PREPARING THE SALE OF A BUSINESS

January 2023

Preparing the sale of a business (whether a separate company or a branch of business) consists of: (i) carrying out a seller's due diligence review of the business (branch, company or group of companies) before launching the sale process and even before canvassing potential buyers, and (ii) considering the consequences of the sale on the seller's ongoing business activity and/or personal situation, with a view to correcting any irregularities identified and restructuring the company or group, if necessary. All this should facilitate the subsequent sale and transfer process for all parties concerned (seller, buyer, advisors, bankers, auditors).

The seller's due diligence review…

The seller must first gather all the legal, tax, commercial and financial information relating to the business to be sold, which will (for the most part) also be made available to prospective buyers (via a data room) for the purpose of conducting their own review.

So long as the sales process has not started, the full human resources of the company can be drawn upon, under the guise of good management, to gather and organize this information. Once the process is underway, the exercise will have to be carried out with limited staff (for reasons of confidentiality), under time pressure, while ensuring the day-to-day running of the business.

The purpose of the seller's review is, on the basis of this information, in particular: (i) to verify that corporate records have been properly kept and that legal and contractual obligations have been complied with, (ii) to carry out an analysis of existing commercial and other legal relationships (remaining term, change of control or transfer clauses), and (iii) to confirm the nature of the company's title and rights over its material assets (real estate, plant and equipment, intellectual property, etc.).

This stage can also be used to identify any authorizations that need to be obtained from the competent authorities, particularly in terms of control of foreign investment if foreign potential buyers are being courted and if the business is on a list of protected activities, or in terms of merger control if certain thresholds are reached.

Finally, the seller should consider at an early stage its objectives leading to and following the sale:

- Does the seller wish to keep certain assets or branches of activity?
- Does the individual seller wish to take advantage of the sale to prepare his or her succession (Pacte Dutreil, donations, dismemberment of ownership), to reinvest part of the proceeds from the sale, to accompany the buyer and under what conditions?
- Does the seller wish to transfer the business to a third party (industrial buyer or investment fund), to some of the company's managers and/or to his or her heirs?

A tax review of the seller's situation in the light of these objectives, and the means to be used to achieve them, is always recommended.

…to correct irregularities and/or reorganise the business…

The seller's review therefore makes it possible to identify risks and irregularities linked to the operation of the business and/or the organisation of the company, to evaluate them and to anticipate the means of eliminating them or mitigating their consequences. If the seller does not take such corrective action, the subsequent due diligence review by prospective buyers would almost certainly reveal the same issues, with a resulting loss of confidence.

At the same time, the seller's objectives may require a reorganization of the business, the company or the group (carve-out, spin-off, disposal of assets or shareholdings, donations, contributions) prior to or as part of the sale process.

It is all the more important to anticipate sufficiently these reviews and analyses as some resulting measures may take time to complete.

… in order to facilitate the sales process.

This prior review and ensuing corrective measures by the seller will enable the seller's various advisers (including investment banks and lawyers) to save time in putting together the information memorandum for potential buyers. The reliability of the information provided will be appreciated by such buyers, who will use it to construct their offer.

The quality of the contents of the data room that the seller will have prepared conscientiously (initially in its own interest), and a reduced number of irregularities (even of minor importance) will attest to the seller's seriousness and the reliability of the target business, making it all the easier to value the latter.

The seller will have the same level of information and analysis as prospective buyers and will be able to provide precise and rapid answers to their questions (the so-called Q&A process).

A prospective buyer will generally require, where possible, that the riskier matters identified be addressed and resolved prior to completion of the sale (as conditions precedent), thereby injecting uncertainty and delaying completion and receipt by the seller of the sales proceeds.

By identifying and neutralizing such risks or irregularities before the buyer raises them as a result of its own review, the seller speeds up the sales process and limits the discussions and negotiations that often lead to mutual frustration and discomfort.

Where risks have not been eliminated on completion of the sale, the buyer will negotiate more forcefully the level of contractual guarantees (specific indemnity clauses, increase in the scope of warranties and claimable amounts, security for the seller's undertakings (in the form of escrow arrangements or third party guarantees, etc.)) and/or the terms of payment (deferred payments, price conditional in part on the future elimination of the identified risk).

For the seller, identifying in advance the main issues that may give rise to discussions on guarantees and/or the price makes it possible to prepare the negotiations and its arguments, and to accept the principle of future discussions

In conclusion, a reasonable investment of time and energy in advance of a planned sale is highly recommended and ultimately profitable.

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