PREPARING A BUSINESS FOR SALE
FAIL TO PREPARE, PREPARE TO FAIL

George Knighton and Chloe Bowskill of Skadden, Arps, Slate, Meagher & Flom (UK) LLP consider how to manage the key issues that arise on the sale of a business in order to preserve deal certainty and maximise the purchase price.

The quotation "by failing to prepare, you are preparing to fail" is usually attributed to Benjamin Franklin, although there seems to be scant evidence to support him having actually said it. The British Army teaches its recruits about the seven Ps: "proper planning and preparation prevents particularly [sic] poor performance". Whichever phrase is reached for, it is unarguably the case that a seller of a business needs to take proper steps to prepare that business before starting a sale process.

It is critical for the seller to identify issues with a business to be sold before engaging with buyers. If a buyer identifies an issue before the seller, the seller is on the back foot on that specific issue, and the buyer's confidence in the seller's overall process and quality of information is undermined. This often leads to the seller having to provide an indemnity to address the issue or accept a price deduction and, if the issue is of sufficient magnitude, it may mean that the deal does not proceed.

This article sets out the common areas where problems can arise during the sale process and the steps that sellers can take to resolve, or at least mitigate, issues so that deal certainty is preserved and the sale price is maximised.

PERIMETER AND STRUCTURE

The first step is to determine the perimeter and structure of the sale; that is, what the seller wants to sell, which entity or entities within the seller's group owns those assets and whether the transaction will be structured as a business sale or a share sale.

In some cases, such as where the target business comprises an entire division or is held in a self-contained holding structure, the perimeter may be easy to identify and it will be simple to implement the sale by way of a share sale. In other cases, where the sale is a carve out from a larger business or the seller group and target group have been more heavily intertwined, it may not be as easy. Thinking through the sale perimeter will also help the seller to identify whether its preferred option is to propose a share sale or a business sale. A share sale is generally easier to implement, as assets do not have to be transferred individually and will mean that, subject to agreement otherwise in the sale documents, all assets, rights and liabilities of the target business transfer to the buyer. However, a share sale may not be possible if the target business is held by an entity that owns multiple other assets or businesses that are excluded from the sale.

If the seller intends to proceed by way of a share sale, the seller should consider if there are assets, such as properties, licences, permits, intellectual property rights, contracts or other interests such as an entitlement to receive anticipated litigation proceeds, within the target group that the seller wishes to retain or if there are assets outside of the target group that should be included in the sale. If so, a reorganisation may be required to move those assets into the right place before signing a sale agreement or completion (*see box "Reorganisations"*).

It is also helpful to identify if there are dormant companies within the identified target group that are no longer required and whether it is preferable for the seller to start the process to deal with these entities by liquidating them or, for UK companies, by striking them off the register at Companies House before the sale. A buyer will generally prefer not to inherit multiple unrequired companies if it will need to carry out due diligence on them, pay the costs of ongoing administration and the preparation of accounts, and commit management time and expense to winding them up after completion. If the seller plans to leave dormant companies in the target group, it will need to ensure that it can provide sufficient comfort that there are no liabilities in them that may prevent them being easily dealt with by the buyer or result in losses to the target group.

For a business sale, once the perimeter is established, the seller should consider in more detail the list of assets that are being sold and any that are excluded. This will not only enable the buyer to be provided with a clear list of what it is acquiring, but also help the seller to identify the appropriate parties to the sale agreement and any potential issues in transferring the target assets to the buyer, such as third-party consents or any assets that are not owned by the target group but are instead leased or contracted.

Reorganisations

If a seller has identified that a reorganisation will be required before the sale completes, either to extract from the target group assets that are excluded from the perimeter or to transfer to the target group assets that are to be included, the seller should consider whether it is preferable to implement the reorganisation process before entering into a sale agreement or between signing and completion. This may depend on how complex the reorganisation is. In particular, if the reorganisation will involve business or asset transfers, the seller should ensure that it has carried out in advance the necessary due diligence and legal and tax analysis in order to confirm the steps needed to implement the reorganisation, identify any consents needed to transfer assets and determine that these will be obtainable within the seller's timetable.

A pre-signing reorganisation has the benefit that the target group is able to be presented cleanly to the buyer. It can also save an additional transaction workstream and avoid the buyer and the seller needing to negotiate the legal documents for the reorganisation once the buyer has been identified. However, the seller may not be able to implement a reorganisation before the sale for confidentiality reasons or may not wish to commit to implementing the steps, or incur the time and expense of doing so, if the sale might not go ahead.

Whenever the reorganisation is to be implemented, the seller will need to ensure that the buyer is comfortable that the reorganisation has effected the transfer of the relevant assets without creating additional liabilities or obligations, including tax issues, for the target group. This may be achieved by allowing the buyer to carry out due diligence on the reorganisation documents or by the seller agreeing to take on the risk of the reorganisation by providing warranties and indemnities. If the seller can present the buyer with a clear and detailed plan for a proposed reorganisation, or an overview of a completed reorganisation supported by a detailed legal and tax plan, this will likely save significant time with the buyer.

If the target group and the seller group currently share premises, contracts, intellectual property or other assets, the seller will need to consider whether those shared assets will be included or excluded from the perimeter and what transitional services or access arrangements the target group or seller group may need in order to continue to access or use those assets after the sale until they can be replaced.

Selling entity

Once the preferred structure is established, the seller should consider whether the proposed selling entity is likely to be acceptable to a buyer; that is, whether the seller will remain an entity of substance following the transaction and be able to provide the buyer with sufficient comfort that it can stand behind any warranty or indemnity claims under the sale agreement, or whether the seller intends to distribute the sale proceeds, leaving the selling entity as an empty shell, or to wind up the selling entity after completion (*see Briefing "Warranties on an indemnity basis: a question of damages", www.practicallaw.com/w-029-7746*).

If the selling entity is to be wound up, the seller risks the buyer requesting that sale proceeds are placed in escrow or subject to a retention to cover any claims after completion and the seller should consider how it will provide the buyer with necessary comfort that this is not required. The seller may be able to propose a guarantee by another entity within the seller group or that warranties and indemnities (W&I) are covered by insurance (*see feature article "Warranty and indemnity insurance: a global reach", www.practicallaw.com/7-534-6007*). If the seller is going to propose W&I insurance, it is worth the seller scoping in advance with insurance brokers whether and on what terms this will be available. The seller will also need to factor in the additional time that will be needed to allow for a W&I insurance underwriting process and the possibility of the buyer asking the seller to pay the costs of any insurance.

PURCHASE PRICE

The buyer will need access to recent and reliable financial information in order to allow it to form a view on the value of the target business and commit to a purchase price. The quality of the available financial information is likely to be critical to the success of the sale process.

The seller should assess whether the target group or the target business has standalone accounts that cover the whole target perimeter, and only the target perimeter, which the buyer can use to value the business. If it does, the seller should consider whether these accounts are audited, so that the buyer will be more comfortable relying on them, and how recent they are. If the last audited accounts are more than a few months old, the buyer will likely also expect to see management accounts covering the period between the last audited accounts and the date of the sale. The buyer will also find it easier to carry out due diligence on the target business if the historic accounts have been prepared on a consistent basis with the latest accounts (*see box "Keeping the books up to date"*). If there have been changes in accounting policies or practices, the seller should consider pre-emptively explaining these to avoid questions or concerns being raised. If any accounting information has been affected by any extraordinary events, the seller should consider how it will explain and present that to the buyer, especially if any event may have a negative impact on value.

If the target business is being carved out of a larger business or a parent company and does not have its own accounts, the seller will need to consider preparing pro forma accounts to allow the buyer to understand the value of the target business as a standalone entity. Engaging a firm of accountants to prepare or report on these will mean that the buyer is likely to be more comfortable relying on them, and is likely to be a worthwhile investment by the seller.

A locked box sale is where the price is based on the value as at a specific "locked box" date based on a set of locked box accounts, rather than being adjusted based on the balance sheet at completion (*see feature article "Pricing mechanisms: locked box vs completion accounts", www.practicallaw.com/7-516-6888*). If the seller is proposing a share sale structured as a locked box, it is particularly important that the seller consider whether it has appropriate accounts to propose as the locked box accounts and if this structure is viable.

Buyers usually prefer locked box accounts to be no more than six months old and prefer audited rather than unaudited accounts. If the seller is proposing unaudited accounts it may wish to consider obtaining an additional accountant's report on the accounts to assist in making the buyer comfortable with the structure. Although possible, it is generally considered more difficult to use the locked box structure if a material pre-sale reorganisation is required or has been carried out and a buyer is likely to be more comfortable to proceed with completion accounts in this case.

Keeping the books up to date

The seller should consider using the time before the sale to ensure that the company books and records are up to date, to tidy up any known issues that the buyer may otherwise identify during due diligence, and to make sure that it has copies of all title documents, material contracts and other key documents that a buyer is likely to request as part of its due diligence process in order to demonstrate the seller's title to the target group and assets. There will be a number of competing demands on the seller management team's time once the sale process begins, particularly if the seller is engaging with more than one potential buyer. Therefore, taking the time to prepare in advance for the buyer's due diligence process, such as by collating documents for a data room, is likely to be time well spent.

RIGHTS AND RESTRICTIONS

Once the target group has been identified, the seller should consider in more detail the entities within the target group and, in particular, whether there are any options over shares or assets in the target business that may become exercisable on signing or completion of the transaction, or minority interests or joint ventures (JVs) within the target group that may complicate the sale.

If there are minority interests in the target group, the seller should consider whether the buyer will be willing to acquire the target business with those interests in place and, if not, whether the target group has any contractual right to acquire the minority shares or if any acquisition of those shares would need to be negotiated with the relevant counterparty.

JV or shareholder agreements may contain rights that could be triggered by the JV partner on an indirect sale of the JV shares as part of a share sale (*see feature article "Technology joint ventures: partnering for the future", www.practicallaw.com/w-030-0176*). These rights could include:

- A right to trigger a winding up of the JV.
- A right for the JV partner to acquire the shares in the JV, meaning that the buyer could be left unable to acquire a material asset that it expected to acquire.
- A right for the JV partner to require the target group to acquire its shares in the JV, therefore requiring the target group or buyer to find funding for those additional shares or needing to replace services or assets that the JV partner currently provides to the JV.

Any pre-emption process or put option in a JV agreement, or any other contractual pre-emption rights over target group assets that may be triggered by the transaction, should be identified early to allow the seller to formulate a strategy for dealing with them and to allow time for any contractual process to be built into the timetable. Depending on the materiality of the asset that is subject to a pre-emption right and the value at which any right can be exercised, the existence of these rights may put off a buyer unless a waiver is able to be obtained.

Although confidentiality will be a factor, the seller may wish to consider whether pre-sale discussions with material counterparties would be helpful to assess whether those counterparties would trigger any rights they may have on the sale or would be willing to waive them. However, a counterparty is unlikely to be willing to commit one way or the other without knowing the identity of the buyer and the financial terms in relation to which it can trigger any buy-out or sale rights.

If the target company has any minority shareholders, such as employee shareholders, the seller should consider how it will deliver 100% of the shares to the buyer, and whether it will need the support of minority shareholders for a sale or it is able to exercise a drag-along right to require a sale. If the target company is a JV, the seller will need to identify at an early stage any transfer restrictions or pre-emption rights that may prevent it from making the sale or require it to sell to a third party instead. A buyer may be reluctant to commit the time and cost in agreeing terms for a sale only for the sale to be pre-empted by a third party.

The seller should also identify whether there are any financing arrangements within the target group that may become repayable as a result of the transaction and whether there is any security over the target group or its assets. Whether the target group's financing arrangements are repaid or rolled over (if possible) on completion will usually be dictated by the buyer based on its own financing structure but, as with other matters, it is helpful if the seller is aware in advance of all arrangements that will need to be dealt with as part of the sale. If there is any security over the shares or assets of the target group under the seller's financing arrangements, the seller will need to ensure that this is released at completion.

TAXES

The first question in relation to tax is whether, like with accounts, the target business has its own standalone tax records and status on which a buyer can carry out due diligence or whether it has accounted for tax as part of group-wide arrangements.

If the target business has made its own tax filings, the buyer can carry out due diligence on the historic and current tax policies and filings. The buyer can form a judgement regarding any risks inherent in the history and assess how best to fold the business into its own tax arrangements. This is more likely to be the case in the context of a share sale than with an asset sale, although most tax liabilities in a third-party asset sale will remain with the seller. A share seller with a clear tax history or strong bargaining position may even be in a position to convince the buyer to take on the business without having to provide a tax covenant.

On a share sale, where the business does not have its own tax identity, the position is more difficult. It may be that the business has shared losses with other parts of its corporate group to reduce the taxes paid on profits. The seller needs to be able to present to the buyer as much information as is available so that the buyer can assess the standalone tax profile of the business. In these cases, it will almost always be necessary for the seller and buyer to enter into a tax covenant, and this should include a clear allocation of responsibility for preparing tax returns for relevant pre-sale tax periods and of the liability for paying the resulting tax. A tax covenant in these situations is also of assistance to the seller as it will enable the seller to contractually control, after the sale, certain aspects of the tax affairs of the business for the pre-sale period.

In either format, the seller also needs to assess whether there are any tax risks or benefits in the business and form a view, which it can defend to the buyer, on the potential impact of those risks. The seller will need to consider issues such as whether:

- There is a current, or recent, dispute with the tax authorities.
- The business has adopted an especially aggressive approach in its tax policy, which may be vulnerable to challenge in the future.
- Any disputes or policies will result in claims for additional tax for past periods or for a higher tax bill in the future.

The seller should be prepared to provide the buyer with an assessment of the quantum of risk and information to defend this assessment. If the target business has significant accumulated tax attributes that are likely to be of value to the buyer and the seller expects the buyer to pay for the value of these, the seller need to be able provide the buyer with enough information to justify that valuation.

A well-advised seller will be thinking about all of these issues long in advance of starting the sale process, especially if internal reorganisations are required to establish a commercially sensible transaction perimeter. If retained businesses are carved out of existing companies, or the business to be sold is to be transferred to a newly in-scope company, this can have a significant impact on tax outcomes for the seller and the business, and on the nature of the protections that a buyer is likely to seek.

EMPLOYEES

The starting question in relation to employees is whether the target business directly employs all of the people that work in it. If so, the employees will all move over with the company when its shares are sold and will continue on their current terms and conditions. If a business sale is contemplated, provided that the employees are all predominantly engaged in that business and the business is located in the UK or the EU, they will all move on their current terms and conditions through under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (*SI 2006/246*) (TUPE) regime. TUPE implements EU-wide legislation to protect employees on a change of employer, including on a business sale. TUPE is implemented in subtly different ways across Europe.

However, it is rarely that simple. Many groups use a single company as the employer of record, or engage key staff at a group company level, and provide the services of those employees through service agreements or secondment arrangements. If the target business operates on the basis of arrangements like this, the seller will either need to resolve these arrangements before the sale process begins or have a plan that can be implemented by the time that the transaction completes. On a share sale, this could involve a voluntary arrangement where employees agree to transfer their employment to the target company or an internal business transfer where TUPE automatically transfers the employment relationship. Whichever route is used, the seller needs to ensure that the transfers are undertaken on a basis that a buyer will be comfortable with.

It is also common for employees, usually those in business support functions such as finance, HR or IT, to devote only part of their time to the target business, with the remainder spent supporting other divisions of the seller's group. Where this is the case, the seller needs to assess and balance:

- The needs of the target business to continue to have access to that support following completion.
- Its own need to retain those services in the future.

It may be that services agreements can address these issues (*see "Services agreements" below*). However, even if the buyer and the seller reach an understanding, the employees will have their own rights under TUPE and may assert these to remain with the seller or move to the buyer. If employees are not already assigned to the part of the business that the parties want them to remain in, their consent may be required to give effect to the parties' proposal. The seller needs to assess whether this is a risk and have a plan to address it. If the target business is going to increase its staffing costs, such as by having to pay for a full-time employee where currently it only pays for a portion of those costs, this needs to be explained to the buyer.

Part of the compensation of the target's employees may be provided by group level

Branding

A target business may have traded under the brand name of its parent since formation. If the target business is to leave the corporate group, the seller needs to determine whether it will rebrand the target business before the sale and perhaps allow it time to develop strength in its new brand before it is sold.

Where a seller is completely exiting a geographical area, it may be willing to provide the buyer with a licence to continue to use the existing brand name in that area. This would require a brand licence to be negotiated, which would need to address issues such as licence fees, protection for the licensed brand, the basis on which the brand can be developed in the future and responsibility for defending the intellectual property of the brand.

Brands can represent a significant amount of value for buyer and seller; if the seller is contemplating a brand-sharing arrangement, it should invest time before starting the negotiations to determine the detailed terms that it is willing to offer.

share or other incentive arrangements, or the employees may participate in benefits provided by the group. Normally, when a target business leaves a group the participation in those arrangements terminates. On a business sale there are likely to be additional employment disclosure requirements as a result of TUPE but, in any event, the seller needs to provide the buyer with information regarding the level and basis of compensation and benefits that have been provided historically so the buyer can determine whether, and if so how, to replace the arrangements. A period of transitional participation may be agreed but this may require the co-operation of a benefit provider.

The buyer will also want to assess the impact of the transaction on existing employee restrictive covenants and whether they will be enforceable after the sale (*see feature article "Employee restrictive covenants: enforcement, challenge and trends", www.practicallaw.com/w-024-8474*).

On a business sale to which TUPE applies there is likely to be a requirement to inform and consult employees or their representatives, such as works councils, unions or representatives elected specifically for the purpose, about the proposed transaction and the likely implications for the employees. In some jurisdictions, most notably in France and the Netherlands, this duty can arise before signing, so early in the process the seller will need to assess the likelihood of information and consultation obligations arising and what assistance it might need from the buyer so that this can be factored into the transaction documents and timetable. As a matter of good employee relations, the seller should prepare a communication plan to engage with the employees and any applicable representatives, whether or not there is an obligation to inform and consult under TUPE.

The seller should also assess the immigration status of the transferring employees and whether that will transfer with the target business. For example, on a share sale, the seller should consider whether the target company is the sponsor of the relevant employees or whether it needs its own sponsorship licence. On a business transfer, the seller should consider how long it will take the buyer to obtain the necessary immigration permission to employ the transferring employees.

PENSIONS

Many older UK businesses may have a continuing liability for a defined benefit (DB) pension scheme, where the employer bears the investment risk of providing sufficient returns to provide a pension on the retirement of the participating employees. While most DB schemes will have ceased to admit new members and ceased to allow existing members to accrue additional benefits, the potential liabilities can be considerable as these are lifetime arrangements.

Where the target business has a current or historic connection with a DB scheme, the seller needs to be able to provide a clear explanation of the current status of the scheme and relationship with the pension trustees, details of any buy-in or buy-out arrangements where the risk has been largely transferred to an insurance company or the details of how the scheme was wound up (*see feature article "De-risking pension schemes: an employer's perspective", www.practicallaw.com/w-021-9882*). Sellers should also be able to respond to the buyer's queries about any entitlement to early retirement benefits retained by employees who have previously transferred under TUPE. Buyers are hugely sensitive to the risk of DB schemes: some financial sponsors have a blanket policy not to invest in businesses with any DB exposure, while others have a more nuanced approach but will not proceed without detailed, accurate and up-to-date information.

From 6 April 2022, employers sponsoring DB pensions in the UK, and the trustees of those pensions, will have increased obligations to notify the Pensions Regulator (the Regulator) of certain events connected to a business sale (*see News brief "Notifying and providing information to the Pensions Regulator: new obligations", www.practicallaw.com/w-032-7591*). These events are:

- The sale of a material proportion of the sponsoring employer's business or assets (for example, 25% or more of the annual revenue or gross value of the employer's assets) by reference to the most recent annual accounts.

- The granting of security over 25% or more of the employer's assets or revenue, so that this security would rank in priority to the pension scheme on an insolvency.

- Existing notifiable events that include a change in control of a pension scheme employer.

In relation to each of these events, an initial notification should be made to the Regulator when there is a decision in principle and a follow-up notice with an accompanying statement should be made when main terms have been proposed. Any notice to the Regulator should be updated over the life of the event or transaction where there is a material change. As a minimum, the seller should be able to demonstrate that it has considered the impact of the transaction or proposal on the pension scheme.

Although the amended notification regime is subject to final implementation, sellers should consider the need to notify pension trustees and the Regulator early in the process. Where the transaction involves a reorganisation or asset sale, the seller should ask its financial advisers to analyse whether a material proportion of the employer's business or assets will be sold or security will be granted over a material portion of its assets. The Regulator is considering implementing a minimum penalty of £100,000 for failing to comply with the updated regime.

RISKS

Every business carries a degree of risk, and every potential buyer of a business needs to assess and quantify that risk. While the usual business risks, such as customer loyalty, obsolescence of product or change of regulatory regime, are something for the buyer alone to judge, the seller will often need to retain some of the burden in relation to extraordinary risks that are specific to the relevant business.

The classic area is litigation. For example, the business being sold may be party to ongoing or imminent litigation. If the target business is a claimant, the seller may want to retain the right to receive the anticipated, or at least hoped for, recoveries from the process. If the target business is a defendant, the seller may expect the buyer to take on the process and the risk of losses or, alternatively, may have to provide the buyer with an indemnity to cover that risk. In either case, the seller may want or need to retain conduct of the proceedings.

The seller will need to carefully determine the degree of control over the proceedings that it expects, the level of access to the target business's staff and information that its advisers will require, and how much information to share with the buyer once it has become the new owner. Where the litigation is with a party with an important and ongoing relationship with the target business, such as a key supplier, a large group of employees or a regulator, the buyer is likely to insist on being involved and having a say over the final outcome, even if that means accepting a portion of the risk.

Similarly, a recent or threatened breach of law or regulation by the target business will be of major concern to a buyer. The seller needs to have established whether the breach was a one-off event or part of a systemic issue and provide evidence of this to the buyer. If there is a wider culture of non-compliance within the target business, the buyer will want to know what steps have been taken to remedy that culture and what evidence can be provided that it has succeeded or will succeed. There are often complex legal issues that arise from seeking to indemnify liability for breaches of law or regulation, which a simple indemnity may not be sufficient to address. The seller needs to understand these risks and provide the buyer with a comprehensive and defensible analysis of its solution.

The other area of risk that buyers often worry about is a breach of environmental law. While most technology or services businesses are unlikely to be concerned with this area, manufacturing businesses and businesses that have traded potentially polluting materials are likely to need to assess the risks in this sphere. Contamination that occurred several decades ago could be identified years later and become a significant liability for a new owner. The best defence in this area is due diligence and information. A seller will invariably save time, reduce risk and protect the purchase price if it has available recent environmental diligence reports for the sites on which the business operated. These reports will allow the buyer to quantify the risk and, if required, agree an allocation of responsibility with the seller.

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CONSENTS

The seller should consider early on in the process what regulatory or other consents will be needed to implement a transaction. Depending on the sector and the identity of the proposed buyer, competition or regulatory approvals or notifications may be required, such as from the Financial Conduct Authority or under the new National Security and Investment Act 2021 (*see feature article "National Security and Investment Act 2021: taming the M&A dragon", www.practicallaw.com/w-032-2847*). Carrying out an initial analysis in advance will allow the seller to understand the expected timetable for the sale and, in some cases, may allow a seller to identify early that a sale to a particular buyer will not be viable.

On a share sale, the seller should also consider whether there are change of control provisions in material contracts, licences or leases that could result in termination or a penalty being triggered on completion of the transaction. Depending on materiality, the buyer may insist that these provisions are waived before completion. Being aware in advance of the likely issues, rather than these first being raised by the buyer during due diligence, will allow the seller to formulate a strategy for dealing with any consents that might be needed and, depending on confidentiality, to approach the counterparties in advance and assess the likely implications for the sale.

On a business sale, third-party consents may be required to transfer the target assets, such as landlord consent to transferring a property or a consent to assign a material contract. Given that it can often be a lengthy process to obtain landlord consents, in particular, the seller may wish to consider carrying out initial negotiations with relevant counterparties before the sale agreement is signed or a preferred bidder is identified, even if it is unlikely to be able to obtain formal consent until the buyer is identified.

The seller should also consider any consents that the seller group may need to divest the target group, such as shareholder approval or approval under the seller's financing arrangements, so that these can be built into the timetable.

SERVICES AGREEMENTS

While some transactions represent a clean break, with the target business and its new owner ceasing to have any ongoing relationship with the seller after completion, in many cases there is an ongoing business relationship which may last for months or years ahead (*see box "Branding"*).

Where a business is being spun out of a larger corporate group, it is common for the business to need to access support services for an interim period after completion. The areas of services typically include IT, accounting and legal services, but can also include procurement and joint purchasing. These arrangements will typically last for up to a year. The seller needs to have a clear inventory of the services that are currently provided to the target business so that the buyer can be comfortable that the business can continue to operate after completion and can make a plan to have its own service provision at the end of the transitional period.

In some cases, a long-term commercial agreement may be negotiated as part of the sale. Where a target business has received a supply from other parts of its group, it may enter into a long-term agreement to continue to receive that supply. Indeed, these arrangements may represent a larger element of value for buyer and seller than the sale agreement itself. Where these arrangements are proposed, the buyer will be aware of the imbalance of information. The seller will need to assess how to provide enough information to make the buyer comfortable that it is agreeing to fair terms, while maintaining the commercial advantage to the ongoing relationship.

It may make sense for a target business and its seller to continue to combine their purchasing power when negotiating with suppliers as it is well known that a buyer of 5,000 widgets will nearly always pay a lower price than a buyer of 500 widgets. The seller should therefore assess what makes sense from its perspective and have a detailed proposal for the buyer to review. It will be important to ensure that any ongoing arrangements are compliant with competition law.

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