

SALE

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1. Introduction

There will come a time in the life of any company when a sale is considered by the owners. This may be because someone else has offered to buy the company at a price which the owners cannot refuse, or it may be because the rationale behind the company has disappeared. Whatever the reason, and whether it be driven by the owners of the company, or outside circumstances, there are many issues to consider.

2. Share Sale versus Asset Sale

When the owners come to dispose of the business, such disposal will, most commonly, occur in either one of two ways: (i) they can sell the assets of the company (commonly referred to as a 'business' or 'asset' sale); or (ii) they can sell their shares in the company (commonly referred to as a 'share sale').

The form of purchase may be driven entirely by the buyer, entirely by the seller, or by both. There are various considerations which should be borne in mind, depending on whose perspective the sale is being viewed from. We have assumed that it is the whole of the business which is being sold off – obviously, if only certain assets are to be sold, an asset sale is the appropriate route to follow.

2.1 Seller's perspective

2.1.2 Liabilities

Share sale: Following a sale of its shares, the seller loses his connection with the company. The company itself continues to exist and, in particular, liabilities (hidden or otherwise) continue to be enforceable against it. However, these liabilities will now be those of the new owners.

Business sale: On the other hand, where the sellers only sell the business (i.e. assets) of the company, they will continue to own the company, and therefore still be responsible for the continuing liabilities and obligations which the company may have against and to third parties. Even where the buyer has contracted to assume responsibility for certain liabilities in the acquisition agreement, this will not affect third parties who can still take action against the seller unless they have expressly released him from liability. Further, the buyer may have expressly excluded responsibility for certain specific matters for which the seller will therefore remain 'on the hook'.

Bear in mind, however, that in practice this share sale advantage may not apply. Buyers will commonly seek wide protections from the seller in the acquisition agreement. Although it is common to see warranties and indemnities (see paragraph 4.1.5 below) in both share sale and business sale acquisition agreements, the scope of these protections will be much wider in the share sale context. In addition, where the seller has guaranteed obligations of the company being sold (the 'target'), a clean break will obviously not be possible unless the guarantee is released.

2.1.2 Transfer of Title

Share Sale: Ownership of shares is transferred simply by drawing up and signing a stock transfer form (although in reality a share purchase agreement will supplement this).

Business Sale: On the other hand, on a business sale, each separate asset must be transferred, and this can involve complications, particularly where consents are required from third parties. Although transfer by delivery will be possible for some assets, such as stock and loose plant and machinery, transfers of other assets will be more complicated, such as leasehold property (consent of the landlord will be required) and certain intellectual property (consent of the licensor will be required).

2.1.3 Employees

Share Sale: There is no change of employer – the employees remain employed by the target once the sale has completed. Liability for the employees therefore rests with the target (now owned by the buyer) rather than the sellers. The share sale of itself will not therefore give rise to any potential claims by the employees. Do bear in mind, however, that this analysis will be affected if any warranties are given by the seller about the employees in the acquisition agreement (please see paragraph 4.1.5 below for further discussion on this).

Business Sale: Where the business is sold as a going concern (as opposed to only certain assets being sold off) full responsibility for the employees automatically passes to the buyer. The contracts of employment of those employees employed immediately before the transfer are transferred automatically to the buyer (although complications can arise in respect of the enforceability of restrictive covenants contained in employee's employment contracts.).

2.1.4 Corporate Finance Regulation

Share Sale: The requirements on how, and whom, potential sellers can approach are more onerous on a share sale, as shares come within the ambit of the relevant legislation, whereas businesses generally do not. This is only relevant where a seller is searching for a potential buyer, but has implications on the sorts of information that can be given to potential buyers, and who can give such information. Please see the document entitled 'Raising Finance' for further information on this area.

Business Sale: As set out above, the sale of a business generally does not come within the ambit of the relevant legislation.

2.1.5 Taxation

Share Sale: Sellers who are UK companies (in certain instances) may be exempt from paying tax on gains on a sale of shares otherwise any gain realised on the sale of shares would be subject to corporation up to the rate currently of 30%. Where a UK company (which is a trading company or the holding company of a trading group) has, for a continuous twelve month period beginning not more than two years before the disposal, held a 'substantial shareholding' (at least 10%) in the target (which is a trading company or holding company of a trading group) and is entitled to not less than 10% of the profits on distribution, the seller will be exempt from tax on the sale (the 'substantial shareholding exemption').

Where the sellers are individuals, the consideration will be received directly by them. The taxation consequences are fairly straightforward: for UK resident individuals shares are chargeable assets for capital gains tax (**CGT**) purposes, and any disposal which realises a gain will involve (subject to exemptions) a charge to tax at the rate of 18%. Individual sellers are not eligible for the substantial shareholding exemption. Chargeable gains that qualify for entrepreneurs' relief will be charged to CGT at an effective rate of 10% subject to a lifetime cap of £1 million.

Various other reliefs are available, including reliefs within the Enterprise Investment Scheme and Venture Capital Trust. The Enterprise Investment Scheme aims to assist certain types of small higher-risk unquoted trading companies to raise capital, by providing a range of tax relief for investors in qualifying shares in these companies. The annual investment limit for income tax relief under the Enterprise Investment Scheme was doubled to £400,000 with effect from 6 April 2006 and is to be increased to £500,000 by the Finance Bill 2008 which has yet to receive Royal Assent for such tax years as are to be specified by Treasury Order. For each of these areas, there are stringent conditions which must be met in order to benefit from the reliefs, and specific tax advice should obviously be sought in each case.

Note also that an individual also has the benefit of the annual CGT exemption – currently set at £9,600 for tax year 2008/9 – i.e. in such tax year, the first £9,600 of an individual's net gains is exempt from CGT.

Business Sale: In this instance, the company itself, as the seller, receives the consideration. In order for the consideration to be passed on down to the shareholders of the selling company, further steps have to be taken, such as declaring a dividend or liquidating the company. This complicates the tax position, as there are effectively two points at which tax will be charged. First, the selling company suffers corporation tax on the sale of the business. Second, there will be a further charge when the proceeds of the sale of business, as reduced by the corporation tax charge, are distributed to the shareholders (whether it be by way of income tax on payment of a dividend, or CGT on a deemed disposal of their shares in a winding up). Income distributions to the shareholders would carry a notional tax credit of 10% but a 40% taxpayer would be liable to pay an additional 22.5% tax on the value of the gross dividend (i.e. the dividend plus the notional tax credit). Do note, however, that it is possible to apportion the purchase price so as to avoid capital gains tax liability on assets – although the method for apportionment must be 'just and reasonable'.

2.1.6 Tidying up

Share Sale: Once the sellers have sold their shares in the target, they lose all rights of ownership with respect to that company and its business. There are no further steps which need to be taken, in order to sever themselves from ownership.

Business Sale: On a business sale, on the other hand, once the sellers have sold the business, they are left owning the shares in the company. As well as considering the best way to pass the consideration up through the company to them (see paragraph 2.1.5 above) they also need to consider what to do with the company itself. It will now be a 'shell company' and the sellers may therefore consider liquidating it, which will involve additional time and expense.

2.2 Buyer's perspective

2.2.1 Continuity of Business

Share Sale: From a third party's point of view, they will continue dealing with the target, and the fact that the target now has new owners need have little effect on them. From the buyer's perspective, the assets of the target, and outstanding contracts remain unaffected legally by the change in ownership of the company. Bear in mind the following, however: (i) the buyer has no guarantee that third parties will continue to deal with the company, unless they are contractually obliged to do so; and (ii) contracts with third parties might contain change of control clauses, giving them the right to terminate the contract on a change of control of the company.

Business Sale: A business sale has a more obvious impact on third parties, in that they will now be dealing with a new entity. This may prompt them to review their dealings with the new owners. More importantly, the benefit of existing contracts will not be transferred to the buyer automatically on the sale. Further, the terms of many contracts require the consent of a third party for an assignment of the benefit to be effective – it is vital for potential buyers to draw up a list of ‘key’ contracts, and ensure that consent of the relevant third parties is obtained as soon as possible (or, failing that, at least some sort of indication that they will be happy to continue to do business with the target, notwithstanding the presence of the new owner).

2.2.2 Choice of what to buy

Share Sale: All the underlying assets of the company are indirectly acquired by the buyer. However, against this, all the liabilities of the company (hidden or otherwise) remain with it and therefore become the responsibility of the buyer. Although warranties and indemnities may help to ameliorate this, they are often not a complete panacea – for example the seller may not have the money to pay up under an indemnity.

Business Sale: On the other hand, the buyer in a business sale is able to pick and choose the assets he wants, and will only be liable for those matters for which he agrees to take responsibility in the acquisition agreement.

2.2.3 Financial Assistance

Share Sale: As a general rule, a public company is not allowed to give financial assistance, directly or indirectly, to a person who is proposing to acquire shares in it. Therefore, for example, if the buyer is hoping to finance the purchase by a bank loan, the buyer will not be able to charge the target’s assets as collateral for such loan. Financial assistance is wide-ranging, from providing money directly, to more indirect forms, such as providing guarantees. Although the prohibition on private companies giving financial assistance for the purchase of their shares has recently been removed, it may not be as straightforward as many hoped as it is very likely that banks will still require some level of comfort from the directors.

Business Sale: There is no such prohibition, thereby giving the buyer more flexibility in its financing arrangements.

2.2.4 Taxation

From a taxation perspective it generally tends to be preferable for a purchaser to opt for a business sale. As the buyer does not assume responsibility for all the hidden liabilities of the company, he can save the time and expense involved in carrying out an in-depth investigation into the tax affairs of the company. Note that the tax consequences are similar whether the purchaser is a company or an individual.

By way of overview, the following points are relevant, although as with a share sale, specific advice must be sought in all instances. With respect to base cost for CGT, the price paid for chargeable assets of the business will form the buyer’s base cost for CGT purposes. With respect to roll-over relief, where a buyer has disposed of ‘qualifying assets’ in the previous three years or is intending to do so in the next twelve months, he may be able to roll over any chargeable gain from such a disposal into those assets of the target which are themselves ‘qualifying assets’.

The buyer will be entitled to capital allowances for qualifying expenditure on plant and machinery, generally, at 20% a year on a reducing balance basis or 10% for certain assets with an expected useful life of more than 25 years. A similar taxation regime applies as the capital allowances regime for intangible fixed assets such as copyright that entitles the buyer of such assets to write off the cost of such assets in accordance with the buyer's UK GAAP compliant accounts and thus it may be more tax efficient for a buyer of a business whose assets consist largely of intangible fixed assets to acquire the assets rather than the shares in the company.

VAT will not be payable where the transfer is of the whole or part of a business as a going concern, provided that the assets are to be used by the buyer in carrying on the same kind of business with no significant break, and the buyer is a 'taxable person' or becomes one as a result of the transaction.

Stamp duty at the rate of 0.5% of the consideration paid is payable on the acquisition of shares whilst stamp duty is not normally chargeable in respect of a business sale agreement if drafted properly as most assets will either be deemed to be transferred by delivery or will be exempt from stamp duty such as intellectual property rights, goodwill and debts.

3. Steps common to both types

3.1 Finding out all you can

The buyer should find out all it can about the target. Once professional advisers are involved, this will usually take place by way of the buyer's solicitors sending out 'preliminary enquiries' to the other side, covering a whole raft of issues, such as employees, ownership of property and intellectual property, key contracts which the target has, etc. See paragraph 4.1.2 below for further information in this area.

This process in itself can help the buyer to decide whether they would like to proceed on the basis of a business sale or an asset sale. Further, if a business sale is the preferred route, this process can help the buyer to decide exactly which assets, if any, he does not want to purchase. On the other hand, if a share sale is the preferred route, this process can help the buyer to decide what areas should be focused on in the warranties, and even what, if any, indemnities might be appropriate.

3.2 Licences/Consents

It is important for the buyer to consider, at a very early stage, what, if any, licences and/or consents might be required.

In the context of a business sale, the buyer should establish what licenses are needed to carry on the business, and find out whether they can be transferred (and what consent is required), or whether it will be necessary to obtain new licenses. Examples include liquor licences, cable and telecoms licences, software licences and consumer credit licences.

A similar exercise should be carried out with respect to key contracts – can they be assigned, and if so, is consent of the other party to the contract required?

In the context of a share sale, key contracts often contain 'change of control' provisions, enabling the third party to terminate the agreement on a change of control of the target.

In addition, it might be that certain tax clearances, or even competition clearances, are required, the obtaining of both of which might take considerable time.

3.3 Searches

It is always important to do a search on the seller, whether the seller is the owner of the target or the target itself. A full company search will need to be carried out, together with a bankruptcy search against the owners (if individuals) and/or a winding up search against the target and any corporate sellers.

In addition, if any intellectual property is relevant, it will probably be appropriate to carry out searches of the relevant registries (such as the trade mark registry and patent registry) to check the ownership and existence of rights, and whether, for example, there are any existing licences.

3.4 Articles of Association/Shareholders' Agreement

In the context of a share sale, it is important to check whether there are any restrictions on transfer of shares. These will be set out in the Articles of Association (**Articles**) and/or shareholders' agreement, if relevant.

In context of business sale, once again the Articles and/or shareholders' agreement will need to be checked, in case they contain provisions requiring shareholder consent before the business of the company (or at least a material part of it) is sold.

3.5 Pre-Sale Planning

This is a key consideration from a seller's point of view. Any action taken will obviously be very dependant on the seller's identity/circumstances, and much will be driven by tax.

Examples of the sorts of steps taken include generally getting the house in order (such as by ensuring employment contracts exist and comply with current law, and that standard business terms reflect current law), intra-group restructuring, and pre-sale dividends on a share sale. As to the latter, where the seller is a corporate and the target has sufficient distributable reserves, the target will pay out a dividend before the agreement for sale, thereby reducing the purchase price by an equivalent amount and, as a result, the seller's gain. Where the seller is an individual, the effect of a pre-sale dividend will convert a potential CGT liability into an income tax liability under Schedule F.

4. Share Sale

4.1 Documentation

Standard documentation tends to include:

- 4.1.1 confidentiality agreement;
- 4.1.2 preliminary enquiries;
- 4.1.3 heads of terms;
- 4.1.4 due diligence report;
- 4.1.5 acquisition agreement;
- 4.1.6 disclosure letter;
- 4.1.7 tax deed; and
- 4.1.8 other miscellaneous documents.

Taking each of these in turn:

4.1.1 Confidentiality Agreement

The process of finding out more about the target would not be worthwhile unless the buyer is able to ascertain information which is central to the target, and which therefore may be of a sensitive and confidential nature. It is therefore vital, from the seller's point of view, that a confidentiality agreement is entered into, ensuring that the buyer keeps all information of a confidential nature to itself and its advisers, and does not use it for its own gain. If the buyer is also giving out confidential information about itself, then the agreement should be two-way. These agreements commonly also provide that neither party can make an announcement about the transaction without the consent of the other.

If a seller is particularly worried about giving out sensitive and confidential information to the proposed buyer, who may be a competitor, then they may agree to give out a certain level of information at this stage, but only give details of, for example, their key contracts, once the buyer has completed their preliminary due diligence and still expresses an interest in proceeding.

Note, however, that confidentiality agreements are notoriously difficult to police and enforce.

4.1.2 Preliminary Enquiries

These are generally sent out by the buyer's lawyers, in an attempt to elicit all information which they can about the target. The aim is to decide whether or not to go ahead with the proposed transaction, and if so, on what terms. In particular, the results of the enquiries may lead to a re-negotiation of the price, and even a change from a share sale to a business sale, or vice versa.

The scope of the enquiries in a share sale will be very broad, as the buyer will acquire a 'live' company with all its assets and liabilities. In addition, a thorough investigation of the target should reveal areas in which the buyer is at risk, and needs to protect himself by including warranties and indemnities in the acquisition agreement.

Note, however, that where a seller wants to keep the proposed sale secret from its staff, this can make dealing with the preliminary enquiries fairly difficult. Often sellers will try and disguise the investigation, by stating, for example, that an audit of the company is being carried out by the accountants or by a relevant industry body.

If the sale is a large scale transaction, and the enquiries lead to the production of much documentation, the buyer's solicitors will commonly set up a 'data room' in which the information is stored in a logical, coherent and easily accessible way.

4.1.3 Heads of Terms

Although by no means a necessity, once negotiations have reached a certain point, the parties often decide to record the main points on which they have agreed, and the basis on which they are prepared to proceed with the transaction. Heads of terms can act to cement the moral/commercial commitment of the parties. People may feel more confident that the exercise will not prove a waste of time and money if they are able to point to a document setting out at least some of the fundamental issues. The drawing up of heads of terms can also serve to focus the minds.

As a general rule, heads of terms tend to be 'non-binding' – this will be the case especially for the buyer, who will no doubt still be carrying out its due diligence on the company. Note, however, that if the heads contain a provision about confidentiality (in the absence of a separate confidentiality agreement) it is usual to see this clause made into a binding clause.

Another clause which tends to be binding, if present, is the 'lock-out' clause – this is the clause which gives the buyer a period of exclusivity in its negotiations with the seller, preventing the seller from talking to anyone else about a potential sale for a certain period of time.

As stated above, heads of terms are not a necessity, and are not always found. People often take the view that the time and cost involved in producing them can be more usefully employed in drafting and negotiating the main agreement, rather than going through the process of 'rehearsing' the arguments at the heads of term stage, and then repeating them at the main agreement stage. They may also fudge legal and commercial difficult issues, creating an illusion of consensus whilst storing up problems for more detailed negotiations. In addition, they can open up a separate area of debate on having legally binding preliminary commitments or not.

4.1.4 Due Diligence Report

This is a report which tends to be drawn up by the buyer's professional advisers (either the accountants or the lawyers, or both) as a result of the information gathered from the preliminary enquiries exercise. The report will normally start with an executive summary, highlighting any potential problem areas, and continue in the main body to summarise the information which has been gleaned, ranging from key contracts and commercial activities, to the management structure and employees, ownership of any relevant rights, and the balance sheet strength.

4.1.5 Acquisition Agreement

This is the main agreement which governs the sale of the shares in the company. The structure of such an agreement tends to follow a fairly standard pattern: date; parties; operative provisions (including the definition section and details of the consideration); schedules (including the warranties); and execution clauses.

Much of the acquisition agreement in a share sale is taken up with warranties by the seller in favour of the buyer, covering a whole range of aspects of the target company, including accounts, subsisting contracts, employees, pensions, intellectual property rights etc. As discussed in paragraph 4.1.2 above, the focus of the warranties is driven very much by the due diligence carried out on the company. The main aim of warranties is the apportionment of risk. In a share sale, neither common law nor statute protects the buyer by implying terms into the agreement: the law is one of caveat emptor (i.e. buyer beware). In addition, warranties, from the buyer's point of view, serve to elicit information.

A warranty is essentially an undertaking by the seller that a particular state of affairs exists as at a specific date. If a warranty is breached (and no relevant disclosure was made in the disclosure letter (see paragraph 4.1.6 below)), then the buyer must establish his loss – i.e. the reduction, if any, in the value of the shares.

If the due diligence process has thrown up a particular area of concern, the buyer might want to consider asking for an indemnity, instead of or in addition to a warranty. An indemnity is essentially a promise to reimburse the buyer in respect of a designated type of liability which may arise in the future. There is no need to assess any reduction in the value of the shares: the recipient of the indemnity simply receives an amount equal to the actual liability (and the indemnity clause will also usually provide for costs and expenses relating to it to be covered as well).

Note that the acquisition agreement will often contain limitations on the warranties – i.e. the seller will only be liable up to a certain fixed amount (commonly equivalent to the consideration paid for the shares) and for a particular time period, such as two years.

Unlike a typical conveyancing transaction, completion of a share sale will normally be simultaneous with exchange of contracts. However, note that there may be circumstances in which this is not possible, such as where there is a delay in obtaining a particular consent. In this instance it is normal to have a conditional contract, whereby the parties agree to enter into a contract which is conditional on the specific consent(s) being obtained. The acquisition will go ahead provided the condition (i.e. the obtaining of the consent(s)) is satisfied. However, it is usual to include a long-stop date by which the condition must be satisfied, in the absence of which the agreement will terminate automatically without any liability attaching to either party. It is, of course, never entirely satisfactory to have a gap between exchange and completion as there is always the risk of lack of business direction, and the buyer should seek to insert undertakings on the seller into the acquisition agreement, relating to conduct of business in the interim period.

With respect to consideration, a variety of payment methods can be used. The buyers may pay in cash, or in shares in itself. There may also be an earn-out element, if the sellers are participants in the business and are to remain involved – i.e. a proportion of the sellers' consideration will be dependant on the future performance of the target.

Finally, note that it is common to find restrictive covenants in the acquisition agreement. These attempt to provide protection for the buyer in that they restrict the seller from competing with the target and from poaching staff and customers, for a certain time period. Note that in order for these covenants to be valid, they must be reasonable.

4.1.6 Disclosure Letter

As stated above, the seller might try to limit its liability under the warranties by limiting the amount/and or time period for and within which they can be liable. Another approach is to try and limit the actual warranties themselves, by negotiating the wording. In addition, the seller will limit its liability by drafting a disclosure letter. This is a letter in which the seller makes disclosures against the warranties, and which has the effect of qualifying such warranties. The incentive for the seller in making the disclosures is that they avoid him being in breach of warranty in relation to those matters disclosed, and for the buyer, they facilitate the elicitation of information (as referred to in paragraph 4.1.5 above).

By way of example, a warranty might state that all intellectual property used in the business is owned by the company. If this is in fact not the case, and some intellectual property is merely licensed, rather than owned (such as software) then this would need to be disclosed against the warranty.

Note, however, that if the disclosure is a major one, this might lead to the buyer's insisting on an indemnity with respect to the particular issue, or even asking for a reduction in price.

The disclosure letter will also seek to make general disclosures against all warranties, such as of information on public records, the statutory books and all information and documentation which has been passed to the buyer and its advisers during the negotiations (although this tends to be hotly contested by the buyer's solicitors).

4.1.7 Tax Deed

As well as having a set of taxation warranties in the acquisition agreement, the buyer will need the additional comfort of tax indemnities. These are commonly set out in a separate

deed given at completion, although they are sometimes found in the acquisition agreement itself.

The tax deed will contain a general indemnity designed to cover any liability incurred before completion which is not reflected in the latest audited accounts of the target, excluding liabilities incurred in the ordinary course of business since the date of those accounts. It will also contain specific indemnities against certain liabilities which may arise after completion. The seller will seek to add further exclusions as appropriate to the circumstances of the particular transaction.

4.1.8 Other Miscellaneous Documents

New service contracts might be necessary, both for new directors of the target, and those directors who are remaining with the target.

In addition, the new owners of the target might want to put in place new Articles for the company (which will require a special resolution (i.e. 75% majority)).

4.2 Steps

The steps taken in a share sale tend to follow the documentation process as set out in paragraph 4.1 above.

- Any pre-sale planning undertaken
- Confidentiality agreement signed
- Buyer's advisers send out preliminary enquiries
- Sellers' and their advisers respond to the preliminary enquiries
- Relevant searches carried out by the buyer/its advisers
- Buyer's advisers draw up due diligence report
- Buyer's solicitors draft acquisition agreement and tax deed
- Sellers' solicitors draft disclosure letter
- Negotiation of the acquisition agreement, tax deed and disclosure letter
- Exchange and completion (although if not simultaneous, there will also be built in a period within which any relevant conditions need to be satisfied)
- Post completion matters (see paragraph 4.3 below).

In addition, the drafting and negotiation of heads of terms may take place (probably somewhere between the first and sixth bullet points).

4.3 Post Completion

There will inevitably be a certain amount of post-completion tidying up to do, on completion of the share sale. These will include matters such as stamping of stock transfer forms, updating of the statutory books, and filing any relevant forms with the Registrar of Companies, such as forms 288a and 288b dealing with the appointment and resignation of directors respectively.

5. Business Sale

Much of the analysis set out in paragraph 4 above has equal relevance to a business sale. However, in some instances there will be a slightly different emphasis, as set out below.

5.1 Documentation

5.1.1 Confidentiality Agreement

The same analysis applies as for a share sale.

5.1.2 Preliminary Enquiries

The extent of these does not need to be so broad in a business sale, as the buyer on a business sale does not assume the liabilities of the business (except as regards the employees – see paragraph 2.1.3 above). The buyer will, however, often agree to accept responsibility for certain of these liabilities in the acquisition agreement, and the buyer will therefore direct his investigation at the specific assets which he wishes to acquire and the liabilities which he is prepared to accept. In any event, it is still important for the buyer to find out all he can about the business which he is buying.

5.1.3 Heads of Terms

The same analysis applies as for a share sale.

5.1.4 Due Diligence Report

As discussed in paragraph 5.1.2 above, the scope of the preliminary enquiries tends to be less extensive on a business sale, and the scope of the due diligence report will accordingly be less extensive.

5.1.5 Acquisition Agreement

This will follow the same format as the main agreement on a share sale. However, unlike a share sale, in which the only item being sold is the shares in the target, the acquisition agreement in a business sale will tend to define and set out each particular asset which is being sold. It will also set out in detail, if not already obtained, any significant consents which may be required, and the agreement will normally be conditional on such consents being obtained (please see paragraph 3.2 above on this.)

In addition, the warranty section will tend to be shorter and more straightforward, for the reasons outlined in paragraph 5.1.2 above.

5.1.6 Disclosure Letter

As the warranty section tends to be shorter on a business sale, so does the disclosure letter.

5.1.7 Tax Deed

Since a business acquisition will not involve the purchaser becoming responsible for the seller's tax liabilities, a tax deed is not relevant.

5.1.8 Other Miscellaneous Documents

As with a share sale, if any of the directors/key employees of the target are going across with the sale, then employment/service contracts will need to be entered into between them and the buyer company.

The requirements of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) will be relevant in the event of the sale of a business as a going concern – in very broad terms, there will be a requirement on the buyer to ensure that the employees are employed on the same terms as previously.

5.2 Steps

The same analysis applies as for the share sale.

5.3 Post Completion

As with a share sale, there will inevitably be a certain amount of tidying up to do, such as getting the acquisition agreement stamped as relevant. In addition, the buyer will no doubt want to spend much time at first letting people know about the change in ownership, and ensuring that any disruptions to clients/suppliers are kept to a minimum.

6 Completion Concerns

On both business sales and share sales competition concerns need to be borne in mind, depending on the circumstances and position of the buyer and particularly if the result of the transaction is that the buyer has a dominant position in the 'relevant market'. This is a complex but very important area, and specialist advice should be sought in all instances.

7 Other Exit Mechanisms

This section has focused on an exit by way of sale, whether it be by way of share sale or business sale. There are, of course, other methods of exit, such as winding up a company, or even a listing of shares. Please see the documents entitled 'Termination of a company' and 'Listing' for further information in these areas.

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This document reflects the law and practice as at October 2008. It is general in nature, and does not purport in any way to be comprehensive or a substitute for specialist legal advice in individual circumstances.