COMMERCIAL

Intra-Group Reorganisations - Not Always That Simple

An intra-group reorganisation often takes place in an attempt to improve the administrative, operational, and economic efficiency of a business. However, what seems simple in theory can often raise significant practical and legal issues.

Why consider a reorganisation?

A group of companies can make a decision to undertake an intra-group reorganisation for various reasons. Typical situations where an intra-group reorganisation may be undertaken are as follows:

- Tax
  Often the goal is generally to change the group structure to make the business more tax efficient. This can be especially relevant to a group that has subsidiaries in different countries with different, and ever changing, tax regimes.

- In preparation of a sale
  When a company proposes to sell part of its business, a reorganisation may be used to separate the business to be sold into a separate subsidiary. This avoids the risk of assets that the group wishes to retain being unintentionally sold. It also provides a more attractive target for potential buyers.

- In preparation for an acquisition
  When a group is planning to make an acquisition, they can reorganise the existing group structure to make sure the new
  subsidiary can easily fit into the group.

- After an acquisition
  The assets of a new acquisition may be moved to appropriate subsidiaries within the group following their acquisition.

Shares vs Assets

Where the reorganisation involves the transfer of a business, it needs to be decided whether the business and assets should be transferred by way of the sale of shares or assets. They have different advantages and disadvantages.

- Share purchase
  This involves the buyer acquiring the shares of the company owning the target business or assets. All assets and liabilities are acquired indirectly, including those the buyer does not know about. In theory, the process is less complex than purchasing different assets but also less flexible. Also there are fewer consent and approval issues that need to be addressed.

- Asset purchase
  Purchasing assets give greater flexibility as to what assets and liabilities are transferred to the buyer and retained by the seller, therefore helps the reorganisation to be more tailored. Asset purchase also can be more useful when buying only a certain part of the business. However, unlike share purchase, different types of assets may need different forms of transfer. Similarly, certain types of assets may require consents, such as a landlord's consent when transferring a lease property.

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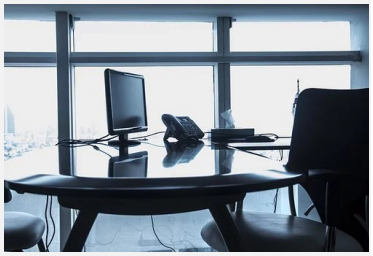
Key issues to consider when carrying out intra-group reorganisation

- Undervalue transaction
  Intra-group asset transfers are often carried out at nominal value. However if this is significantly less than market value, this can potentially cause undesirable consequences such as the transaction being invalid, and potential personal liability for the directors, if there is a subsequent insolvency.

- Ownership and shared assets
  Within a group, it is often the case that companies use the assets owned by other companies without formal entitlement, without even realising. When a reorganisation is carried out in preparation of a sale to a third party, the buyer would expect the business to own or at least retain all the rights to access such assets. Equally, after the sale, the group will want to make sure that all remaining companies still have an access to the assets they need for operation. Therefore it is important to identify the ownership of the shared assets and put appropriate agreements in place when the reorganisation is a precursor to an external sale.



- Consents and notifications
  Although an intra-group reorganisation involves fewer external issues, certain consents, approvals or notifications may be required from third parties such as regulators, shareholders, banks, landlords, key suppliers, customers and so on.

- Transfer of Undertakings Regulations (TUPE)
  Employees may be protected by TUPE when the business is transferred. If TUPE applies, the seller should inform and consult the employees and pass employee liability information to the buyer. The buyer will have to observe the existing employment contracts made between the seller and the employees.

- Documenting an intra-group reorganisation
  Intra-group reorganisations are often carried out and documented in a less detailed way. However, it is still important to make sure that all necessary legal documents are prepared and executed appropriately. Basic ancillary documents such as board minutes, relevant approvals, HMRC consents and clearances, releases from charges and new banking security documentation may be required. In an asset purchase, in addition to the asset purchase agreement, formal transfer documents such as property transfers, assignments or novations of various contracts may need to be prepared. In a share purchase, the share purchase agreement and a stock transfer form are required. For both, other documents such as subscription agreements, loan agreements or deeds of release may be needed depending on the structure of the consideration.

We are seeing an increased number of companies restructuring themselves, including through intra-group reorganisation. Some are being done in light of the economic challenges of the last year and some in preparation for a return to more normal times. If you are considering a group or company re-organisation, please do get in touch.

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