

For businesses to grow, sell or restructure a business can be one of the most significant steps in your firm's life cycle. Below is the basic structure of a corporate merge.

- Once a target has been identified, the main two methods of acquisition are either to buy the shares in the company that owns the business, or to buy the business and related assets from the company.
- With a share acquisition a buyer takes everything in the company and therefore from a legal perspective, this process is quicker and simpler.
- With an asset sale, the buyer only takes what assets they want and can avoid taking on liabilities, other than those explicitly accepted. Assets have to be assigned or novated into the name of the buyer. If employees are being acquired, these employees need to be 'transferred' by the buyer and the correct legal process needs to be followed.

1. Preliminary Stages

- Heads of Terms

Sometimes the buyer and seller want to put down in writing key terms and conditions. This can help clarify their positions, however, it can become costly and time-consuming. Nevertheless, they are beneficial to deal with confidentiality and exclusivity.

- Confidentiality Agreement

Before the parties start to trade information, it is standard procedure for a Confidentiality Agreement to be drawn up.

- Advisors

Need suitable lawyers and accountants to deal with the process. Oury Clark can offer you these services all under one roof.

2. Due Diligence

A) Commercial

Representatives of the buyer will want to spend time with the other party in order to find out key commercial elements such as customer lists, contracts and staff levels. The outcome of this will underpin the buyer's

decision to continue with the transaction.

B) Legal

The buyer's legal team will also request a lot of information from the seller's advisors in relation to the operations of the business from a legal perspective. This will include asking for details of share capital, any group structure, compliance records as well as details of on-going and historical litigation. The buyer's legal team will report back to the buyer in order to report risks identified which need to be specifically dealt with in the warranties and indemnities sections of the Share and Purchase Agreement.

3. Key Documents/SPA Disclosure Letter

• **Price and Payment**

Both parties will agree to a price and payment mechanism. The SPA will define a range of terms including the events for payments, calculation or turnover of profits, specific accounting policies to be taken into account.

The parties will therefore negotiate a raft of provisions dictating what action the buyer can or cannot take during the deferred period.

• **Warranties**

The warranties given by the seller tend to focus on a large amount of negotiation. The seller will want the warranties to be as narrow as possible, however, the buyer will want to feel that the seller has made a significant effort to be transparent about the business thereby instilling confidence that it is going to get full value for money.

A focused commercial approach should be adopted by both parties. The schedule of warranties should be, to some extent, tailored to the nature of the business being acquired.

Disclaimer:

This note does not contain a full statement of the law and it does not constitute legal advice. Please contact us if you have any questions about the information set out above

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Merger & Acquisitions

Date of publication: 2019

The seller will resist attempts by the buyer asking it to give warranties in relation to events outside of its control and knowledge. There is a fine balance to satisfying the buyers needs whilst not burdening the seller with unreasonable risk.

- **Indemnities**

A buyer may feel that some warranties are so fundamental that it needs the ability to not only claim damages on a contractual basis but also on an indemnity basis.

Indemnities are used to address specific areas of risk that have been identified through due diligence.

4. **Disclosure Letter & Bundle**

The Disclosure Letter is a key document in any acquisition. If the seller fails to make accurate or complete disclosures, it may find itself on the end of breach warranty claim. Conversely, if the buyer does not review the contents it can find itself exposed.

- **Fair**

To avoid uncertainty it is vital that the seller discloses everything that is relevant, even if it knows the buyer is aware of it.

- **General Disclosures**

The scope of information considered to fall under general disclosure. A buyer should resist as much general disclosure as possible.

- **Specific Disclosures**

If the seller already knows that there are facts which contradict a warranty being given then rather deleting the warranty it should disclosure those facts which as much detail as is reasonable to allow the buyer to ascertain the potential impact they may have on the business.

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