Introduction

Speakers: Michael and Nick

Nick - Corporate Transactions

Michael - Pensions

Focus on your questions and issues

Recent work for trustees of the Great Lakes UK Pension Plan
Topics for discussion

- Corporate Transactions - Overview
- Private M&A
- Public M&A
- Group Re-organisations
- "Pre-packs"
- PPF Drop-ins

The impact of pension schemes on corporate transactions

<table>
<thead>
<tr>
<th>Defined Benefit Scheme</th>
<th>Defined Contribution Scheme</th>
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<tbody>
<tr>
<td><img src="image1.png" alt="Lightning Storm" /></td>
<td><img src="image2.png" alt="Daisy Field" /></td>
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</table>
Corporate Transactions - Overview

<table>
<thead>
<tr>
<th>Corporate transactions – common structures</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Private M&amp;A – sale of a company</strong></td>
</tr>
<tr>
<td>Transactions involving the sale and purchase of shares in private companies.</td>
</tr>
<tr>
<td>No prescribed format for the deal.</td>
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<tr>
<td>TUPE does not apply.</td>
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<tr>
<td><strong>Public M&amp;A – Takeover offer</strong></td>
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<tr>
<td>Bidder makes an offer to shareholders in the Target company.</td>
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<tr>
<td>Parties must comply with the City Code on Takeovers and Mergers.</td>
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<tr>
<td>Takeover Panel supervises and regulates takeovers.</td>
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<tr>
<td>TUPE does not apply.</td>
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<tr>
<td><strong>Private M&amp;A – sale of a business</strong></td>
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<tr>
<td>Package of assets, rights and liabilities transferred. TUPE applies – employee consultation required.</td>
</tr>
<tr>
<td><strong>Public M&amp;A – Scheme of Arrangement</strong></td>
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<tr>
<td>Target company publishes a circular to shareholders setting out the scheme.</td>
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<tr>
<td>Parties must comply with City Code and provisions of Companies Act 2006 relating to schemes.</td>
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<td>Takeover Panel and Court involved.</td>
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</table>
Corporate transactions: decision tree

- Shares in public company? → Takeover or Scheme (City Code)
  - Shares in private company? → Share sale
    - Target has significant liabilities or disposal of part of a business / division → Business sale
      - Distressed seller → Pre-pack

Private M&A
Private M&A – key stages

- Shares or assets?
- Marketing
- Heads of terms/offer letter
- Due diligence
- Sign sale documents
- Obtain consents/regulatory approvals
- Completion and funds transferred

Private M&A: common deal structures
Private M&A: Sale of a business

- Seller
- Business sale agreement
- Purchaser

Assets, Rights and Liabilities associated with the Business:
- Real Estate
- IPR
- Contracts
- Plant & machinery

TUPE Regulations

Private M&A: Sale of a company

- Shareholder
- Share purchase agreement and other transaction documents
- Purchaser
  - wholly owned subsidiary

Target Company

- Subsidiary 1
- Subsidiary 2
- Subsidiary 3

OCCUPATIONAL PENSION SCHEME
Private M&A: Combination of share sale and business sale

Pre-deal

Parent

Subsidiary 1

Target Company

Post closing

Newco / Purchaser

Target Company

Parent staff who provide services exclusively to Target Company transfer to Purchaser under TUPE

Sale and purchase

Target Company staff remain on same employment contracts (TUPE not applicable)

Private M&A – transaction documents

Confidentiality Agreement

Disclosure Letter

Exclusivity Agreement

Share / Business Purchase Agreement

Tax Deed (not on a Business Sale)
Private M&A: Shares or assets?

Shares or assets?

What should be purchased: shares or assets?

<table>
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<th>Advantages of a share sale</th>
<th>Advantages of an asset sale</th>
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<tbody>
<tr>
<td>• A share sale provides continuity for the business being sold. It avoids the practical pain in the neck of identifying and transferring individual assets and liabilities. Share sales, therefore, are usually easier and faster.</td>
<td>• It is easier to cherry pick which assets are to be transferred. With a share sale, all assets owned by the company will go across as part of the sale unless transferred out pre-completion.</td>
</tr>
<tr>
<td>• A share sale will usually avoid the need to obtain third party consents for particular asset transfers – e.g. landlord’s consent for assignment of leases. Do bear in mind, however, the possibility of change of control provisions in any contract.</td>
<td>• Perhaps even more important is the ability to pick and choose which liabilities are to be assumed by the Buyer.</td>
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<tr>
<td>• It is usually easier to deal with employment issues on a share sale – no consultation requirement.</td>
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Tax factors – many and varied.

Most transactions are structured as share sales.
Private M&A: Pensions issues

Share Sale
• Purchaser inherits Target Company’s pension arrangements (including historic pension arrangements) whether DB or DC.
• **Section 75** risk for purchaser/vendor?
• Pension liabilities in a DB scheme retained by the “statutory employer” but now liability within new group:
  – **inter-group guarantees**; and
  – “**moral hazard**” provisions under Pensions Act 2004 (contamination risk!)
• New group could inherit significant liabilities!

Private M&A: Pensions issues

• Due diligence is key.
  – DB funding level (contribution rule)*
  – balance of powers (amendment, winding up etc.)
  – equalisation? (other nasties?)*
• Trustees: although no change in “statutory employer” trustees will be keen to understand any change to the “employer covenant”
• What you will be looking at as actuaries?
Private M&A: Pensions issues

Asset Sale

- (Unless agreed otherwise) the Purchaser will not acquire current/historic occupational pension schemes whether DB or DC
- **Section 75** risk for vendor?
- TUPE: terms and conditions of employment transfer excluding
  - rights to “benefits for old age, invalidity or survivors”
- No pension issues? – Unfortunately:
  - **Beckmann** (ECJ) – redundancy benefits
  - **Martin** (ECJ) – enhanced early retirement
  - Monster – targeted benefits
Private M&A: Pensions issues

- Pensions Act 2004 (s 257/258)
  - minimum protection
  - matching employer contributions to DC of up to 6% of basic pay
- Personal pensions
  - rates maintained as contractual term
- Auto-enrolment – is there a qualifying scheme available with the receiving employer?
- “Fair Deal” on outsourcing?
- DB: Issues for Vendor/Trustees:
  - Vendor – “What can I do with sale proceeds?” – “Type A Event” on distribution?
  - Trustees – Would the transaction weaken the “employer covenant”? (Is this scheme abandonment?)

Public Company M&A
Public M&A: deal structures for quoted companies

Public M&A: Takeover offer

- Rule 2.7 Announcement
- Offer document published
- Offer remains open for acceptance
- Offer closes and consideration then paid
Public M&A: Scheme of arrangement

Public M&A: Pensions issues

- Purchaser inherits pension arrangements
- Pension liabilities retained by the “statutory employer”:
  - inter-group guarantees; and
  - “moral hazard”
- Due diligence is critical as no warranties will be given by the shareholders or the company
- Trustees: change in “employer covenant”?
  - “Boots pension trustees seek to block takeover in court”
  - “Pension row threatens Sainsbury takeover deal”
M&A Transactions: Do we need clearance on this deal?

Group Re-organisation
Existing Group Structure - Overview

Post re-organisation: Target Structure
Group re-organisation: key stages

Planning
Due diligence
Steps paper
Approvals
Business Transfers
Simplify balance sheets
Strike-off / liquidate companies

Pensions issues on Group Re-organisation
Section 75 Risk

- Section 75 Pensions Act 1995 provides for certain trigger events when a “buy-out” debt is triggered:
  - “employment-cessation event” (e’er ceases to employ active members when another e’er continues to employ active members) (“ECE”);
  - scheme wind-up
  - insolvency events

<table>
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<th>Share Transfer</th>
<th>Business Transfer</th>
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<td>- E’er cease to participate? ECE?</td>
<td>TUPE creates ECE (where all active members transfer)</td>
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<tr>
<td>- “Change in control” winding up trigger</td>
<td>&quot;Change in control&quot; winding up trigger</td>
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<td></td>
<td>What to do with &quot;shell companies&quot;?</td>
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Covenant risk

- Transfer of shareholding below “statutory employer”
- Transfer of business from or below “statutory employer”
- Additional debt or liability?
- Trustee engagement
- Clearance?
Companies in financial difficulties

PPF Drop-ins
PPF Drop-Ins - Pensions
PPF Drop-Ins - Pensions

- Employer liable to fund DB scheme (with deficit)
- Liability to DB scheme likely to result in insolvency for employer
- Newco created and adopts all pension liabilities
- Newco suffers an “insolvency event” and DB scheme enters PPF assessment
- Original employer continues in business without pension liability
- PPF, tPR and trustee consent required
- PPF (through scheme) typically receives cash payment and often retains equity stake in continuing business (anti-embarrassment clause)

“Pre-packs”
What is a “pre-pack”?  

- Pre-packs are a fairly commonplace tool  
- Means of effecting sale through an insolvency process  
- Sale negotiated in conjunction with proposed administrator  
- Sale negotiated BEFORE administration takes place, and completed immediately on appointment  
- This ensure certainty and CONFIDENTIALITY – can be very important  

Key messages  

- Get to grips with the overall structure  
- Understand what each party is doing  
- Identify key pension risks  
- Develop solution to mitigate those or potentially abandon transaction  
- If the Buyer does not have operations in UK – they will need a lot of support  
- ROLE OF THE ACTUARY IS KEY
Questions?

If you have any further questions, please do not hesitate to contact:

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