

Asset Purchases

Initial Phase

An asset agreement will usually be preceded by non-binding heads of terms which will deal with the agreement in principle, the process of due diligence and disclosure. The heads of terms should cover the outline deal and will not usually be binding. Confidentiality and exclusivity obligations may be contained in separate agreements or may be incorporated in the heads of terms, which will be binding.

Once preliminary agreements are settled, the buyer should commence due diligence, which is an information gathering process about the target business. The purpose is to give the buyer as broad a picture as possible of the business and everything relevant to it, including details of assets, transfer issues, timing and regulatory consents.

Different businesses will be comprised of different assets. For example, the assets could include a property in the case of a hotel, intellectual property in the case of a software company, customers in the case of a large retail outlet or licenses in the case of a media outlet.

Due Diligence

The due diligence and information gathering process is designed to find out information on a number of areas which may impact upon the price to be paid. The buyer will make its own enquiries based on information made available by the seller together with searches of public registries such as company searches, Land Registry and IP registers. The buyer will furnish an information request such as a due diligence questionnaire to elicit information.

A data room may be made available in which all relevant information is held. This can be done physically or on line. This is common with an auction type sale. A key part of the

process will be to involve instructing accountants to prepare a report on the target business.

Lender's consent will be required to the change of control, variation of loan terms or breach of covenant. Landlord's consent will be necessary if a business is held under leasehold property. The counterparties on major contracts consent will be required to any change of identity. Regulatory consent may be required, depending on the nature of the business. Where significant competition issues are involved, the matter may be referred to the Competition Commission. Pensions obligations may have implications.

Asset Purchase Agreement

An asset purchase agreement will be the key document which deals with the issues arising in the transfer of assets from the seller to buyer. It is usually fairly lengthy, but not as lengthy as a share purchase agreement.

The parties will normally be the vendor and purchaser. A guarantee may be appropriate in respect of the potential liabilities and warranties, where the vendor is being wound up or is a company without substantial value. The agreement will specify the assets to be transferred and set out the consideration and timing.

Warranties and indemnities will usually be given in relation to the assets. They will be more limited than in the case of a share purchase. A disclosure letter will water down the effect of warranties. There will normally be general disclosures and specific disclosures relevant to specific issues.

After completion, it will be necessary to undertake announcements, to stamp the transfer, stamp assets, to pay stamp duty and stamp duty land tax, renew contracts with customers, suppliers and deal with administrative matters such as insurance, payroll, VAT etc.

As in Ireland, VAT is not transferrable when a sale is as a going concern. Where this is not the case the transaction will be subject to VAT.

TUPE Obligations

Where a business or undertaking is purchased, the Transfer of Undertakings Protection of Employment (TUPE) Regulations apply. The Regulations provide that the employees engaged in the business will be transferred to the buyer with all their current rights and contract terms. The Regulations do not apply to mere asset purchases (e.g. plant and equipment) only. They apply where any element of goodwill or a standalone business is bought.

Under the TUPE Regulations, it is not permissible to change an employee's terms of contract if the transfer itself is the sole reason and the reason connected with the transfer is not an economic, technical or an organisationally reason relating to changes in the workforce. Any other dismissals would be deemed unfair.

TUPE Regulations require the buyer and seller to inform and consult with the representatives of the affected employees. If redundancies are proposed the obligation to consult in relation to collective redundancies may arise. The trade union or elected employee or representative must be informed about the transfer long enough before to enable consultations to take place. There is no prescribed time limit, but the consultation must take place in good time.

There is an obligation on the seller to provide certain information to the buyer about the transfer of employees, including details of identity, age, information contained in written particulars, information on collective agreements, disciplinary proceedings and legal actions taken by the employers within the last two years.

The TUPE obligations do not apply to Occupational Pension Schemes. Following a TUPE transfer, an obligation may apply where the seller has made contributions in the past. If the buyer arranges for the employee to be a member of a scheme which is not a

money purchase scheme or a stakeholder scheme, it must ensure that the new scheme meets certain minimum standards and provides certain minimum benefits.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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