

Focus on

Realising the full value of technology assets in M&A transactions

Realising the full value of technology assets on sale or flotation depends very much on how easy they are to transfer.

In extreme circumstances, where problems exist with transfer, implementation of an intended transfer strategy may have to be postponed or the perceived value of the assets in question may be significantly affected. Therefore, the desired end result of any technology-related transfer will be to ensure that the investor or purchaser ends up with all of the intellectual property rights, contracts, licences, assets, equipment and consents which are necessary to conduct the business without breaching any laws or third party rights.



The main reasons for the transfer of technology assets can generally be summarised into two categories.

Intra-group transfers

These usually involve the transfer of assets within the group. Such transfers may be relevant when the group is undertaking a reorganisation of all of its assets or setting up an entirely new company to consolidate some or all of its technology assets. The main reasons for this may be to enable a new group company to act as a centralised provider of technology services to other group companies, or to ring fence potential liabilities arising from a technology business.

Extra-group transfers

These may involve the transfer of assets and/or shares outside of the group. The main reasons for this may be an initial public offering ("IPO") or sale to a third party.

IPO

Legal rules require full disclosure of all potential materially adverse aspects of the company's business. This will include any problems with title, any past or current infringement of third party rights or any deficiencies with licences, consents or permissions. The consequences for failing to give full disclosure are both civil and criminal, whereas inadequate disclosure may lead to the flotation being delayed or possibly even aborted.

Sale to third party

As part of the transaction, the purchaser will carry out due diligence and request a raft of warranties as part of the legal documentation. Where there is uncertainty regarding technology assets held, this could lead to timetable delays, price reductions, embarrassment and blemished image or ultimately deal abandonment.

Key considerations

Intellectual property rights ("IPR"):

Where such rights are being used exclusively in the business being transferred, normally a straightforward assignment is all that is required. However, where such rights are also used by other members of the corporate group, the standard approach is either to assign them to the target and licence them back, or to retain such rights and grant the target a licence. In a technology-related business, the main IPR likely to arise are copyright, confidential information, trademarks, patents, database rights and domain name registrations.

Data protection:

Regulations impose important restrictions on the way in which personal data is collected, stored and used. Failure to comply can result in civil and criminal sanctions.

Where the transfer includes a database, the purchaser may require confirmation that the existing owner of the business has held an adequate registration or notification.

Hardware:

The hardware in a transferred business will generally be owned or leased. If owned, the main consideration will include the adequacy and transferability of support and maintenance arrangements, and the extent to which such assets can be transferred without encumbrances. Where the hardware is leased, the conditions of leasing will generally prevent the transfer of such assets to third parties without the consent of the lessor.

Software:

Issues surrounding software ownership are particularly important in technology businesses, such as software suppliers and web developers. The transferring business will be required to prove title to such software during the due diligence process.

Other contracts:

The transferability of ancillary supply or services contracts also needs to be considered. Such contracts can often be crucial to the ongoing viability of the business. Such contracts may include maintenance and support, escrow arrangements, disaster recovery. The ability of the business to transfer customer contracts without the prior consent of such customers also needs to be reviewed.

Shared services:

If the transferred business is to share services with any of the remaining group companies for a period of time post transfer, then a transitional agreement may be required.

Conclusions

In summary, technology business owners who are looking to transfer technology assets must make sure that they have covered all the key issues before they speak to potential investors or purchasers. You only get one chance to realise full value, so getting it right first time is critical.

Contact

We would be delighted to talk to you about your requirements.

Please call 0845 366 4793 or email mhcfinfo@mhllp.co.uk to arrange an initial no obligation meeting.

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