

## PRACTICAL GUIDE Sale of a business as a going concern

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The transfer of a company is often carried out through the sale of its business as a going concern (“*cession de fonds de commerce*”). However, such an operation must be subject to particular precautions so that the interests of the buyer are as well protected as those of the seller and his creditors.

A business as a going concern is constituted of the entirety of the means necessary to operate a business. It comprises tangible assets (merchandise and supplies) and intangible assets (clients, right to lease the premises, company’s name, rights to industrial property, etc). The buildings are not part of a business as a going concern.

In order to protect the interests of all parties, the sale of a business as a going concern is not only submitted to the general commercial law but also to a particular regime established by the Commercial Code (articles L. 141-5 and subsequent, L. 141-1 and subsequent, and R. 141-1 and subsequent). Among all these regulations and conditions, the important points highlighted below should be paid **specific attention** by the parties involved in the sale of a business as a going concern.

### I – PROCEDURAL CONDITIONS

- Written

In principle, the sale of a business as a going concern could be effected without a written document. It is nevertheless **strongly recommended that the parties formalise the sale through a written document**. In particular, a written document is required if the seller wishes to register with the commercial Court a lien on the items of the business as a going concern, further to its sale. Such lien constitutes a guarantee of payment for the seller, allowing the exercise of a right of continuation and of a right of preference in case of a failure on the part of the buyer.

- Required Provisions

The seller is required to specify in the sale and purchase agreement (“SPA”) certain obligatory provisions. In particular, he must state the company’s **turnover and profits acquired during the last three fiscal years preceding the sale**.

It is essential to respect this requirement since the omission or inaccuracy of required provisions could have heavy judicial consequences, ranging from a reduction in the price specified in the SPA to the nullity of the sale. Nevertheless, in exceptional circumstances, it is possible to depart from this requirement if the turnover and profits figures are not available for a given business.

## II – SUBSTANTIVE CONDITIONS

- Sale of essential elements of the business as a going concern

To complete a proper and valid sale of a business as a going concern, the **essential elements of such business as a going concern** must be transferred (in particular the clients).

On the other hand, it is important to note that certain elements are, in principle, excluded from the sale of a business as a going concern, specifically **letters of credit, debts and contracts**. There will be no automatic transfer of contracts, except under express acceptance by the purchaser and the other contracting parties. For example, contracts tying the seller to distributors are not automatically transmitted since the distributors are not clients of the business as a going concern as such but co-contractors of the seller (i.e. of the company or of the individual owning the business).

Certain contracts are nevertheless transmitted automatically to the buyer, such as **commercial leases, employment contracts** (article L. 1224-1 of the Labour Code) and **insurance contracts**. Consequently, the buyer must be particularly vigilant before concluding the sale of the business as a going concern. It is in his best interest to verify the existence of and the content of employment contracts (number, duration, etc.).

- Ousting Warranty (“Garantie d’éviction”)

It is advisable for the buyer to include a **clause of non-competition or non-reestablishment** in the SPA so that he is protected from all acts of competition on the part of the seller.

## III – CONSEQUENCES OF THE SALE

The principal consequences of the sale are the transfer of ownership of the business as a going concern and the payment of the sale price.

Nevertheless, it is strongly advised that the buyer shall not pay the seller directly upon signing the SPA. Indeed, it is primordial to **place the price or a portion of the price into an escrow account** since the creditors of the seller could **oppose the payment of the price** for a period of ten days following the last publication concerning the sale of the business as a going concern. The escrow of the price will then allow paying unpaid creditors if any.

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