

# BUYING AND SELLING A BUSINESS

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At some stage, those who have built up and are running a business may wish to sell it in order to realise value from it. Or they may wish to exit the business at a particular point in time, e.g. on retirement. This leaflet outlines some key considerations for those thinking of buying or selling businesses which are incorporated as private companies.

## Buying Shares or Assets of the Company

An important initial consideration for both the buyer and seller of an incorporated business is whether the sale will consist of buying shares in the private company that runs the business, or buying some or all of its assets rather than the company itself. If the business is not run in the form of a private company (i.e. it is unincorporated, such as a sole trader or partnership) then the sale will be of the assets that the trader owns.

The key difference between the two is summarised in the classic phrase that when a buyer buys shares in a company it is a 'warts and all' purchase. In buying shares, all the assets, contractual commitments and liabilities of the company pass with it. In an asset purchase, the legal entity that is the company remains with the seller, and the buyer has the opportunity to 'cherry pick' assets and take over only the contractual liabilities that they choose to accept (subject to some exceptions regarding obligations and liabilities to employees of the business).

If the sale is by way of assets it constitutes a supply by the seller for the purpose of VAT. However, VAT is not chargeable on assets sold as part of the sale of a business as a 'going concern', subject to certain requirements.

## Overview of the Stages and Documentation

At the beginning of the negotiations for the sale of a business, the seller and buyer may enter into an informal agreement known as a Heads of Agreement or Memorandum of Understanding. The purpose of this is to serve as a record of what the parties have agreed at an early stage, e.g. what is being bought and the price. The parties might also enter into a lock-out agreement to ensure a certain time-period of exclusivity of bargaining between them. A confidentiality agreement is common at this stage to protect the interests of the seller and the business to be acquired whilst information is being exchanged between the parties.

Before entering into a formal Sale and Purchase Agreement for the sale of the business, the buyer's advisers will investigate the target business under a process known as 'due diligence'. Whether the acquisition is of shares or assets but particularly in relation to share purchases, the buyer has to accept a risk that there are potential skeletons in the cupboard of the company that they are acquiring.

During due diligence the assets and liabilities for the company are carefully checked in advance, to avoid the risk of the buyer picking up any unwanted liabilities and to check the trading position of the company. The due diligence investigation process is backed up with contractual warranties and indemnities from the seller contained in the Sale and Purchase Agreement which confirm the assets and liabilities

It is essential that the seller and buyer take separate legal advice in relation to the detailed provision of the Sale and Purchase agreement.

### Dealing with the Business' Contracts

In most businesses there will, at the time of completion of the sale, be contracts which the seller has entered into for the supply of goods and services to or by the business. The buyer and seller and their advisers must consider what action (if any) needs to be taken to transfer those contracts to the buyer. If shares in the company have been sold to the buyer then the contracts remain binding and enforceable after the sale. If the assets of the business are sold, then, if the buyer wants to take over particular contracts, these need to be assigned to them by the seller. To transfer fully all the rights and liabilities in a business contract often means that the other party to that contract needs to agree to the assignment. This is usually the case in relation to any leased property or assets that the business uses, where the Lessor will want to agree to the changeover.

### Transfer of Employees

If shares in a business are sold then the contracts of employment of all employees of the business will remain in place and be taken over by the buyer. However, even where assets of the business are sold there are certain regulations (known as the Transfer of Undertakings

(Protection of Employment) Regulations 2006) which operate to automatically transfer workers engaged in the business to the buyer, whether or not the seller and buyer wish this to happen.

The Regulations also require the seller to give certain information to the buyer about employees employed by the business before the sale, and for both the buyer and seller to consult with the workforce regarding the sale.

### Protecting the Transferred Business from Competition by the Seller

Since the buyer has paid to acquire the goodwill of the business, they will want to ensure that the value of the business is not diminished by the seller opening up a competing business or poaching valuable customers or staff after the sale. In the Sale and Purchase Agreement the seller can agree not to act in ways that are competitive or would potentially harm the buyer's new business. Such contractual promises are generally enforceable to the extent that they are necessary for the legitimate protection of the buyer's business interests, and are restricted in duration and geography.

## How Can We Help?

We can advise both sellers and buyers of business and deal with all aspects of the transaction for them, or give advice on particular aspects such as transferring contracts or dealing with transferring employees.

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