
Cyprus

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

Contacts

Spyros Evangelou

S.A. Evangelou, Nicosia

spyros.evangelou@pwc.com

Kypros Santis

S.A. Evangelou, Nicosia

kypros.santis@pwc.com

Panayiotis Panayides

S.A. Evangelou, Nicosia

panayiotis.panayides@pwc.com

1. INTRODUCTION

The Republic of Cyprus is a former colony of the United Kingdom. Following its independence in 1960, it still forms part of the Commonwealth and retains a common law legal system. Furthermore, the Republic of Cyprus has adopted most legislation which applied during British colonial rule in the same form, with amendments, to reflect the reality of a modern democratic republic.

As of 1 May 2004, Cyprus is also a Member State of the European Union, and therefore, all EU legislation takes precedence in Cyprus. In the context of acquisitions of private companies in Cyprus, the main legislation which is applicable is the Cyprus Companies Law, Cap 113 and Cyprus Contract Law, Cap 149.

Depending on the practicalities of each transaction, a proposed acquisition or disposal must be considered in light of other legislation, ranging from competition law to employee protection provisions. EU Directives on related matters, as well as legislation applicable to the business carried on by the target company, must be considered.

Currently and during the peak of the Covid-19 pandemic, we have seen an acceleration in merger and acquisition (M&A) activity. The impact of Covid-19 resulted in organisations experiencing significant operational, financial and liquidity challenges, making them in some cases an attractive acquisition opportunity – especially organisations in the tourism and hospitality sector.

2. PRACTICAL FOCUS OF THIS GUIDE

There are two main methods of acquiring a business. Even though an acquisition transaction may take either the form of an asset acquisition or a share acquisition, when one considers all the practicalities of the Cypriot market, there is a tendency to opt for share acquisitions.

3. TRANSACTION STRUCTURES ADOPTED IN PRIVATE M&A TRANSACTIONS

In the event of an asset acquisition, the seller, who owns assets, sells those, sometimes along with the liabilities. In the event of a share acquisition, the control of the company will be transferred by the shareholders through selling their shares in the target company.

There are both legal and practical advantages and disadvantages for the seller and the buyer in both proposed methods of acquisition, the most important of which are set out below.

3.1 Asset acquisition advantages

From the buyer's point of view, an asset acquisition provides for greater flexibility as the buyer can cherry-pick the assets which they desire to buy, ensuring that they do not take on any unwanted liabilities of the business. This is the most important advantage of an asset acquisition. An asset acquisition also essentially means that the buyer is integrating the newly acquired assets into its existing business, which may result in cost savings.

From the seller's point of view, the mechanics of the transaction are much simpler than those of a share acquisition. The seller gives fewer warranties and indemnities, as most of the liabilities remain with the seller.

3.2 Asset acquisition disadvantages

In an asset acquisition, from the buyer's point of view, complications may arise since every asset of the business acquired must be transferred individually, which could become over-complicated when dealing with a large number of assets. This can be particularly tricky with business contracts which must be individually transferred through assignment or novation and may also require third-party consent – leading to delayed negotiations and frustration for all parties involved, and becoming costly and time-consuming. In considering employment protection issues, the buyer may not be keen to proceed via an asset acquisition when this involves the acquisition of the employees and any rights or liabilities that relate to them.

The same considerations apply to the seller, including the fact that the seller may retain liabilities after an asset acquisition is completed. Asset acquisitions also tend to have more complex tax considerations which can potentially increase the acquisition cost.

3.3 Share acquisition – advantages

From the buyer's point of view, a share acquisition achieves continuity of trade, with minimum disruption and with little effect on third party dealings with the target and its business. Very little appears to have changed and the target continues to trade as before. The due diligence process is more thorough in a share acquisition, which gives the buyer further assurances concerning the acquisition. The mechanics of a share acquisition are much simpler. Finally, there are some important tax advantages to opting for a share acquisition: the most important being that the stamp duty for the acquisition of shares in Cyprus is capped at €20,000 per agreement.

From a seller's point of view, a share acquisition releases it absolutely from its relationship with the business; all liabilities remain with the target and the seller does not have to deal with any employment issues that may arise. The seller also benefits from the fact that the mechanics of the transaction are much smoother and the tax advantages of a share acquisition. Finally, the seller receives consideration for the sale directly, not through the subsequent issue of dividends from the selling company's profits.

3.4 Share acquisition – disadvantages

Although the benefits of a share acquisition are attractive, the disadvantages must also be considered.

There is always a risk that third parties may wish to sever their relationship with the target following change of control. The buyer is also acquiring all of the assets and liabilities of the target with all inherent apparent risks. Some further expenses can be contemplated as a result of the extensive due diligence process which is, almost invariably, carried out.

Finally, for the seller, the due diligence process may prove to be quite long and exhaustive, notwithstanding that the seller will provide the buyer with extensive warranties, representations and indemnities.

The remainder of this guide will focus on share acquisitions, being the most popular means of structuring M&A transactions.

4. PRE-AGREEMENT STAGE

4.1 Letter of intent, heads of agreement and memorandum of understanding

Once the negotiations of an acquisition transaction have reached a certain degree of certainty, the parties may feel comfortable setting out in written form the main terms on which they wish to proceed with the transaction.

This is an optional stage in the transaction and it usually takes the form of a formal letter, most commonly prepared by the buyer's legal adviser and addressed to the seller(s). This formal letter is a technique used in a number of jurisdictions and takes various names such as the letter of intent or heads of agreement. In Cyprus, it is more commonly referred to as the memorandum of understanding (MOU).

The MOU sets out and makes clear the principal commercial terms of the acquisition. It usually describes whether the proposed transaction is an asset or share acquisition, the conditions that need to be fulfilled by the acquisition date, the price and payment terms, and outline the timetable for the acquisition.

Further, the MOU serves as an outline of the various parties' intentions and sets out the basis for further negotiation. Finally, the MOU may also serve as a useful guide to the transaction for the parties and their legal advisers alike.

With regards to the legal status of the MOU, it is not intended to be, and usually is not, legally binding. The buyer in particular will prefer that the MOU is not legally binding. Its signing takes place before the buyer has had the chance to undertake a detailed investigation of the target, the outcome of which may convince the buyer that the particular transaction is not worth pursuing.

One technique used by legal advisers is to mark the MOU as 'subject to contract'. However, this may not be enough to discharge the legal status of the document, so it is advisable to insert an express statement providing that 'the provisions of this memorandum of understanding are not intended to be legally binding under any circumstances'.

If either of the parties intend that one or more provisions inserted in the MOU, such as exclusivity and confidentiality (which are both discussed in more detail below) or liability for costs in the event of an abortive transaction, be binding, then this should be expressly stated in the MOU itself.

4.1.1 Exclusivity clause

One of the main terms in the MOU which is intended to be legally binding is the exclusive bargaining right given to the buyer for a specific period. During this time, the seller shall be prohibited from entering negotiations with anyone else. Where an MOU is not used, an exclusivity clause may be inserted in the confidentiality agreement.

The proper form of exclusivity clause is a 'lock-out' clause, which is drafted to prohibit parties from negotiating with third parties. Such a 'lock-out' clause will be enforceable if it is sufficiently certain. In order to achieve this, the clause should be clear that there is an obligation not to negotiate with others for a fixed time period depending on the circumstances, (ie size and complexity), for which consideration is provided (usually the buyer's commitment to finance

the due diligence investigation) and for which remedies are available for breach, such as the recovery of costs incurred in pursuing the transaction.

4.2 Confidentiality agreement

4.2.1 Confidential information

The seller will be expected to provide a wide range of commercially sensitive information during the due diligence process. There are two main areas of confidential information that are of concern to the parties – namely, information about the target or asset(s).

It is in the interests of both parties to keep the terms of the deal confidential. Accordingly, the parties usually enter into a confidentiality agreement specifying the parties' obligations in relation to the confidential information, procedures for handling confidential matters and the remedies for breach of confidentiality.

The initial draft is usually prepared by the seller's legal adviser and is then negotiated between the parties. From the seller's point of view, the agreement will normally cover as much information as possible and contain a wide definition of the term 'confidential' to protect them to a satisfactory level.

The buyer, on the other hand, will normally seek to reduce the restrictions desired to be imposed with the aim of reducing costs. Accordingly, the buyer will insist that restrictions apply only to the most sensitive information.

4.2.2 Content of confidentiality agreement

The confidentiality agreement will normally include a comprehensive definition of 'confidential information'. The definition will typically exclude information already in the public domain and information that the buyer is already aware of. Additionally, the definition should include information obtained from the seller and its advisers, and should extend to documents that have been prepared by the buyer on the basis of the information provided.

The confidentiality agreement will expressly state to whom such documents can be disclosed and how this information should be used by such authorised persons. A common clause of the confidentiality agreement is an undertaking by the buyer to return or destroy any confidential information, including copies, if the acquisition falls through. If particularly sensitive information is involved, then agreed procedures for the tracking of such documents must also be incorporated into the agreement. These undertakings may take the form of a separate letter, the consideration for which will usually be the fact that the seller is providing the confidential information.

The confidentiality agreement will typically also impose an obligation on the buyer not to disclose any confidential information except for authorised purposes. The seller will normally be careful not to draft the agreement in a manner that will be construed as being a restraint of trading, making it void.

The confidentiality agreement normally includes the agreement of the parties that they will not, without the written consent of the other, make any disclosure of their negotiations regarding the proposed acquisition transaction.

Finally, the confidentiality agreement will ordinarily cover the duration for which it shall have effect, any relevant exclusions, and of course the remedies for breach (which are usually damages, as an injunction would only be of limited value after wrongful disclosure is already made).

4.3 Due diligence

The aim of the due diligence investigation is to allow the buyer to gather as much essential information about the target as possible.

Due diligence is conducted by business advisers, professional advisers and legal advisers in order to identify the material potential risks of an M&A transaction. The legal due diligence focuses on the constitutional framework of the target, the terms on which it is trading, ownership of assets and any restrictions on their use and the extent of any potential liabilities of the target. Even though the financial advisers will be carrying out their own investigation, the practice is that legal advisers will also look at some financial information, in order to make an all-round assessment.

At the beginning of the investigation public searches of the target are conducted. This search includes a full company search, an intellectual property (IP) rights search (if necessary) with the Registrar of Companies and Trademarks, a search with the land registry if the target owns property, and a search with the public files of any regulator under the regulation of which the activities of the target company may fall. Depending on the circumstances, searches in relevant websites, trade press and commercial organisations are also advisable.

Additionally, in the case where highly classified information is involved, a data room may be set up where the seller, through its legal advisers, will make available key documentation. The use of a data room can be particularly helpful in a transaction where the seller has particularly sensitive information to share and will need this kind of reassurance to enable it to feel confident about disclosure. The data room is usually operated by designated employees who may also be asked to sign a confidentiality agreement.

There is no exhaustive list of information but usually due diligence investigates the following information.

4.3.1 Corporate information

The first group of documents that are usually investigated are those which contain the corporate information of the target. Example of these documents are:

- (a) statutory registers (eg register of members, register of directors etc);
- (b) articles of association and memorandum of association;
- (c) minutes and resolutions of the meetings of shareholders for the last few years (depending on the extent of the due diligence requested, usually this is the previous three years);
- (d) minutes and resolutions of the meetings of the board of director(s) for the last few years (as above depending on the extent of the due diligence requested – usually this is the previous three years);
- (e) latest financial statements;
- (f) ultimate beneficial owner register;
- (g) share certificates; and
- (h) certificates of incorporation (including upon a change of name).

It is also considered good practice to check if the information shown on the corporate records and the registry extract correspond, in order to spot any failure by the target to comply with its responsibilities imposed by the registrar of companies.

For an asset acquisition, it is important to check the objects clause of the memorandum of association to see whether the company has the power to dispose its (relevant) assets. The articles of association will have to be checked to identify the persons authorised to dispose them.

For a share acquisition, it is important to scrutinise thoroughly the objects clause in the memorandum to ensure that the company has the power to carry the business that the buyer is interested in purchasing. The articles of association will also be helpful to the legal advisers in planning the stages of the proposed transaction from exchange of contract to completion, especially if the articles provide for restrictions on share transfers (such as pre-emption rights).

4.3.2 Information on directors and shareholders

In a share acquisition, it is crucial to request accurate information about the shareholders to ensure that the correct persons are included in the share purchase agreement (SPA) and that clean title to the shares is able to be transferred.

In both types of acquisition, it is also important to collect sufficient information about the current directors, so that the buyer may make its decisions.

4.3.3 Internal registers and minutes

The register of members and their minute books must be checked to ensure that all allotments and transfers of shares were carried out in accordance with both company law and the company's internal regulations. The register of directors and their minute books (along with their service contracts) will typically also be reviewed to make sure that the correct procedures were followed at all times. Finally, the charges' register of the company will be reviewed, as the buyer in a share acquisition will be acquiring the company along with all its encumbrances. A review of the charges register may help the buyer decide whether an encumbrance exists that makes the acquisition not worth proceeding with.

4.3.4 Other key information

Part of the legal due diligence will involve perusing other important documentation. This includes key contracts of the target that need to be reviewed so that the buyer is aware of those contracts that are of interest to their business, or any change of control restrictions included within. This review will also enable the buyer to negotiate the acquisition price accordingly.

With regards to immovable property, agreements such as lease or licence agreements are reviewed for change of control restriction clauses, restrictions on assignment, termination, renewal of lease term, alterations and sublease. With regards to land and premises, legal due diligence will also be performed on certificates of title and existing charges on significant assets of the target.

In addition, if requested, there will be a thorough search with the registrar of trademarks to ensure that trademarks, if any, are properly registered and protected, and that there is no pending litigation in relation to those.

Furthermore, the buyer should have a clear picture of the employees of the company. Service contracts must be checked for details of any discretionary or customary arrangements as well as the records of the target company to confirm any formal/informal employees, any dismissals, disputes or charges in terms and conditions of employment which may result to a potential claim by any employee. It is pivotal to check any pension schemes set up by the target. The trust deed under which the pension fund is administered will be reviewed, and so will a list of its members.

Environmental, social and corporate governance aspects of a company's focus are increasingly playing a part in due diligence exercises when evaluating business risks and opportunities.

Another issue that has to be examined is the financing of the company. In an asset acquisition, it should be confirmed whether any of the assets being transferred are subject to a charge (which may also be revealed on the charges register). In such a case, the buyer should demand that the charge is removed upon completion or ask for the consent of the chargeholder for the asset to be transferred subject to the charge. In a share acquisition, it is even more important to check the loans of the company. The legal adviser should ask for copies of all loan documentation to ascertain the nature and extent of the target company's borrowing commitments and obligations. It must also be checked whether any loans are repayable on demand or entitle the lender to demand immediate repayment of the balance on change of control of the target. In this event, this can be remedied either by the buyer making arrangements with the lender directly, or by making it a term of the SPA that the seller will settle the loan. If the seller has guaranteed any obligations of the target, or if the target has guaranteed obligations of a third party, additional arrangements must be agreed. This is more relevant if the target is a member of a group of companies. The buyer will want to ensure that such obligations do not continue after completion.

Finally, the solvency of the seller has to be ascertained by making bankruptcy/solvency enquiries against the seller, including with the Registrar for Companies and Official Receiver. This is crucial as any proceedings entered into after bankruptcy or insolvency may be void. The due diligence will generally also cover any recent, pending, or contemplated litigation. It is not possible to conduct a search by entity for outstanding disputes so this is normally handled by requesting letters from the target's legal counsel and will form part of the representations and warranties in the SPA. Furthermore, details of any complaints by, or disputes with, customers, suppliers, employees or other third parties should be investigated, and a proper risk assessment should be made if any exist.

5. ACQUISITION AGREEMENT

It is becoming common for SPA negotiations to be run in parallel to the due diligence process. The main disadvantage is if any red flags appear from the due diligence process late in the negotiation process, then extra costs may have been incurred by the parties.

5.1 Structure of the SPA – operative terms

Even though there is no specific rule regarding the structure of the SPA, it is best practice to draft the terms in a carefully structured manner, with a logical flow. Many legal advisers opt for the use of schedules in order to make the SPA easier to read. Nevertheless, there are several operative provisions which will normally be included in order to safeguard the rights and ensure the obligations of both parties involved.

Certain matters have to be included in the SPA for its validity under Cypriot law, such as clearly mentioning all the parties involved, the date of the agreement, the agreement for the sale, along with the consideration and conditions of sale.

5.1.1 Definitions and conditions precedent

The SPA will normally include a comprehensive list of all definitions which are used throughout the agreement. The second clause usually covers conditions precedent to the agreement, especially in the situation where completion will not occur on signing, but at a later date. Therefore, the SPA may be entered into on the basis that it will be completed if certain conditions are fulfilled. This may include an obligation of the parties to seek fulfilment of such conditions, and also a longstop date by which they must be fulfilled or waived.

5.1.2 Agreement for sale, consideration and completion

The agreement will generally set out what is being bought and sold, either by reference to a schedule, or outright in the clause. It must be specified whether a full or limited title guarantee is granted in order to safeguard the buyer's interests. The consideration to be paid for the acquisition, stipulating the price, form and timing will normally be set out. In an asset acquisition, a schedule may also be used to set out the amount attributable to each asset. The consideration may be fixed, or a provision may be included to allow for price adjustments subject to completion accounts.

When negotiating, the parties are making a valuation based on dated information, such as the latest audited accounts. The buyer will want to verify this projection at the completion date. Therefore, parties may agree to adjust the price to reflect the actual net assets and profits of the target on the date of completion. This can be determined by a set of agreed accounts which are drawn up at or after completion, known as completion accounts. The SPA usually provides for a maximum purchase price, to which further adjustments (or repayments) are to be made once the completion accounts have been prepared.

Even though the use of completion accounts mechanism is the most common practice in Cyprus, the locked box mechanism may also be used. This enables the parties to agree to a fixed price of the transaction at the date of the execution of the agreement. This is a less time-consuming practice as opposed to completion accounts, since the price is fixed and does not need to be estimated later. Nevertheless, this is a riskier mechanism to use, especially when there is a time lag between agreement of the price and completion. The buyer may be negatively affected if the target business faces financial instability but can also attain a profitable deal when the business of the target grows and becomes more profitable. Thorough legal due diligence can alleviate this risk or assist the buyer to decide whether to use the locked box mechanism at all.

Another possible option is earn-out clauses, linking part of the consideration to the future profitability of the target for a specified period after completion. Typically, part of the purchase price is agreed to be paid at completion, to be followed by further payment(s) depending on financial milestones being met within the period specified. Such a provision protects the buyer from paying too much for a target which fails to perform as expected, and also acts as a motivating factor for the target's directors, especially if they are to remain in their position after completion.

5.1.3 Split signing and completion

It is common to have split signing and completion, often for procedural condition precedents to be collected and prepared (ie, merger notifications). In such cases additional care will need to be taken by the buyer to ensure suitable restrictive covenants are included to protect their interests for such intervening period.

A frequently used mechanism in the case of split signing and completion is the use of an escrow agent for the purpose of holding the purchase price or part thereof, or even the share certificates of the target and instruments of transfers for the shares, until the satisfaction of conditions precedent has been completed.

5.1.4 Restriction on seller's activities

The buyer may also seek to protect the goodwill of the target by including restrictive covenants to restrict the seller's activities (in regard to competition with the target) after the completion date. This is more widely known as the 'non-competition clause'. Care should be taken when drafting this clause, as courts will not enforce a clause unreasonably barring the seller from setting up a competing business. Only implied undertakings will be enforceable, such as not disclosing confidential information, or forbidding the seller from representing itself as the business it has sold and from soliciting customers from the business. The key in drafting such a provision is that the clause can go no further than is necessary to protect the goodwill of the business or company.

Furthermore, the buyer must be aware that all restraints of trade are *prima facie* void in common law but the court will not strike down a clause if it considers it reasonable to protect the buyer's legitimate interests. In the case where the clause is disputed, the court will look at the time duration of the restraint (it will usually only be considered reasonable if it spans one to five years), the geographical area of the restraint and the activities it seeks to restrain. Finally, the clause should be drafted to keep the restrictions separate, so in case one of them is struck out, the others will remain unaffected.

5.1.5 Other important clauses

The SPA usually also contains clauses relating to employees and pension funds, insurance, VAT, boilerplate clauses including an entire agreement clause, a clause excluding the rights of third parties, and clauses to provide for notices, variation, severance and choice of law and jurisdiction.

The choice of law and jurisdiction clause has to be considered with care, since it will bind both parties. In most cases Cypriot law and the jurisdiction of the Cypriot courts is chosen, especially where the acquisition does not take an international perspective. The courts in Cyprus have proven to handle disputes from such agreements in a satisfactory way, applying the law and the principles of equity in a just manner.

However, where the parties wish to avoid court proceedings in the case of a dispute, a dispute resolution clause may be negotiated and inserted into the SPA to provide for an alternative form of dispute resolution, such as mediation, alternate dispute resolution (ADR) or arbitration. Such a clause directs parties in dispute to initiate the agreed form of dispute resolution to produce a

compromised solution without engaging the costly and time-consuming court procedure, and where such solution would be upheld by a Cyprus court.

5.2 Warranties, representations and indemnities

5.2.1 Warranties

As discussed above, the SPA will typically include a carefully drafted clause (often accompanied with a detailed schedule) of the warranties granted by the seller to the buyer. The purpose of giving warranties is two-fold; first to provide the buyer with a remedy in the case of a breach, and second as a mechanism to elicit information about the target from the seller. As the seller will want to avoid any liability for breach of warranty, it will attempt to disclose all relevant information before the SPA is agreed and signed. Finally, warranties are made in relation to the state of the target at a specific point in time; if completion will not be simultaneous to exchange, then the warranties will be re-confirmed at completion.

5.2.2 Indemnities

Warranties usually go hand in hand with indemnities. The indemnity basis is usually compensation on a 'euro for euro' basis for the loss the buyer has suffered. However, a threshold and or pre-agreed maximum may be contractually set. The amount recoverable under an indemnity is far more favourable to the buyer, as they include the cost of the loss, and any costs or expenses relating to it that may be indemnified.

The buyer generally wants indemnities wherever possible, but the seller is usually reluctant to provide them. The final draft of indemnities is the end result of negotiations between the two parties, based on each side's bargaining power. Therefore, unless the buyer has a particularly strong bargaining position, it is only likely to obtain indemnities for tax liabilities – ie, historically based indemnities, pursuant to a date agreed by the parties of the transaction, in regards to the affairs of the target company prior to that specific date, that can be also indemnities in regards to the SPA. In the context of a strong bargaining position, the buyer can also obtain indemnities in relation to certain areas, where specific problems have been identified from the due diligence process and has not resulted in a price adjustment. Some of these areas may be environmental risks, potential litigation for infringement of IP rights, specific book debts, loans of the target and product liability claims.

5.2.3 Relevant issues when drafting warranties and representations

Some consideration must be given to who will be providing the warranties to the buyer. In an asset sale, it is always the seller. In a share sale, it depends on who the shareholders are. If the target is a wholly owned subsidiary, then the parent company will be giving the warranties. In other situations, it will be the individual shareholders. However, this may be a sensitive issue, especially if there are minority shareholders involved with no active involvement in the company. Such minority shareholders will be reluctant to assume the exposure to liability as they will have limited knowledge. Other shareholders who will be reluctant to give too many warranties (and indemnities), are institutional sellers and trustee shareholders. Since such shareholders are holding shares solely for investment purposes, they will want to limit their liability.

5.2.4 Negotiating warranties

It is common practice for the buyer's legal advisers to seek that the warranties are drafted as widely as possible to achieve maximum protection for their client. In contrast, the seller's legal advisers aim to keep the warranties as concise and narrow as possible, to restrict the liability of the seller. Since this area will usually be heavily negotiated, the clause is usually drafted with limitations.

Firstly, a time limit on warranty claims may be imposed, as a limitation period for which warranties are actionable. For tax indemnities, this is usually a period of six or seven years from the date of the SPA. For all other matters, it is usually a period between one and three years after the sale, when the parties would expect any problems to have been identified.

Imposing financial limits on warranty claims are also a possible approach that may be taken. The limit will cover a minimum limit for individual claims, a minimum limit for aggregate claims, and a maximum overall limit for all claims. The minimum limit will typically be 1 per cent of the (aggregate) consideration price. The maximum limit is often set as a percentage of the purchase price. This ranges drastically, from 20 per cent to 100 per cent of the purchase price, and is often a by-product of the deal's pricing structure. Furthermore, if any of the parties are taking out insurance, a double recovery clause may be inserted, which prevents the buyer from claiming for the same loss twice and obligates it to seek compensation via the insurance route first.

When acting for the seller, legal representatives seek to exclude any general warranties (for example, that the buyer has been supplied with all relevant information). In addition to this, any warranties which are forward-looking (and warrant matters about the target's future performance) are also avoided. Finally, the seller's representatives seek to insert wording such as 'so far as the seller is aware' into the warranties clause, to limit the warranty by the seller's actual awareness.

5.2.5 Representations

A warranty may also be a representation where it was made by the seller in pre-contract negotiations, and it induced the buyer to enter into the contract. Therefore, if a warranty has induced the buyer to enter into the contract, it will be deemed a representation, and breach of such will entitle the buyer to rescind the contract, especially in situations where there is a gap between exchange of contracts and completion of the acquisition. The buyer may also be entitled to damages in the case of misrepresentation.

The nature of an acquisition agreement makes it likely that any representations made by the seller in the pre-contract stage, and which have induced the buyer to proceed with the agreement, will be included in the SPA as warranties. In this event, the buyer's legal representatives seek to have such representations included in the SPA as warranties. In contrast, the seller's representatives seek to limit this by inserting an acknowledgment in the SPA that the buyer has not relied on any representations, known as a 'non-reliance' clause.

A 'non-reliance' provision is essentially an acknowledgment by the buyer that he has not relied on any representations which are not contained in the contract. To rely on such a clause, the seller must prove that the provision itself is clearly drafted, that the buyer intended for the provision to be acted upon and that the seller believed the statement to be true. In other words,

it must be obvious that the buyer was not relying on any other representations except those expressly incorporated into the agreement. If the seller knows this statement to be untrue, then he cannot rely on it against the buyer.

Finally, another way of safeguarding the seller is to include an 'entire agreement' clause in the SPA. It is worth emphasising that such a clause can never exclude liability for fraudulent misrepresentation.

5.3 Disclosure

5.3.1 The disclosure letter

The disclosure letter forms an integral part of the acquisition transaction and is closely linked to the SPA. Its purpose is to disclose matters which have to do with the target, which if they were not disclosed would result in the seller's breach of warranty. The disclosure letter is usually prepared by the seller's legal advisers, who go through each of the warranties in the SPA to ensure that the seller has disclosed all known facts which may give rise to a warranty claim by the buyer.

For the buyer, the disclosure letter supplements the legal due diligence process, and gives the buyer a fuller picture of the target. The buyer may use the disclosure letter to identify additional risks and renegotiate the purchase price, ask for further indemnities to cover a specific risk, or even walk away from the transaction. For the seller, the disclosure letter essentially means that the seller is negating its liability under a warranty. In other words, it is in the seller's best interests to disclose as much as possible, to avoid future argument as to whether or not the buyer was aware about certain facts which give rise to a breach of warranty. Full disclosure will also provide the seller with a successful defence against a breach of warranty claim.

5.3.2 The standard of disclosure

The standard of disclosure required under the warranties is incorporated in the warranties clause of the SPA. The standard will apply to both deemed and general disclosure, as well as specific disclosures. The SPA often states that disclosure will only be effective if it could reasonably be expected that the buyer will become aware of the relevant breach of warranty from the examination of the documents.

The starting point is that, for disclosure to be effective, the buyer must be given specific notice of the particular issue qualifying the warranty. If the parties' legal advisers fail to include a standard of disclosure in the SPA, then the standard to be applied will be that the seller must give specific notice, and that disclosure must be 'full and fair'. However, this is not common, as the parties negotiate and often reach a compromise to what the standard of disclosure must be.

A standard which is more favourable to the buyer is where the agreement provides that the buyer's 'actual or constructive knowledge' does not preclude a claim for breach of warranty. In such a situation, the seller would have to show that the buyer's actual or constructive knowledge affected the consideration price, in order to defend a breach of warranty claim.

Notwithstanding the above, the drafting more frequently used as a compromise between both the seller's and buyer's interests, is that where the buyer has 'actual knowledge', then they

cannot claim a breach of warranty. By removing the word ‘constructive’, this limits the standard only to information that the buyer actually possesses.

6. COMPLETION

6.1 Between exchange and completion

As per Cyprus law, an agreement can be signed in counterparts. Usually, scans of the agreement can be exchanged pre-completion, with originals to follow.

6.1.1 Conditionality

Before the acquisition is completed, various approvals, consents and clearances may have to be obtained or be requested by the buyer. Such matters may include: a tax clearance certificate up to a specific date; tax rulings from the Cypriot tax authority with regards to the tax treatment of specific transactions stipulated in the SPA; a notification from the Cypriot commission for the protection of competition; the provision or transfer of a regulatory licence for the particular industry; confirmation of consent to assign any contracts, consent of a landlord for the change of a tenant; and the shareholders of a corporate buyer passing any necessary resolutions.

6.1.2 Notification to the Commission for the Protection of Competition

When M&A transactions fall under the provisions of the Control of Concentrations Between Undertakings Law of 2014, L. 83(I)/14, the Commission for the Protection of Competition has to be notified in writing of such agreements, prior to the onset of the implementation of the concentration. As per the concentration provisions, those M&A transactions that do not fall within the scope of application of Regulation (EC) No. 139/2004, and meet either of the below criteria, are considered concentrations of major importance and fall under the provisions for notification:

- (a) the aggregate turnover achieved of each of at least two of the participating undertakings is more than €3.5m; and
- (b) at least two of the participating undertakings achieve turnover within the Republic; and
- (c) at least €3.5m out of the aggregate turnover of all the participating undertakings is achieved within the Republic; or
- (d) it is declared as such by Order of the Minister under Section 5 of the Control of Concentrations Between Undertakings Law.

The impact of these concentration provisions on the concentrations of major importance is that the concentration cannot be implemented until the Commission approves of the notice of the notifying party. In addition, the parties of the agreement for the concentration of major importance may suffer administrative sanctions if they omit the notification to the Commission, which can reach up to 10 per cent of the total turnover of the undertaking, plus an administrative fine not exceeding €8,000 for every day during which the infringement continues.

6.1.3 Conditions precedent

As already mentioned with respect to the structure of the SPA, the agreement can contain a clause dedicated to any conditions to be fulfilled and specific terms relating to them. One important condition precedent is that the buyer will seek the repetition of warranties. A buyer with a strong bargaining position will usually negotiate for this to be added into the conditions precedent, giving him the right to withdraw from the acquisition in the event of a breach.

Another important addition would be a material adverse change (MAC) clause, which would give the buyer the right to terminate in the event of a MAC in the business, assets or profits of the target during this period. Such provisions are included for the protection of the buyer against the general risk of adverse events that may occur in the period between signing the agreement and completion.

7. POST-COMPLETION

Filings that are procedural by nature and are not required for the share transfer's effectiveness are usually left as post-closing items.

7.1 The register of the company must be updated

- (a) Filing of form HE57, along with a certificate signed by the secretary of the target company notifying the Registrar of the transfer of shares (accompanied by the relevant secretary's certificate).
- (b) Filing of form HE4, along with a certificate signed by the secretary of the target company notifying the Registrar of the change of directors and secretary (accompanied by the relevant secretary's certificate).
- (c) Filing of form HE2, along with a certificate signed by the secretary of the target company notifying the Registrar of the change of registered office (accompanied by the relevant secretary's certificate).
- (d) Filing of form HE 24, along with a certificate signed by the secretary of the target company, notifying the Registrar of the change of the particulars of any acquisition of a property already subject to a charge (accompanied by the relevant secretary's certificate).

7.2 Cyprus filing obligations and notifications

- (a) Filing of beneficial owner information by way of an update of the beneficial ownership register, which is maintained by the Registrar of Companies in Cyprus.
- (b) The annual return of the company, along with its audited financial statements, must be filed yearly.