

Thinking of buying a business?

Corporate & Commercial

Structuring the acquisition

It is possible to buy either the shares of a company, or simply buy the assets which make up that business:

- **Share purchase.** The buyer buys the whole company (including liabilities that it may not know about); or
- **Asset (or business) purchase.** The buyer chooses the assets that it wants to buy. This will provide more flexibility, but it can be complicated to identify and transfer specific assets.

Tax and accounting issues

Tax is one of the key factors when structuring an acquisition. Asset deals are typically less tax efficient for sellers than share deals, which can affect the price the buyer pays.

Deal breakers?

Employees

- If you buy a business as a going concern (even via an asset purchase), you must take on its employees on their existing contract terms.
- It is worth considering whether you want to incentivise or tie in key staff or management on special terms.

Pensions

- You may have to take over the target company's existing pension arrangements or offer prescribed pension arrangements to transferring employees.

Intellectual property rights

- A brand, trade mark or patent may be the most valuable asset of the target business. Take legal advice to check that the target business:
 - owns the rights;
 - has adequately protected the rights; and
 - in the case of asset sale, can transfer the rights to the buyer.

Environmental issues

- You could face huge liabilities (possibly including criminal liability) if you buy contaminated land or a company that caused or allowed contamination.

Shared assets

- If the target business is part of a larger corporate group, it may share assets (such as computer systems, property and insurance policies) with other group members. Consider whether these arrangements can be unravelled without incurring prohibitive costs or disruption to the target business. An agreement can be drafted to deal with how the assets are divided and shared after the completion of the sale.

Consents and third party approvals

- The acquisition may need the approval of third parties (for example, industry regulators) or require approval from competition authorities. Consider when to approach them and whether the transaction is likely to get their consent.
- If you are acquiring all the shares in the target company, check that no important contracts can be terminated on a change of control.
- The transaction may require approval from either the buyer's or the seller's shareholders.

Early stage negotiations: key points to remember

- Make sure that the person you are negotiating with has the authority to talk to you and has the power to provide the information you require.
- If the seller or the target company is a competitor, you should take legal advice before starting any discussions or exchanging information. Sharing business sensitive information is risky as it could lead to a breach of competition law, and potentially a large fine.
- Avoid making a legal commitment by mistake. A binding deal can be made without anything in writing (even through a conversation). When talking or writing, make sure the seller is aware that nothing is legally binding until the formal acquisition agreement has been signed.

Process and documents

Confidentiality agreement

Acquisitions are highly business sensitive. Sign a confidentiality agreement (also called a non-disclosure agreement) at an early stage. This will generally require both parties to keep the deal secret until it is formally announced and protect any information exchanged by the parties. A buyer should take legal advice before signing a confidentiality agreement to ensure that its position is adequately protected and its obligations under the agreement are reasonable.

Heads of terms

Heads of terms are usually signed at an early stage of a deal before detailed due diligence. They may also be known as:

- Heads of agreement;
- Memorandum of understanding;
- Letter of intent; or
- Term sheet.

They set out the key terms of the deal and are generally not legally binding. However, legal obligations can be created inadvertently and a strong "moral commitment" can be created that could weaken the buyer's negotiating position later on. The buyer will normally prepare this document. A buyer should always take legal advice before signing this document.

Exclusivity agreement

An exclusivity agreement (also known as a lock-out or no-shop agreement) gives the buyer a period of exclusivity in which to negotiate the transaction by preventing the seller from actively seeking or negotiating with other prospective buyers during the specified period. An exclusivity commitment can be dealt with in a separate agreement or as part of the heads of terms for the transaction.

Due diligence

The purpose of due diligence is to investigate the assets and liabilities of the target business. A buyer should take legal advice to ensure it gets the legal protections that it requires. If the buyer becomes aware of any significant problems in the due diligence process, it can:

- abort the deal;

- negotiate a price reduction; or
- seek specific protections in the acquisition agreement.

Acquisition agreement

The acquisition agreement sets out the agreed terms governing the transaction and the mechanics of the deal (for example, the parties involved, the amount to be paid, the timing of the completion and any consents or approvals required before completion). It will typically contain a number of provisions designed to protect the buyer, including:

- **Warranties.** These are contractual promises given by the seller about different aspects of the target business (for example, that it owns all the assets and there are no disputes with third parties). If they are untrue, the buyer can sue for damages.
- **Indemnities.** These require the seller to compensate the buyer (on a pound for pound basis) for specific liabilities if they arise (for example, potential tax or environmental liabilities).
- **Restrictive covenants.** These can prevent the seller from competing with the target business or poaching key customers or employees for a period following completion. They will only be enforceable if they are reasonable in scope, duration and geography.

Please note that the information contained in this fact sheet does not constitute legal advice. This fact sheet is not intended to be a full summary of the law and advice should be sought on individual situations. All statements of law are applicable to the laws of England and Wales only.