

Attorneys-at-Law TRUST.

Toolkit for SMEs: Preparing for M&A and Investment Rounds

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About TRUST

Attorneys-at-Law TRUST. is a Finnish law firm focusing on the most demanding banking & finance assignments and corporate transactions. We advise on M&A, strategic investments, complex technology and IP transactions, financial regulation and banking.

We regularly deal with the most sensitive and business-critical matters of the most demanding foreign and Finnish corporate clients. We seldom handle routine assignments.

Our objective is to provide exceptional value through innovative solutions, specialist knowledge, insight and maturity of judgment.

We have strong links to prominent international law firms, which also gives us a great view on the most demanding clients and a possibility to assist our clients in all cross-border transactions.

We are ranked as a leading firm in Finland e.g. by [Chambers Global](#), [Chambers Europe](#), [IFLR1000](#), [Corporate INTL](#) and [ACQ International](#).

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Scope

This toolkit is tailored for small and medium sized companies and central points in making of their investment decisions.

When I (that'd be Jan) started my law studies one of our more-distinguished professors said that: "during you career you learn to ask more and more questions on each topic and after law school you should be able to present at least three relevant questions on any legal issue". On the other hand, Mika mentioned that his old boss and partner, a well-known M&A figure, taught him years ago that every M&A deal contains the maximum of three fundamental issues that need to be resolved or addressed. The rest is not that significant. Mika claims that is actually five point that you ought to clear out.

So if you are planning a transaction either as a buyer or a seller – what are the questions you should ask? Well, we cannot offer here the pleasure of enjoying the bliss of a full law degree, but at the minimum we can provide you all with a head start and some insights on the matters you should go through to ensure that your deal will be successful.

Alternative Structures

First of all, if you are planning to acquire or sell a business in Finland there are a couple of alternative basic structures you should be aware of:

1. an acquisition of the shares in the target company (beware of the liabilities);
2. an acquisition of all or part of the target company's business (buy the assets you need – limit the liabilities); and
3. a statutory merger or a share exchange (may be a tax neutral structure).

Questionnaire

We have concentrated below on share purchase deals of a non-listed target, which is the most common structure that we see. It should be noted that the questions are directed solely to that kind of deal structure and some structuring issues are mentioned later as well.

Let's go through the questionnaire first to get us started. You should ask yourself the following questions – and try to answer them:

Why?

- Why are you doing the deal (getting rid of competition, synergies, accessing, specific clients, brand, IP rights, market access)?
- What are the specific risks that might prohibit or restrict you from reaching the fundamental goals?

- What is the business rationale for planning to sell or planning to pay what you are planning to pay?

Some preliminary issues and timing

- Start with the identification of the parties – potential buyer and sellers. Do these parties exist and do they have any assets or background?
- Need for non-disclosure agreements? One-sided or mutual? At what point can you present one without feeling embarrassed.
- Letter of intent or memorandum of understanding – is this needed?
- Is there negotiation exclusivity? Note that the need and content depend on whether you are the buyer or the seller and whether you want to "lock" the negotiating position – at all.
- Is the process an auction or negotiation with a specific named party? What does the auction mean – cost-wise and time-wise?
- Practical matters like deadlines, contact details of legal and financial advisors and similar?
- More practical matters like signing rights and proxies? A need for Board of Directors approval? Who has the authority?

Practical matters and outside help

- Stock exchange releases – who will handle? A road map is often needed as disclosure will often have to be made without undue delay
- Handling of payments and other closing arrangements – who will handle and who will agree with banks?
- Is there a need to engage also foreign legal and financial advisors? Legalization of documents and similar official requirements? Rule of thumb – advice in the parties' home jurisdiction and from the location of the collateral is often required.
- Other issues needed to keep the deadlines like rulings from competition law authorities, co-operation procedures, preliminary rulings from tax authorities? How do these affect the closing?
- Planned signing and if needed closing dates?

Checking what you are buying

- Due diligence issues, responsible parties and form of the report (descriptive or finding report)? Is the report intended to be relied upon by parties financing the said transaction?
- Are certain issues excluded from the scope of due diligence? How the data room is formed and what is the materiality threshold? How do you manage the confidentiality issues – who has access and what should be accessed?
- Then identify the target carefully – is it a separate company or a group? This is also important due to the fact that you'll need to know with whom you can discuss
- You never know enough of the background - so what are the countries where the target operates, what is the operating model (e.g. subsidiary, branch office, distributor or something else) and also what are the most relevant of these all (e.g. in terms of revenue)?
- Ownership structures for all entities? Are there options or convertibles that might change the structure?

Funding the deal and basic structure

- How the transaction is about to be financed, e.g. shares or cash?
- Business sale or share sale?
- It is important to engage tax advisor in the process early as this structuring is heavily influenced by tax considerations – are shares part of the sellers' fixed assets and do capital gains benefit from tax exemption?
- If the deal would be a business transfer, could the seller otherwise minimize taxes e.g. use losses from previous years? Effects on the purchase price?
- Special rights entitling to shares like options, convertible capital loans, transfer restrictions and similar?
- Are there special risks, assets or liabilities that should be excluded from the transaction?
- Need to establish new companies for the purposes of the transaction? Why? Are you planning to merge the acquirer with the target (may be needed due to the "financial assistance" restrictions)?
- Specific key persons? Management considerations? How do you plan to engage them?

- Transitional services after transaction? IT, administration, real estate, for example?
- Other tax e.g. from the purchase price perspective, or future considerations from the buyer's perspective?
- Purchase price structure, adjustments and earn-outs? How do you fix the mechanism and the numbers for determining these?
- Is the purchase price connected with the refinancing or rearrangement of target's financing?
- Should there be an escrow arrangement?
- How the deal is financed – cash, debt from banks? Determine which balance of creditor and shareholder control is acceptable to you as a buyer.
- Redemptions, targeted issuances of shares or similar as part of the purchase price?
- Do you want the seller to hang on to the company- or would it be better to just have a vendor note from the seller (i.e. deferred purchase price with interest)?
- What are the most critical business issues – that we know already?

Little matters that really matter

- Main suppliers and customers?
- Core assets and intellectual property rights?
- Litigations?
- Key persons?
- Corporate law matters – will there be trade name change or other similar changes with the trade register? Board composition of the closing? Assignment of IP rights as a precondition for the closing?
- New employment and director agreements – is there a need to make changes?
- Cooperation procedures (employment laws) if needed?
- What kind of SPA draft is optimal – friendly or aggressive? Internal approval for drafts?
- What kind of representations or warranties should be used as a starting point?
- Limitations of liability? Claim periods? Basket?
- Financial standing of the seller – need to consider parent company guarantee?
- Other specific issues regarding environment, transfer tax, competition law and so forth

Closing Remarks

As a summary, any transaction is a process and most of the law firms have already these processes in place like we have ours as well. The rest is pretty much implementation typically without a need to be engaged in theoretical discussions regarding, for example, seller liability under the Contracts Act in situations X, Y or Z.

We hope that by thinking about the questions in this toolkit you start focusing on the right questions. We have a number of postings and updates at TRUST how to deal with these matters in practice and we hope that you find them useful in getting the deal forward.

We guess the most important lesson is that you should identify those most critical issues why the deal is done and what are the factors ensuring the successful case and hold on to those points.

As a point to reflect upon, the Greek historian Herodotus was not talking about M&A when he said, "Great deeds are usually wrought at great risks." It is however very much true that in many cases companies are not well prepared for complexities of an M&A risks and we hope that this list could serve at least as a starting point for such preparations – until next time!

The views expressed in this market update are of a general nature and should not be considered legal advice or relied upon in a specific situation.

Any actual situations should be evaluated legally on a case-by-case basis.

J.L. & M.J.L

Recent reference cases:

- *Advised the target and owners in the investment round of Forest BtL Oy*
- *advised management in several listed and private Finnish companies in their IT audit disputes against all leading IT software vendors from Oracle to Microsoft;*
- *advised in the divestment of Suunto Benelux to its current management;*
- *advised in the IT infra outsourcing of a Nasdaq OMX listed Finnish company;*
- *represented a Nordic consumer brand in an unfair competition litigation in the Markets Court.*