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Selling your Business

How to Maximise Value and avoid Pitfalls

10 February, 2022

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WHITNEY MOORE

A leading Corporate and Commercial law firm.

Acts for leading Irish and International (United States, Canadian and UK) companies.

Technology, media and natural resources.

Mergers and Acquisitions.

Corporate Finance

1. PREPARATION

Legal Due Diligence – by the Buyer

Share Purchase Agreement:

- warranties and
 - indemnities (to cover a significant liability)
- given by Seller to Buyer

Time for LDD and SPA

Legal Audit

- Shareholder's agreements and constitution
- Drag Along
- Consents of third parties: contracts, lenders/facility letters, mortgages and licences.
- Employment Contracts/Service Contracts.
- GDPR/data protection audit.

Result:

- avoid delays
- minimise risk of warranty or indemnity claims
- maximise purchase price

2. RESTRUCTURING

Example:

Essential asset – marketing business.

Non-essential asset – own office lease.

- (1) Non-qualifying or non-essential assets - transferred out of the group/trading company.
- (2) Qualifying or essential assets - transferred out of the group/trading company into a newly incorporated company.

3. PRE-SALE REORGANISATION (1)

Assets to be disposed of can be **shares** or **trade/business**.

Transfer of non-qualifying subsidiaries or assets to a **shareholder** or a **company** owned by a shareholder:

Distribution (s.117 CA 2014):

- adequate distributable reserves?
- create distributable reserves
- capital reduction (e.g. share premium converted to distributable reserves)
- SAP Declaration of solvency by directors (personal liability of directors within one year)
- If SPA within one year, obtain protection against personal liability.

Unlimited liability company

- Connected persons – ordinary resolution of shareholders (s. 238 CA 2014)
- Financial assistance in connection with the purchase of the shares in the Company (s. 82 CA 2014).
- SAP declaration of directors
- Solvency/creditors – must ensure that the Company does not become insolvent.

Result: company being sold has only target assets.

4. PRE-SALE REORGANISATION (2)

Transfer target assets (business or companies) out of the group/company with a long trading history (TradeCo).

Long trading history can mean significant liabilities in TradeCo.

Transfer assets to a clean newly incorporated company (NewCo) which will hold the target assets (business or companies).

Leave liabilities (where assets and not shares being transferred) in TradeCo.

Sell shares in NewCo to purchaser.

If transferring employees to a NewCo comply with TUPE and notice periods.

Due Diligence of NewCo - more straightforward.

Fewer liabilities for seller in SPA - warranty or indemnity claims.