INSIDE M&A

The Legal Architecture of a Deal

Complete 15-Part Editorial Series

From the NDA and deal structure to the SPA, risk allocation, closing and post-closing execution.

Collected Edition

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The complete series

Each article begins on a new page. LinkedIn summaries and cover images are not included in this collected edition.

PART 01

The NDA: Where the Deal Really Begins

Inside M&A: The Legal Architecture of a Deal

When people think about the contracts that define an M&A transaction, attention usually goes straight to the Share Purchase Agreement.

That is understandable. The SPA ultimately determines what is being acquired, at what price, subject to which conditions and with what allocation of risk between buyer and seller.

But the legal architecture of an M&A deal normally begins much earlier.

Before valuation is agreed, before due diligence starts and often before the potential buyer has received any meaningful information about the target, the parties will typically enter into a **Non-Disclosure Agreement, or NDA**.

At first sight, its function appears simple: the seller provides confidential information and the prospective buyer agrees to protect it.

In practice, an M&A NDA can do considerably more. It establishes the framework within which information can move between the parties and can influence how the entire due diligence process is organised.

In other words, the NDA is not merely a confidentiality form. It is often the first agreement that determines how the deal itself will be run.

Why confidentiality matters differently in M&A

An acquisition process creates a particular problem.

To decide whether to acquire a business, a potential buyer needs access to information that the seller would ordinarily never disclose outside the company.

This may include financial forecasts, margins, customer concentration, commercial contracts, pricing policies, employee information, intellectual property, disputes, financing arrangements and strategic plans.

Yet at that stage there is no certainty that the transaction will ever complete.

The buyer may withdraw. The seller may select another bidder. Due diligence may identify an issue. Financing may not become available. The parties may simply fail to agree on valuation.

The result is a fundamental asymmetry:

information is transferred before ownership is transferred.

The NDA is designed to manage that risk.

Importantly, confidentiality in an M&A context is not only about preventing disclosure to third parties. It is also about preventing the information from being used for purposes unrelated to the contemplated transaction.

A potential buyer might never publicly disclose confidential information and nevertheless derive a commercial advantage from knowing the target's pricing, customers or business strategy.

For this reason, a properly drafted NDA will usually restrict both **disclosure and use**, allowing the information to be used only for evaluating, negotiating and potentially completing the transaction.

What does an M&A NDA actually protect?

The starting point is the definition of **Confidential Information**.

The seller will generally want this definition to be broad enough to cover information disclosed in writing, orally, through management presentations or through a virtual data room.

It may also extend to analyses, reports and internal documents prepared by the buyer on the basis of the information received.

In some transactions, even the existence of the proposed deal can itself be confidential.

A premature disclosure that a company is considering a sale may affect employees, customers, suppliers, lenders or other stakeholders. The NDA may therefore restrict disclosure of the negotiations themselves, as well as the identity of the parties involved.

At the same time, the definition cannot sensibly capture everything.

Customary exclusions normally apply to information that is already public, was lawfully known to the recipient before disclosure, is independently developed or is legitimately obtained from another source.

The purpose is not to create an unlimited restriction. It is to protect information that genuinely derives from the transaction process.

Who gets access?

The potential buyer rarely evaluates the deal alone.

An acquisition may require input from directors, employees, lawyers, accountants, tax advisers, consultants, banks, debt providers, insurers and other specialists.

The NDA therefore normally permits disclosure to a defined class of **Representatives**, often where they have a genuine need to know the information for purposes of the transaction.

This creates an important legal question: who bears responsibility if one of those representatives breaches confidentiality?

But there is also a practical issue.

If the NDA is drafted too narrowly, the buyer may struggle to involve the people required to perform due diligence or arrange financing.

If it is drafted too broadly, sensitive information may circulate unnecessarily.

The right balance depends on how the transaction is actually expected to proceed.

This is one of the first points at which legal drafting and transaction advisory overlap: the document should protect the seller without creating a framework that makes the deal operationally difficult to execute.

Beyond confidentiality: access, employees and counterparties

An M&A NDA may also regulate conduct that goes beyond the simple treatment of documents.

During due diligence, a buyer can acquire detailed knowledge about key employees, customers, suppliers and commercial relationships.

The seller may therefore seek restrictions on soliciting employees or contacting customers and suppliers without prior consent.

The rationale is straightforward.

An uncontrolled approach to an important customer may reveal the existence of the deal. Contacting senior employees too early may create uncertainty within the business. Direct discussions with suppliers may undermine the seller's control over the process.

These restrictions therefore serve both a legal and a transaction-management purpose.

The NDA establishes the legal boundary. The deal team decides how access should actually be managed within that boundary.

When particularly sensitive information requires more protection

Not all information presents the same level of risk.

This becomes especially relevant where the prospective buyer is also a competitor of the target.

To value the company properly, the buyer may legitimately want access to customer-level profitability, pricing, margins, product pipelines or other commercially sensitive information.

But providing that information directly to the buyer's commercial management may itself create competition-law and business risks.

One possible solution is a **clean team**.

Particularly sensitive information can be restricted to external advisers or specifically designated individuals who review the underlying data and provide the wider transaction team with aggregated or appropriately filtered conclusions.

This allows the seller to provide deeper access without unnecessarily exposing the business.

From an advisory perspective, this is a useful example of a broader principle: good deal structuring is rarely about eliminating risk completely. It is about creating a framework in which the risk becomes manageable enough for the transaction to continue.

What about standstill provisions?

Standstill provisions are often associated with M&A NDAs, particularly in **public-company transactions**, although they are not a universal feature of private deals.

In broad terms, a standstill prevents a prospective acquirer from taking steps to acquire or increase control over the target without its consent. Its purpose is to allow the target to share sensitive information during the transaction process without giving the bidder an opportunity to use that access to pursue an unsolicited acquisition.

Depending on the deal, a standstill may restrict the bidder from acquiring shares in the target, launching an unsolicited takeover offer, seeking to influence the composition of the board, supporting a proxy contest or proposing an uninvited merger or other change-of-control transaction.

From the target's perspective, the provision helps preserve control over the sale process. From the bidder's perspective, however, it can become restrictive if circumstances subsequently change.

For that reason, standstills may include a **fall-away provision**, under which the restrictions cease to apply if a specified event occurs - for example, if a third party launches or publicly announces a competing takeover proposal. This allows the original bidder to re-enter the process rather than remaining contractually sidelined while another buyer pursues the target.

The scope, duration and exceptions of a standstill therefore need to reflect the ownership structure of the target, whether its securities are publicly traded, the identity of the bidder and the competitive dynamics of the transaction. As with the NDA more generally, the provision should be tailored to the deal rather than simply imported from a precedent.

The advisory perspective: protect the company without obstructing the deal

The strongest possible NDA is not necessarily the best NDA.

An agreement that is too permissive may expose the seller. An agreement that is excessively restrictive may prevent a serious buyer from completing proper due diligence and ultimately reduce its willingness to proceed or the price it is prepared to offer.

The legal document therefore needs to work together with the transaction process.

In practice, advisers may need to decide not only what the NDA says, but also:

- when access to the virtual data room should begin;
- which members of the buyer's team should have access;
- whether certain information should only be released at a later stage;
- whether clean-team arrangements are appropriate;
- when management meetings should take place;
- whether customers or suppliers may be contacted; and
- whether particularly sensitive information should only be disclosed once the bidder has demonstrated sufficient commitment to the deal.

These are not all contractual provisions.

But they determine how the contractual protection provided by the NDA works in practice.

A well-run process often uses **staged disclosure**: enough information is provided for the buyer to progress its analysis, while the most commercially sensitive materials are released only as the transaction becomes more credible.

This can protect the seller without preventing a genuine bidder from reaching an informed investment decision.

What happens if the transaction fails?

Many potential M&A transactions never reach closing.

The NDA must therefore contemplate from the beginning what happens if discussions end.

It will normally address the return or destruction of confidential materials, often subject to practical exceptions for regulatory requirements, professional record-keeping and automatic IT backups.

This matters because information may no longer exist only in the data room.

It may have been downloaded, circulated internally, included in advisers' reports or incorporated into valuation and diligence work.

The larger the transaction team, the more important it becomes to ensure that post-termination obligations are realistic and capable of being implemented.

The first allocation of risk in the deal

The SPA will eventually allocate many of the transaction's most important risks: price risk, warranty risk, closing risk and post-closing liability.

The NDA deals with a different issue at a much earlier stage.

It asks:

how much access should one party receive to another company's business before either side has committed to the transaction?

Answering that question requires more than confidentiality boilerplate.

It requires legal protection, an understanding of how the due diligence process will operate and sufficient commercial judgment to avoid protecting the information so aggressively that the transaction itself becomes unworkable.

That is why the NDA should not be treated as the administrative document signed before the "real" M&A work begins.

By defining what can be disclosed, who can receive it, how it can be used and how the parties interact during the process, the NDA sets the first boundaries of the deal.

And in that sense, it is where the M&A transaction really begins.

PART 02

LOIs and Term Sheets: When "Non-Binding" Starts to Matter

Inside M&A: The Legal Architecture of a Deal

After confidentiality has been addressed and the first discussions have taken place, an M&A process usually reaches a point where conversations need to become more concrete.

What is the buyer proposing to acquire? At what valuation? How will the price be paid? What needs to happen before a definitive agreement can be signed? And, perhaps most importantly, are both sides sufficiently aligned to justify the time and cost of moving into full due diligence and documentation?

This is where the **Letter of Intent (LOI)**, term sheet, memorandum of understanding or heads of terms enters the transaction.

The terminology varies between jurisdictions and markets, but the underlying function is broadly similar: to record the principal terms on which the parties are prepared to continue negotiating before committing themselves to a definitive acquisition agreement.

An LOI is therefore an unusual document.

It is often described as **non-binding**, yet it can have a major influence on everything that follows.

Why have an LOI if it is not the final contract?

The purpose of an LOI is not to complete the acquisition.

It is to establish whether there is enough agreement on the fundamental commercial and structural points to justify moving forward.

A typical M&A LOI may address:

- the proposed purchase price or valuation framework;
- whether the transaction will be structured as a share or asset acquisition;
- the form of consideration, such as cash, shares or a combination;
- possible purchase price adjustments;
- the intended due diligence process;
- conditions to the transaction;
- financing assumptions;
- the anticipated timetable;
- exclusivity;
- confidentiality; and
- transaction costs.

The value of the exercise is therefore partly legal and partly commercial.

It allows the parties to identify major disagreements **before** committing significant resources to a process that may have little prospect of completion.

"Non-binding" does not mean irrelevant

The central characteristic of most M&A LOIs is that the parties do not intend the principal transaction terms themselves to create an obligation to complete the acquisition.

A buyer stating that it is prepared to acquire a company for EUR 50 million does not normally become legally obliged to pay EUR 50 million simply because the seller signs the LOI.

The transaction remains subject to negotiation and execution of the definitive agreement and commonly to due diligence, corporate approvals, regulatory matters and other conditions.

However, that does not mean the entire LOI is non-binding.

Certain provisions are frequently intended to have immediate legal effect, particularly those dealing with **confidentiality, exclusivity, expenses and governing law**.

This distinction should be made explicit.

The drafting should clearly identify which provisions are intended to bind the parties and which merely record their current commercial understanding.

Otherwise, a document intended as a roadmap for negotiations can create uncertainty about whether the parties have already assumed obligations they did not intend to undertake.

The precise legal consequences will, of course, depend on the governing law. In some jurisdictions, concepts such as intention to create legal relations, certainty of terms, pre-contractual good faith or liability for breaking off negotiations can materially affect the analysis.

For that reason, calling a document "non-binding" is not a substitute for careful drafting.

The LOI sets the negotiating perimeter

Although its principal commercial terms may not be legally binding, an LOI can become extremely important in practice because it establishes the **reference point for the definitive negotiations**.

Suppose the LOI provides for an enterprise value of EUR 100 million on a cash-free, debt-free basis with a normalized level of working capital.

The definitive SPA will contain the detailed mechanics required to translate those few words into an actual purchase price.

But it would be commercially difficult for either side simply to ignore the agreed framework and introduce a fundamentally different pricing methodology later in the process without a reason.

The same applies to deal structure, earn-outs, rollover equity, escrow arrangements or other major economic terms.

This is why an LOI must strike a careful balance.

If it is too vague, difficult issues are merely postponed and may reappear after substantial diligence costs have been incurred.

If it is too detailed, the parties can spend excessive time negotiating a document that was supposed to facilitate the negotiation of the real agreement.

From an advisory perspective, the right question is therefore not:

"How much can we put into the LOI?"

It is:

"Which issues need to be settled now to determine whether this deal is worth pursuing?"

Price: the headline number is rarely enough

One of the most important functions of an LOI is to establish the initial economics of the transaction.

But stating a purchase price alone may be misleading.

A proposal of "EUR 100 million" can mean very different things depending on whether that amount refers to enterprise value or equity value, how debt and cash will be treated, what level of working capital is assumed, and whether part of the consideration is deferred or contingent.

An LOI may therefore need to indicate the basic pricing architecture even if the detailed calculation will only appear in the SPA.

For example:

EUR 100 million enterprise value, on a cash-free, debt-free basis and subject to a normalized working capital adjustment

provides considerably more information than:

purchase price: EUR 100 million.

The legal drafting is important because it avoids ambiguity. The advisory contribution is equally important because the drafting must correctly reflect the economic understanding reached between the parties.

This is one of the earliest points in the transaction where lawyers, financial advisers and the parties need to be speaking precisely the same language.

Due diligence should not become an unlimited option

Most LOIs contemplate further due diligence.

For the buyer, this is essential. The indicative valuation and structure may have been developed using limited information and will need to be tested against the target's financial, legal, tax, commercial and operational position.

From the seller's perspective, however, opening a data room creates cost, disruption and information risk.

The LOI can therefore help define the expected scope and timetable of the diligence process and make clear that the proposed transaction remains subject to satisfactory completion of that review.

Advisers should also consider the sequencing of the process.

A bidder that has not yet resolved fundamental questions about valuation or financing should not necessarily receive the same degree of access as a bidder that has demonstrated a credible path to closing.

As with the NDA, information access can be staged according to the maturity of the transaction.

Exclusivity: where the LOI becomes immediately consequential

Perhaps the most commercially significant binding provision in many LOIs is **exclusivity**, often referred to as a no-shop provision.

The seller agrees, for a defined period, not to solicit or negotiate competing transactions while the buyer conducts due diligence and works toward a definitive agreement.

From the buyer's perspective, the rationale is clear.

Due diligence requires time and money. Lawyers, accountants, advisers and financing sources may all become involved. A buyer will often be reluctant to incur those costs if the seller remains free to use its offer to solicit a better bid elsewhere.

For the seller, however, exclusivity has a real opportunity cost.

Once granted, competitive tension may be reduced. If the buyer delays the process or attempts to renegotiate important terms after obtaining exclusivity, the seller may find itself temporarily unable to pursue alternatives.

The duration and structure of the exclusivity period therefore matter considerably.

A seller may seek a relatively short period, clear milestones or the ability to terminate exclusivity if the buyer does not progress the transaction as expected.

The buyer, conversely, will want sufficient time to complete diligence, arrange financing and negotiate definitive documentation.

This is a good example of why an LOI should not be regarded as a ceremonial document. Even where the acquisition itself remains non-binding, exclusivity can immediately change the parties' negotiating leverage.

Financing assumptions matter early

A buyer's offer also needs to be understood in the context of how the acquisition will be funded.

Is the proposal fully funded from available cash? Does it depend on acquisition financing? Is a private equity sponsor involved? Will the seller receive shares or deferred consideration?

An LOI does not need to reproduce the financing documentation, but material financing assumptions should normally be identified early enough for the seller to assess **execution certainty**, not just headline valuation.

A slightly higher offer that depends on uncertain financing may be commercially less attractive than a lower offer with a clear and credible funding path.

This is where the advisory analysis goes beyond simply reading the price written on the page.

In M&A, the best offer is not necessarily the offer with the highest number. It is often the offer with the best combination of **price, conditionality and probability of closing**.

How much detail is enough?

There is an inherent tension in every LOI.

The parties want enough detail to establish meaningful alignment, but not so much that they effectively negotiate the SPA twice.

The most useful LOIs therefore focus on matters capable of becoming genuine deal breakers: valuation, structure, consideration, major price mechanics, financing, diligence, exclusivity, timetable and significant conditions.

More detailed questions - extensive warranties, indemnification mechanics, disclosure standards or detailed closing deliverables - will generally belong in the definitive agreement unless a particular issue is already known to be fundamental to the transaction.

The objective is not completeness.

It is **clarity on the points that justify continuing the deal**.

More than a preliminary document

An LOI sits in an unusual position in the M&A process.

It is not normally the agreement that transfers ownership, and its principal economic terms are often expressly non-binding.

Yet by the time it is signed, the parties may already have agreed the valuation framework, transaction structure, diligence process, exclusivity period and principal conditions around which the rest of the transaction will develop.

That makes the LOI more than a statement of intention.

It is the document that converts an initial discussion into a structured transaction process.

And although the parties may remain legally free not to complete the acquisition, the choices made at the LOI stage can define the negotiating position from which the rest of the deal will be built.

PART 03

Exclusivity: Buying Time to Buy a Company

Inside M&A: The Legal Architecture of a Deal

Once a buyer has made a credible proposal and the parties are ready to move into detailed due diligence and documentation, a difficult question often arises:

should the seller stop talking to everyone else?

For the buyer, the request is understandable. An M&A process requires significant investment in legal, financial, tax and commercial due diligence. Financing may need to be arranged, management time committed and a definitive purchase agreement negotiated.

Few buyers want to incur those costs while knowing that the seller can continue negotiating with competitors and potentially use their offer to create a better auction.

For the seller, however, granting exclusivity means giving something valuable away: **competitive tension**.

That makes exclusivity one of the first points in an M&A transaction where legal drafting can materially change negotiating leverage.

What is an exclusivity agreement?

An exclusivity agreement - also referred to as a **no-shop, lock-out or no-talk agreement** - gives a prospective buyer a defined period during which the seller agrees not to pursue competing transactions.

It may appear as a binding provision of an LOI or term sheet or as a separate agreement entered into before the definitive acquisition agreement.

Its fundamental purpose is to create a protected period during which the buyer can conduct due diligence, obtain financing and negotiate the transaction without competing against another bidder.

Although the precise drafting varies, the seller may agree not to:

- solicit or encourage alternative acquisition proposals;
- initiate or continue negotiations with another potential buyer;
- provide confidential information to competing bidders;
- enter into an agreement concerning an alternative transaction; or
- in some cases, fail to notify the buyer if an unsolicited approach is received.

The restrictions may also extend to the seller's shareholders, directors, employees and advisers so that the exclusivity undertaking cannot effectively be circumvented through another member of the transaction team.

No-shop, no-talk and exclusivity are not necessarily the same thing

The terminology is often used loosely, but the scope of the restriction can vary materially.

A **no-shop** provision generally prevents the seller from actively soliciting competing proposals.

A broader **no-talk** provision may also restrict the seller from entering into discussions with a third party that approaches it independently.

An exclusivity agreement can go further still, combining restrictions on solicitation, discussions, information sharing and entry into alternative transactions.

The distinction matters.

From a buyer's perspective, preventing the seller from actively shopping the company may not be sufficient if the seller remains free to negotiate with any bidder that happens to approach it.

From the seller's perspective, an absolute prohibition on responding to unsolicited proposals can be significantly more restrictive.

In public M&A, these questions can also interact with the fiduciary duties of the target's board and with applicable takeover rules, so the contractual position cannot be considered in isolation. In private M&A, the parties generally have greater freedom to define their negotiating framework, subject to the applicable governing law.

Why buyers ask for exclusivity

The buyer's argument is primarily one of **execution risk**.

Once serious due diligence begins, substantial resources are committed to a transaction that may still fail.

External lawyers review contracts and corporate records. Financial advisers analyse valuation and working capital. Tax advisers examine potential exposures. Financing providers conduct their own underwriting. Management teams spend significant time answering questions.

The buyer is therefore investing before it owns anything.

Exclusivity protects that investment by reducing the risk that another bidder can enter the process after much of that work has already been completed.

There is also a strategic consideration.

Without exclusivity, a buyer may be reluctant to reveal its strongest offer, invest in detailed structuring or commit financing resources if doing so merely helps the seller improve its position with other bidders.

A limited period of exclusivity can therefore help move a transaction from **competitive exploration to execution**.

Why sellers should be cautious

For the seller, exclusivity has a very different economic meaning.

Before exclusivity, the seller may have several alternatives. It may be talking to multiple buyers, testing valuation expectations or simply retaining the option to do so.

The moment exclusivity is granted, those alternatives are temporarily restricted.

That can change negotiating leverage.

Suppose a buyer offers EUR 100 million and receives six weeks of exclusivity. After four weeks of due diligence, it identifies several issues and reduces its offer to EUR 90 million.

The seller now faces a difficult choice.

It can reject the revised proposal, but the other interested buyers may have moved on. Management has already spent weeks on diligence, and restarting the process will take time.

This is one of the classic risks of exclusivity: **a seller can move from a competitive process into bilateral negotiation before sufficient certainty has been achieved on price and terms.**

The buyer has effectively obtained something resembling an option over the process - without yet being obliged to acquire the company.

That is why exclusivity should usually be granted in exchange for a meaningful degree of buyer commitment.

The real negotiation is often about time

An exclusivity provision is only as important as its duration.

A buyer will normally ask for enough time to complete due diligence, secure financing, negotiate the definitive agreement and obtain any approvals necessary before signing.

A seller generally wants the shortest period reasonably capable of achieving those objectives.

There is no universal correct duration.

The appropriate period depends on the complexity of the business, the status of diligence, the financing structure, regulatory requirements and how much work has already been completed before exclusivity is granted.

From an advisory perspective, however, the duration should ideally be linked to a **realistic transaction timetable**, not simply to an arbitrary number of weeks.

If management presentations have already taken place, the data room is complete and financing is substantially arranged, a buyer may have less justification for requesting a lengthy exclusivity period.

Conversely, a complex cross-border acquisition requiring extensive diligence may legitimately require more time.

The question is not simply "How many days of exclusivity?"

It is:

"What does the buyer need to accomplish during those days?"

Milestones can prevent exclusivity from becoming a free option

One way to balance the parties' interests is to make exclusivity conditional on progress.

Instead of granting the buyer an unconditional period during which the seller has no alternatives, the parties may establish milestones such as:

- completion of key due diligence workstreams by a specified date;
- delivery of financing evidence;
- circulation of the first draft SPA;
- submission of comments on definitive documentation;
- confirmation of the buyer's valuation after diligence; or
- internal investment committee or board approval.

If the buyer fails to progress the transaction, exclusivity can expire or cease to apply.

This approach can be particularly valuable for the seller because it changes the commercial logic of the provision.

The buyer is not simply purchasing time. It is receiving protected negotiating space **in exchange for progressing toward signing**.

That is often a better alignment of incentives.

What happens if another buyer appears?

An exclusivity agreement should also address unsolicited approaches.

A seller may agree not to solicit other bids but still receive an unexpected proposal from another party.

The contract may require the seller to reject it immediately, or it may impose a notification obligation so that the existing buyer is informed of the approach.

More buyer-friendly provisions can require disclosure of certain information about the competing proposal.

The treatment of unsolicited approaches can become particularly sensitive in public-company transactions, where fiduciary duties and takeover regulation may require greater flexibility.

In private transactions, the issue is more contractual, but still commercially important: the seller needs to understand precisely how much freedom it is surrendering before signing the exclusivity arrangement.

Remedies matter because time cannot always be recovered

A breach of exclusivity creates an unusual problem.

If the seller secretly negotiates with another bidder and signs an alternative transaction, damages may not fully compensate the original buyer for losing the opportunity.

For that reason, exclusivity agreements may contemplate equitable remedies such as injunctions or specific performance, depending on the governing law, as well as contractual claims relating to transaction costs in certain structures.

Enforceability, however, remains jurisdiction-specific.

The duration of the restriction, the consideration supporting it and the precision with which the prohibited conduct is defined can all matter. An agreement that merely requires parties to "negotiate in good faith" indefinitely is legally different from a clearly defined obligation not to negotiate with third parties for a fixed period.

Again, the label "exclusivity" is less important than what the contract actually requires.

Exclusivity should follow conviction, not create it

From an advisory perspective, perhaps the most important question is **when** exclusivity should be granted.

A seller may weaken its position by granting exclusivity immediately after receiving an attractive headline valuation if important elements of the buyer's proposal remain unclear.

Before removing competitive tension, it may be sensible to establish sufficient clarity around:

- valuation and purchase price mechanics;
- transaction structure;
- financing certainty;
- material conditions;
- required approvals;
- diligence scope;
- management rollover or retention, if relevant; and
- the expected path to signing.

A buyer asking for exclusivity should therefore normally be able to demonstrate more than interest.

It should demonstrate a credible route to completing the transaction.

This is particularly important in an auction process. The seller's negotiating leverage is often strongest immediately before selecting a preferred bidder. Once the other bidders are released and exclusivity begins, recovering that competitive dynamic may be difficult.

A well-advised seller will therefore use the moment **before** exclusivity to resolve as many material commercial issues as reasonably possible.

Buying time - but not the company

Exclusivity is sometimes treated as a short procedural clause sitting at the end of an LOI.

Its economic significance can be much greater.

For the buyer, it protects the time, money and resources required to convert an indicative proposal into a signed transaction.

For the seller, it temporarily gives up the ability to test the market and use competing interest to strengthen its negotiating position.

Neither side is necessarily wrong.

The purpose of the provision is to create enough stability for a serious transaction to progress, without giving the buyer an unrestricted opportunity to control the process while remaining free to walk away.

That balance depends on scope, duration, milestones and the maturity of the buyer's proposal.

The most effective exclusivity arrangement therefore does not merely stop the seller from talking to someone else.

It creates a protected period in which the buyer is expected to move the deal forward.

PART 04

Acquisition or Merger? Choosing the Legal Structure of the Transaction

Inside M&A: The Legal Architecture of a Deal

One of the most important decisions in an M&A transaction is made before the definitive agreement is fully negotiated: **how will the transaction legally be implemented?**

The "M&A" acronym brings together two broad concepts: **mergers and acquisitions**. An acquisition can itself take different forms. Most commonly, the buyer may acquire the shares of the target company in a **share deal**, or acquire specific assets and liabilities of the business in an **asset deal**. Alternatively, depending on the jurisdiction and circumstances, the transaction may be implemented through a **statutory merger** or similar corporate combination.

Economically, each route may ultimately result in control over a business changing hands. Legally, however, they operate in very different ways. The choice affects liabilities, contracts, employees, licences, regulatory approvals, taxation, financing, execution mechanics and ultimately the price the buyer is prepared to pay.

The distinction between a merger and an acquisition is not always purely economic. An acquisition describes the objective of obtaining ownership or control of a business, typically through the purchase of shares or assets. A merger, by contrast, is a corporate-law mechanism through which two entities are legally combined. In practice, however, a merger may still have the economic substance of an acquisition where one party effectively obtains control of the combined business.

Deal structure is therefore not simply a drafting choice. It is one of the first points where **legal analysis and transaction strategy must be considered together**.

The share deal: acquiring the company itself

In a **share deal**, the buyer purchases some or all of the shares in the target company from its existing shareholders.

The distinction is important: the buyer does not directly acquire the target's individual assets and liabilities. It acquires ownership of the legal entity that already owns those assets and remains subject to those liabilities.

If Buyer acquires 100% of Target, Target normally continues to exist as the same company after closing.

Its employees remain employed by it. Its premises remain owned or leased by it. Its contracts generally remain contracts of the same legal entity. Its intellectual property remains registered in its name.

From an execution perspective, this continuity can make a share acquisition considerably simpler than transferring an operating business asset by asset.

But continuity has another side.

The company does not leave its history behind at closing.

Tax exposures, litigation, contractual liabilities, employment issues, regulatory problems and other risks existing before the acquisition generally remain within the target. The buyer therefore acquires economic exposure to them through its ownership of the company.

This explains why **legal due diligence, representations and warranties, disclosure and indemnification** become so important in a share deal.

The buyer cannot simply select the good parts of the company and leave the historical risks with the seller.

Instead, much of the SPA negotiation is about identifying those risks and determining who should ultimately bear their economic consequences.

Continuity does not mean that consents are irrelevant

It is tempting to assume that because the underlying contracts remain with the same company, no third-party consent is required in a share acquisition.

That is not always the case.

Material agreements may contain **change-of-control provisions** allowing a counterparty to terminate, renegotiate or require consent if ownership of the target changes.

Financing arrangements may contain similar restrictions. Regulatory licences may require notification or approval following a change of control.

An apparently simple share transaction can therefore still depend on a detailed analysis of the target's contractual and regulatory framework.

From an advisory perspective, these issues should be identified early.

Discovering shortly before closing that a key customer can terminate its contract because of the acquisition can materially alter both valuation and execution risk.

The asset deal: acquiring the business piece by piece

An **Asset Purchase Agreement, or APA**, takes a fundamentally different approach.

Instead of acquiring the company that owns the business, the buyer acquires specified assets directly from it.

These may include machinery, inventory, intellectual property, customer contracts, real estate, receivables, goodwill or an entire business division. The agreement identifies which assets are transferred and which liabilities the buyer agrees to assume.

This creates one of the principal attractions of an asset transaction:

selectivity.

A buyer interested in only one division of a diversified company may acquire that business without purchasing the rest of the corporate group.

Similarly, depending on applicable law, the buyer may seek to assume only specified liabilities rather than acquiring an entity containing its entire historical liability profile.

But this apparent flexibility comes with greater execution complexity.

Assets do not always move together automatically.

A contract may need to be assigned. A landlord may need to consent to the transfer of a lease. Intellectual property registrations may need to be updated. Licences may need to be transferred or obtained again. Employees may be subject to specific transfer rules. Real estate may require separate formalities.

The more integrated the business, the more complicated separating and transferring it can become.

Can a buyer really leave all unwanted liabilities behind?

The ability to "cherry-pick" assets and liabilities is frequently presented as one of the great advantages of an asset acquisition.

Conceptually, that is correct.

Legally, however, it should not be overstated.

Depending on the jurisdiction and the type of liability involved, certain obligations may follow the transferred business regardless of what the APA says between buyer and seller. Employment, environmental, tax and other forms of successor liability may be governed by mandatory rules.

The contractual allocation of liability between the parties therefore does not necessarily determine the rights of third parties or regulators.

This is another reason why transaction structure should be analysed before assuming that an asset deal automatically provides complete isolation from historical risk.

And what about a merger?

A **merger** achieves the transaction through corporate law rather than simply through a transfer of shares or individual assets.

Depending on the relevant jurisdiction, one entity may be absorbed into another, or the transaction may result in a combined entity through another statutory mechanism.

The consequences can be significant because assets, liabilities and contractual relationships may transfer by operation of law, subject to the applicable corporate, regulatory and contractual framework.

Merger transactions can also involve shareholder approvals, creditor protections, statutory procedures and, particularly in listed-company transactions, additional securities and takeover requirements.

For that reason, a merger is not simply an alternative form of SPA.

It is a different legal mechanism for achieving a business combination.

Which mechanism is available - and commercially sensible - depends heavily on the jurisdiction, ownership structure and nature of the transaction.

Structure changes the economics of the deal

Choosing between structures is not only about liability.

It can materially change the **economics of the transaction**.

In a share sale, the purchase price is paid to the selling shareholders.

In an asset sale, the purchaser generally pays the company selling the assets. Any subsequent distribution of those proceeds to shareholders is a separate step.

The tax consequences can therefore be very different for both buyer and seller, depending on the relevant jurisdictions.

Accounting treatment, acquisition financing and the ability to obtain security over acquired assets can also influence the preferred structure.

This means that transaction structuring should not be undertaken by legal advisers in isolation.

Tax, financial and legal advisers need to model the same transaction from different perspectives before the parties commit themselves to a particular route.

A structure that is legally elegant but economically inefficient may not survive negotiations.

Buyer and seller may naturally see structure differently

Deal structure can itself become a negotiation.

A buyer concerned about unknown historical liabilities may prefer an asset acquisition.

A seller looking for a complete exit from a business may prefer to sell the shares of the company rather than retain a corporate shell containing excluded assets and liabilities.

But these are tendencies, not rules.

A buyer may strongly prefer a share deal because transferring hundreds of contracts and licences individually would make an asset acquisition impractical.

A seller may prefer an asset sale because it wishes to retain another part of the company.

The right structure is therefore not the structure that is theoretically most favourable to buyer or seller.

It is the structure that best reconciles **commercial objective, risk allocation and execution feasibility**.

The advisory question: what are we actually trying to achieve?

Before selecting the documentation, advisers should first understand the commercial objective.

Is the buyer acquiring the entire business?

Only a division?

A controlling stake?

A minority investment?

Are there material historical liabilities?

Are key licences transferable?

Would important customers have termination rights?

Does management remain?

Are there regulatory approvals?

How easily can the business be separated from the seller's wider operations?

And what are the tax consequences of each alternative?

These questions can lead two economically similar transactions toward completely different legal structures.

Consider a buyer interested in a manufacturing division embedded within a much larger group.

Buying shares in the parent company would make little sense simply to obtain one business line. An asset or business transfer may be the natural solution.

Now consider a regulated business dependent on hundreds of customer agreements, employees and licences.

Attempting to transfer every element individually may create far greater execution risk than acquiring the shares of the company that already holds them.

The structure should therefore follow the business reality - not the other way around.

Structure determines the rest of the legal architecture

The decision between a share deal, asset deal and merger is not isolated from the rest of the transaction.

It determines much of what comes next.

It changes the scope of due diligence.

It changes what must be transferred at closing.

It influences the representations and warranties required from the seller.

It determines which third-party consents matter.

It affects how liabilities are allocated.

It may alter purchase price mechanics and tax treatment.

And it determines the form of the definitive transaction agreement itself.

That is why the question should be addressed early, often already at LOI stage.

The parties should know not only **how much** is being offered, but what legal transaction that offer actually contemplates.

Because in M&A, buying a company and buying its business may look economically similar from a distance.

Once the lawyers, advisers and transaction teams begin examining how ownership will actually change hands, they can become very different deals.

PART 05

Inside the SPA: The Contract at the Heart of the Transaction

Inside M&A: The Legal Architecture of a Deal

By the time an M&A transaction reaches the definitive agreement, much of the commercial story has already been written.

The parties may have signed an NDA, agreed the principal terms in an LOI, completed substantial due diligence and settled the basic structure of the transaction.

But none of this, by itself, transfers ownership.

In a private share acquisition, that task is ultimately governed by the **Share Purchase Agreement, or SPA**: the contract that turns the commercial understanding between buyer and seller into a detailed and legally enforceable transaction.

The SPA determines not only **what is being sold and for how much**, but also what must happen before the deal closes, what each party is promising about the business, how risk is divided between them and what happens if something goes wrong.

That is why the SPA is often described as the central document of a private M&A transaction.

But it is better understood as something more precise: **the legal operating system of the deal**.

From the LOI to the definitive agreement

The LOI establishes the negotiating perimeter. The SPA converts that perimeter into detailed legal obligations.

A term sheet might state that the parties have agreed a EUR 100 million enterprise value on a cash-free, debt-free basis.

The SPA must explain what "cash" means, what counts as "debt", how working capital is calculated, when the calculation is made, who prepares it, what happens if the parties disagree and when any resulting adjustment is paid.

The same principle applies throughout the agreement.

A few lines in an LOI can become dozens of pages in the SPA because the definitive contract must answer a question that preliminary documents generally do not:

what happens if reality differs from what the parties currently expect?

The precise organisation varies from deal to deal and between jurisdictions, but the underlying architecture is relatively consistent: transaction mechanics, purchase price, representations and warranties, covenants, closing conditions, indemnification, termination rights and general contractual provisions.

First: what exactly is being bought?

An SPA begins with what may appear to be the simplest part of the transaction: the sale and purchase itself.

The agreement identifies the shares being transferred, the seller or sellers, the buyer and the consideration payable in return.

But even this apparently straightforward section can contain important questions.

Is the buyer acquiring 100% of the company or only a controlling interest?

Are there different classes of shares?

Are options, warrants or other rights outstanding?

Will management retain or roll over part of its equity?

Is part of the consideration being paid in shares of the buyer?

The SPA must make the legal perimeter of the acquisition unambiguous.

This follows directly from the structural choice discussed earlier in this series. In a share acquisition, the buyer acquires ownership of the target entity; the assets and liabilities themselves generally remain with that company.

The purchase price is a mechanism, not just a number

The consideration provisions answer the obvious question - **how much is the buyer paying?** - but also several less obvious ones.

The headline valuation rarely tells the whole story.

The agreement may need to address cash and debt, normalized working capital, locked-box mechanics, completion accounts, leakage, deferred consideration, earn-outs, escrows or other adjustments.

This is where legal drafting and financial analysis become inseparable.

A formula can be legally precise and still fail to reflect the economics the parties actually intended.

For that reason, lawyers, financial advisers and the transaction principals need to ensure that the purchase price provisions translate the agreed valuation into the **same economic result everyone believes has been negotiated**.

The mechanics of purchase price will be examined separately in the next part of this series.

Representations and warranties: defining the business being acquired

The buyer has performed due diligence, but diligence rarely provides complete information about every aspect of a business.

The SPA therefore contains **representations and warranties** through which the parties make contractual statements about specified facts.

For the seller, these may cover areas such as corporate authority, ownership of shares, financial statements, material contracts, litigation, tax, employees, intellectual property and regulatory compliance.

For the buyer, the representations may address matters such as authority, capacity and, depending on the structure, financing.

These provisions do more than describe the target.

They allocate information risk.

If a particular statement proves inaccurate, the agreement determines whether the buyer has a remedy and under what conditions.

This is why representations and warranties are among the most heavily negotiated parts of an acquisition agreement.

But warranties cannot be read in isolation.

They interact with the seller's disclosures, the indemnification regime and the contractual limitations on liability - subjects that will each deserve their own article later in the series.

Covenants: what happens between signing and closing?

Not every M&A transaction signs and closes on the same day.

Regulatory clearances may be required. Third-party consents may still be outstanding. Financing or corporate approvals may need to be completed.

During this **gap period**, the seller still owns the company, while the buyer has already agreed to acquire it.

The SPA must therefore establish what the parties can and cannot do before closing.

Typical covenants may require the seller to continue operating the business in the ordinary course and restrict extraordinary actions such as major acquisitions, disposals, new debt, significant contractual commitments or changes to capital structure without the buyer's consent.

These clauses reflect a delicate balance.

The buyer wants to ensure that the business it agreed to acquire does not materially change before closing.

The seller, however, still owns and manages the company.

The SPA therefore needs to protect the value of the transaction without giving the buyer premature control of the target - particularly where competition law or other regulatory constraints apply.

Conditions precedent: when does the obligation to close arise?

Where signing and closing are separated, the SPA normally identifies the **conditions that must be satisfied before completion can occur**.

These may include regulatory approval, merger control clearance, foreign investment approval, shareholder consent, third-party contractual consents or completion of specified restructuring steps.

The agreement may also require representations and warranties to remain sufficiently accurate at closing and the parties to have complied with relevant pre-closing covenants.

These conditions determine whether the parties must actually proceed from a signed agreement to a completed acquisition.

They therefore sit at the intersection between contractual commitment and execution risk.

A transaction can be fully negotiated and signed yet still fail because a necessary condition cannot be satisfied.

Risk allocation does not stop at closing

One of the biggest misconceptions about an SPA is that its purpose ends when the shares change hands.

In reality, some of its most important provisions are designed precisely for what may happen **after closing**.

Suppose a tax liability relating to the pre-closing period emerges six months later.

Or a material litigation matter was not properly disclosed.

Or a representation concerning ownership of intellectual property proves incorrect.

The SPA must determine whether the seller remains responsible, for how long, subject to what thresholds and up to what maximum amount.

This is the territory of indemnities, liability caps, baskets, de minimis thresholds, survival periods and other negotiated limitations.

In modern transactions, warranty and indemnity insurance may also alter the traditional allocation of post-closing exposure.

The purpose is not to pretend that the acquisition eliminates uncertainty.

It is to decide **who bears the financial consequences when an identified category of uncertainty becomes a real loss**.

Termination: a signed deal is not always a closed deal

Where there is a gap between signing and closing, the SPA must also address the circumstances in which the transaction can be terminated.

What if regulatory approval is refused?

What if a condition remains unsatisfied by the long-stop date?

What if one party materially breaches the agreement?

What if an event occurs that falls within an agreed Material Adverse Change provision?

Termination provisions define when a party may walk away and what consequences follow.

Again, the SPA is doing more than documenting the transaction.

It is providing rules for a transaction that might not happen.

The SPA as the negotiated allocation of uncertainty

It is easy to see an SPA as an extremely long contract containing dozens of independent clauses.

That misses the broader logic.

The sections are interconnected.

Due diligence identifies a risk.

That risk may affect valuation.

It may generate a specific warranty.

The warranty may be qualified by disclosure.

A known exposure may instead require a specific indemnity.

That indemnity may be excluded from the general liability cap.

And if the issue must be resolved before completion, it may become a condition precedent rather than a post-closing remedy.

This is where the legal and advisory perspectives converge most clearly.

A good transaction adviser does not simply identify problems. A good M&A lawyer does not simply draft clauses.

The objective is to determine **where each risk belongs in the transaction**.

Should it change the price?

Should it be solved before closing?

Should the seller retain it?

Should the buyer accept it?

Should it be insured?

Or is the risk significant enough that the transaction should not proceed at all?

The SPA is where those decisions ultimately become contractual.

The contract at the heart of the deal

An SPA does not create the commercial rationale for an acquisition.

It does something different.

It takes the valuation, diligence findings, negotiated positions, identified risks and execution requirements of the transaction and turns them into a single enforceable framework.

Its purchase price provisions determine the economics.

Its representations and warranties establish the contractual picture of the business.

Its covenants protect the period before closing.

Its conditions determine whether closing must occur.

Its indemnification provisions allocate post-closing risk.

And its termination provisions determine when the parties may leave the transaction behind.

That is why negotiating an SPA is not simply the final legal step after the "real" deal has already been agreed.

The SPA is where the commercial deal becomes the legal deal.

PART 06

Purchase Price: Why the Headline Number Is Only the Beginning

Inside M&A: The Legal Architecture of a Deal

A buyer offers EUR 100 million for a company. The seller accepts. It may appear that the most important economic point of the transaction has been settled.

In reality, one of the most complex negotiations may only be beginning.

In M&A, the **headline valuation and the amount ultimately received by the seller are not necessarily the same thing**. Between them sit questions of cash, debt, working capital, leakage, completion accounts, deferred consideration, earn-outs and other adjustments that can materially change the economics of the deal.

For this reason, the purchase price provisions of an SPA are not simply the section in which lawyers record a number already agreed by the parties. They translate a valuation concept into the amount that will actually be paid at closing - and, in some transactions, into amounts that may only be determined months or years later.

This is one of the clearest areas in M&A where legal drafting and financial analysis cannot be separated.

Enterprise value is not the same as equity value

A common starting point in M&A negotiations is the **enterprise value** of the target. Broadly speaking, enterprise value reflects the value attributed to the operating business independently of how that business is financed.

But the seller is selling shares, not an abstract enterprise value. What ultimately matters to the shareholders is the **equity value** they receive.

This is why many transactions are negotiated on a **cash-free, debt-free basis**. The agreed enterprise value is adjusted to reflect the target's financial position at the relevant date. Debt-like items are generally deducted, while cash or cash-like items may increase the amount payable to the seller.

The difficulty lies in determining what actually constitutes cash and debt.

Bank borrowings are obvious. Other items may be less so. Shareholder loans, accrued interest, unpaid bonuses, factoring arrangements, certain tax liabilities, transaction expenses or lease obligations may become the subject of negotiation depending on the agreed definition of indebtedness.

Similarly, not every amount sitting in a bank account necessarily represents freely distributable cash. Restricted cash or amounts required for the ordinary operation of the business may need different treatment.

A purchase price formula therefore needs more than financial logic. It requires precise contractual definitions capable of producing the economic result that the parties intended.

Working capital: paying for a business that can continue operating

Debt and cash are only part of the equation.

A buyer generally expects to acquire a business with a **normal level of working capital** - enough receivables, inventory and other current assets, net of relevant current liabilities, to allow the company to continue operating normally immediately after closing.

If the seller extracts too much working capital before the transaction completes, the buyer may technically acquire the same company but have to inject additional cash immediately after closing simply to keep the business functioning.

For this reason, many purchase price mechanisms compare actual working capital at closing against an agreed or normalized target.

If actual working capital is below the target, the purchase price may decrease. If it is above the target, the seller may receive an upward adjustment.

The financial principle is relatively intuitive. The legal complexity comes from defining precisely what goes into the calculation, which accounting policies apply and how exceptional or seasonal items should be treated.

This is often where seemingly small drafting differences can have significant economic consequences.

Completion accounts: calculating the price after closing

One traditional way to deal with these variables is through **completion accounts**.

Under this mechanism, the parties agree a provisional purchase price at closing. After closing, accounts are prepared showing the target's actual financial position at the agreed measurement date, typically covering cash, debt, working capital and any other agreed adjustment items.

The final purchase price is then recalculated using those figures.

This approach can provide a relatively precise economic result because the price is based on the company's actual position at closing. But it also means that part of the price remains unsettled after ownership has already transferred.

That can create a second negotiation.

The buyer may interpret an accounting item differently from the seller. The parties may disagree on whether an amount is debt-like, whether a receivable should be included in working capital or whether historical accounting practices have been applied consistently.

A well-drafted SPA therefore needs to establish not only the formula but also the **accounting hierarchy, preparation procedure, review rights, timetable and dispute-resolution mechanism**.

Often, unresolved accounting disputes are referred to an independent expert rather than ordinary litigation.

From an advisory perspective, the quality of this drafting is critical because a purchase price mechanism should reduce uncertainty, not simply move the valuation dispute from signing to the post-closing period.

Locked box: fixing the price before closing

The **locked-box mechanism** takes a different approach.

Instead of recalculating the target's balance sheet after completion, the equity price is fixed by reference to a historical balance sheet - the locked-box accounts - prepared at an agreed date before signing.

Economically, the buyer is treated as having the benefit of the business from that date, even though legal ownership transfers later.

Because the price is generally fixed, there is no traditional post-closing true-up based on completion accounts. This can provide greater price certainty and allow the seller to know in advance how much it will receive.

But that certainty creates another concern.

If value is transferred out of the company between the locked-box date and closing, the buyer may acquire a business worth less than the business reflected in the agreed price.

The SPA therefore normally includes **anti-leakage protections**.

Leakage may include dividends, distributions, payments to shareholders or related parties, transaction bonuses paid for the seller's benefit or other transfers of value outside the ordinary course.

Certain payments may instead be specifically identified as **permitted leakage** and taken into account when the price is negotiated.

The locked-box mechanism therefore replaces the post-closing price adjustment with a different form of protection: the seller effectively promises that value will not be extracted from the company during the locked-box period except as expressly agreed.

Completion accounts or locked box?

There is no universally superior mechanism.

Completion accounts provide the buyer with greater protection against changes in the target's financial position before closing but leave the final price open to adjustment and potential dispute.

A locked box offers greater certainty and a cleaner exit for the seller but requires the buyer to have sufficient confidence in the historical accounts and appropriate protection against leakage.

The choice can also be influenced by the transaction process.

In a competitive auction, sellers often prefer a locked-box structure because bidders can be compared on a more consistent basis and the seller can seek price certainty earlier in the process.

In other transactions, especially where the balance sheet may change materially before closing, completion accounts may provide a more appropriate mechanism.

The decision is therefore not merely accounting-driven. It also reflects **negotiating leverage, transaction timetable, diligence quality and the degree of certainty each party is seeking**.

Earn-outs: when the parties disagree about the future

Sometimes buyer and seller agree on the business but disagree on what it will be worth.

The seller may expect significant growth over the next two years. The buyer may accept the potential but refuse to pay today for performance that has not yet occurred.

An **earn-out** can bridge that gap.

Part of the purchase price is made contingent on the target achieving agreed future results, such as revenue, EBITDA, customer milestones or other performance indicators.

In theory, this aligns price with performance.

In practice, earn-outs are among the purchase price mechanisms most capable of generating post-closing disputes.

Once the buyer controls the company, its decisions can affect whether the earn-out is achieved. It may change pricing, integrate the business into a wider group, allocate costs differently, alter investment levels or discontinue products.

The SPA therefore needs to define not only the performance metric but also how the business will be operated during the earn-out period, how the relevant figures will be calculated and what restrictions, if any, apply to the buyer's conduct.

The legal drafting must anticipate a basic tension: **the seller remains economically interested in a business it no longer controls**.

From an advisory perspective, an earn-out can be useful to bridge a genuine valuation gap. It should not be used merely to postpone a disagreement the parties have been unable to resolve.

Deferred consideration, holdbacks and escrow

Not all amounts need to be paid at closing.

Part of the consideration may be **deferred**, with payment scheduled for a later date regardless of future performance. This can assist financing, create an element of seller financing or simply form part of the negotiated economics.

The seller will naturally focus on credit risk: if the buyer is obliged to pay in two years, what protection exists if its financial position deteriorates in the meantime?

Security, guarantees, interest and acceleration provisions may therefore become important.

A portion of the purchase price may also be retained in **escrow** or subject to a holdback to secure potential post-closing claims.

That introduces another question into the negotiation: whether the seller should receive the full price immediately or whether part of it should remain unavailable until certain risks have expired or been resolved.

Again, this is not separate from the overall valuation.

A EUR 100 million offer paid entirely in cash at closing is economically different from EUR 100 million where EUR 15 million is deferred, EUR 10 million depends on an earn-out and EUR 5 million remains in escrow.

The headline figure may be identical. The quality and certainty of the consideration are not.

The advisory perspective: compare offers on more than price

This becomes particularly important in competitive sale processes.

A seller may receive two offers:

Buyer A offers EUR 105 million, but part of the consideration is contingent on future performance and the transaction includes significant price adjustment mechanisms.

Buyer B offers EUR 100 million with a fixed locked-box price and fully funded cash consideration at closing.

Which is the better offer?

There is no automatic answer.

The analysis must consider not only nominal valuation but also **certainty of proceeds, timing of payment, adjustment risk, financing certainty and probability of completion**.

This is why advisers should be careful when presenting competing bids purely by reference to the headline price.

A higher enterprise value does not necessarily produce a higher or more certain return to the seller.

Likewise, a buyer should not focus solely on negotiating the lowest possible headline number. The purchase price mechanism itself may provide substantial economic protection if properly structured.

Drafting the economics of the deal

Purchase price provisions demonstrate why an SPA cannot be divided neatly between "legal" and "financial" sections.

The lawyers may draft the formula, but the formula represents a financial concept.

The financial advisers may calculate working capital, but their calculation only matters if it corresponds to the contractual definition.

The parties may agree a valuation, but that valuation only becomes meaningful once the agreement explains how it translates into consideration payable to the seller.

This requires close coordination.

Terms such as cash, debt, working capital, leakage and EBITDA may appear familiar, but in an SPA their meaning is contractual. If the parties want a particular item included or excluded, that intention needs to be expressed with sufficient precision.

The objective is not merely to produce technically sophisticated drafting. It is to ensure that **the contract and the valuation model produce the same answer**.

The headline number is only the beginning

Purchase price is often discussed as if it were the simplest element of an acquisition: buyer offers a number, seller negotiates it, and the parties eventually agree.

In sophisticated M&A transactions, that number is often only the starting point.

The final economic outcome depends on how enterprise value becomes equity value, how cash and debt are defined, what level of working capital the buyer receives, whether the price is fixed or adjusted after closing, whether value can leak from the company and whether part of the consideration depends on future events.

These mechanics can move substantial value from one side of the transaction to the other without changing the headline valuation at all.

That is why negotiating purchase price means more than negotiating **how much** a company is worth.

It also means negotiating **how that value will be measured, protected and ultimately paid**.

PART 07

Representations & Warranties: What Is the Seller Really Promising?

Inside M&A: The Legal Architecture of a Deal

By the time a buyer signs an SPA, it may have spent weeks reviewing financial statements, contracts, corporate records, tax matters, litigation, employment arrangements and intellectual property. Yet even the most extensive due diligence cannot establish every fact about a business with absolute certainty.

This is where **representations and warranties** become central to the transaction.

Through them, the seller makes contractual statements about the company and the shares being sold: that it owns the shares, that the financial statements have been properly prepared, that material contracts have been disclosed, that there is no undisclosed litigation, that taxes have been dealt with appropriately, and so on.

These provisions are sometimes described simply as a list of assurances from the seller. Their real function is more important. They help determine **which risks remain with the seller and which risks the buyer accepts when it acquires the company**.

That makes the warranty package one of the principal mechanisms through which due diligence findings are translated into contractual risk allocation.

Due diligence and warranties perform different functions

A common misconception is that extensive due diligence should reduce the need for warranties.

The two mechanisms are complementary, not interchangeable.

Due diligence allows the buyer to investigate the business before completing the acquisition. It helps identify known issues, test assumptions and determine whether the valuation and transaction structure remain appropriate.

Warranties deal with the residual uncertainty that remains after that investigation.

A buyer may review hundreds of customer contracts but still require a warranty that the material contracts disclosed are valid and that the target is not in material breach of them. It may review the litigation schedule but still require confirmation that there are no other material proceedings pending or threatened.

Due diligence asks: **what can the buyer discover?**

Warranties ask: **what is the seller prepared to stand behind contractually?**

The distinction is fundamental because no diligence process can realistically verify every aspect of a company. An acquisition ultimately requires the buyer to rely on a combination of information, contractual protection and commercial judgment.

Not all warranties are equal

The warranty package normally covers a broad range of matters, but different statements carry different significance.

Certain warranties concern the seller's ability to enter into the transaction itself. These typically include ownership of the shares, authority to sell them and capacity to enter into the SPA. They are often referred to as **fundamental warranties** because they go to the legal basis of the acquisition.

Other warranties relate to the target's underlying business. These may cover financial statements, taxation, material contracts, employment, intellectual property, compliance, litigation, assets, insurance, data protection and regulatory matters.

The distinction matters because the SPA may treat different categories differently.

A claim concerning ownership of the shares may be subject to a higher liability cap and a longer limitation period than a claim relating to an ordinary operational matter. The parties are effectively recognising that some contractual promises are more fundamental to the transaction than others.

The appropriate warranty package should therefore reflect the business being acquired rather than simply reproduce a standard precedent.

A software company will require extensive attention to intellectual property and data. A regulated financial business will raise different compliance questions. A manufacturing company may require greater emphasis on environmental matters, product liability, real estate and machinery.

The warranties should follow the risks of the business.

The negotiation is often about qualification, not the headline statement

Many warranty negotiations are not really about whether a statement should appear in the SPA. They are about **how absolute that statement should be**.

Consider a warranty stating that:

> *The Company is not involved in any litigation.*

The seller may reasonably object that it cannot give an unlimited statement if the group has hundreds of employees, customers and commercial relationships.

The provision might therefore become:

> *So far as the Seller is aware, the Company is not involved in any material litigation.*

Two relatively small qualifications have now changed the allocation of risk.

The first is **materiality**. Minor claims no longer fall within the warranty.

The second is **knowledge**. The seller is no longer guaranteeing the objective absence of litigation; it is effectively warranting that it is not aware of it.

These qualifications are common, but their drafting matters considerably.

What does "so far as the seller is aware" actually mean?

Knowledge qualifiers can appear deceptively simple.

If an SPA states that a particular warranty is given "so far as the Seller is aware", the next question should be: **whose knowledge counts, and what steps must they have taken to acquire it?**

In a company with thousands of employees, it may be unreasonable to treat every piece of information known anywhere within the organisation as knowledge of the seller.

The parties may therefore define knowledge by reference to specific individuals - for example the CEO, CFO, general counsel or heads of particular business functions.

They may also negotiate whether the relevant individuals are deemed to know only what they actually know, or what they would have discovered after making reasonable enquiries.

That distinction can materially affect a claim.

The drafting therefore needs to match the practical reality of the business. An overly broad knowledge standard may make a warranty impossible for the seller to give responsibly. An overly narrow one may deprive the buyer of meaningful protection.

Materiality can appear in several places

Materiality qualifiers create a similar issue.

A warranty may state that the target has complied "in all material respects" with applicable laws, or that no "material" contract has been breached.

This is intended to prevent immaterial matters from creating contractual claims.

But materiality can also operate elsewhere in the SPA through thresholds governing whether a claim can actually be brought. If materiality appears both inside the warranty and again in the claims regime, the buyer may argue that the seller is receiving the benefit twice.

This is why sophisticated negotiations sometimes address whether materiality qualifiers should be disregarded for certain purposes when determining whether a breach has occurred or calculating loss.

The broader point is that apparently modest drafting words - **material, reasonable, aware, substantial** - can change the economic allocation of risk just as much as the headline warranty itself.

The disclosure process changes the meaning of the warranties

Warranties cannot be properly understood without considering disclosure.

Suppose the SPA contains a warranty that the company is not involved in litigation, but the seller has expressly disclosed an ongoing proceeding in the disclosure letter.

The warranty is no longer read in isolation.

The seller is effectively saying: the statement is true **except for the matters that have been disclosed to you in accordance with the agreed disclosure standard**.

This interaction between warranties and disclosure is one of the most important elements of private M&A.

The seller uses disclosure to qualify the warranties. The buyer reviews those disclosures to determine whether they reveal risks that should affect the price, require a specific indemnity or change the decision to proceed.

For that reason, the disclosure letter - the subject of the next article in this series - is not a peripheral attachment to the SPA. It is part of the mechanism through which the warranties actually operate.

Known risks often belong somewhere else

Not every identified problem should be dealt with through a warranty.

Suppose due diligence reveals an ongoing tax investigation with a reasonably identifiable potential exposure.

It makes little sense for the buyer simply to rely on a broad tax warranty and wait to see whether it is breached. The issue is already known.

The parties may instead negotiate a **specific indemnity**, adjust the purchase price, require the matter to be resolved before closing or retain part of the consideration in escrow.

This highlights an important distinction between unknown and known risks.

Warranties are particularly useful for allocating risks relating to facts that the buyer cannot completely verify.

Once a specific exposure has been identified, the transaction advisers should ask whether a more targeted solution is appropriate.

A warranty should not become a substitute for addressing a known problem directly.

Warranties can also affect the period before closing

Where signing and closing occur on different dates, the warranty package may operate at more than one point in time.

The seller may give warranties at signing and be required to repeat - or **bring down** - some or all of them at closing.

That creates an important question: what happens if a warranty was accurate at signing but becomes inaccurate before completion?

The answer may depend on the seriousness of the change, the relevant closing conditions and the termination provisions of the SPA.

This is another example of how the various sections of the agreement interact. A warranty is not simply a post-closing compensation mechanism. In certain circumstances, its accuracy may influence whether the buyer is required to close at all.

The seller is not normally offering unlimited insurance

A warranty breach does not usually expose the seller to unlimited liability for every problem that might subsequently emerge.

The SPA will typically contain an extensive claims regime regulating matters such as financial caps, minimum claim thresholds, aggregate baskets, time limits and procedures for bringing claims.

Certain warranties may receive different treatment, particularly fundamental warranties or matters involving fraud.

In some transactions, **Warranty & Indemnity insurance** may transfer a significant part of the warranty risk to an insurer, allowing the seller to achieve a cleaner exit while still providing the buyer with recourse if covered warranties prove inaccurate.

These mechanisms will be considered more closely when we examine indemnification and seller liability later in the series.

For present purposes, the important point is that warranties form part of a wider contractual architecture. Their practical value depends not only on what the seller says, but also on the remedies available if what it says turns out to be wrong.

The advisory perspective: warranties are a map of transaction risk

A warranty schedule can sometimes appear like a long legal checklist.

Viewed properly, it is something more useful: **a map of where the parties believe risk may exist in the business**.

If negotiations become particularly intense around intellectual property ownership, that often says something about the transaction.

If the buyer insists on detailed environmental warranties, it may reflect concerns identified during diligence.

If the seller repeatedly seeks knowledge and materiality qualifications in a particular area, that may indicate that absolute certainty cannot realistically be provided.

The drafting process therefore generates information of its own.

For transaction advisers, this is important because warranty negotiations should not be disconnected from valuation and due diligence. If a seller cannot provide a warranty that the buyer considers fundamental, the answer may not simply be to continue negotiating the words.

The issue may require further diligence, a price adjustment, an indemnity, insurance or a different transaction structure.

The legal negotiation is sometimes revealing a commercial problem.

What is the seller really promising?

Representations and warranties do not guarantee that the acquired business will perform as expected.

They do not promise future revenues, successful integration or an attractive investment return.

Their purpose is narrower and more precise.

They establish a contractual picture of the company at the relevant point in time and allocate the consequences if important elements of that picture prove inaccurate.

For the buyer, they provide protection against information risk that due diligence cannot entirely eliminate. For the seller, their scope, qualifications and disclosure determine how much post-closing exposure remains after the shares have been sold.

That is why the most important question is not simply whether the SPA contains "standard warranties".

There is rarely anything truly standard about risk allocation.

The real question is:

which facts about this particular company is the seller prepared to stand behind, and what happens if those facts are wrong?

PART 08

The Disclosure Letter: The Other Half of the SPA

Inside M&A: The Legal Architecture of a Deal

If representations and warranties define the contractual picture of the target, the **Disclosure Letter** explains where that picture needs to be qualified.

This makes it one of the most important documents in a private M&A transaction.

The SPA may contain a warranty stating that the target is not involved in material litigation, has complied with applicable laws, owns its intellectual property and is not in breach of any material contract. The seller may nevertheless know that one specific dispute is pending, that a licence renewal is outstanding or that a customer has raised a contractual issue.

The purpose of disclosure is not necessarily to remove those warranties. It is to identify the relevant exceptions with sufficient clarity so that the buyer enters into the transaction knowing that those particular facts exist.

In practical terms, the warranty package and the Disclosure Letter must therefore be read together. One sets out the general statements the seller is making. The other identifies the circumstances in which those statements are qualified.

That is why the Disclosure Letter is not a secondary closing document. It is part of the **core risk-allocation mechanism of the SPA**.

What does disclosure actually do?

Suppose the SPA contains the following warranty:

> *The Company is not involved in any material litigation.*

If that statement is given without qualification and a material lawsuit already exists, the warranty may be inaccurate from the moment it is made.

The seller can instead disclose the proceeding against that warranty, explaining the nature of the claim, the parties involved and the relevant status.

The effect, subject to the wording of the SPA and the applicable law, is generally that the buyer cannot later claim that the existence of that properly disclosed proceeding itself constituted a breach of the warranty.

The disclosure therefore changes the contractual allocation of risk.

The seller has said, in substance: **the warranty is true, except for this identified matter, which you now know about and are accepting subject to whatever other protection we have agreed.**

That last point is important. Disclosure does not necessarily mean that the buyer simply accepts the economic risk.

If the disclosed issue is significant, the parties may respond through a price adjustment, a specific indemnity, an escrow, a condition precedent or another contractual solution.

Disclosure identifies the problem. It does not automatically determine who should ultimately pay for it.

General disclosure and specific disclosure

Disclosure is often divided into two broad categories: **general disclosures** and **specific disclosures**.

General disclosures typically cover information that is publicly available or otherwise deemed to be known to the buyer under the agreed terms of the transaction. This may include matters appearing in public corporate registers, constitutional documents or other identified sources.

Specific disclosures are different. They relate directly to particular warranties and identify individual facts or circumstances that would otherwise make the relevant warranty inaccurate.

For example, against a warranty stating that no material customer has given notice of termination, the Disclosure Letter might identify a particular customer that has communicated its intention not to renew a contract.

The more significant the issue, the more important it becomes that the disclosure is specific enough for the buyer to understand its nature and potential consequences.

A vague statement that "certain customers have raised commercial issues" is very different from identifying the relevant customer, contract, correspondence and potential financial exposure.

The quality of disclosure matters because the document is supposed to provide information, not simply create a broad legal shield around the seller.

When is a matter fairly disclosed?

One of the most important concepts in disclosure is whether a matter has been disclosed with sufficient detail.

The precise test depends on the transaction and governing law, but commercially the issue is intuitive.

Has the buyer been given enough information to understand the nature and significance of the exception to the warranty?

Simply uploading a document somewhere in a large virtual data room does not necessarily mean that its relevance has been properly communicated.

Imagine a data room containing 40,000 documents. One email, buried within a folder containing hundreds of customer communications, refers to a potentially significant claim by a major client.

The seller may argue that the buyer had access to the email. The buyer may respond that no reasonable disclosure process identified the issue as an exception to a warranty.

This is why the SPA and Disclosure Letter often regulate the standard of disclosure itself.

The debate is not only whether information was technically available. It is whether the matter was brought to the buyer's attention in a way that allowed it to assess the risk meaningfully.

Can the entire data room qualify the warranties?

This is often a major negotiation point.

The seller may want the full contents of the virtual data room to qualify the warranties. From its perspective, information already made available during due diligence should not later become the basis of a warranty claim.

The buyer may resist.

A data room is primarily an information repository. It is not necessarily organised as a legal disclosure exercise, and requiring the buyer to treat every document as qualifying every warranty may significantly weaken the contractual protection it negotiated.

A compromise may involve incorporating the data room into the disclosure framework subject to agreed conditions, such as a defined disclosure standard, a fixed copy of the data room and confirmation that only information sufficiently clear and identifiable will qualify the warranties.

From an advisory perspective, the broader lesson is important: **a data room and a Disclosure Letter perform different functions**.

The data room allows the buyer to investigate the business. The Disclosure Letter tells the buyer which facts the seller specifically relies upon when qualifying its contractual promises.

The two processes overlap, but they should not be confused.

Disclosure should begin before the SPA is finished

One of the most common practical mistakes is treating disclosure as something to be completed at the end of the transaction.

That creates unnecessary pressure.

The seller's management team may suddenly be asked, shortly before signing, to review dozens or hundreds of warranties and identify every exception that needs to be disclosed.

The exercise can reveal problems that should have been identified much earlier.

A more effective process begins while the SPA is still being negotiated.

If the draft warranty says that all material contracts are in full force and effect, the seller should immediately ask whether any key agreement is being renegotiated, disputed or terminated.

If there is a warranty concerning intellectual property, the relevant business team should verify ownership, licences and pending registrations.

If employee warranties are extensive, HR should be involved early.

This makes disclosure not merely a legal drafting exercise but a **structured internal due-diligence process on the seller's side**.

It often forces the company to examine its own business with greater precision than it has before.

The Disclosure Letter can reveal where the real transaction risk sits

From an advisory perspective, the Disclosure Letter is particularly valuable because it shows where the warranties collide with reality.

If a warranty schedule appears clean but the Disclosure Letter contains repeated exceptions relating to the same area, that may indicate a broader issue.

Multiple disclosures concerning key customer contracts may suggest commercial fragility. Numerous intellectual-property exceptions may reveal unclear ownership. Repeated regulatory disclosures may indicate that compliance risk deserves deeper analysis.

The buyer and its advisers should therefore not review disclosures only from the perspective of whether they legally qualify a warranty.

They should also ask whether the pattern of disclosures changes the investment case.

Sometimes a disclosure is perfectly acceptable as a contractual matter but commercially significant enough to affect valuation or deal structure.

The legal document may therefore reveal a financial problem.

Known issues may require more than disclosure

Disclosure is not always an adequate solution.

Suppose the seller discloses a tax assessment for EUR 4 million that is under challenge.

The disclosure may protect the seller from a claim that the tax warranty was breached merely because that assessment exists.

But the buyer still faces the economic risk that the target may ultimately have to pay EUR 4 million after closing.

If that risk is material, the buyer may require a **specific tax indemnity**, a purchase price adjustment, an escrow or another form of protection.

Similarly, disclosure of a major customer threatening termination may not solve the commercial problem. The buyer may require the matter to be resolved before closing or reconsider the valuation.

This is why disclosure should not become an automatic response to every identified issue.

The question is not simply:

"Can we disclose this?"

It is:

"If we disclose this, who bears the risk after closing?"

That is a much more important transaction question.

The process matters almost as much as the document

A strong disclosure process requires coordination between legal advisers, management and the commercial teams that actually understand the business.

Lawyers can identify what needs to be disclosed against the warranties, but management often holds the underlying knowledge.

The person responsible for sales may know that a major customer relationship is deteriorating. The CTO may know that part of the software relies on third-party code. HR may know about a threatened employment claim. The finance team may know that a particular receivable is disputed.

A Disclosure Letter prepared only by the legal team without effective management input can therefore create significant risk.

The seller should treat the exercise as a disciplined internal review, with relevant warranties allocated to the individuals best placed to confirm whether exceptions exist.

For the buyer, the same principle applies in reverse. The disclosure should be reviewed not only by lawyers but, where appropriate, by financial, tax, commercial and technical advisers.

The meaning of a disclosure often depends on its economic context.

Disclosure and negotiation are closely connected

The disclosure process can also become a negotiating tool.

The seller may seek broader disclosures and more extensive qualifications in order to reduce post-closing liability.

The buyer may seek narrower disclosures and greater specificity in order to preserve the value of the warranties.

Neither objective is surprising.

The negotiation is ultimately about **how much information is enough to shift a particular risk from seller to buyer**.

This is why disclosure standards matter so much.

A seller will often prefer language that allows information contained in the data room or otherwise made available to qualify the warranties broadly. A buyer will generally prefer a requirement for sufficiently specific and detailed disclosure against identified warranties.

The drafting determines how much contractual protection remains once the Disclosure Letter is taken into account.

The other half of the SPA

A warranty schedule viewed without the Disclosure Letter can create a misleading impression.

The SPA may appear to contain broad and comprehensive assurances about the business, while the Disclosure Letter materially qualifies many of them.

Conversely, a carefully prepared Disclosure Letter can significantly reduce uncertainty by ensuring that known issues are addressed openly before closing rather than becoming disputes afterwards.

The relationship between the two documents is therefore fundamental.

The warranties establish the contractual baseline.

The disclosures identify the exceptions.

And the negotiation around those exceptions determines whether the buyer accepts the risk, reprices it, requires specific protection or refuses to proceed.

That is why the Disclosure Letter should never be treated as an administrative attachment prepared once the SPA negotiations are substantially complete.

It is the document that shows where the seller's contractual promises meet the actual business being sold.

PART 09

Indemnities, Caps and Baskets: Allocating Risk After Closing

Inside M&A: The Legal Architecture of a Deal

An acquisition does not eliminate the risks that existed before closing. It simply changes who owns the company in which those risks may eventually materialise.

A tax assessment may arrive months later. A customer may bring a claim relating to conduct that occurred before the acquisition. An environmental issue may emerge at a facility. A representation contained in the SPA may prove inaccurate.

By that point, the purchase price has been paid and ownership has transferred. The practical question is no longer whether a risk exists, but **who should bear its financial consequences**.

This is the role of the SPA's post-closing liability regime.

Indemnities, liability caps, baskets, de minimis thresholds and limitation periods are sometimes viewed as technical provisions appearing toward the end of a purchase agreement. In reality, they are among the most important economic terms of the transaction because they determine how much of the acquisition risk remains with the seller after closing and how much permanently passes to the buyer.

The negotiation is therefore not simply about legal remedies. It is about defining the point at which the seller's exposure to the business ends.

Warranty claims and specific indemnities are not the same thing

The distinction between a warranty claim and a specific indemnity is fundamental.

As discussed earlier in this series, warranties are contractual statements concerning the target. The seller may warrant, for example, that the company is not involved in undisclosed litigation or that its tax filings have been properly made. If such a statement proves inaccurate, the buyer may have a contractual claim, subject to the requirements and limitations contained in the SPA and the governing law.

A **specific indemnity** addresses the problem differently.

Suppose due diligence has already identified an ongoing tax investigation. The issue is no longer unknown, and the buyer cannot realistically say that it relied on a general warranty without knowledge of the risk. Instead, the parties may agree that if the identified tax exposure crystallises after closing, the seller will compensate the buyer for the resulting loss.

The indemnity therefore allocates a **known or specifically identified risk**.

This distinction is commercially important. A warranty is generally part of the wider contractual description of the business. A specific indemnity isolates a particular exposure and determines in advance which party will bear it.

In practice, some of the most important negotiations following due diligence are therefore not about whether a risk exists, but whether it should be reflected in the purchase price, resolved before closing or covered by an indemnity.

Why disclosure is not always enough

The Disclosure Letter protects the seller by identifying exceptions to the warranties, but disclosure alone does not necessarily solve the economic problem.

Imagine that due diligence identifies a material employment dispute with a potential exposure of EUR 2 million. The seller properly discloses the proceeding against the litigation warranties.

The disclosure may prevent the buyer from later arguing that the mere existence of the proceeding constituted an undisclosed breach.

But if the target loses the case after closing, the company - now owned by the buyer - may still have to pay EUR 2 million.

The parties therefore need to answer a separate question: **who bears that EUR 2 million?**

The buyer may require a specific indemnity. The seller may argue that the risk has already been reflected in the valuation. The parties may agree to split the exposure, place funds in escrow or require the seller to retain conduct of the litigation.

This demonstrates why disclosure and indemnification serve different purposes. Disclosure establishes knowledge. Indemnification determines economic responsibility.

The liability cap: putting a ceiling on seller exposure

From the seller's perspective, one of the principal objectives of the SPA is to achieve a degree of finality.

A seller that has sold a company for EUR 100 million will generally resist remaining exposed indefinitely to claims that could theoretically consume a substantial part of the sale proceeds.

The SPA therefore commonly sets an aggregate **liability cap** for certain categories of claims.

The cap may be expressed as a percentage of the purchase price or as a fixed amount. Different types of claims may also be subject to different caps.

General business warranties might be subject to a relatively limited cap, while fundamental warranties concerning title to the shares or the seller's authority to enter into the transaction may carry a substantially higher cap, sometimes up to the purchase price itself.

Specific indemnities may sit outside the general warranty cap or have their own negotiated limits.

The logic is straightforward: **not every breach represents the same level of transaction risk**.

If the seller did not legally own the shares it purported to sell, the issue strikes at the basis of the transaction itself. A relatively minor breach of an operational warranty belongs in a different category.

The cap therefore reflects a hierarchy of contractual importance.

De minimis thresholds: not every problem should become a claim

Without limitations, even very small breaches could theoretically generate claims under the SPA.

That is rarely commercially efficient.

The parties may therefore establish a **de minimis threshold**, below which an individual loss does not count for the purposes of the warranty claims regime.

Suppose the SPA contains a EUR 50,000 de minimis threshold. A EUR 15,000 warranty claim would generally be disregarded. A EUR 100,000 claim would qualify, subject to the other provisions of the agreement.

The purpose is to prevent the post-closing relationship from becoming dominated by numerous immaterial disputes.

This has practical value for both sides. The buyer avoids spending time and legal costs pursuing negligible claims, while the seller receives protection against being presented with a long list of small operational issues after completion.

However, the threshold must be proportionate to the transaction.

A EUR 100,000 de minimis may be insignificant in a multibillion-euro acquisition and excessive in a EUR 5 million transaction.

As with most liability provisions, the number has meaning only in relation to the economics of the deal.

Baskets: when do qualifying claims become recoverable?

A **basket** operates at the aggregate level.

Rather than looking at the size of each individual claim, it determines how much total qualifying loss must accumulate before the buyer can seek recovery.

Consider an SPA with a EUR 500,000 basket. The buyer identifies several valid warranty claims after closing with aggregate losses of EUR 400,000. No recovery is available yet. Once qualifying claims exceed the agreed threshold, the consequences depend on the type of basket negotiated.

Under a **deductible basket**, the seller is responsible only for losses above the threshold. If total qualifying losses reach EUR 700,000 and the basket is EUR 500,000, the buyer can recover EUR 200,000.

Under a **tipping basket**, once the threshold is exceeded, the buyer may recover the entire qualifying amount, including the first EUR 500,000, subject to the precise drafting.

The distinction may appear technical, but the economic difference can be significant.

For the buyer, a tipping basket offers materially greater protection once losses cross the threshold. For the seller, a deductible basket creates a true layer of retained risk that the buyer must absorb.

This is why baskets should be negotiated as part of the overall economic allocation of risk rather than treated as boilerplate.

Time limits: seller liability cannot remain open forever

The SPA will also normally determine how long different claims can be brought.

General business warranty claims may be subject to a relatively limited contractual period. Tax claims often remain available for longer because tax authorities themselves may have longer periods in which to raise assessments. Fundamental warranties may survive for a different period again.

The exact duration depends on the transaction, jurisdiction and category of risk.

For the seller, time limits are essential to achieving finality. It becomes increasingly difficult to manage contingent liabilities years after the company has been sold, particularly where proceeds have already been distributed or reinvested.

For the buyer, however, the period needs to be long enough for relevant problems to become visible.

Some issues emerge quickly. Others may only appear after an audit, regulatory inspection, customer dispute or tax review.

A sensible limitation period therefore reflects the **nature of the underlying risk**, not simply a generic number inserted across all warranties.

How is "loss" defined?

Another deceptively important issue is the definition of **Loss**.

If the buyer is entitled to compensation for a breach or indemnified matter, what exactly can it recover?

The SPA may address direct losses, liabilities, costs, interest and professional fees. The parties may negotiate whether indirect, consequential, punitive or speculative losses are excluded. Questions can also arise around lost profits, diminution in value and multiples-based claims.

These issues can materially affect the value of the protection.

A buyer acquiring a company at a multiple of ten times EBITDA may argue that a recurring EUR 1 million reduction in EBITDA has impaired the value of the target by considerably more than EUR 1 million.

The seller may respond that allowing a multiple-based claim would overcompensate the buyer and create an exposure far beyond the direct loss suffered by the company.

The answer will depend heavily on the SPA and governing law, but the commercial point is clear: **the definition of recoverable loss can be as important as the warranty itself**.

Double recovery and mitigation

The buyer should generally not recover twice for the same economic loss.

If a liability is already reflected in the purchase price adjustment, compensated by insurance or recovered from a third party, the seller will normally seek to ensure that the same amount cannot also be claimed again under the SPA.

Similarly, the agreement may address the buyer's obligation to take reasonable steps to mitigate its loss.

Suppose the target suffers a covered loss but could materially reduce it by enforcing an insurance policy or taking straightforward remedial action. The seller may argue that it should not be responsible for losses that the buyer could reasonably have avoided.

These provisions reinforce a broader principle: indemnification is intended to allocate genuine transaction losses, not create an additional source of return for either party.

Who controls a third-party claim?

Some indemnified matters involve claims brought by third parties.

A tax authority may open an investigation. A customer may sue the target. A regulator may commence proceedings.

The SPA therefore often regulates **conduct of claims**.

Who appoints the lawyers? Who controls settlement strategy? Can the buyer settle without the seller's consent and then demand reimbursement? Can the seller take over the defence where it bears the economic risk?

There is an obvious tension.

If the seller is paying the claim, it may want control over the defence. But the buyer now owns the company and may be concerned about reputational damage, customer relationships or regulatory consequences that extend beyond the monetary amount of the claim.

A EUR 1 million lawsuit may be economically manageable but commercially sensitive if the claimant is the target's largest customer.

The best solution therefore depends not only on who pays, but also on **whose continuing business is affected**.

This is another area where a purely legal approach can miss the wider transaction reality.

Escrow and holdbacks: protection needs to be collectible

A contractual right is only valuable if the counterparty can satisfy it.

A buyer may negotiate extensive indemnification protection only to discover after closing that the seller has distributed the entire purchase price and has insufficient assets to meet a claim.

For that reason, part of the consideration may be placed in **escrow** or retained through a holdback for an agreed period.

If a covered claim arises, the buyer may be able to recover against that amount without having to pursue the seller directly.

The seller, of course, will prefer to receive the full purchase price immediately.

This creates another economic negotiation.

A EUR 100 million purchase price with EUR 15 million held in escrow for two years is not equivalent, from the seller's perspective, to receiving EUR 100 million in cash at closing.

The amount, duration and permitted uses of the escrow should therefore be considered alongside the rest of the purchase price mechanics, not merely as part of the legal claims section.

W&I insurance changes the traditional model

Warranty and Indemnity insurance can materially alter the post-closing liability framework.

In a typical buyer-side structure, the buyer may recover certain covered warranty losses from an insurer rather than directly from the seller.

This can be particularly attractive in private equity exits, where the seller often seeks a clean distribution of sale proceeds and limited continuing exposure after closing.

The existence of W&I insurance does not, however, eliminate the need for careful SPA drafting.

The insurance policy and the purchase agreement need to work together. Coverage exclusions, retention amounts, disclosure standards and specific known risks still need to be addressed.

A known tax investigation, for example, may be excluded from the general W&I policy and require a separate tax liability policy, indemnity or escrow.

Insurance therefore changes where risk sits. It does not make the risk disappear.

The advisory perspective: liability terms affect deal value

Post-closing liability provisions are sometimes negotiated after the headline economics of the transaction have supposedly been agreed.

That can be misleading.

Consider two EUR 100 million offers.

Buyer A requires a EUR 30 million warranty cap, extensive specific indemnities and a EUR 10 million escrow.

Buyer B accepts a EUR 10 million cap, limited specific indemnities and no escrow because W&I insurance will provide most of the warranty protection.

The nominal purchase price is identical.

The seller's **risk-adjusted proceeds** are not.

This is why liability provisions need to be considered when comparing offers, particularly in competitive M&A processes.

The same applies from the buyer's perspective. A higher purchase price may be acceptable if the buyer receives stronger protection against identified risks. A lower price with almost no recourse may ultimately expose the buyer to substantially greater downside.

Transaction value therefore cannot be assessed solely by looking at what is paid at closing.

It also depends on **which risks remain economically attached to that price afterwards**.

Closing the deal does not close every risk

The acquisition may close on a single day, but the allocation of responsibility between buyer and seller often continues for years.

Indemnities determine who bears identified exposures. Caps limit the seller's aggregate risk. De minimis thresholds and baskets prevent immaterial claims from dominating the post-closing relationship. Time limits establish when liability finally ends. Escrows and insurance influence whether protection is practically recoverable.

Taken together, these provisions answer one of the most important questions in M&A:

when a problem from the past appears after the company has changed hands, whose problem is it?

The answer is rarely found in a single clause.

It emerges from the entire post-closing liability architecture negotiated between the parties.

And that is why the economics of an acquisition do not end with the purchase price. They also depend on how much risk follows the buyer through the door after closing.

PART 10

Signing Is Not Closing: Conditions Precedent and the Gap Period

Inside M&A: The Legal Architecture of a Deal

One of the most important distinctions in M&A is also one of the least intuitive for anyone approaching a transaction for the first time: **signing the acquisition agreement does not necessarily mean that the acquisition has completed**.

In some transactions, signing and closing occur simultaneously. The SPA is executed, the purchase price is paid and ownership of the shares transfers on the same day.

In many others, however, the parties sign the SPA first and complete the acquisition only weeks or months later. Between those two dates lies what is commonly referred to as the **gap period**.

This period is not simply an administrative delay. It is a distinct phase of the transaction in which the parties are already contractually committed to the deal, but the seller still owns the company and the buyer has not yet acquired control.

The SPA must therefore regulate two fundamental questions: **what still needs to happen before the buyer is required to close, and how should the business be operated while everyone waits?**

Why do signing and closing happen on different dates?

The simplest transaction may require very little between signing and completion. But more complex acquisitions often depend on events that cannot be satisfied instantaneously.

Regulatory approvals are a common example. A transaction may require merger-control clearance, foreign investment approval or consent from a sector-specific regulator before ownership can legally change hands.

Third-party consents may also be required. Important financing agreements, licences, leases, joint ventures or customer contracts may contain change-of-control provisions that need to be dealt with before closing.

The parties may need to complete an internal restructuring, repay existing debt, release security, obtain shareholder approval or take other specified steps before the transaction can complete.

The existence of a gap period therefore usually reflects **execution conditions that remain outstanding after the commercial deal has been agreed**.

This distinction matters because the legal commitment to acquire the company and the legal ability to complete the acquisition are not necessarily achieved at the same time.

Conditions precedent: what must happen before closing?

The SPA will normally identify the events that must occur before the parties are required to complete the transaction. These are commonly referred to as **conditions precedent** or conditions to closing.

Their precise scope depends on the deal.

Typical examples include obtaining competition clearance, securing foreign investment approval, receiving specified third-party consents, completing a pre-closing reorganisation or obtaining relevant corporate approvals.

The SPA may also make closing conditional upon the seller having complied with material pre-closing covenants or upon certain representations and warranties remaining sufficiently accurate at completion.

The important point is that a condition precedent is not merely another contractual obligation.

If the relevant condition is not satisfied or waived in accordance with the SPA, the obligation to complete may never arise.

For that reason, the negotiation over conditions precedent is ultimately a negotiation about **closing certainty**.

Not every desirable outcome should become a condition precedent

From the buyer's perspective, it can be tempting to make closing conditional upon resolving every outstanding issue identified during diligence.

That approach may provide maximum theoretical protection, but it can also make the transaction extremely difficult to complete.

A condition precedent should generally be reserved for matters that genuinely need to occur before ownership changes hands.

Suppose due diligence reveals a small historical employment claim. That issue might be better addressed through an indemnity rather than making the entire acquisition conditional upon final resolution of the dispute.

By contrast, if the target cannot legally operate without a regulatory licence that will be affected by the change of control, obtaining the necessary approval may be essential before closing.

This is where legal analysis and deal judgment need to operate together.

The question is not simply whether a problem exists. It is **where in the transaction architecture that problem should sit**.

Some risks belong in the purchase price. Others belong in warranties, indemnities or insurance. Only some genuinely belong as conditions to completion.

The gap period creates an unusual ownership problem

Once the SPA is signed, the buyer has agreed to acquire a particular business at an agreed economic value.

But until closing, the business still belongs to the seller.

This creates an obvious tension.

The buyer does not want to arrive at closing and discover that the company has materially changed since signing. The seller, however, cannot simply stop operating the business or surrender control to someone who does not yet own it.

The SPA therefore commonly requires the seller to operate the target **in the ordinary course of business** during the gap period.

At the same time, certain actions may require the buyer's consent.

These restrictions may cover material acquisitions or disposals, significant new borrowing, dividends, changes to share capital, major contracts, unusual capital expenditure, changes to senior management or other actions outside the ordinary course.

The purpose is to preserve the business the buyer agreed to acquire.

But the drafting needs to be carefully calibrated.

The buyer cannot own the company before it owns the company

Buyer consent rights create an important legal and practical boundary.

The buyer may reasonably want protection against material changes to the target, but it should not effectively begin controlling the company before closing.

This concern is particularly acute where merger-control rules apply.

Competition law can restrict the parties from implementing a transaction before the required clearance has been obtained. If the buyer begins directing the target's commercial decisions, approving ordinary business activities or integrating operations prematurely, the parties may create **gun-jumping risk**.

The seller therefore needs enough autonomy to continue managing the business.

The buyer needs enough protection to ensure that extraordinary decisions do not materially alter what it has agreed to buy.

Good gap-period drafting tries to preserve that balance.

The objective is not to freeze the company. It is to ensure that it continues to operate normally while preventing decisions that could fundamentally change its value or risk profile.

What does "ordinary course" really mean?

The phrase "ordinary course of business" appears frequently in acquisition agreements, but its application can be less straightforward than it sounds.

A company may need to make decisions during the gap period that are commercially sensible but unusual.

Perhaps an important supplier becomes insolvent and needs to be replaced urgently. Perhaps the company receives an attractive opportunity to sign a large new customer contract. Perhaps market conditions require an unexpected increase in inventory.

The seller may consider these decisions essential to running the business properly. The buyer may argue that they fall outside the historical ordinary course and require consent.

A well-designed SPA therefore needs to provide enough flexibility for the company to respond to genuine business needs.

The consent process should also be workable. If every meaningful operational decision requires prolonged discussion with the buyer's lawyers, the provision can interfere with the business the parties are supposedly trying to preserve.

From an advisory perspective, the contractual mechanism should reflect **how the target actually operates**, rather than relying solely on generic drafting.

Efforts obligations: who is responsible for getting the deal to closing?

Many conditions precedent depend on action by one or both parties.

A regulatory filing needs to be submitted. Information must be provided to an authority. A consent may need to be requested from a contractual counterparty.

The SPA therefore commonly imposes obligations requiring the parties to use an agreed level of effort to satisfy the outstanding conditions.

The precise drafting matters because not every effort standard requires the same degree of commitment.

The central commercial question is usually straightforward: **how far must each party go to make closing happen?**

This becomes particularly sensitive in regulatory matters.

Suppose competition authorities indicate that approval will only be granted if the buyer divests part of another business. Is the buyer required to accept that remedy? What if the required divestment is economically significant?

The agreement may need to determine in advance how much regulatory burden the buyer is expected to accept.

Otherwise, both parties may sign the transaction believing that the other has assumed more closing risk than it actually has.

The long-stop date: a deal cannot remain pending forever

Even where both parties are working toward closing, the transaction cannot normally remain open indefinitely.

The SPA therefore often establishes a **long-stop date** by which the conditions precedent must be satisfied or waived.

If closing cannot occur by that date, one or both parties may acquire a right to terminate the agreement, subject to the agreed terms and responsibility for the delay.

The long-stop date is particularly important in transactions requiring regulatory approval, because the timetable may not be entirely under the parties' control.

It therefore needs to be realistic.

A deadline that is too short may create unnecessary termination risk. One that is excessively long can leave the seller's business effectively constrained by an unresolved transaction for an extended period.

From an advisory perspective, this is another reminder that execution certainty has economic value.

A seller agreeing to a long and uncertain gap period is accepting more than a delayed payment date. It may be accepting months of operational restrictions, management distraction and reduced strategic flexibility.

What if the business changes before closing?

A more difficult question arises where something significant happens during the gap period.

A major customer may terminate a contract. A factory may suffer serious damage. A regulatory investigation may begin. The company's financial performance may deteriorate sharply.

Whether such an event allows the buyer to refuse to close depends on the SPA.

The agreement may address the issue through the accuracy of representations and warranties, compliance with pre-closing covenants, specific conditions or a **Material Adverse Change / Material Adverse Effect provision**.

The MAC concept will be examined separately in the next article, but its role in the gap period is important: it attempts to define how severe a deterioration must be before the buyer is entitled to treat the transaction as fundamentally different from the one it signed.

The threshold is usually intended to be high.

Ordinary fluctuations in business performance should not automatically allow the buyer to abandon a signed acquisition.

Otherwise, the seller would have transaction certainty only for as long as everything continued exactly as expected.

Bring-down of representations and warranties

Representations and warranties may also become relevant again at closing.

In many transactions, the seller gives them at signing and is required to repeat, or **bring down**, some or all of them at completion.

The buyer therefore receives confirmation that the contractual picture of the target has not materially changed during the gap period.

But this raises another negotiating question.

Must every warranty remain perfectly accurate, or only accurate subject to an agreed materiality standard?

If a relatively minor warranty becomes technically inaccurate, should that allow the buyer to refuse to complete a major acquisition?

The answer depends on the drafting, but the commercial objective is generally to distinguish between breaches that genuinely affect the transaction and those that should instead be dealt with through post-closing remedies.

The closing condition should protect the buyer from a materially different business, not necessarily provide an easy exit for immaterial technical breaches.

The advisory perspective: the gap period is execution risk

From a purely contractual perspective, the gap period is the period between signing and completion governed by conditions, covenants and termination rights.

From an advisory perspective, it is a period of **concentrated execution risk**.

The transaction has been publicly or internally committed to, advisers remain engaged, management attention is diverted and the seller may be restricted from pursuing alternative strategic opportunities.

Yet ownership has not transferred and the purchase price has not necessarily been received.

This means the quality of the closing plan matters enormously.

Regulatory filings should be mapped before signing. Third-party consents should be identified during diligence. Responsibility for each condition should be allocated. Timelines should be realistic. Potential bottlenecks should already be understood.

The best gap-period strategy is not simply to draft strong contractual protection.

It is to reduce the number of things that can still go wrong after signing.

Signing creates commitment; closing creates ownership

The distinction between signing and closing captures an important feature of M&A.

At signing, the parties agree to the transaction.

At closing, they actually perform it.

Between those moments, the SPA must protect the business, allocate responsibility for satisfying the remaining conditions and define what happens if completion becomes impossible.

Conditions precedent determine whether the parties are required to close. Interim covenants regulate the target while they wait. Efforts obligations determine how hard each party must work toward completion. The long-stop date prevents uncertainty from becoming indefinite.

The gap period therefore should not be viewed as the empty space between two important dates.

It is a transaction phase in its own right.

And in many deals, **getting from signing to closing can be just as important as negotiating the agreement that was signed in the first place.**

PART 11

MAC Clauses and Termination Rights: When Can a Buyer Walk Away?

Inside M&A: The Legal Architecture of a Deal

Once an SPA has been signed, the basic expectation is straightforward: **the parties are supposed to close the transaction**.

That expectation matters. Signing would have little value if either party could simply reconsider the economics, change strategy or walk away because market conditions had become less attractive.

But M&A transactions do not take place in a static environment. Where signing and closing are separated by weeks or months, the target's business may deteriorate, regulatory approval may fail, a condition precedent may remain unsatisfied or one of the parties may breach an important obligation.

The SPA therefore needs to define the circumstances in which a signed transaction can legitimately be terminated.

Among the most closely negotiated mechanisms is the **Material Adverse Change, or MAC, clause**, often expressed through the related concept of a Material Adverse Effect (MAE). Its purpose is to address an exceptional question: what happens if the target changes so significantly between signing and closing that the buyer can reasonably argue it should no longer be required to acquire the business it originally agreed to buy?

The concept sounds simple. Drafting it is not.

A signed SPA is not an option to buy

The starting point is important.

A buyer should not be able to sign an acquisition agreement, reserve the target for several months and then decide at closing whether the transaction still looks attractive.

If market valuations fall, financing becomes more expensive or the buyer develops doubts about the strategic rationale, those developments do not automatically justify termination.

When the SPA is signed, the buyer assumes a substantial degree of transaction risk.

This is why termination rights are generally linked to **defined events**, rather than to a general change of mind.

Depending on the transaction, these may include failure of conditions precedent, material contractual breach, failure to obtain regulatory approvals, breach of interim covenants, failure to close by the long-stop date or occurrence of a qualifying MAC.

The commercial purpose is to create certainty while recognising that some developments genuinely make completion impossible or fundamentally different from what was agreed.

What is a Material Adverse Change?

At its core, a MAC clause attempts to identify a sufficiently serious deterioration in the target's business, financial condition or operations that may allow the buyer not to complete the acquisition.

The emphasis is on **material**.

A disappointing quarter is not necessarily a MAC. Losing a relatively small customer is unlikely to be enough in a large diversified business. Temporary disruption or ordinary volatility may also fall short.

The concept is generally intended to capture something substantially more significant and durable.

This makes sense commercially. The buyer is purchasing a business whose performance will inevitably fluctuate. It cannot normally expect the seller to guarantee that nothing negative will happen between signing and closing.

The more difficult question is determining where ordinary business risk ends and a genuinely transaction-changing event begins.

That boundary depends heavily on the wording of the SPA, the governing law and the circumstances of the target.

The definition matters enormously

A MAC provision commonly begins with a broad definition referring to events, circumstances, changes or effects that have - or could reasonably be expected to have - a material adverse effect on specified aspects of the target.

But the real negotiation often occurs in the **exceptions**.

The seller will typically seek to exclude events that affect the economy or market generally rather than the target specifically. Depending on the deal, carve-outs may address general economic conditions, changes in financial markets, changes in law, geopolitical events, industry-wide developments, natural disasters, pandemics or the consequences of announcing the transaction itself.

Why?

Because the seller will argue that the buyer should bear systemic market risk once the SPA is signed.

If interest rates rise across the economy or an entire industry experiences temporary contraction, the target may perform worse without anything having gone uniquely wrong with the company.

The buyer may respond that even a general event should matter where the target is affected **disproportionately** compared with comparable businesses.

That leads to one of the characteristic structures of MAC drafting: a broad definition, a series of carve-outs and then exceptions to those carve-outs.

The clause can therefore become one of the most technically intricate provisions in the agreement, despite being designed for an event that everyone hopes will never occur.

Company-specific risk versus market risk

A useful way to understand the negotiation is to ask who should bear different categories of risk during the gap period.

Suppose the target loses its largest customer because of a serious failure in its product. That may represent a company-specific risk that the buyer will argue should remain with the seller until closing.

Now suppose an economic recession reduces demand across the entire sector by 10%. The seller may argue that this is market risk that the buyer accepted when it signed the transaction.

The distinction is commercially important.

The buyer should not normally be able to use a MAC clause as protection against every deterioration in the economic environment. At the same time, the seller should not necessarily be able to insist on closing where the target itself has suffered an extraordinary and lasting deterioration.

The MAC definition is therefore another form of **risk allocation between signing and closing**.

How material is "material"?

One of the difficulties with MAC clauses is that the concept cannot always be reduced to a fixed percentage.

A 10% decline in EBITDA may be significant in one transaction and relatively ordinary in another. A regulatory event affecting a critical licence may be far more serious than a larger short-term decline in earnings.

Duration matters as well.

A temporary interruption lasting several weeks may have little effect on the long-term value of the target. A structural event that permanently damages a key part of the business may have much greater significance even if its immediate financial impact is initially difficult to quantify.

This is why MAC disputes tend to be intensely fact-specific.

The buyer generally needs to distinguish between **ordinary business volatility and a fundamental deterioration in the company it agreed to acquire**.

From an advisory perspective, that also means parties should not rely on a MAC clause as a substitute for identifying foreseeable risks before signing.

If a particular customer contract is already known to be uncertain, or a regulatory decision is expected shortly, that issue may be better addressed specifically in the SPA rather than left to the general MAC definition.

MAC clauses are not a substitute for due diligence

A buyer should not sign first and investigate later on the assumption that a MAC clause will protect it from anything it subsequently discovers.

If due diligence identifies a potentially serious issue, the parties have several more precise tools available.

They can adjust the purchase price. They can require a specific indemnity. They can make resolution of the issue a condition precedent. They can require a particular representation or covenant.

A MAC clause should generally remain a **backstop for exceptional developments**, rather than a general remedy for risks that could have been identified and allocated more precisely before signing.

This distinction is important because a buyer attempting to invoke a MAC faces a much more significant proposition than simply bringing a post-closing warranty claim.

It is arguing that the deterioration is serious enough that the acquisition itself should not have to complete.

Termination rights go beyond MAC

A MAC is only one potential basis for termination.

A well-drafted SPA will normally contain a broader termination framework addressing the principal reasons why the transaction may fail before closing.

One of the most common is failure to satisfy a condition precedent by the agreed **long-stop date**.

Suppose a transaction requires regulatory approval but clearance has still not been obtained nine months after signing. The parties may not be expected to remain committed indefinitely.

The agreement may therefore allow termination once the long-stop date passes, provided that the party seeking to terminate is not itself responsible for the failure to satisfy the condition.

Termination may also arise from a **material breach** of the SPA. If one party fails to perform an important pre-closing obligation and the breach cannot be remedied within the agreed period, the other party may have a right to terminate.

The contract may further address circumstances in which a governmental authority permanently prohibits the transaction or another legal impediment makes closing impossible.

Each termination right reflects a different type of execution risk.

Regulatory failure: who owns the risk?

Regulatory approval can become one of the most important termination issues in larger or cross-border transactions.

Consider a buyer agreeing to acquire a competitor subject to merger-control approval.

If the regulator objects, what must the buyer do?

Is it required merely to submit the application and cooperate with the authority? Must it offer behavioural remedies? Must it dispose of assets? How economically painful must the remedy become before the buyer is entitled to refuse?

These questions are usually addressed through the SPA's efforts covenants and regulatory-risk provisions.

The commercial allocation can vary significantly.

A seller seeking maximum closing certainty may insist that the buyer accept substantial remedies necessary to obtain clearance. The buyer will want to limit its obligation where the required remedy would materially damage the rationale of the transaction or another part of its business.

Termination rights therefore cannot be understood in isolation from the obligations that precede them.

Before asking whether the buyer can terminate for regulatory failure, the agreement needs to answer **what the buyer was required to do to prevent that failure**.

Break fees and reverse break fees

In some transactions, termination has an economic consequence beyond simply ending the agreement.

A **break fee** may become payable where the transaction fails in specified circumstances, often depending on the structure and jurisdiction.

A **reverse break fee** operates in the opposite direction: the buyer pays the seller if the transaction fails because of certain risks allocated to the buyer, such as financing failure or, in some structures, regulatory failure.

The purpose is not necessarily to compensate the seller for the entire lost value of the transaction.

Instead, the fee can serve as an agreed allocation of specific execution risks and provide some compensation for the disruption caused by a failed deal.

From the seller's perspective, this can be particularly important where it has spent months under exclusivity, incurred substantial advisory costs and potentially lost alternative transaction opportunities.

The amount and triggers therefore need to be considered together.

A large reverse break fee has little value if its triggering conditions are so narrow that it is unlikely ever to become payable.

Financing failure deserves particular attention

A buyer may intend to fund an acquisition partly through external debt.

The seller will naturally want to understand what happens if that financing does not materialise.

In many private M&A transactions, the seller will resist a broad **financing condition** allowing the buyer to terminate simply because its lender has withdrawn.

From the seller's perspective, the buyer selected the financing structure and should generally bear that execution risk.

This is why acquisition financing arrangements, equity commitment letters, limited guarantees and reverse break fee structures can become central to transaction certainty.

Again, the highest headline price is not necessarily the strongest offer.

A slightly lower fully funded bid may be more valuable to a seller than a higher bid carrying substantial financing conditionality.

Termination risk is therefore part of deal economics.

Can a party terminate because the other side breached?

Not every breach should allow the entire transaction to be abandoned.

The SPA will often distinguish between ordinary breaches, which may result in damages or other remedies, and sufficiently serious breaches that justify termination.

Materiality thresholds, cure periods and closing conditions can all influence the analysis.

Suppose the seller fails to provide one minor document by the agreed date. That should not ordinarily allow the buyer to escape a EUR 200 million acquisition.

If the seller instead disposes of a core division in violation of an interim covenant, the position is fundamentally different.

The termination framework should preserve proportionality.

Its purpose is to protect against failures that materially undermine the transaction, not to provide either party with technical opportunities to exit a deal it no longer likes.

The advisory perspective: termination rights have economic value

When comparing two offers, sellers often focus primarily on valuation.

But an offer is also a package of **closing certainty**.

Consider two bidders offering the same EUR 100 million.

Buyer A requires broad MAC protection, extensive closing conditions, a financing condition and flexible termination rights.

Buyer B has committed financing, accepts narrowly defined conditions and offers a reverse break fee if a specified buyer-side risk prevents closing.

The headline value is identical. The probability-weighted value of the offers may be very different.

This is why advisers should analyse not only what the buyer is offering to pay, but how easy it is for the buyer **not to pay it**.

The same applies from the buyer's side. Excessive closing certainty can force an acquirer to complete a transaction despite a genuinely catastrophic change in the target.

Good structuring therefore seeks the appropriate balance between commitment and protection.

The walk-away right should remain exceptional

An SPA is intended to create transaction certainty.

If termination rights are drafted too broadly, that certainty becomes illusory. If they are drafted too narrowly, a party may remain forced into a transaction that has fundamentally changed or become impossible to complete.

MAC clauses, long-stop dates, regulatory provisions, breach termination rights and break fees collectively define that boundary.

They answer a question that sits at the centre of every signed-but-not-yet-closed transaction:

how much can change before the deal is no longer the deal the parties agreed to?

The answer should not depend on whether the buyer still likes the economics at closing.

It should depend on the risk allocation negotiated at signing.

That is ultimately the purpose of termination provisions: not to create an easy exit, but to define the exceptional circumstances in which contractual commitment must give way to a transaction that can no longer reasonably be completed.

PART 12

The Shareholders' Agreement: When the Seller Stays in the Deal

Inside M&A: The Legal Architecture of a Deal

Not every M&A transaction ends with the seller walking away from the business entirely.

In many acquisitions, particularly in private equity, founder-led businesses and minority investments, the seller retains part of the equity after closing. Management may roll over shares into the acquisition vehicle, a founder may remain as a significant minority shareholder, or the buyer may deliberately acquire less than 100% of the target.

At that point, the transaction changes character.

The SPA governs the acquisition itself. But once the shares have been transferred, the parties need a second framework to regulate how they will own, govern and eventually exit the business together.

That framework is usually contained in the **Shareholders' Agreement, or SHA**.

If the SPA answers the question "how does ownership change?", the SHA answers a different one: **"how will shared ownership actually work after closing?"**

Why would a seller remain invested?

There are several reasons why a seller may retain equity.

A buyer may want the founder to remain financially aligned with the future performance of the business. A private equity investor may require management to roll over part of its sale proceeds into the new holding structure. The seller may itself believe that the company has significant upside and prefer to monetise only part of its stake.

Sometimes the decision is driven by valuation.

If buyer and seller disagree about the company's future potential, retaining equity can allow the seller to participate in the upside rather than forcing the parties to resolve the entire valuation gap at closing.

Consider a founder who owns 100% of a company valued at EUR 40 million. A private equity fund acquires 70%, while the founder retains 30% and continues to manage the business.

The founder has completed a significant liquidity event, but the relationship with the buyer has only begun.

From that moment, the most important questions are no longer just about price. They concern **control, governance, information, future funding and exit**.

That is the territory of the SHA.

Ownership percentage does not automatically determine control

One of the first misconceptions in shared ownership structures is assuming that percentage ownership tells the entire governance story.

It does not.

A shareholder holding 70% of the equity will normally have significant voting power, but the SHA may require consent from the minority shareholder for certain decisions.

These are commonly known as **reserved matters**.

They may include changes to the company's constitutional documents, issuance of new shares, major acquisitions or disposals, borrowing above agreed thresholds, changes to the nature of the business, significant capital expenditure, related-party transactions, approval of budgets or appointment and removal of key executives.

The objective is generally not to allow the minority shareholder to manage the company day to day.

It is to ensure that certain fundamental decisions cannot be taken unilaterally by the majority where they could materially alter the minority shareholder's investment.

The scope of reserved matters is therefore one of the most important negotiations in an SHA.

Too few protections may leave the minority economically exposed. Too many can make the business difficult to govern.

Board composition turns ownership into governance

The SHA will also normally address the composition of the board.

The majority investor may have the right to appoint most directors. The founder or minority shareholder may retain one or more board seats. Independent directors may also be contemplated depending on the transaction.

Board rights matter because they determine who participates directly in the strategic oversight of the company.

But board representation and shareholder veto rights should not be confused.

A minority shareholder may have one director on a five-person board and therefore lack the votes to block an ordinary board decision. It may nevertheless retain contractual consent rights over specified reserved matters.

The governance package needs to be analysed as a whole.

Who appoints the chair? Does the chair have a casting vote? What constitutes quorum? Can meetings proceed without the minority-appointed director? Which decisions require simple majority, supermajority or unanimous approval?

Small drafting choices can materially change the balance of power.

For advisers, the objective should be to create a governance structure that protects legitimate interests without turning every commercial decision into a negotiation between shareholders.

Information rights become critical for the shareholder no longer in control

A shareholder that does not control the company depends heavily on information.

The SHA may therefore provide rights to receive management accounts, annual budgets, business plans, audited financial statements and other operational information.

This is particularly important where the former owner has sold control but retained a meaningful economic stake.

Before the transaction, the founder may have had unrestricted access to every aspect of the company. After closing, that same person may legally be only a minority shareholder and, unless management responsibilities continue, no longer have automatic access to the same information.

The SHA needs to bridge that gap.

The appropriate level of reporting should reflect the size and nature of the investment. A 5% passive shareholder and a founder retaining 40% of the company will not necessarily require the same information rights.

The guiding principle is that a shareholder expected to remain materially exposed to the company's performance should receive enough information to understand and monitor that exposure.

Future funding can become a source of conflict

A company may require additional capital after the acquisition.

That raises several questions.

Are shareholders required to provide further funding? If so, in what proportion? Is new capital introduced as equity, shareholder loans or third-party debt? What happens if one shareholder participates and another does not?

The SHA may address **pre-emption rights**, allowing existing shareholders to participate proportionately in new equity issuances.

This protects shareholders from involuntary dilution.

But sometimes dilution is exactly what the transaction structure contemplates if a shareholder does not provide additional capital.

Suppose the company needs EUR 10 million of new equity. The majority investor is willing to provide it, while the minority shareholder cannot or does not wish to participate.

Should the majority be able to subscribe alone and dilute the minority? At what valuation? Under what procedure?

These issues can become highly contentious if they are not anticipated at the outset.

A well-structured SHA should therefore consider not only the company's current ownership, but also how that ownership may evolve.

Transfer restrictions: choosing your future shareholder

Private-company shareholders generally care deeply about who they own a business with.

The SHA therefore commonly restricts the ability of shareholders to transfer their shares freely.

A shareholder may be required to offer shares first to the other shareholders, obtain consent before transferring to a third party or comply with other agreed procedures.

These provisions serve an obvious purpose: the majority investor may not want to discover that the founder has sold its stake to a competitor, while the founder may not want the majority investor to transfer control to a counterparty it never agreed to partner with.

Transfers within the same corporate group may be treated differently, provided the shares are transferred back if the recipient leaves the group.

The precise mechanics vary, but the fundamental principle is clear: in private M&A, **who the other shareholder is can be almost as important as how many shares each party owns**.

Tag-along rights: protecting the minority on an exit

Suppose the majority shareholder later decides to sell its stake to a third party.

Without protection, the minority could remain invested alongside a new controlling shareholder it never selected.

A **tag-along right** addresses that problem.

It generally allows the minority shareholder to participate in the majority's sale and sell some or all of its shares to the same buyer, usually on equivalent terms.

If a private equity fund owns 70% and the founder owns 30%, a tag right may allow the founder to sell alongside the fund when the fund exits.

From the minority perspective, this is an important liquidity protection.

It prevents the majority from monetising its position while leaving the minority trapped in an illiquid company under new control.

Drag-along rights: allowing a complete exit

The majority shareholder faces the opposite problem.

A strategic buyer interested in acquiring the company may only be willing to proceed if it can obtain 100% ownership.

If a minority shareholder can refuse to sell indefinitely, it may block the entire exit.

A **drag-along right** allows specified shareholders, once agreed conditions are satisfied, to require the remaining shareholders to sell their shares alongside them.

The minority is effectively "dragged" into the transaction.

Because the provision can force a shareholder to sell against its wishes, its terms are normally negotiated carefully.

The parties may consider the minimum ownership threshold required to exercise the drag, whether a minimum price applies, what representations minority shareholders must give, and whether they can be required to assume liability beyond their proportionate share of sale proceeds.

The provision must enable an efficient exit without unfairly exposing the minority to obligations negotiated principally by the majority.

Tag and drag rights therefore work together: one protects the minority's ability to participate in an exit; the other protects the majority's ability to deliver one.

Management shareholders create an additional layer of complexity

Where founders or executives remain shareholders and continue working in the business, ownership and employment become intertwined.

What happens if a manager resigns? Is dismissed? Retires? Dies? Leaves because of illness?

The SHA, often together with the management incentive documentation, may include **good leaver and bad leaver provisions** governing what happens to the manager's shares in different departure scenarios.

The economic consequences can be significant.

A good leaver may be entitled to retain shares or sell them at fair market value. A bad leaver may be required to transfer them at a substantial discount or, depending on the structure and applicable law, at another contractually determined value.

These provisions are intended to align management with the investment thesis and discourage key executives from leaving prematurely.

But they require careful calibration.

An overly punitive structure may create incentives that are commercially counterproductive or legally problematic. A structure that is too generous may fail to achieve the intended alignment.

Again, the legal mechanism should support the commercial objective rather than dominate it.

Deadlock: what happens when shareholders cannot agree?

Shared ownership creates the possibility of deadlock.

This becomes particularly relevant in 50/50 structures or where minority consent is required for important decisions.

If the parties cannot approve the budget, appoint senior management or agree on a major strategic decision, the company cannot simply remain paralysed indefinitely.

The SHA may therefore include a **deadlock mechanism**.

The first stage is often escalation: the matter is referred from the board to senior representatives of the shareholders in an attempt to find a commercial solution.

If that fails, more significant mechanisms may apply.

Depending on the structure, the parties may agree to mediation, buy-sell procedures or ultimately a sale of the company.

The correct mechanism depends heavily on the relationship between shareholders.

A sophisticated institutional joint venture may tolerate a more structured deadlock procedure. A founder retaining a minority stake after selling control may need something quite different.

The objective should not be to design the most elaborate dispute mechanism possible.

It is to ensure that an unresolved disagreement does not destroy the value of the company.

Restrictive covenants protect what the buyer has acquired

Where a founder sells control but remains involved in the business, the parties will often negotiate restrictions concerning competition, solicitation of employees or customers and use of confidential information.

These covenants may appear in the SPA, SHA, employment documentation or a combination of them.

Their commercial rationale is straightforward.

A buyer paying substantial value for a business does not want the seller immediately establishing a competing operation and using the same customer relationships or team to undermine the asset just acquired.

At the same time, restrictive covenants need to remain proportionate and enforceable under applicable law.

Their scope, geography, duration and subject matter therefore require careful consideration.

This is another area where legal drafting should reflect the genuine commercial interest being protected rather than defaulting to the broadest restriction imaginable.

The SHA should be negotiated with the exit already in mind

One of the most useful advisory principles in negotiating a Shareholders' Agreement is to think about the end of the relationship at the beginning.

How long does the majority investor expect to remain invested? Is the likely exit a strategic sale, secondary buyout, IPO or founder buyback? Does the minority expect liquidity at the same time?

The answers should influence the drafting.

A private equity investor with a five-year investment horizon may require strong drag rights and transfer flexibility to ensure that the eventual exit can be executed.

A founder retaining significant equity will focus heavily on tag rights, information, governance and protection against dilution.

The SHA should therefore not only regulate how the parties **live together**.

It should also regulate how they **eventually separate**.

In many cases, the success of the initial acquisition will only be fully determined when that second transaction occurs.

The advisory perspective: alignment matters more than control alone

It is easy to approach an SHA as a battle over control.

How many board seats does each side get? How many vetoes? Who can block what?

Those questions matter, but they can obscure the broader objective.

A successful shared-ownership structure should create sufficient alignment between the parties for the company to operate effectively.

If the majority can do virtually anything without consultation, the minority may feel economically exposed and disengage.

If the minority has veto rights over ordinary business decisions, management may become paralysed and the majority investor may be unable to implement the strategy for which it acquired control.

The strongest SHA is therefore not necessarily the agreement that gives one side the greatest number of rights.

It is the one that matches rights and protections to the economic reality of the transaction.

Who has invested the majority of the capital? Who is responsible for running the business? Who bears the downside? Who is expected to fund future growth? What is the expected exit?

The governance structure should reflect the answers.

When closing is the beginning rather than the end

In a full sale, closing often represents the point at which the seller's relationship with the business largely ends.

Where equity is retained, closing can represent the beginning of a new relationship instead.

The seller becomes a minority investor. The buyer becomes a controlling shareholder. Management may become both employee and co-investor. Strategic decisions that were once unilateral must now operate within an agreed governance framework.

The Shareholders' Agreement provides that framework.

It regulates control without necessarily equating it with ownership percentage. It protects minority shareholders without preventing the majority from running the company. It establishes rules for future funding, transfers and exits. And it anticipates what happens when shareholders no longer agree.

That is why, in partial acquisitions and rollover structures, the SHA should not be treated as a secondary document negotiated after the main deal is complete.

The SPA determines who buys the company. The SHA determines whether they can successfully own it together.

PART 13

Beyond the SPA: Transition Services and Ancillary Agreements

Inside M&A: The Legal Architecture of a Deal

The Share Purchase Agreement may sit at the centre of an M&A transaction, but it rarely tells the whole story.

A business does not operate through ownership alone. It depends on people, technology, premises, intellectual property, supply chains, banking arrangements, licences, shared services and commercial relationships. When ownership changes, particularly where a business is being separated from a larger group, some of those elements may not automatically follow the company on closing.

The SPA transfers the shares and allocates the principal transaction risks. **Ancillary agreements make the transaction operational.**

In a straightforward acquisition of a self-contained company, the ancillary documentation may be relatively limited. In a complex carve-out, however, the documents surrounding the SPA can become almost as important as the SPA itself.

A buyer may legally own the business at 9:00 a.m. on closing day and still discover that it cannot issue invoices, process payroll, access essential software or operate certain facilities without continuing support from the seller.

The legal question is therefore not only whether ownership can be transferred.

It is whether the business can actually function the morning after closing.

Why the SPA cannot solve everything

Suppose a multinational group sells one of its business divisions.

The division has its own employees and customers, but historically it has relied on the parent group for accounting, HR, cybersecurity, procurement, insurance, IT infrastructure and treasury.

Once the transaction closes, the buyer acquires the business. But those shared services do not necessarily move with it.

Recreating them immediately may be impossible.

The buyer may need several months to migrate the company's systems, establish new banking relationships, transfer data, obtain software licences and integrate the business into its own infrastructure.

Rather than delaying the entire acquisition until every operational dependency has been eliminated, the parties can use contractual arrangements to manage the transition.

The most important of these is often the **Transition Services Agreement, or TSA**.

The TSA: keeping the business running after closing

Under a TSA, the seller agrees to continue providing specified services to the transferred business for a defined period after completion.

Typical services can include IT systems, finance and accounting, payroll, HR administration, procurement, logistics, cybersecurity, facilities management or other functions historically provided centrally within the seller's group.

The commercial rationale is simple.

The buyer obtains ownership immediately, while the operational separation takes place gradually.

Consider a company that relies on the seller's ERP platform to process orders and issue invoices. Migrating onto the buyer's system may take six months.

Without a TSA, the buyer may either have to postpone closing or build a replacement system before it owns the company. With a TSA, closing can occur first and the migration can follow under an agreed contractual framework.

The TSA therefore provides a **bridge between legal separation and operational independence**.

Defining the services precisely

One of the greatest risks in a TSA is vagueness.

A provision stating that the seller will "continue providing IT services" is unlikely to be sufficient.

Which systems? Which users? What level of technical support? Who handles cybersecurity incidents? Who maintains licences? Does the service include upgrades? Is support available twenty-four hours a day or only during normal business hours?

The same issue arises with finance, HR and other shared functions.

The services should generally be described in sufficient detail for both parties to understand what the seller must actually provide after closing.

This is particularly important because the relationship has fundamentally changed.

Before closing, the seller's central functions supported another company within the same group. After closing, those same teams may be providing services to a company owned by a third party.

What was previously managed informally now needs contractual precision.

Duration should reflect the separation plan

A TSA is intended to be transitional.

The buyer should eventually become operationally independent, either by building its own infrastructure or integrating the acquired business into its existing organisation.

The duration of each service should therefore be linked to a realistic separation plan.

Not every service needs to terminate on the same date.

Payroll may be migrated within three months. Accounting systems may require six months. A complex IT infrastructure may require twelve months or longer.

The agreement may therefore include different termination dates for different service categories, as well as mechanisms allowing the buyer to terminate individual services early once they are no longer required.

From the buyer's perspective, flexibility is valuable because it should not continue paying for services it has successfully replaced.

From the seller's perspective, certainty matters because it needs to know how long its personnel and infrastructure will remain committed to supporting a business it no longer owns.

A poorly planned TSA can become a source of frustration for both sides.

Pricing can be more complicated than it appears

How much should the buyer pay for transitional services?

One approach is to continue charging the historical cost allocation used before the transaction.

But historical allocations within a corporate group may not reflect the real cost of providing services to a separate third party.

The seller may therefore seek cost reimbursement, cost-plus pricing or predetermined fees for each service.

The parties should also consider extraordinary costs. If the buyer requests additional functionality, increased service volumes or bespoke support beyond the agreed scope, who pays?

From an advisory perspective, the important point is that TSA costs form part of the **true economics of separation**.

A buyer comparing acquisitions should not focus exclusively on the purchase price. If extracting a business from its existing group requires several million euros of transitional services, technology migration and standalone infrastructure, those costs affect the real investment required.

This is particularly important in carve-outs, where the cost of creating a standalone business can materially change the acquisition case.

Service standards and liability

The buyer will normally want reassurance that transitional services will be delivered to an appropriate standard.

But the seller may resist becoming a professional outsourcing provider with extensive service-level obligations and unlimited liability.

A common commercial starting point is that services should be provided broadly in a manner consistent with how they were provided to the business before closing.

Certain functions may nevertheless require more precise standards, especially where service failure could materially disrupt operations.

The TSA should also address responsibility where problems occur.

If the seller's system fails and the target cannot process customer orders for three days, what remedies does the buyer have? Are there service credits? Is liability capped? Are certain categories of loss excluded?

The appropriate regime depends on the importance of the service.

The more critical the dependency, the less comfortable the buyer will be relying on vague standards and limited remedies.

A TSA should contain an exit strategy from day one

A TSA works best when it is negotiated together with a **separation plan**.

The objective is not simply to maintain the status quo after closing. It is to eliminate the dependency that made the TSA necessary.

For each material service, the parties should understand what needs to happen before the buyer can operate independently.

Which data needs to be migrated? Which software licence needs to be obtained? Which employees need to be hired? Which bank accounts need to be opened? Which supplier agreement needs to be transferred?

The TSA can then support those milestones.

This changes the mindset from "the seller will keep helping us" to "the parties have a defined programme for achieving independence".

That distinction matters because transitional arrangements have a tendency to become permanent if no one owns the separation process.

The best TSA is often the one that becomes unnecessary exactly when the parties expected it to.

IP licences: the business may use assets it does not own

Another common ancillary issue concerns **intellectual property**.

A business being acquired may use trademarks, software, patents, databases or know-how owned by another company within the seller's group.

If those assets are not part of the acquisition, the buyer needs to determine whether they remain necessary after closing.

A licence may therefore be required.

In some cases the licence is temporary, allowing the buyer time to rebrand or migrate onto alternative technology.

In others it may be long term because the business depends structurally on intellectual property that remains with the seller.

The agreement needs to define scope, duration, territory, permitted use, sublicensing rights and termination.

Brand transition is a common example.

A business may continue operating under the seller's trade name for several months after completion while the buyer introduces a new identity. A transitional trademark licence allows that use while imposing rules around how the brand may be displayed and when it must disappear.

Again, something that appears operational can become essential to the legal ability of the business to continue trading.

Supply and commercial agreements may survive the transaction

Sometimes buyer and seller remain commercial counterparties after closing.

A manufacturing business being sold may still depend on components produced by another part of the seller's group. Alternatively, the acquired company may continue manufacturing products for the seller.

The transaction may therefore require a **supply agreement, manufacturing agreement, distribution agreement or other commercial arrangement** alongside the SPA.

These agreements can be particularly important where the historical relationship existed entirely within the same group and therefore was never documented on arm's-length commercial terms.

Closing forces the parties to define that relationship properly.

Pricing, volumes, forecasts, minimum purchases, quality standards, delivery, warranties, liability and termination all need to be addressed.

The acquisition may therefore create a slightly unusual result: the parties stop being shareholders in the same group and immediately become important customers and suppliers of each other.

The legal documentation needs to anticipate that new relationship.

Management, retention and employment arrangements

People can also form part of the ancillary documentation.

A buyer may consider certain founders or executives essential to the value of the target and require them to remain involved after closing.

Their continuing relationship may be governed through new employment agreements, service agreements, retention arrangements or management incentive plans.

Where management rolls over equity, these arrangements will often interact with the Shareholders' Agreement discussed in the previous article.

The economic package may include salary, bonuses and long-term incentives together with equity participation.

Legal advisers therefore need to understand how the different documents work together.

A management executive should not, for example, have one set of obligations under an employment agreement and inconsistent obligations under the shareholders' documentation.

Likewise, restrictive covenants concerning competition, solicitation and confidentiality may appear across several transaction documents and need to be coordinated carefully.

Escrow agreements convert contractual protection into practical security

An SPA may provide that part of the purchase price is retained to support possible warranty or indemnity claims.

Where the relevant amount is held by an independent third party, an **escrow agreement** will usually govern how those funds are held and released.

The document may specify the amount deposited, the duration of the escrow, permitted investments, the claim process and the conditions for releasing funds to seller or buyer.

The principle is straightforward, but the mechanics matter.

If the buyer asserts a claim one week before the scheduled release date, does the entire escrow remain blocked or only the amount corresponding to the claim? What happens if the parties disagree? When can undisputed funds be released?

The escrow arrangement should support the risk allocation already negotiated in the SPA without creating an unnecessary second layer of uncertainty.

Financing and security documents can form another transaction layer

Where an acquisition is financed with external debt, the financing documentation may represent an entire parallel workstream.

The buyer may enter into facility agreements with lenders and grant security over shares, bank accounts or other assets. Intercreditor arrangements may be required where several layers of financing are involved.

Equity sponsors may provide commitment letters or guarantees supporting the buyer's obligations.

These documents are not technically ancillary to every SPA in the same way as a TSA or escrow agreement, but they can be essential to completing the transaction.

This illustrates a wider point: the legal architecture of M&A extends well beyond the bilateral relationship between buyer and seller.

Lenders, insurers, management, landlords, licensors, suppliers and escrow agents may all become parties to documents required for the transaction to work.

Carve-outs make ancillary agreements particularly important

The significance of ancillary documentation becomes clearest in **carve-out transactions**.

When an entire standalone company is acquired, many operational relationships already sit inside the target.

When only a division is separated from a larger group, the business may rely on dozens of services and arrangements that historically existed outside its legal perimeter.

The buyer therefore needs to establish what it is actually acquiring and what still needs to be recreated.

Which employees belong to the business? Which contracts need to be transferred? Which systems are shared? Who owns the relevant data? Does the business have its own insurance? Does it have standalone financial statements? Which licences remain with the seller?

These questions affect valuation as well as documentation.

A business generating EUR 10 million of EBITDA inside a corporate group may not necessarily generate the same EBITDA once it must pay market prices for services previously provided centrally.

The buyer therefore needs to analyse the target not simply as it exists before closing, but as it will operate **on a standalone basis afterwards**.

The advisory perspective: operational separation is part of deal value

This is where ancillary agreements move beyond legal housekeeping.

Suppose two businesses each generate EUR 15 million of EBITDA and are offered at the same valuation.

Business A is fully standalone, with its own systems, personnel, contracts and infrastructure.

Business B depends extensively on the seller's group and will require two years of transitional support, substantial IT investment and several new senior hires.

The headline financial performance may look identical.

The acquisition economics are not.

The second business carries greater separation cost, execution complexity and operational risk.

An adviser evaluating the transaction therefore needs to incorporate these factors into valuation, financing requirements and integration planning before signing.

The TSA should not be discovered after the SPA economics have already been agreed. The need for ancillary arrangements should emerge from diligence and feed directly into transaction structuring.

Beyond ownership transfer

A successful acquisition requires more than transferring title to shares.

The buyer needs a functioning business.

That may require transitional services, intellectual-property licences, new supply relationships, employment arrangements, escrow mechanisms and financing documentation.

Each agreement responds to a dependency or relationship that the SPA alone cannot fully regulate.

The more interconnected the target is with the seller, the more important these documents become.

They also reveal an essential truth about M&A execution: **legal completion and operational separation are not always the same event**.

The SPA may determine the exact moment ownership changes.

The ancillary agreements determine whether the business can continue operating once it does.

And particularly in complex carve-outs, that difference can determine whether a transaction that looks successful on closing day actually works in practice.

PART 14

Closing an M&A Deal: The Documents Behind the Signature

Inside M&A: The Legal Architecture of a Deal

Closing is often presented as the decisive moment of an M&A transaction: the agreements are signed, the money moves, the shares change hands and the deal is complete.

In practice, a sophisticated closing is less a single signature than a **carefully coordinated sequence of legal, corporate and financial actions** that must occur in the correct order.

By this stage, the commercial terms should already have been negotiated, due diligence completed, the SPA signed and the relevant conditions precedent satisfied or waived. Yet ownership will not change merely because the parties have reached the end of the timetable.

The transaction still has to be implemented.

Share transfer instruments may need to be executed. Corporate approvals must be in place. Existing security may need to be released. Directors may resign or be appointed. Funds have to move between multiple accounts. Registers may need to be updated. Certificates, legal opinions and closing confirmations may need to be delivered.

Each individual item may appear administrative. Collectively, however, they determine whether the transaction actually closes as intended.

The purpose of closing mechanics is therefore simple: **to convert contractual commitment into legal ownership and economic control without leaving gaps between the two**.

Closing is an execution process, not a meeting

Historically, one can imagine lawyers, clients and bankers gathering around a conference table exchanging physical documents and signatures.

Modern closings are often very different.

Documents may be signed electronically in advance, funds transferred through several banks and lawyers coordinating the process across jurisdictions and time zones. Some closing documents may already be held in escrow pending confirmation that all conditions have been satisfied.

The physical "closing meeting" may not exist at all.

But the underlying logic remains the same.

The parties need to know precisely what must be delivered, by whom, in what form and in what sequence before completion can be declared.

This is why complex transactions usually operate through a **closing checklist** or completion agenda.

Far from being a simple administrative list, this document becomes one of the most important execution tools in the transaction.

It identifies every outstanding document, action, responsible party and completion status.

A well-managed closing should contain very few surprises because the checklist has already exposed them.

The closing checklist is the transaction's control panel

By the time closing approaches, the documentation can be extensive.

The closing checklist brings the various workstreams together.

It may include the SPA and ancillary agreements, corporate approvals, share transfer documents, regulatory clearances, third-party consents, debt repayment documentation, security releases, management arrangements, escrow documentation and funds-flow mechanics.

Each item should normally show whether it is agreed, signed, outstanding or conditional upon another closing step.

Consider a transaction involving a target with existing bank financing.

The buyer cannot simply pay the seller and assume that the existing lender's security disappears automatically. The debt may need to be repaid from the closing proceeds, after which the lender releases its security, allowing the buyer to acquire the target without the previous financing encumbrances.

Those actions need to be coordinated.

If the repayment occurs too early and the acquisition then fails to close, the target may suddenly have lost its financing. If the buyer pays the seller before the release mechanics are sufficiently secure, it may acquire shares in a company still subject to unwanted security arrangements.

The closing checklist therefore does more than confirm that documents exist.

It helps establish **the order in which legal and financial risk transfers during completion**.

Corporate approvals: someone must have authority to complete the deal

Before the transaction can close, the relevant companies need to have properly authorised the required actions.

Depending on the corporate structure and applicable law, this may involve board resolutions, shareholder resolutions or approvals from other corporate bodies.

The buyer may need to approve the acquisition, the execution of ancillary documentation and the financing arrangements.

The seller may need to approve the sale, related distributions, repayment of shareholder loans or other steps associated with the transaction.

The target itself may need to approve matters that become effective at closing, such as director appointments, banking changes or entry into new agreements.

These approvals are important for a simple reason: a complex transaction should not depend on someone discovering after the event that the person who executed a document lacked authority to do so.

Corporate approvals also create a formal record of the transaction and the decisions surrounding it.

In larger groups, this can require careful coordination because multiple entities may participate in different parts of the closing structure.

Transferring the shares

At the centre of a share acquisition is the legal transfer of the target's shares.

The precise mechanics vary between jurisdictions, but may involve executed share transfer forms, endorsements, notarial formalities, updates to shareholder registers, cancellation and issuance of share certificates or filings with corporate registries.

The SPA creates the contractual obligation to transfer the shares.

The applicable corporate law determines how that transfer is legally perfected.

This distinction is important.

A buyer may have paid the purchase price and signed the SPA, but if the required corporate transfer formalities have not been completed, the legal status of ownership may remain unclear.

Closing counsel therefore needs to understand precisely **which action makes the buyer the shareholder under the applicable law**.

This is particularly important in cross-border M&A, where assumptions based on one legal system may not apply in another.

Resignations, appointments and control of the board

Ownership and corporate control often change together at closing.

Seller-appointed directors may resign. Buyer nominees may be appointed. Corporate secretaries or authorised signatories may change.

The timing matters.

The seller will generally not want its directors resigning before it knows the purchase price is being paid. The buyer will not want to release the funds and then discover that the agreed governance changes have not occurred.

Resignation letters, appointment resolutions and board documentation are therefore often held together as part of the completion process and released once the agreed closing sequence is satisfied.

This illustrates a broader principle: **closing should minimise the period in which one side has performed while the other has not**.

Perfect simultaneity is not always technically possible, but the transaction documents and closing process should bring the relevant steps as close together as practicable.

Existing debt and security can dominate closing mechanics

A target may enter the transaction with bank debt, shareholder loans, guarantees or security over its assets and shares.

The buyer may require some or all of these arrangements to be discharged at closing.

This introduces a separate workstream involving the existing lenders.

The parties may need a **payoff letter** setting out the exact amount required to repay the facility as of the closing date, together with confirmation of how and when guarantees and security will be released.

The funds flow may then direct part of the buyer's purchase price not to the seller, but directly to the target's lenders.

For example, a transaction with an equity value of EUR 80 million may involve the buyer transferring EUR 15 million to repay existing debt, EUR 5 million into escrow and only the remaining amount to the sellers.

The purchase price is therefore not always represented by a single wire transfer.

The financial settlement can involve several simultaneous payments, each connected to a different contractual requirement.

This is why the legal team and the financial advisers need to work from the same closing numbers.

The funds flow: where exactly does the money go?

The **funds-flow memorandum** or closing funds flow is one of the most practical documents in an M&A closing.

It maps every payment that needs to occur.

The document may identify the gross purchase price, debt repayments, transaction expenses, escrow deposits, shareholder loans, withholding amounts and final proceeds payable to individual sellers.

Bank account details, currencies and payment references may also be included.

Its importance should not be underestimated.

A transaction can have perfectly drafted legal documentation and still encounter significant problems if funds are transferred incorrectly.

Account details should be verified through robust procedures. Changes to payment instructions close to closing should be treated with particular caution, given the well-known risk of transaction-related payment fraud.

From an advisory perspective, the funds flow also provides a final reconciliation between the **headline economics of the deal and the cash that each party actually receives**.

A EUR 100 million transaction may result in substantially less than EUR 100 million reaching the seller's account on closing day once debt, escrow, expenses and other adjustments are taken into account.

The closing process is therefore where the purchase price mechanism becomes cash.

Closing certificates and bring-down confirmations

Where there has been a gap between signing and closing, the parties may need to confirm that certain contractual conditions remain satisfied.

A seller may deliver a closing certificate confirming that specified representations and warranties remain accurate subject to the standard agreed in the SPA and that relevant pre-closing covenants have been complied with.

Other certificates may confirm satisfaction of particular conditions or completion of corporate actions.

These documents create a formal bridge between what was agreed at signing and the state of affairs at closing.

They are particularly important where the SPA makes completion conditional upon certain facts continuing to be true.

A certificate should not be treated as a routine signature exercise.

If management knows that a relevant statement can no longer properly be confirmed, that issue needs to be raised before closing rather than buried inside a completion document.

Third-party consents and regulatory approvals must be evidenced

If completion depended on obtaining a material contractual consent or regulatory clearance, the closing file should include appropriate evidence that the condition has been satisfied.

This may be an approval decision from a competition authority, an FDI clearance, a consent letter from a contractual counterparty or another formal document.

The issue matters not simply because the SPA says so.

A buyer needs confidence that it is acquiring a business capable of continuing to operate legally and contractually after completion.

If a critical licence required approval for the change of control, that approval should not remain an assumption.

It should be part of the closing evidence.

The same principle applies to conditions that have been waived.

If a party is closing despite an unsatisfied condition, the waiver should be documented clearly so that there is no later ambiguity about whether the transaction was completed intentionally with that risk outstanding.

Ancillary agreements also need to become effective

The previous article discussed the importance of ancillary agreements such as TSAs, IP licences, supply arrangements, employment agreements and escrow documentation.

Closing is when many of these documents become effective.

The timing should be coordinated with the transfer of ownership.

If the acquired company requires access to the seller's IT systems immediately after completion, the TSA needs to be operational from the moment the group relationship ends.

If management is remaining with the business under new employment arrangements, those agreements should take effect at the appropriate time.

If part of the purchase price is being placed in escrow, the escrow account and agent arrangements need to be ready to receive the funds.

The documents surrounding the SPA therefore converge at closing.

This is the point at which the legal architecture stops being a set of negotiated agreements and becomes an operating framework.

Signature, delivery and release are different concepts

One subtle but important aspect of closing mechanics is that a document can be **signed before it becomes effective**.

Parties may execute signature pages in advance and authorise lawyers to hold them pending closing.

The relevant documents are then released only once the parties confirm that the agreed completion conditions have been met.

This can be particularly useful in transactions involving many shareholders or parties located in different jurisdictions.

It avoids the need to collect signatures at the precise moment funds move.

But the authority to hold and release signatures should be clear.

A document that has been signed but not validly delivered may have a different legal status from one that has been fully released into the transaction.

Closing counsel therefore needs to manage not only signatures, but also the conditions on which those signatures become operative.

Legal opinions may provide additional closing comfort

Certain transactions, particularly cross-border or financing-heavy deals, may require **legal opinions**.

These may address matters such as the valid existence of a company, authority to enter into transaction documents, enforceability of specified agreements or the validity of security.

Legal opinions should not be understood as broad guarantees that the transaction has no legal risk.

They address defined legal questions based on stated assumptions and qualifications.

Their function is to provide a formal level of legal comfort on matters that another party, often a lender, cannot easily verify itself.

Whether an opinion is necessary depends on transaction practice, jurisdiction, financing requirements and the nature of the documents involved.

In a simple domestic acquisition it may be unnecessary. In a multi-jurisdictional financing structure, several opinions may form part of the completion package.

Closing should be rehearsed before closing day

One of the most valuable execution practices is also one of the simplest: **do not wait until closing day to discover how closing works**.

Several days before completion, the parties should ideally understand the final sequence of events.

Which conditions remain outstanding? Which documents are still unsigned? Which signatures are being held in escrow? Which bank accounts will receive funds? At what point are the shares deemed transferred? When are board changes effective? Who gives the final instruction that the closing package may be released?

Complex deals sometimes use a formal closing call during which lawyers confirm each step sequentially.

Other transactions close largely through coordinated email confirmations.

The method is less important than having a clear process.

A closing should feel procedural rather than improvisational.

The more important the transaction, the less acceptable it is for execution to depend on assumptions, incomplete documents or last-minute interpretation.

The closing bible: preserving the transaction record

After completion, the legal work is not necessarily finished.

The final signed transaction documents are usually assembled into a **closing set or closing bible**, historically a physical volume and now generally an electronic collection.

This may include the SPA, disclosure documentation, ancillary agreements, corporate approvals, consents, certificates, financing documents and other completion materials.

This is not simply archival housekeeping.

Years later, the parties may need to confirm what was signed, which version of a document was final, what disclosures were made or what corporate authority supported a particular action.

The closing set creates an authoritative transaction record.

Incomplete closing records can become particularly problematic when the people who originally worked on the deal have left the organisation.

Good post-closing administration therefore begins with preserving the legal evidence of what occurred.

The advisory perspective: execution certainty has value

Closing mechanics may appear primarily legal, but they have direct commercial significance.

The longer and more complicated the list of outstanding actions, the greater the execution risk.

A seller assessing competing bidders should therefore care about more than price.

One buyer may require complex acquisition financing, multiple internal approvals and extensive third-party consents. Another may have committed funds and a relatively simple path to completion.

The difference affects the probability that the seller actually receives the purchase price.

The same is true for buyers. An acquisition requiring the separation of dozens of contracts, the refinancing of significant debt and regulatory clearances across several jurisdictions may require more execution resources and carry more risk than the headline valuation suggests.

This is why transaction advisers should focus on **closing readiness** well before the intended completion date.

Execution risk should be identified and reduced throughout the transaction, not merely managed in the final forty-eight hours.

When the legal deal becomes the completed deal

Signing establishes the contractual commitment.

Closing is the point at which that commitment is performed.

The shares transfer. The consideration is paid. Existing security may be released. New governance takes effect. Ancillary arrangements become operative. The buyer acquires legal and economic control of the target.

None of those events should be left to implication.

They are implemented through a coordinated package of documents, payments, approvals and confirmations designed to ensure that each side receives what it negotiated.

That is why closing an M&A deal is more than collecting signatures at the end of a long process.

It is the moment when months of negotiation, diligence, structuring and documentation have to work together simultaneously.

A transaction may be negotiated in the SPA, but it is completed through the precision of the closing process.

PART 15

The Deal Has Closed. Now It Has to Work.

Inside M&A: The Legal Architecture of a Deal

Closing is often treated as the finish line of an M&A transaction.

Legally, that makes sense. Ownership has transferred, the purchase price has been paid and the buyer controls the target.

Commercially, however, closing is only the point at which the transaction begins to prove whether the assumptions behind it were correct.

A successful closing shows that the deal was executable.

What happens afterwards determines whether it was actually a good deal.

The legal work does not necessarily end at closing

Several elements of the transaction may remain open after completion.

Completion accounts may still need to be prepared. Purchase price adjustments may need to be calculated. Escrow amounts may remain blocked. Earn-outs may depend on future performance. Specific indemnities may continue for years.

The SPA therefore continues to regulate the relationship between buyer and seller even after ownership has changed.

This is particularly important where the economic consideration is not fully fixed at closing.

If part of the price depends on EBITDA over the following two years, for example, the buyer now controls the very business whose performance determines how much more the seller receives.

The contract needs to provide the rules, but the commercial relationship between the parties also matters.

Post-closing mechanics work best when they are treated as an execution process rather than as the beginning of the next dispute.

Integration is where value can be created - or lost

The buyer may have acquired the shares, but the business still needs to operate.

Systems may need to be integrated. Reporting structures may change. Banking relationships, procurement, HR, IT and compliance may need to move onto the buyer's infrastructure.

Some acquisitions require only limited integration. Others depend heavily on it.

The danger is assuming that integration is simply an operational matter to be considered after closing.

If the investment case depends on combining sales teams, removing duplicated costs or integrating technology, those actions are part of the economic rationale for the acquisition.

They should therefore have been considered before the deal was signed.

A purchase price based on expected synergies is only justified if those synergies can actually be delivered.

People often matter more than the model suggests

A financial model can value customers, margins and growth.

It is much harder to model what happens if three key executives leave within six months of closing.

This is why management retention and organisational clarity become critical immediately after completion.

Employees want to know who makes decisions, whether their roles are changing and what the acquisition means for the future of the company.

Key managers may also have very different incentives after the transaction.

A founder who previously owned 100% of the business may now be a minority shareholder or an employee of the buyer. Senior executives may have received transaction bonuses but have no meaningful long-term incentive to remain.

These issues can affect the value of the acquisition quickly.

Retention arrangements, management equity plans and carefully designed governance structures therefore form part of value protection, not simply HR administration.

Synergies need owners, numbers and deadlines

Synergies are among the most frequently cited reasons for acquisitions.

Cost savings may come from eliminating duplicated functions, consolidating suppliers or integrating systems. Revenue synergies may arise from cross-selling, entering new markets or combining distribution networks.

The problem is that synergies often look more convincing in the transaction model than in the operating business.

"EUR 5 million of expected synergies" is not an execution plan.

A useful post-closing programme identifies what creates those EUR 5 million, who is responsible for each initiative, when the benefits should appear and what costs are required to achieve them.

A cost saving that requires EUR 3 million of restructuring expenses is economically different from an immediate EUR 5 million saving.

Likewise, a revenue synergy based on selling products to each other's customers should be tested against actual customer behaviour rather than assumed simply because two commercial networks now belong to the same group.

The acquisition model needs to become an operating plan.

The first months should protect the business before transforming it

Buyers naturally want to begin implementing their strategy immediately after closing.

But speed is not always the same as effectiveness.

The first priority should normally be preserving what made the target valuable in the first place.

Key customers should not become uncertain about service. Important employees should understand their future. Critical suppliers should know whom they are dealing with. Management should have clarity about decision-making.

Some changes should happen quickly.

Others benefit from understanding the acquired business before imposing a new structure.

The first months after closing therefore require a balance between **integration and continuity**.

A buyer that changes everything immediately may destroy valuable knowledge and relationships. A buyer that changes nothing may fail to realise the strategic rationale of the transaction.

Good integration is selective.

The transaction should be measured against the original investment case

After closing, the buyer should eventually return to the assumptions that justified the acquisition.

Was revenue growth achieved?

Did margins improve?

Were the expected synergies realised?

Did integration cost more than expected?

Were key employees retained?

Did the business require more working capital or capex than anticipated?

These questions matter because M&A performance should not be measured by whether the deal closed successfully.

Closing is an execution milestone.

Investment success is measured by what the acquired business ultimately produces relative to the capital and risk committed to it.

This is also where lessons from one transaction improve the next.

If integration costs were systematically underestimated, future valuations should reflect that. If management retention proved more important than expected, future deal structures should address it earlier.

Post-closing analysis therefore belongs to the M&A process itself.

Closing is the end of the transaction process - not of the investment thesis

Over the course of this series, the transaction has moved from the first NDA through valuation, structure, the SPA, warranties, disclosure, indemnities, signing, ancillary agreements and finally closing.

Each document solves a different problem.

But none of them can guarantee that the acquisition will create value.

Contracts can allocate risk. Due diligence can identify it. Advisers can structure the transaction around it. Closing can transfer ownership precisely.

After that, the buyer still has to operate the business it decided to acquire.

And that is the final distinction worth making.

Closing proves that the transaction was executable. What happens afterwards determines whether it was a good transaction.