Due Diligence for Private Acquisitions in Singapore
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A Practice Note considering the purpose, scope, and practical aspects of a legal due diligence investigation for the purchase of a private company or business in Singapore. It outlines the process for legal due diligence in Singapore, including organising the investigation and various sources of information. It also considers issues of confidentiality and data protection during due diligence in Singapore.

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Due diligence in the context of a private acquisition is the process of investigating the potential investment and verifying all relevant facts. A potential buyer can use the due diligence process to gather information about the target company or business that is for sale (and, if relevant, the seller). While uncommon in the context of a private acquisition, a seller may in certain circumstances conduct its own due diligence (see Box, Seller Due Diligence), although the due diligence process is generally more significant for the buyer.

There can be several aspects to a buyer's due diligence investigation, including legal, commercial (or business), financial, tax, information technology (IT), and environmental, social, and governance (ESG) due diligence. The primary purpose is to provide the buyer an opportunity to uncover all it reasonably can about the target company or business so that it can decide whether to proceed with the proposed acquisition, and, if so, the valuation and terms upon which the buyer is prepared to do so.

A due diligence investigation of a target company or business can be more challenging and complex where a proposed transaction has cross-border elements. Due diligence practices can vary significantly between countries because of different:

- Legal and regulatory practices.
- Financial reporting systems.
- Business practices, expectations, and customs.

If different jurisdictions are involved, it is important for the buyer to understand the local legal and financial systems, operations, and culture.

This Practice Note considers, from the buyer's perspective, the purpose, scope, and practical aspects of legal due diligence for a private share or asset acquisition in Singapore. It outlines the process for legal due diligence, including:

- How to organise the legal due diligence process.
- Various sources of information.
- What to look for when reviewing information.
- Communicating results of legal due diligence.

It also considers issues of confidentiality and data protection in Singapore.

Overview of Legal Due Diligence

Legal due diligence refers to the verification and investigation of the legal aspects of the target company or business. The scope of legal due diligence may vary depending on factors such as the buyer's commercial priorities, the buyer's budget, as well as time constraints (see Factors Influencing the Scope and Extent of Legal Due Diligence). A typical legal due diligence investigation can cover matters such as:
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• The corporate information of the target company or business (including, where relevant, the seller's title to the shares, the target company's organisational documents and share capital structure, and intergroup arrangements between the seller group and the target group).

• The regulatory approval and notification required in respect of the proposed acquisition (including, where relevant, merger notification to and clearance from the Competition and Consumer Commission of Singapore).

• The licences and permits held by the target group companies, including whether such licences and permits prohibit or restrict the change in control of the target company, or impose shareholding thresholds or foreign ownership limits.

• The contracts of the target group companies with key suppliers, customers, and employees, including whether such contracts contain change of control provisions or restrictions on transfer or assignment.

• The banking and financing arrangements entered into by the target group companies.

• The human resources matters of the target group (including, where relevant, compliance with applicable laws and employee share plans).

• The material assets of the target group (including, where relevant, intellectual property, real properties, and leases) and material liabilities of the target group.

• Litigation and disputes involving the target group companies.

Legal due diligence complements the other forms of due diligence conducted by the buyer and its other advisers. Taken together, due diligence aims to uncover potential risks and issues which puts the buyer in a better position to, among others:

• Negotiate with the seller.

• Assess the value of the target company or business and the price it is prepared to offer.

• Determine its preferred acquisition structure and terms of the proposed acquisition.

• Determine whether any consents, waivers, or notifications may be required for the proposed acquisition.

• Determine whether any issues should be rectified by the seller or the target group prior to completion.

• Plan the integration of the target company or business.

• Determine whether any ancillary documents are needed (for example, a transitional services agreement or employment agreements with key management personnel).

• Decide whether to purchase warranty and indemnity insurance protection.

• Decide whether to walk away from the proposed acquisition.

While a buyer may be able to seek contractual protection from the seller in the form of representations, warranties, and indemnities, it may not always be practicable to rely on suing for breach of warranty or on an indemnity claim (which could in any event be heavily negotiated or subject to limitations and disclosures). For example, in an acquisition where a seller will be employed as a key management employee post-completion, or where a seller group will continue to provide transitional services post-completion, it may not be commercially sensible to sue the seller. Accordingly, contractual protection is not a substitute for due diligence and vice versa, and due diligence should be seen as an essential process in any private acquisition in Singapore.

Factors Influencing the Scope and Extent of Legal Due Diligence
Many factors influence the scope of the legal due diligence investigation. It is important to determine the scope at the outset because it impacts how many people are needed, how much time is required, whether outside experts are engaged, and the depth of review.

Common factors that can influence the scope of a legal due diligence review include:

- **Deal Structure.** For example, if a transaction involves the acquisition of target shares, the buyer will likely need information about the target group. In an asset acquisition, the buyer may decide to only focus on the specific assets and liabilities it is acquiring.

- **Industry.** The industry in which the target company or business operates may influence areas of legal due diligence on which the buyer will concentrate.

- **International presence.** If the target group has international operations, it is important to assess whether foreign counsel's assistance is required to conduct legal due diligence on the material overseas subsidiaries of the target group.

- **Competition.** If the buyer and seller compete, they may want (or be required by competition (antitrust) laws) to keep certain information (such as pricing) confidential until after the transaction is completed (see Disclosure and Receipt of Sensitive Information).

- **Risk tolerance.** The buyer may be willing to purchase a target business or assets without engaging in much due diligence if the price is right. The buyer's lawyers should engage in a thorough discussion with the buyer about its risk tolerance level and advise their client about potential risks involved in the transaction.

- **Commercial considerations.** The buyer may require its lawyers to focus on material aspects of the target group, for example, legal issues relating to the key revenue drivers, key assets, and key liabilities.

The extent of the legal due diligence review is also likely to be influenced by practical considerations, such as:

- **Access to the seller and the target company.** Unless contractually agreed, there is generally no legal obligation for the seller to provide full support to the buyer and its lawyers in the legal due diligence investigation, and the seller may be reluctant to share information which it may regard as commercially sensitive. The target group and its management team may also be managing the day-to-day operations of the target group in parallel with the buyer's due diligence investigation and may therefore be unable to provide all the information and documents required within the timeframe requested by the buyer.

- **Budget.** The buyer may limit the scope of legal due diligence to fit its budget for the proposed acquisition. Sometimes a buyer may conduct a preliminary investigation and only appoint lawyers or increase its spending when there is a greater likelihood of signing or completion.

- **Time constraints.** The parties may wish to complete the proposed acquisition by a certain date (such as the financial year end) or the seller may have enough bargaining power to limit the time allowed for due diligence (for example, in an auction).

- **Type of transaction.** In an auction, the due diligence process is likely to be structured and managed in stages, and there may be a limit on the number of requests which the buyer can raise.

- **Regulatory constraints.** The COVID-19 pandemic has restricted certain due diligence processes, such as onsite due diligence, physical meetings, and inspections. The impact can be felt to a greater extent in cross-border acquisitions in light of international border closures and entry restrictions. These limitations have to an extent been overcome by a greater reliance on parties and their advisors on virtual data rooms and video conferences.
Organising the Legal Due Diligence Process

Discussing Scope of Legal Due Diligence with Buyer

It is helpful for the buyer and its lawyers to discuss and agree on the parameters of the legal due diligence at an early stage. During such discussion, the buyer's lawyers can find out how much the buyer already knows about the target company or business and ask the buyer to highlight any areas of concern. To prepare for such a discussion, the buyer and its lawyers should as far as practicable review any publicly available information on the target group (see Other Sources of Information).

The extent of the legal due diligence should be in keeping with the value and importance of the acquisition to the buyer and the potential risks. It is important to agree on the scope of the legal due diligence investigation at the outset, and for the buyer to understand the limits of such scope.

Some of the other preliminary matters which the buyer's lawyers should establish with the buyer prior to commencing the legal due diligence review include:

- A legal due diligence budget.
- The type of legal due diligence report required (see Legal Due Diligence Report).
- The deadline for completing the legal due diligence and delivering the legal due diligence report.
- Whether foreign counsel should be engaged.
- If certain areas should be a primary focus, and whether there should be a limit on the information to be supplied by the seller or reviewed by the buyer's lawyers (such as contracts outside of the ordinary course of business or contracts above a certain monetary value).
- If there are any key commercial concerns that could make or break the deal.
- The process for communicating with the seller and the management of the target company. For example, the buyer's lawyers may be required to communicate through a third party such as the seller's financial advisers.

The Legal Due Diligence Team

Generally, the team conducting the legal due diligence will comprise corporate lawyers and, where relevant, other specialists (such as tax, employment, real estate, and intellectual property lawyers). Lawyers conducting the legal due diligence should be fully briefed as to the purpose of the acquisition, the scope and extent of legal due diligence required, and the buyer's commercial priorities.

If the target group has international operations and foreign counsel's assistance is required, the legal due diligence team can potentially be large and comprise several law firms. Accordingly, it may be efficient to have a point person to organise and coordinate the legal due diligence process. The point person can be a member of the buyer's in-house acquisition team, though it is common for the buyer to delegate the responsibility to a lead counsel.

Legal Due Diligence Information Request and Supplementary Requests
The buyer or its lawyers will typically send a preliminary list of legal due diligence information requests (also known as legal due diligence questionnaires) to the seller or its lawyers to kickstart the legal due diligence process. This will set out the preliminary list of documents and information to be provided by the seller and the target group to the buyer and its advisers.

In drafting the information request, the buyer's lawyers should consider the scope of the legal due diligence that has been agreed with the buyer (see Factors Influencing the Scope and Extent of Legal Due Diligence). That said, it is possible for the scope of the information request to be broader than the scope of the legal due diligence exercise, as a broader request list can help to flush out additional information that may be relevant to the buyer's acquisition team (although not all such additional information will be reviewed by the buyer's lawyers as part of the agreed scope of legal due diligence).

The legal due diligence information request should be well organised and ideally should not be too technical. Each section should be stand-alone so that it can be considered by the appropriate adviser. Care should also be taken to tailor the information requests so that they are relevant to the target group and the proposed acquisition. For general guidance from the UK perspective, see Standard Documents, Legal Due Diligence Information Request: Asset Purchases (long form) (UK) and Legal Due Diligence Information Request: Long Form: Share Purchases (UK).

The buyer or its lawyers may have additional requests in the course of legal due diligence and negotiations, and may send supplementary request lists to the seller or its lawyers. The seller's responses to the legal due diligence information request and supplementary requests should be uploaded to the data room.

**Data Room**

The seller and its advisers would usually provide information and documents to the buyer and its advisers via a data room. Sometimes, especially in smaller transactions, the seller and its advisers may send the buyer electronic copies of documents by email or hard copies of documents by post.

Nowadays it is common for legal due diligence to be conducted through a password protected virtual data room rather than a physical data room at the seller's offices or the office of the seller's lawyers. It is helpful for the buyer's lawyers to determine which members of the buyer's external legal team (including, where applicable, foreign counsel) will require access to the virtual data room so that a comprehensive request for access can be submitted to the seller. For general guidance on due diligence data rooms, see Practice Note, Setting up a Data Room (UK).

**Vendor Due Diligence Reports**

It is common in auction sales for the seller to conduct a sell-side due diligence and prepare one or more vendor due diligence reports (also referred to as VDD reports or VDDR), which can be provided to prospective buyers. The types of VDD report commissioned by a seller can vary from transaction to transaction, and can cover financial, legal, tax, commercial, property, and other matters.

VDD reports are not a substitute for the prospective buyers' own due diligence and may require considerable management input before the auction sale process begins. However, there are some benefits to preparing VDD reports, such as:

- VDD reports can accelerate the prospective buyers' due diligence on the target group.
- VDD reports can provide a helpful reference to the seller in assessing the representations, warranties, and indemnities which it is prepared to make in relation to the transaction.
- Once the auction sale process is underway, management could spend less time answering due diligence questions from prospective buyers.
Other Sources of Information

Information about a target group can be derived from a variety of sources, including the website of the seller or the target company, and publicly assessable electronic databases maintained by the relevant regulatory authorities in Singapore.

Sources of Corporate Information
Key corporate information in Singapore can be obtained from:

- **The online filing and information retrieval system of the Accounting and Corporate Regulatory Authority of Singapore (ACRA) or BizFile⁺.** The buyer or its lawyers can retrieve certain information from the BizFile⁺ system for a fee. For details of the information available at the BizFile⁺ portal, see Company Searches.

- **The Integrated Electronic Litigation System (eLitigation) cause book searches.** The buyer or its lawyers can conduct eLitigation cause book searches on payment of a fee, which can reveal ongoing or former claims made by or against the target group companies, or winding up proceedings or petitions filed against the target group companies, in the Singapore courts. These searches will not reveal information on mediation or arbitration proceedings or claims which have not been filed with the Singapore court registries, and appropriate queries should be raised during the legal due diligence process to flush out any such proceedings or claims.

- **Sectoral directories.** Depending on the target company or business, the target company may be regulated by specific sector regulators, which may maintain a directory of licensed companies and the type of licences held by such companies. These registries include the Financial Institutions Directory (Monetary Authority of Singapore).

Non-public corporate information may also be obtained through specialist commercial providers and news service providers. However, the buyer will not usually be able to rely on the accuracy of such information as part of the due diligence process.

Sources of Information about Real Property
Information about property and land survey information such as property ownership information and survey plans can be obtained from the Integrated Land Information Service portal operated by the Singapore Land Authority upon payment of a fee.

Sources of Information about Intellectual Property (IP)
Information about IP can be obtained from the online Digital Hub of the Intellectual Property Office of Singapore (IPOS). The types of searches supported by the IPOS Digital Hub include patent searches, trade mark searches, design searches, design international registration searches, and geographical indication searches.

If IP issues are critical to the proposed acquisition, the searches should be conducted by (and the results of such searches should be reviewed by) specialist IP lawyers.

Contact with Target's Management

One important aspect of legal due diligence can be establishing contact with the target's management to discuss the business with them. The buyer may ask to visit the target's place of business and meet with members of the target's management. The buyer's lawyers may also have questions which can be answered more completely during such a discussion.
However, due to confidentiality concerns, the target or seller may not want its employees to be aware of the proposed acquisition, so access to management may be limited to key management personnel only.

**Confidentiality and Data Protection**

Although a seller typically requires prospective buyers to enter into a confidentiality agreement, these can be difficult to enforce in practice. Therefore, if the buyer is a competitor or potential competitor, a seller may be particularly reluctant to disclose sensitive information about the target company or business until it can be sure that the sale will go through.

The knowledge that a company or business is for sale can also be unsettling for employees, customers, and suppliers. It can lead to a loss of customers or key staff during the sale process. In some cases, the seller will wish to keep its intention to sell the target confidential from all but the most senior management. This will limit the scope of the information available for a full due diligence investigation.

The seller will want to ensure that no approaches are made to its customers, suppliers, management, or employees either with a view to poaching them or obtaining more information. In an auction sale, it is more difficult to maintain confidentiality because of the number of parties involved. Bridging the gap in expectations between the seller, who is concerned to restrict the release of information, and the buyer, who wants to gather as much information as possible, is a crucial element of the initial stages of any transaction.

**Disclosure and Receipt of Sensitive Information**

There may be legal restrictions on the disclosure and receipt of sensitive information which the buyer and the seller will have to consider in the context of a legal due diligence investigation. For example, information that falls within the scope of the Official Secrets Act 1935 of Singapore should not be disclosed, regardless of the existence of a confidentiality agreement.

The Competition and Consumer Commission of Singapore has highlighted in its Guidelines on Merger Procedures that, among other things, parties to an anticipated merger (which would include a proposed acquisition) should exercise due caution when exchanging commercially sensitive information (such as prices and customer details) in the context of merger negotiations. The exchange of such information may infringe section 34 of the Competition Act 2004 of Singapore where it has the object or effect of restricting competition within Singapore.

**Data Protection Restrictions**

The main statute governing the collection, use, disclosure, and processing of data protection in Singapore is the Personal Data Protection Act 2012 (PDPA).

Personal data is usually not disclosed during legal due diligence, regardless of the existence of a confidentiality agreement. A well-advised seller would usually redact sections of due diligence documents to the extent they contain personal data to limit exposure to PDPA obligations on the part of the buyer, seller, and the target company. In this regard, a buyer incorporated overseas should note that the PDPA has extraterritorial scope that extends to the buyer in the event any personal data is disclosed to the buyer during legal due diligence.

**Reviewing Information: What to Look For**

After the seller has provided its preliminary responses to the legal due diligence information request and uploaded the due diligence documents to the data room, the next step in the due diligence review is to consider the completeness of the responses
to the enquiries and whether all documents requested have been supplied and all questions satisfactorily answered (see Legal Due Diligence Information Request and Supplementary Requests).

A review of the target's contracts may raise various issues for consideration. Are there any contractual covenants that could be triggered by the transaction, such as a change of control clause? Any provision in the target's organisational documents imposing limitations on anyone obtaining more than a specified percentage of the voting rights might also act as an obstacle to assuming control of a business. Antitrust or other regulatory issues may require the buyer to dispose of various brands owned by the buyer or the target before the acquisition can proceed.

The sections below set out a brief guide to assessing corporate information, material agreements, licenses, and litigation disclosed as part of the legal due diligence investigation. The list of considerations is not exhaustive, as each transaction has its own specific considerations.

**Corporate Information**

**Company Searches**

The ACRA BizFile+ platform can reveal a wealth of information about a target company, such as:

- The financial statements of the target company (if the target company is required to file such financial statements together with its annual return).
- Details of shareholders and officers such as the directors, company secretary, and auditors.
- The organisational documents.
- Details of the charges registered against the company's assets.

Which companies to search depends on the nature of the transaction. On most share purchases, the buyer or its lawyers should search against the target group companies incorporated in Singapore, and, if applicable, the corporate seller and corporate guarantor. On an asset purchase, where there is no separate target company to search, a search against a corporate seller may be helpful.

The buyer should note that the information available at the ACRA BizFile+ platform may not necessarily be up-to-date and may be erroneous, as such information depends on factors such as prompt and accurate filings by the relevant target group company and its service providers. The buyer should therefore ask a seller to warrant under the purchase agreement that all filings required by applicable laws to be made by the relevant target group companies to ACRA are complete and accurate and have been duly made on a timely basis.

It is common for searches to be conducted by the buyer's lawyers against all relevant target group companies at the outset of the legal due diligence investigation, and for such searches to be refreshed later depending on the buyer's instructions. Typically, refresher searches would be conducted closer to signing and completion.

**Corporate Information Provided by the Seller**

In addition to information obtained through a search on the ACRA BizFile+ platform, the buyer normally requests copies of the following documents from the seller in its due diligence questionnaire:
• **Constitution.** The organisational documents of the company may contain provisions that would be of interest to the buyer, such as pre-emption rights on share transfers, lock-ups, drag-along and tag-along rights, provisions relating to shareholder approvals, minority shareholder protections, rights of appointment of directors or unusual limits on the authority of the board of directors, enhanced quorums and veto rights on certain matters. If the buyer will be obtaining financing and will need to charge its shares, the buyer should also consider whether there are any restrictions on granting security.

• **Electronic register of members.** Under section 196A(6) of the Companies Act 1967 of Singapore, an entry in the electronic register of members maintained with ACRA is prima facie evidence of the truth of any matters which are required to be entered in the electronic register of members. The target company should have a copy of the latest electronic register of members, although such a copy can also be obtained from the ACRA BizFile+ platform on payment of a fee.

• **Encumbrances over shares.** Under Singapore law, it is possible to charge, encumber, or otherwise dispose of the beneficial ownership of shares in the capital of a Singapore company by way of a private agreement without having to lodge the agreement with any public registry in Singapore. Accordingly, it is not possible to independently verify from the corporate records or from public searches in Singapore whether the seller has created any encumbrances over the sale shares. In a share sale, it is important to confirm with the seller that it has not encumbered its shares in the target company.

• **Encumbrances over company's assets.** It is important to check that the target company has not pledged any of its assets. This is critical in an asset sale as it is important to ascertain whether there are any encumbrances on the assets being sold.

• **Board minutes and shareholders' minutes.** All material actions of the company should be reflected in the minutes. Both board minutes and shareholders' minutes can be a rich source of information, containing references to, for example, acquisitions and disposals, financing, litigation, poor or unusual operating results, issues of guarantees and security interests in the company's assets.

• **Financial statements.** It is important to review the financial statements of the last three to five years of the company to understand its financial situation. The legal due diligence team should interact with the financial adviser to coordinate their findings and better understand the accounting data of the target. For example, there could be a contingent liability note, which can suggest that a certain litigation claim against the target company has a remote chance of success.

### Material Agreements

Every business has agreements that are material to the success of its operation. These might include:

• Supply agreements for crucial raw materials.

• Sales agreements (for example, output or requirements contracts).

• Intellectual property licences (for example, patent or trade mark licences).

• Service or management contracts (for key staff).

• Collective bargaining or trade union agreements.

• Leases for important equipment (for example, computers).

• Real property leases for facilities.
• Joint venture agreements.
• Shareholders’ agreements.
• Loan and other debt agreements to provide capital to run the business (as well as the documents relating to the security package).

Other agreements, such as agreements to dispose of assets, businesses, or shares may subject the company to continuing liability with respect to a business sold previously.

In addition, when buying a company out of a group, intragroup transactions involving the target company need to be investigated to ensure they do not give rise to any contingent tax liabilities.

The due diligence enquiries need to identify those agreements that are material to the target’s business. That is, those that will affect the price the buyer is willing to pay for the target or which pose material business or liability risks. The due diligence questionnaire will typically indicate the criteria by which a contract is considered material, for example, by value.

Having identified the material agreements of the business, the reviewer should check that the contracts are effective, that they been executed properly and that they do not contravene any competition law or regulatory requirements.

The principal commercial terms of these agreements should be noted. The following questions are likely to be relevant to almost all enquiries:

• **Parties.** Are the parties to the agreement the persons to whom the agreement relates? For example, in a licence of intellectual property, is the company using the intellectual property the company named in the agreement or is the named party the parent or associated company of the user? Is the grantor of the licence the legal and beneficial owner of the intellectual property?

• **Execution of the agreement.** Has the agreement been properly executed? Did the person signing the agreement have the proper authority?

• **Effectiveness of agreement.** Is the agreement too vague to be enforceable?

• **Assignment clause.** Is the consent of a third party needed for the transfer of the benefit of the contract?

• **Change of control clause.** Does the agreement stipulate that the consent of the other contracting party must be given on a sale of shares in the business or a change of control of the business? Does the change of control affect any employees, for example, will it require a payment or result in an extended notice period? Will the change of control clause allow for termination if the proposed transaction is completed?

• **Confidentiality.** Is the target already in breach of this clause in an agreement, possibly giving a right to damages against the target should it be acquired?

• **Warranties, guarantees, and indemnities.** Warranties in most commercial contracts either relate to compliance with applicable laws and regulations or compliance with the quality standards and the specifications of the contract. Additionally, there are certain standard indemnities relating to breach of third-party rights, breach of contract, and liability for damages. The extent of these warranties and indemnities should be noted.

• **Term and termination.** What is the date of commencement of the agreement? Is the agreement subject to conditions precedent, for example, a regulatory approval? When does the agreement terminate? Will a major supply contract, for
example, terminate soon? Will any compensation be payable on termination of an agreement? What notice must be
given to terminate the agreement? What actions entitle the other party (or the target) to terminate for breach?

- **Liability and exclusion clauses.** Is the liability of the other party or the target limited in respect of breach of the
  agreement? Is there an exclusion of liability in respect of the target's obligations or the other party's? If so, is it likely to
  be enforceable?

- **Intragroup transfers.** Are all intragroup transfers to which the target is party made at arm's length? Do any such
  transfers give rise to any contingent tax liabilities?

- **Restraint of trade.** Are any restrictions imposed on any party's ability to conduct its business?

The significance of issues raised by a review of the target's legal documents will often depend on whether the proposed
transaction is a share sale or an asset sale. For example, a change of control clause may be of no significance on an asset sale
whereas it might be crucial on a share sale. On an asset sale, the assignment clause will be critical.

Inevitably, material agreements will raise their own specific issues in addition to the above. The buyer's intentions also have a
bearing on the review of material agreements. For example, if a loan to the target is to be repaid on completion, the provisions
of the loan agreement relating to prepayment and redemption are critical. If it is to be left outstanding, the buyer will want to
be sure that the terms are appropriate when applied to it as the new borrower.

**Licences and Authorizations**

Depending on the business performed by the target company, it may be obliged to hold certain licences and permits issued by
the public authorities.

The due diligence review should identify that all necessary licences are in place, are duly held by the target company, and are
still in force. The necessary licences and authorisations will depend on the nature of the business.

A share sale transaction would normally not impact the status of the licences and authorisations since the entity holding the
given licence or authorisation (that is, the target company) does not change, although certain licence conditions may contain
a restriction on change of shareholding or management. However, in an asset sale transaction, the transfer of the licence or
authorisation may imply either a notice to the given public entity or even the need to request prior authorisation, depending
on the licence or authorisation.

**Employment Matters**

Employment matters will feature more prominently in the legal due diligence process depending on factors such as the structure
of the proposed acquisition (that is, acquisition by way of share sale or asset sale) and the features of the target company,
including the human capital composition of the target company, the terms of any incentive schemes (for example, bonus or
profit-sharing arrangements, share option schemes, or otherwise).

Depending on, among other things, the size of the target company, it may not usually be practicable and cost effective to review
each employee's employment agreement. In this regard, it is possible for the buyer's lawyers to discuss with the client and limit
the scope of documents to be reviewed for employment matters to:

- The employment agreements of specific key management employees.

- A template employment agreement for rank-and-file employees.
• The employment handbook, terms of any incentive schemes, and such other documents as may be relevant to the scope of the legal due diligence review.

Litigation and Outstanding Claims

Most businesses experience litigation or other claims from time to time. Common legal due diligence issues include:

• **Pending claims.** How many claims are currently pending? What is the estimate of damages? What is the status of each claim? What is the likelihood of success on the merits?

• **Litigation history.** Were there any large claims paid out in the past? Any class actions? What kind of claims is the target business a party to?

• **Litigation trends.** What are the common types of litigation? What is the average amount of damages? Are most claims settled or litigated?

• **Insurance.** Are the pending litigation claims covered by insurance?

Communicating Results of Legal Due Diligence

During the Legal Due Diligence Investigation

Part of the key to a successful due diligence investigation is communicating the results to those responsible for assessing the proposed transaction and making the decisions.

The due diligence review is usually carried out in parallel to the negotiation of the acquisition and the drafting of the definitive document in respect of the acquisition. Ideally, the buyer should aim to complete substantially its legal due diligence as early as possible, although it is common for legal due diligence to continue up to the signing of the definitive document.

The buyer’s lawyers should provide timely and interim updates to the buyer as soon as practicable if there are any significant legal due diligence findings that might affect negotiations or the drafting of the definitive document. It is also important to keep all members of the buyer’s legal team informed of potential deal-breakers so that they understand what information is important and must be shared with the buyer as soon as it is discovered.

Due Diligence Summaries

It is important when reviewing legal due diligence documents to keep careful notes of the findings. In this regard, the buyer’s lawyers can create a written record summarising the key terms and conditions of each document. For sample templates of due diligence summaries, see Standard Documents, Due Diligence Summary Template: Agreements and Due Diligence Summary Template: Organizational Documents.

Legal Due Diligence Report

Once the legal due diligence investigation is complete, the findings will be consolidated in a due diligence report, which should cover the agreed scope of legal due diligence and, if applicable, foreign counsel's findings.
Buyers increasingly seek a "red flags" legal due diligence report as opposed to a full legal due diligence report (with detailed summaries of the target group's material contracts). The legal due diligence report should be in a form that can be circulated to the board in advance of the meeting at which definitive approval of the acquisition will be considered. For general guidance from the UK perspective, see Standard Document, Legal Due Diligence Report: Acquisitions (UK).

Depending on the transaction and the client's instructions, it is also possible for key findings of the legal due diligence investigation to be reported over email.

**Third-Party Reliance on the Legal Due Diligence Reports**

Sometimes (such as when the buyer obtains external financing in respect of the acquisition) the buyer may be asked to share the legal due diligence report with a third party (such as the financing bank or members of the acquisition consortium). Some law firms may permit their client to share their legal due diligence report with a third party, provided that the third party executes a non-reliance letter in their standard form. Lawyers should find out from their client whether it plans to share their legal due diligence report with any third party and whether any third party expects to rely on their legal due diligence report. They should then consult with the deal team to determine the appropriate course of action. If the client shares the legal due diligence report, lawyers should remind their client that the third party may review the legal due diligence report with a different objective, and that the information in the due diligence report may reveal sensitive information about the target group that the buyer may want to keep confidential.

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**Seller Due Diligence**

Although this Practice Note is focused on the buyer, a prospective seller may wish to conduct its own due diligence of the target business or assets before and during the transaction to help it identify risks, deficiencies, and liabilities, enabling the seller to mitigate them before kickstarting the due diligence process.

A seller should also conduct due diligence on the buyer. This will help the seller assess if the buyer can afford the target business or assets and obtain information about the buyer that the seller may leverage when negotiating the purchase agreement.

Furthermore, if the buyer is issuing shares to the seller as consideration or if the transaction is a merger of equals, the seller needs to conduct a thorough due diligence investigation of the buyer.

If the buyer is issuing shares, the seller should:

- Confirm that the buyer has authority to issue the shares.
- Confirm the value of the buyer's shares.
- Identify any impediments to the issuance.

In a merger of equals, each party needs to:

- Confirm the value of the transaction.
- Identify steps necessary to integrate the companies.
- Learn more about the other's businesses.
• Identify any impediments to the transaction.

**Due Diligence Considerations for Private Equity Buyers**

A private equity buyer may have a different view on certain due diligence issues. Private equity buyers are often more risk-averse because they are trying to make a relatively quick profit on a highly leveraged acquisition. Generally, a buyer who is currently operating in the industry (known as a strategic buyer) is better equipped to absorb an operational loss or messy litigation. As a result, private equity buyers often conduct more extensive due diligence reviews than other types of buyers and may seek greater contractual protections.

As opposed to a strategic buyer, a private equity buyer may not have certain operational capabilities. For example, if a private equity buyer buys a target business that does not have its own payroll department or IT systems, the private equity buyer will have to procure those services. A strategic buyer would likely have those services already in place for its existing business. As a result, a private equity buyer may need to focus on operational due diligence.