

Guidance note

The Disclosure Process

This guidance note provides an overview of what to expect of the disclosure process, a crucial element of the overall sale process.

This note is for circulation to the Warrantors and those assisting them with the disclosure exercise.



Warranties and disclosure

It is usual that under the agreement for the sale and purchase of a company (the **Agreement**), all or some of the sellers, and occasionally certain other people (the **Warrantors**) will be required to give certain warranties (the **Warranties**) in respect of the company (which, for this purpose, will also include any subsidiaries of the company).

Each Warranty is a statement of fact made by the Warrantor at the time of signing of the Agreement about the company and its business and operations. **The effect of a Warranty is to allocate some or all of the risk in relation to the existence or extent of a particular liability from the buyer to the Warrantors. If any of the statements made in the Warranties are inaccurate, misleading, false or deceptive, the buyer may be able to recover damages from the Warrantors. In certain circumstances, a criminal offence may also be committed (for example, knowingly giving an untrue warranty).**

The Warranties are subject to any matter “fairly disclosed” in the Disclosure Letter or the Disclosed Documents. This means that before the signing of the Agreement the Warrantors can inform the buyer **in writing** of any matters which make the Warranties untrue, inaccurate or misleading and the buyer is then not able to recover damages from the Warrantors in respect of such matters. “Fairly disclosed” generally

means in such manner and in such detail as to enable the buyer to make a reasonably informed and reasonably accurate assessment of the nature, scope and effect of the matter disclosed and its significance.

The process of informing the buyer of such matters is known as “disclosure” and disclosures may be made against the Warranties either in the Disclosure Letter or the Disclosed Documents. **The effect of an appropriately made fair disclosure is to free the Warrantors of liability from matters so disclosed. It is as if in respect of the particular disclosed liability that the Warranty had never been given.**

The Disclosure Letter is a letter written by the Warrantors to the buyer, which:

- informs the buyer of matters where the Warranties are not true or accurate;
- identifies documents that evidence where a Warranty is not true or accurate; and
- incorporates documents that are required by the terms of the Warranty. For example, *“The copy of the Articles of Association of the company attached to the Disclosure Letter is complete and accurate in all material respects.”*

By way of example, a disclosure against the warranty:

“The company does not recognise a trade union nor does it have any works or supervisory council or other body representing Employees.”

could be: *“Target Limited recognises the [name] trade union.”*

The Disclosed Documents are those documents that the Warrantors have made available to the buyer during the course of the buyer’s investigations of the company and those documents that the Warrantors wish to disclose to the buyer.

Disclosure exercise

You should not discuss the disclosure process with the buyer or its advisers.

If you have any questions on the disclosure process or any doubts as to whether something should be disclosed please contact us to discuss.

The following documents will be helpful when carrying out this exercise:

- the draft Agreement; and
- the draft Disclosure Letter.

The warranty limitations will be of particular relevance to the Warrantors and will also be a key negotiating point for the buyer. **However, when carrying out the disclosure exercise assume that the limitations do not apply.**

Each of the Warrantors and other persons to whom this note is circulated is likely to have a high level of understanding of the company and its business and operations. Each of them should review the Warranties and the Disclosure Letter to identify any disclosures that should be included in the Disclosure Letter or any additional documents that should be included in the Disclosed Documents or the data room.



Disclosure checklist

When reviewing the Warranties and assessing the information that you think may be necessary to disclose you should bear in mind the following points:

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- Each disclosure must be clear, concise and unambiguous. It is not sufficient to make information available to the buyer which enables, or may enable, the buyer to become aware of a particular fact, matter, event or circumstance.
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- Consider whether the Warranties are true and accurate and whether there are any matters, facts, events or circumstances which make or may make any of the Warranties misleading, false or deceptive in any respect, however technical or trivial the falsehood may seem.
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- Wherever possible, provide documentary evidence (including details of the source of the evidence) of how the Warranty may be misleading, false or deceptive.
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- Although the Agreement may be drafted so that the Disclosed Documents in the data room index are generally disclosed against the Warranties you should not rely on this and you should instead specifically identify any relevant Disclosed Documents which should be expressly referred to in the Disclosure Letter as a disclosure against the Warranties (failure to do so could result in an ineffective disclosure).
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- A disclosure against one Warranty may be relevant to other Warranties. If you are aware of other Warranties that are relevant to a particular disclosure, please identify those Warranties as well, so a cross-reference can be made.
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- Although there are typically a number of limitations in the Agreement to give the Warrantors protection (for example, claims have to be above a certain amount before the Warrantors can be sued) this should not be relied on to avoid making a full disclosure; these limitations may be negotiated and they will not apply if the Warrantors wilfully withhold information.
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- Even if you think the buyer is or may be aware of a particular matter, fact, event or circumstance you should still ensure that an appropriate disclosure is made in the Disclosure Letter, because there will only be protection against breaches of the Warranties if the disclosure is set out in the Disclosure Letter. Similarly, if you think that the buyer has a false or misleading impression of a certain matter disclosed, please provide details so an assessment may be made as to the steps required to correct any false or misleading impression.
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