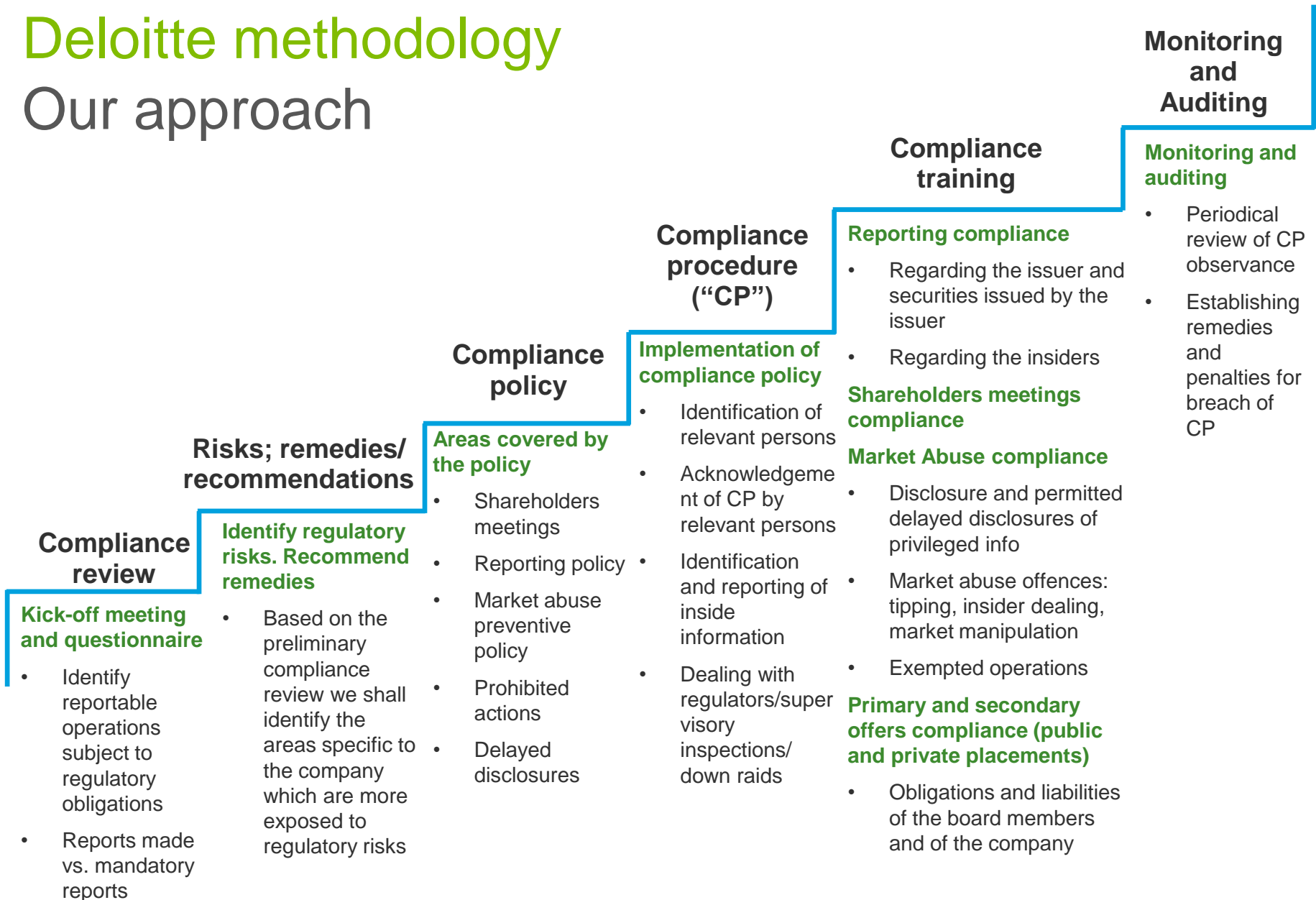
- Implemented written policies and procedures
- Corporate leadership knowledgeable in compliance and ethics and has designated a compliance officer and compliance committee
- Effective training and education
- Effective lines of communication and promoting the compliance and ethics program
- Internal monitoring and auditing of the effectiveness of the compliance program
- Enforcing standards through well-publicized disciplinary guidelines
- Responding promptly to detected problems and undertaking corrective action
- **According to Deloitte's survey a significant number of CEOs of Romanian listed companies were interested in implementing such a program.**

Designing effective legal risk management tools



Deloitte methodology

Our approach



Contact

Tax & Legal



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