Morgan Lewis

Introduction

This guide provides a high-level outline of the steps and documentation involved in a simple, vanilla transaction under English law to acquire a private company (the "**Transaction**"). An indicative timeline of the various stages of the Transaction is set out in Appendix 1.

This guide assumes that the Transaction involves a single, private, corporate buyer (the "**Buyer**") and a single, private, corporate seller (the "**Seller**"), and that the target company or business (the "**Target**") is wholly owned by the Seller.

This guide focuses on a sale of shares of the Target, rather than a sale of the businesses or assets of the Target or an investment alongside other (new or existing) shareholders, or joint venture arrangements.

In particular, this guide considers four key areas of the Transaction:

A. the pre-contract period (including the non-disclosure agreement, term sheet, exclusivity agreement and due diligence process);

B. the key legal documentation of the Transaction (i.e. the share purchase agreement or business/asset purchase agreement, the disclosure letter and the guarantee);

C. signing and completion of the Transaction; and

D. other considerations such as finance, antitrust, employment and tax.

A. Pre-Contract Period

1. Non-Disclosure Agreement

A non-disclosure agreement ("**NDA**") (also referred to as a "confidentiality agreement"), is an agreement between the Buyer and the Seller that may be entered into during the early phases of the Transaction. Proprietary and confidential information often needs to be shared between the parties to a Transaction. The purpose of an NDA is to restrict the receiving party from disclosing such information (and the existence of the negotiations and any deal terms) to unauthorised third

parties, or from using it for unauthorised purposes or in a manner that would adversely affect the disclosing party.

NDAs can be unilateral (where there is a one-way exchange of confidential information) or mutual (where there is a two-way exchange of confidential information, for example, where both sides are disclosing information to each other, as might be the case if all or part of the consideration is shares in the Buyer).

In negotiating a typical NDA, the Buyer and Seller will need to consider, among other matters:

- **Definition of “Confidential Information”**: The disclosing party will want to cast a wide net over what is considered to be confidential (to avoid any gaps or loopholes), whereas the receiving party will want the definition to be as narrow as possible (to provide certainty of what does and does not constitute confidential information for which they are responsible).

- **Parties to the NDA/possible “recipients”**: Disclosure to additional persons (other than the Seller and the Buyer) may be required for the purposes of the Transaction, including to subsidiaries, directors, employees and third parties such as legal and other professional advisers and providers of debt finance. Sometimes the NDA will require the Seller or the Buyer, as applicable, to be liable for any confidentiality breaches by such additional recipients; other times, the additional recipients may need to be bound directly by the NDA or similar confidentiality obligations.

- **Exceptions**: NDAs commonly expressly exclude certain information and disclosures from the confidentiality obligations, i.e. where it would be inappropriate or unreasonable to expect the recipient to keep the information confidential. These exceptions may include information that is: (i) already in the public domain; (ii) already known by the recipient; or (iii) received from a third party where that third party was not obliged to keep the information confidential in the first place. An NDA is also likely to permit the recipient to disclose information in accordance with applicable law or stock exchange rules, or as required by a court, tribunal or regulatory authority.

2. Term Sheet

Before preparing the key Transaction documentation (see *Section B (Legal Documentation)* below), the Buyer and the Seller will often enter into a term sheet (also known as “heads of terms”, a “memorandum of understanding” or a “letter of intent”). This document is normally only a few pages long and may typically include:

- an outline of the key commercial terms and principles that have been agreed between the parties (e.g. price and approach to valuation, conditions to the Transaction and the shares/business/assets being acquired);

- a proposed timeline for the Transaction, and a description of the process (for example, the level of due diligence access to be provided to the Buyer);

- an indication of outstanding matters that will need to be negotiated and addressed in the key Transaction documentation (e.g. "customary warranties"); and

- exclusivity provisions (whereby the Seller agrees not to sell or market the Target to any person other than the Buyer for an agreed period) and confidentiality provisions (whereby the parties agree to keep the Transaction and the term sheet confidential) - also see *Section A(1) (Non-Disclosure Agreement)* above and *Section A(3) (Exclusivity Agreement)* below).

Term sheets governed by English law are usually expressed to be "subject to contract" and non-legally binding (save in respect of exclusivity and confidentiality), and act as a framework for negotiation and drafting of legal documentation. Term sheets can provide clarity in complex transactions. While the parties are not obliged to follow the term sheet and have flexibility to change the terms as negotiations progress (e.g. in light of any due diligence), the term sheet is often seen as having moral weight; it shows the intention of the parties, and may make it more difficult for a party to argue a "re-trade" of the deal at a later date. The Buyer may also seek a costs indemnity or break fee in the event the Seller withdraws from negotiations or otherwise breaches, for example, the exclusivity provisions – legal advice should always be sought for such provisions, as they risk being unenforceable.

3. Exclusivity Agreement

If not covered in a term sheet, a separate exclusivity agreement may also be entered into between the Seller and the Buyer to prevent the Seller from concluding a transaction or pursuing negotiations with, or soliciting interest from, alternative buyers during a fixed period of time. Completing a Transaction can be an expensive and time-consuming process, which can distract the Buyer's management and employees from their "day jobs". Before committing time and resources to due diligence and negotiations, a Buyer will want some comfort that the Seller is not trying to sell the Target to someone else at the same time. This is especially the case when the Transaction is conducted as a unilateral (i.e. non-competitive or auction) process.

The exclusivity agreement would not, however, commit either party to proceed with the Transaction, and the Seller could sell to a third party at the end of the agreed exclusivity period. Furthermore, the Seller will typically insist that the exclusivity period is no longer than is reasonably required to complete negotiations and due diligence. While parties often extend the exclusivity period if satisfactory progress is being made, it is also common to see provisions whereby the Seller can terminate exclusivity if the Buyer is not making sufficient progress. The Seller would also want appropriate carve-outs from the exclusivity restrictions to allow ordinary course activities.

4. Due Diligence Process and Report

Due diligence refers to the Buyer's investigation of the Target, to gain a better understanding of the Target's business, to identify potential issues or "red flags" that might impact the valuation of the Target or the benefits of the Transaction, and to reduce the Buyer's risk profile. Any issues raised during due diligence may be addressed in the legal documentation, but ultimately the Buyer's decision to proceed

with the Transaction (and at what valuation) may depend on the results of the due diligence exercise.

Key aspects of a due diligence exercise include:

- **Timing**: Depending on the complexity of the Target and its business (and the commercial drivers of the Transaction), the due diligence process could last from a couple of weeks to several months.

- **Areas of review**: In addition to the Buyer's internal teams (e.g. operational teams) conducting their own analysis of the Target, the Buyer will usually engage various specialists to conduct due diligence. These specialists usually include finance, tax and legal professionals, but additional specialists may be required depending on the Target's industry (e.g. valuation specialists for a real estate business, environmental experts for businesses that have production operations, etc.).

  In a typical Transaction, the legal due diligence exercise would focus on information and documents relating to:

  - corporate history and records;
  - shares, securities and shareholders;
  - financing, indebtedness and security;
  - assets and services;
  - material contracts and arrangements;
  - litigation and disputes;
  - employees, employee benefits and pensions;
  - data protection, intellectual property rights and information technology infrastructure and security;
  - real estate;
  - insurance;
  - regulatory compliance; and
  - requirements for regulatory filings (e.g. antitrust filings, etc.).

- **Data room**: The Seller will typically set up an online virtual data room to store, and control access to, the information and documents being disclosed about the Target. The Buyer may also seek to schedule conference calls or meetings with the management team of the Target to discuss key areas of due diligence or any issues raised.

- **Report**: Usually the Buyer's advisers will provide due diligence reports to the Buyer, identifying issues that were discovered during the course of the due diligence process. Depending on timing and budget, such reports can be high level, "red flag" reports of key issues only, or more detailed reports about the Target.

- **Identified risks**: Issues and risks identified through the due diligence process may be addressed, for example, by: (i) adjustments to the purchase price; (ii) negotiating appropriate warranties and indemnities in the purchase agreement (see *Section B(1) (Transaction Agreement)* below); (iii) the Seller agreeing to "fix" certain issues either before or after the parties enter into the purchase agreement; or (iv) in extreme circumstances, the Buyer walking away from the Transaction.

B. Legal Documentation

1. Transaction Agreement

Depending on the form of the Transaction (i.e. whether it is a share sale or a business/asset sale, and if there is a "primary" element of new shares being issued), the key agreement that forms the backbone of the Transaction will usually be one of the following (each a "**Transaction Agreement**"):

- a share sale and purchase agreement;

- an asset purchase agreement; or

- an investment/subscription agreement.

The first two types of agreement are used where there is a transfer of ownership of shares or other assets; the last type of agreement is used where there is an investment alongside existing or new shareholders or in combination with a share sale.

The key components of each type of Transaction Agreement are relatively similar, and include:

- **Sale and purchase**: Each type of agreement will have a clause that deals with the actual purchase of shares/assets or subscription for shares. This clause is focused on ensuring that the Buyer acquires the legal and beneficial interest in the relevant shares or assets.

- **Consideration**: This clause deals with the purchase price of the shares/assets, including the amount, form and timing of payment(s), and any adjustments to the purchase price.

  While payment is usually made in cash, it could also be made "in kind". For instance, the Buyer might settle all or part of the consideration by issuing its own shares to the Seller.

In terms of timing, payment for the shares/assets can most simply be made in full at the time the shares/assets are transferred to the Buyer. Alternatively, other common payment mechanisms include:

- *Retention amounts:* The Buyer may withhold part of the payment amount for a period of time to later set off against, for example, any warranty claims payable by the Seller (see below). Retained amounts are sometimes held in a third party escrow account.

- *Deferred consideration*: The Buyer may want to split the consideration so that a portion is paid at the time of the share/asset transfer, and other portions are paid on later dates (sometimes subject to the satisfaction of certain conditions or steps).

- *Deposits*: If the transfer of shares/assets does not take place at the time the Transaction Agreement is signed, the Seller may require the Buyer to pay a portion of the consideration amount upfront as a deposit and pay the rest at the time the transfer completes.

- *Earn-outs:* To incentivise, for example, management Sellers who remain employees of the Target, additional amounts of consideration could be paid at a later date subject to the satisfaction by the Target of certain performance criteria.

- *Completion adjustments*: The amount of the purchase price may also be adjusted following completion of the Transaction, depending on how the value of the Target has been calculated and agreed. For example, if the value of the Target is based on a set of financial accounts as of a date prior to the share/asset transfer, there may be a later true-up exercise on the basis of financial accounts drawn up as of the time of completion of the transfer (often referred to as "completion accounts"). It is common for the Target to be valued on a "debt free/cash free" basis (i.e. on the basis that all debt is paid off and all excess cash extracted prior to completion), and then for a debt/working capital adjustment to take place through the "completion accounts" mechanism.

  On the other hand, if the value of the Target is calculated using a "locked box" mechanism (i.e. when the value is fixed prior to signing and the Target is restricted from making certain payments or "leaking" value following a particular date – most typically, the date of the last relevant accounts), the Seller may need to make payments to the Buyer if any payments are made in breach of the leakage restrictions.

- **Conditions**: Sometimes, the parties will not want, or be able, to proceed to complete the Transaction at the time the Transaction Agreement is signed, but for deal certainty will nevertheless want to enter into the agreement. In these instances, the Transaction Agreement may include conditions that must be satisfied before completion of the Transaction can take place. Examples of common conditions include:

- *Antitrust*: If there is an overlap in the businesses carried on by the Buyer and the Target, the parties may need to obtain merger control or antitrust clearances from the Competition and Markets Authority (or other antitrust regulators) (see *Section E(2) (Antitrust)* below).

- *Regulatory or other third party consents*: If the Target is regulated by a governmental authority, the Transaction may require the regulator's consent.

- *Reorganisation*: The Buyer may require the Target to carry out an internal reorganisation before it proceeds to completion, which could include simplifying the Target's group structure, moving unwanted assets to the Seller or moving required assets (including required intellectual property rights) into the Target.

- *Financing*: The Buyer may need to obtain third party funding before it can proceed with the Transaction.

- *Other consents*: The Target may be subject to commercial or other agreements which require the consent of a third party in the event of a change of control of the Target - such as lenders to the Target (under loan documents) or joint venture partners (under any shareholder agreements).

- **Warranties and indemnities**: Warranties are contractual statements of fact in the Transaction Agreement about a particular state of affairs in the Target and its group, or the respective parties, as the case may be. The parties will usually give mutual warranties in respect of their capacity and authority to enter into, and perform their obligations under, the Transaction Agreement. In addition, the Seller will usually give warranties in respect of its title to the Target's shares, and the Target's businesses and tax situation.

  There are two key purposes for the warranties given by the Seller:

  - to give the Buyer the right to bring a claim in damages for breach of contract if the warranties turn out to be false and the Target was, as a consequence, not as valuable as anticipated; and

  - to encourage the Seller to disclose information about the Target, its group and businesses, as the Seller's liability will normally be limited if it discloses information that is inconsistent with the warranties before the parties sign the Transaction Agreement (see *Section B(2) (Disclosure Letter)* below).

  If the Buyer becomes aware of a specific risk or issue before it enters into the Transaction Agreement, it may seek an indemnity from the Seller. An indemnity is, in essence, a promise by the Seller to pay to the Buyer an amount equal to (on a pound-for-pound basis) the loss suffered as a result of the specific risk/issue (by way of example, if the Target is the subject of an ongoing specific litigation). This is because the Buyer will be unable to bring a claim under the warranties (or its chances of bringing a successful claim may be limited) if such risk/issue is disclosed to or known by the Buyer before signing the Transaction Agreement.

- **Dispute resolution**: The parties will need to agree the governing law of the Transaction Agreement and the method for resolving any disputes under the Transaction Agreement (including its validity and enforceability), e.g. whether the parties will go to court or use arbitration, and which jurisdiction or arbitration forum and rules will be used.

- **Other key provisions**: Other key provisions in the Transaction Agreement may include:

  - *Gap controls*: If there is a period of time between signing the Transaction Agreement and completion of the Transaction, the Seller will usually give some comfort to the Buyer that the Target's business will be run in the ordinary course and that certain key actions will not be undertaken without the Buyer's consent. See *Section C(3) (Business Protections)* below for further details.

  - *Non-compete/non-solicit obligations*: The Seller may agree not to compete with the business of the Target or poach key employees for a period following completion of the Transaction.

  - *Limitations of Seller liability*: The Seller's liability under the Transaction Agreement may be limited by, for example, monetary caps and timing requirements for the Buyer to bring claims.

  - *Termination provisions*: The parties are likely to want to set out the circumstances in which either party can terminate the Transaction Agreement, particularly if there is a gap between signing and completion (e.g. if a material adverse change occurs).

- **Boilerplate**: Boilerplate is the term given to certain fairly standard clauses in the Transaction Agreement that are not generally considered to be commercial terms, and which have essentially a mechanical legal function. These clauses are not typically the subject of much negotiation between the parties, but can have a significant impact on the agreement.

  Key examples of boilerplate provisions include the following:

  - confidentiality obligations and requirements for public announcements about the Transaction;

  - the procedure for giving notices under the Transaction Agreement;

  - whether variations of the Transaction Agreement need to be in writing signed by each party, and whether waivers need to be in writing signed by the party giving the waiver;

  - whether parties can assign their rights under the Transaction Agreement to third parties;

  - whether any third parties have any rights under the Transaction Agreement;

- confirmation that the Transaction Agreement supersedes any prior discussions or other documents or arrangements in relation to the Transaction; and

- what happens if any of the provisions of the Transaction Agreement are unenforceable at law.

2. Disclosure Letter

In the disclosure letter, the Seller discloses facts which might make any of the warranties contained in the Transaction Agreement untrue. If the disclosure meets the required test for disclosure in the Transaction Agreement (e.g. fair disclosure with sufficient detail to identify the nature and scope of the matter disclosed), the Seller may avoid liability for the ostensible "breach" of warranty. As discussed in *Section B(1) (Transaction Agreement)* above, a breach of warranty might give the Buyer a right to bring a claim in contract against the Seller. It is, therefore, critical for both the Buyer and the Seller to review the disclosures in detail: from the Seller's point of view, a poorly drafted disclosure may still result in a claim for breach of warranty; from the Buyer's point of view, a failure to review the disclosures may mean the Buyer loses the opportunity to address an issue that has been flagged to it in circumstances where it may also be unable to bring a successful warranty claim due to its deemed knowledge of the issue.

The Seller typically produces the first draft of the disclosure letter. There are three key elements to the disclosure letter: (i) the general disclosures (the "front-end"); (ii) the specific disclosures (the "back-end"); and (iii) the disclosure bundle.

- **General disclosures**: The Seller will typically draft the general disclosures to be as broad as possible. These will usually include, for example, disclosures of all information which is available in specified public registers (e.g. for a UK company, the public register at Companies House). In the UK, it is also common for the contents of any virtual data room to be generally disclosed (provided the virtual data room is reasonably well organised with an index). However, the Buyer should be careful to ensure that the disclosures are not so broad that they become unreasonable. For example, when conducting searches of public registers, it is common practice to specify the register as at a specific time and date.

- **Specific disclosures**: These disclosures refer to specific, identified matters which, if not disclosed by the Seller, could result in a breach of warranty claim. The specific disclosures typically cross-refer to the relevant warranties in the Transaction Agreement. For example, if the warranty states that the Target is not a party to any legal proceedings, but in fact it is a party to legal proceedings, there should be a specific disclosure about such legal proceedings.

- **Disclosure bundle**: The disclosure bundle contains documents which have been disclosed in the disclosure letter, and is generally attached to the disclosure letter. It is commonly provided by way of an exchange of an external hard drive or USB stick, or other electronic file transfer, containing the contents of any virtual data room or other disclosure materials. Two copies of the bundle

are made: one for the Buyer and one for the Seller. The parties' lawyers should ensure that the two bundles contain identical documents, usually by reference to an agreed index.

The Seller usually delivers the disclosure letter and disclosure bundle at (or before) the signing of the Transaction Agreement (i.e. when the relevant warranties are given).

If there is a gap between signing and completion of the Transaction, the Buyer may seek to have the agreed warranties repeated at completion, so as to get comfort that no material issues have arisen in relation to the Target in the interim period. In return, the Seller would seek to update its disclosure letter, or else it runs the risk of breaching a warranty at completion. As the Buyer will not want to be forced to complete the Transaction if a significant issue arises in a supplemental disclosure letter, the parties often compromise and agree that: (i) the Seller can only make supplemental disclosures relating to new matters which have arisen between signing and completion; and (ii) the Buyer can terminate the Transaction if a supplemental disclosure is made which would constitute a material breach of warranty had it not been disclosed.

3. Guarantees

If a party has concerns about the other party's ability to perform its obligations under the Transaction Agreement (e.g. the Buyer's ability to pay the purchase price or the Seller's ability to meet its liabilities in connection with any potential warranty or indemnity claims), the concerned party will often request that a third party with standing (e.g. the other party's parent company or key shareholder) guarantee the performance of such obligations.

Guarantees can be included as part of the Transaction Agreement or exist as a standalone document. However, there are certain legal formalities that need to be observed for a guarantee to be enforceable, including that the guarantee (i.e. the Transaction Agreement if the guarantee is included in the Transaction Agreement) must be executed as a deed.

C. Signing and Completion

1. Split or Simultaneous Signing and Completion

Signing (also referred to as "execution") occurs when the parties to the Transaction Agreement sign and date the agreement, such that the Transaction Agreement comes into force.

Completion (also referred to as "closing") occurs when the Transaction completes (or closes), which is usually when title to the relevant shares/assets passes to the Buyer (or in the case of a subscription for new shares, when the relevant shares are issued to the Buyer) and the Buyer pays the consideration.

As discussed above in *Section B(1) (Transaction Agreement),* signing and completion can take place simultaneously. Alternatively, the parties may want to lock down the transaction for certainty at signing, even though certain actions or conditions may need

to be satisfied before completion actually occurs. For example, the parties may need to obtain antitrust or other regulatory clearances prior to completion. In this case, signing and completion may be split, with completion happening at a later date. See *Section B(1) (Transaction Agreement)* above for further details in respect of common conditions, and *Section C(3) (Business Protection)* below for protections for the business (also known as "gap controls") in the period between signing and completion.

2. Common Completion Deliverables

Irrespective of whether signing and completion are simultaneous or not, the Transaction Agreement will usually contain a list of completion deliverables, which must be satisfied by the parties (or waived) in order for completion to occur. These may include:

- **Seller deliverables**:
    - (in the case of a share sale) executed stock transfer forms transferring the sale shares from the Seller to the Buyer;
    - (in the case of a share sale) existing share certificates in respect of the sale shares in the name of the Seller for cancellation at completion (or an indemnity for any lost share certificates);
    - new share certificates in respect of the sale (or subscription) shares in favour of the Buyer;
    - any resignation letters of directors/auditors/the Target's secretary; and
    - Target board authorisations (e.g. written resolutions or minutes of a meeting) approving the registration of the share transfer (or subscription) and related steps;
- **Buyer deliverables**:
    - payment of the purchase price;
    - any appointments of new directors/auditors/a secretary of the Target; and
    - a statement of any person who, on completion, will become a registrable person/legal entity in relation to the Target within the meaning of section 790C of the Companies Act 2006 (i.e. persons of significant control);
- **Seller and Buyer deliverables**:
    - copies of the transaction documents executed by the relevant party (e.g. the tax deed, any separate guarantee, employment contracts, any loan termination agreements of the Target, etc.); and
    - board and shareholder authorisations (e.g. written resolutions or minutes of a meeting) of the relevant party approving the entry into and performance of the Transaction Agreement (and related transaction documents).

3. Business Protections

In the case of a split signing/completion, the Seller will usually give certain pre-completion covenants (also known as “gap controls”) to continue to run the company in the normal and ordinary course, and to maintain the business as a going concern. The Seller may agree not to do, without the Buyer’s prior consent, certain actions that might affect the value of the Target’s business or undermine the Transaction, for example:

- change the Target’s share capital or create, allot or issue shares or grant share options or the right to acquire the Target’s share or loan capital (whether by conversion, subscription or otherwise);
- engage in material transactions, such as major acquisitions or disposals of assets or businesses, or exceed agreed capital expenditure limits;
- amend the constitutional documents of the Target (e.g. its articles of association);
- declare or pay any dividends or distributions;
- make any changes to the Target’s loan or security profile;
- make changes to the remuneration or benefits of senior management; or
- commence or settle any material litigation.

The Seller may also grant the Buyer certain access rights to the Target’s books and records, and to its premises and management, so that the Buyer can monitor compliance with the pre-completion covenants.

D. Post Completion

The parties will need to take certain actions following completion, such as:

- updating the Target’s books and records to reflect the change in ownership (e.g. amendments to the Target’s register of members, register of transfers, register of directors and register of persons of significant control);
- making any required filings at Companies House, such as:
    - Form AP01 for any director appointments;
    - Form AP03 for any secretary appointments;
    - Form TM01 for any director terminations;
    - Form TM02 for any secretary terminations;

- Form PSC02 to give notice of a relevant legal entity with significant control; and
- Form SH01 for a return of allotment of shares; and

- payment by the Buyer of any stamp duty on a share transfer (see *Section E(4)* (*Tax*) below).

E. Other Considerations

1. Finance

The Buyer may be using debt finance (including intragroup finance) to fund all or part of the purchase price for the shares. Timing will be key, to ensure that all debt documents are in place and funds available prior to completion.

Key financing documents may include:

- **Facility (loan) agreement**: This is the main agreement documenting the loan and its terms and conditions (including repayment provisions, interest and events of default). Depending on the value and complexity of the Transaction, there may be several layers of debt (e.g. senior, mezzanine) and several facility agreements. Even after the facility agreement is executed, provision of funds under the loan is likely to be subject to certain conditions precedent, e.g. the borrower providing to the lender documents such as its articles of association, board authorisations (minutes or written resolutions), legal opinions, and a director's certificate confirming that any borrowing limit of the borrower is not exceeded by the loan.

- **Security document**: This documents any security to which the loan may be subject, e.g. a charge over the shares in the Target being acquired by the Buyer, or over other Buyer assets. If the Buyer defaults on its loan repayments, the bank/loan provider can enforce the security and potentially take the shares/assets.

- **Intercreditor and subordination agreements**: These contain arrangements between different providers of debt finance (e.g. between senior lenders and mezzanine lenders) in connection with their respective rights and rankings (priority) in the financing, including in respect of any proceeds if the borrower defaults on the loans or becomes insolvent.

2. Antitrust

During the due diligence process, the Buyer should assess the antirust/competition law risks associated with the Transaction, including in light of the Transaction structure, the turnover of the parties and the Target, and the jurisdictions in which the parties and the Target are located or do business. A filing with the relevant antitrust authorities may need to be made, and approval received, prior to completion of the Transaction. In some cases, as a condition to receipt of the antitrust clearance for the Transaction, the Buyer may need to commit to dispose of certain assets following

completion of the Transaction, e.g. where there is significant overlap with the Target's business.

Given the significant implications of an antitrust filing for the Transaction and its timetable, the Buyer should engage specialist antitrust lawyers at an early stage of the process, to determine whether any filing or notification is necessary. In addition, if the Buyer and Seller are competitors operating in the same or a similar industry or market, the parties may have to act with caution prior to completion of the Transaction, in particular when exchanging sensitive information and in respect of any interim access rights or "gap controls" granted to the Buyer, in case of a potential breach of antirust/competition laws.

A failure to comply with antitrust laws can result in significant fines and in some instances the unwinding of the Transaction.

3. Employment

Depending on the structure of the Transaction, there may be particular requirements with respect to the Target's employees. For example, unlike a share purchase (where the Target's employees continue to be employed by the Target irrespective of the Transaction), if the Transaction is structured as an asset/business purchase, there will usually be a number of additional requirements, including under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended), often referred to simply as "**TUPE**".

Where a transfer of the Target's business (or asset/part of the Target's business where the economic entity retains its identity) falls under TUPE, the employment contracts of the employees assigned to that business will automatically transfer to the Buyer on their existing terms (with the exception of old age, invalidity and survivors' benefits under occupational pension schemes). The Buyer should therefore be aware that it would effectively step into the Target's shoes as employer of the transferring employees. In these circumstances (subject to a limited number of exceptions), there are enhanced protections for employees from dismissal and from unilateral changes to their employment terms. In addition, prior to the transfer, the Buyer and Target would need to inform and (if appropriate) consult recognised trade unions or elected employee representatives (if there is no recognised union) in relation to any employees affected by the transfer or any measures taken in connection with it.

4. Tax

The parties will need to consider certain tax matters in connection with the Transaction.

- **Tax structuring**: The parties will need to determine the most tax efficient structure for the Transaction. This will require consideration of any overseas tax issues, whether tax is withheld from dividends or interest remitted from the relevant jurisdiction, and the rules relating to tax evasion and tax avoidance. Selling a member of a group may have additional tax consequences, in particular in relation to de-grouping charges and the availability of group relief, which should be carefully considered.

- **Tax relief**: A number of tax reliefs may be available to Sellers. If the consideration for the transfer of shares in the Target is (in whole or part) the issue, by the Buyer, of shares or loan notes to the Seller, the Seller may wish to obtain roll-over relief from capital gains tax which should defer any tax chargeable on the sale until such time as the new shares or loan notes are disposed of. If the Seller wishes to avail of this treatment it will normally require a tax clearance from HMRC.

- **Tax warranties**: It is standard for the Seller to give specific warranties in the Transaction Agreement in respect of the tax position of the Target (see *Section B(1) (Transaction Agreement)* above for further information in respect of warranties and indemnities).

- **Tax deed/covenant**: In addition to specific tax warranties, it is common for the Seller to give indemnities in respect of pre-completion tax liabilities. These indemnities, and other provisions specifically relating to tax matters (e.g. arrangements regarding cooperation in preparing pre-completion tax returns and conduct of tax enquiries and assessments), may be agreed by the parties either in a separate tax deed, or in tax covenants contained in the Transaction Agreement itself.

- **Taxes to be paid**: These may include:

    - *Stamp duty/stamp duty reserve tax*: In the UK, a stamp duty charge of 0.5% (rounded up to the nearest £5.00) of the purchase consideration (whether settled in the form of cash, equity or an agreement to discharge a debt) will usually be payable on the transfer of shares, unless an exemption applies (e.g. if the consideration is £1,000 or less). It is usually the Buyer's responsibility to pay stamp duty, and the Buyer should note that a transfer of shares in a UK company cannot be registered until any stamp duty due has been paid.

    - *VAT*: In the UK, there is no VAT chargeable on the sale of shares. However, both the Seller and the Buyer may be charged VAT on services provided to them during the course of the Transaction (e.g. lawyer's fees).

This guide is for information purposes only and should not be relied on as a statement of law or as a substitute for appropriate advice.

Date: November 2020

APPENDIX 1
STAGES OF A TRANSACTION

Please see below a high level, indicative timeline of the stages of a Transaction (assuming a split signing/completion).