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Guides**

GERMANY M&A

Contributing Editor
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Getting the Deal Through

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Practice Guide

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Carve-out Transactions

Kamyar Abrar and Michael Ilter¹

Introduction

Carve-out transactions continue to be very popular in Germany, despite their high complexity.² There is no precise definition of the term 'carve-out', which is essentially a generic term for different forms of separation. When talking about a carve-out, market participants and professionals usually mean the separation of divisions or components of a business or groups of businesses, and business units that will conduct the business on a stand-alone basis following completion. Usually, a carve-out is followed by or combined with a disposal of the respective business unit by way of either a public (spin-off or initial public offering (IPO)) or private (sale or contribution into a joint venture) transaction. A carve-out transaction must be distinguished from the disposal of a business unit that operates in separate legal entities within a group, having certain centralised overhead functions, which of course also requires disentanglement measures for a successful completion.

The number of German carve-out transactions has increased significantly over the years.³ One of the main reasons for this increase is the trend towards focusing on the core business developed in recent years, as large listed industry conglomerates mostly face a conglomerate discount of their stock price. This trend is fostered by activist investors demanding changes to the business model to increase stock prices. Another reason is that valuations remain high, creating a good environment for an envisaged disposal.

In addition to listings (either by way of spin-off and booking into the securities accounts of the existing shareholders of a listed company or via an IPO), which was a common method of disposing of highly valued business units in the early 2000s, trade sales to private equity investors have become a popular alternative in recent years. Whereas in previous years, many investment firms tended to be deterred from large carve-out transactions due to their complexity and

1 Kamyar Abrar and Michael Ilter are partners at Willkie Farr & Gallagher LLP.

2 www.goingpublic.de/going-public-und-being-public/schlaegt-die-stunde-der-carve-outs/.

3 www.bcg.com/de-de/press/PM_MA_Roundtable_Germany_06122018.

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the transaction costs involved, they are now queuing up, particularly as private equity investors have recognised the upside potential of non-core corporate carve-out assets when compared with the challenges of value creation by way of secondary, tertiary or even quaternary buyouts of stand-alone businesses as primaries are relatively rare. These days, high transaction volumes only play a minor role as there is an all-time high of dry powder on the market,⁴ and large cap private equity investors are well practised in forming consortia to consummate multibillion-euro deals.⁵ Owing to their growing importance in the German market, this chapter focuses on private carve-out transactions.

Structuring options

There are basically two structuring options for a private carve-out transaction. While the carve-out can be completed prior to the signing of the purchase agreement regarding the disposal, it can also be done in parallel to the negotiations with prospective bidders, and be completed prior to the consummation of the purchase agreement. In the latter case, certain carve-out measures can also be undertaken following closing.

Completion of carve-out prior to signing

A couple of years ago, the completion of a carve-out followed by a transfer to the purchaser via share deal was the preferred method for a carve-out transaction.

Advantages

A sale of a separated business unit via share deal increases transaction security and speed during the sales process, as the risk of business interruptions can be significantly minimised. It allows potential purchasers a more focused due diligence and faster negotiations given the decreased complexity and the reduced content of the purchase agreement, which does not need to provide for a detailed catalogue of carve-out steps, measures and provisions. Also, attempts by the purchaser to cherry-pick certain assets can be avoided. Furthermore, there is often less time pressure with regard to completion, which is not dependent on certain carve-out milestones or even the successful implementation of the entire carve-out.

Disadvantages

On the other hand, a well-prepared carve-out needs time, and the signing of a transaction can only take place later in the process. The overall duration of the sales process is prolonged as the time spent obtaining regulatory approvals cannot be used to work towards the implementation of the carve-out. As the seller usually bears the economic risk of the business, the purchase price might be reduced if the performance of the business deteriorates, market conditions become challenging or the seller does not manage to recover the carve-out costs as part of the purchase

⁴ www.statista.com/statistics/513838/value-of-private-equity-dry-powder/.

⁵ The disposal of Thyssenkrupp elevators at a valuation of €17.2 billion to a consortium of Advent, Cinven and RAG-Stiftung is the largest carve-out deal in Germany of the past 15 years, <https://www.thyssenkrupp.com/de/newsroom/presse-meldungen/thyssenkrupp-verkauft-aufzugsgesellschaft-fuer-17-2-mrd---an-bieterkonsortium-um-advent-cinven-und-rag-stiftung--19840.html>.

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price. Lack of flexibility for the purchaser to tailor the carve-out to its requirements can be another negative factor with regard to the purchase price being realised. In addition, any risk connected to the successful implementation of the carve-out usually rests with the seller.

Completion of carve-out prior to closing

Today, conducting a carve-out transaction via asset deal or combined share and asset deal is the standard approach in German deals.

Advantages

Negotiating the scope and form of the business unit prior to the implementation of the carve-out ensures maximum flexibility for the interested acquirer. This helps to broaden the field of prospective purchasers, as strategic buyers and private equity investors can be addressed. Having a say in the final shape of the carved-out business can avoid restructuring measures or at least reduce the restructuring costs of the purchaser. Synergies can be maximised, resulting in the ability to offer a higher purchase price. Time savings up to completion of the transaction help corporates to save internal resources, focus on other projects and minimise noise and uncertainty on the employee side. The partially shared implementation risk inevitably results in closer cooperation among the parties between signing and closing.

Disadvantages

In the absence of an up and running stand-alone business, various factors need to be considered. A higher degree of disbursement of assets, non-separation of accounts and dependency on services from a parent can complicate the valuation and make carve-out financial statements less reliable than the audited financial statements of a stand-alone business. Therefore, determination of purchase price and adjustment mechanics are usually complex,⁶ as are leakage and reverse leakage provisions and their interplay with the financials. Also, several ancillary agreements besides the purchase agreement are usually required. And, finally, completion of the carve-out only after signing necessarily results in less contractual protection for the purchaser as the seller's ability to guarantee certain aspects of the business is impaired by its ongoing transformation. Despite these challenges, market participants have become familiar with carve-outs and the increased complexity of the transaction process nowadays only plays a minor role. Negotiations can be conducted swiftly when broad-based and experienced teams of advisers come into play.

Planning as key success factor

Carve-out transactions are usually highly complex processes that may last over several (often three to five) years, from taking the implementation decision over reaching the closing date under the purchase agreement – the starting point of the stand-alone operation of the carved-out business (ie, 'day 1') – to achieving full independence, marking the end date of transitional and potentially other services rendered by the parent group.

⁶ In contrast to auctions for stand-alone businesses, bids for carve-out businesses frequently differ significantly.

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Depending on its nature, the carved-out business might require post-closing services from the parent group that go beyond pure assistance, with the transition for a period even exceeding one year. Such services might comprise the use of IP rights or permits and authorisations, operating on the parent's IT systems or supply chain, or even running the carved-out business in the name of the parent group but on the account of its new owner.

In any case, detailed and thorough planning and preparation on an operational level, but also from a financial, accounting, tax and legal perspective, are necessary. This requires strong efforts and coordination between the various stakeholders and internal and external advisers involved. Without a sophisticated and convincing operating model and a detailed carve-out plan, the sales process will be slowed down, and interest from potential purchasers and thereby the achievable purchase price might be put at risk. Thus, planning is key not only for successful implementation of the carve-out, but also for the timely, cost-efficient and smooth completion of the sales process, helping to minimise disruption to the business.

Legal functions and advisers should be involved in the project as early as possible. The first task is usually the analysis of the status quo of the target business unit and its interdependencies with the other operations of the group. Once the stand-alone operational and financial models have been worked out, the tax and legal structuring can be completed. Thereafter, a legal carve-out plan must be drawn up governing the various steps required to separate the business operationally and legally. The carve-out plan is closely linked to the purchase agreement, which should provide for a detailed legal framework on how the carve-out will be implemented. The various steps partially overlap and need to be conducted in parallel with the preparation of materials for and assistance with the due diligence. As part of the contract negotiations with the bidders, the carve-out plan will be discussed and finalised to reflect the needs of the potential acquirer, if economically acceptable to the seller.

Implementation: most important challenges

Scope of carve-out and verification of day-1 readiness

The passing of title to the carved-out business from the seller to the purchaser, and thus the transfer of the legal risk, takes place at consummation of the purchase agreement. The completion of the carve-out measures required to achieve day-1 readiness will become a closing condition thereunder. Since the determination of the purchase price in carve-out transactions is usually based on closing accounts, the economic risk of the carve-out business shifts from the seller to the purchaser at closing. Thus, the purchaser is protected against underperformance of or disruptions to the business during the implementation of the carve-out. However, the most crucial point within the implementation phase is the transfer of the carved-out business to the purchaser, as at such point the business will no longer be part of the seller group. This last carve-out step cannot be simulated or tested and will always bear some uncertainty. Any operational issues arising following closing need to be negotiated and solved between third parties based on the regulations stipulated in the purchase agreement and the carve-out documentation.

Owing to the passing of the business risk, the purchaser needs to ensure that the carve-out is completed to the greatest extent possible prior to closing. In any event, all carve-out steps required to achieve day-1 readiness must have been completed successfully to ensure that the target business can, subject to the seller group rendering transitional (and potentially other ancillary) services, operate on a stand-alone basis following closing. To ensure transactional certainty, the scope of the respective closing condition must be clearly determined. Since the

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seller will seek to close the transaction as soon as possible, it will try to limit the number of carve-out measures required for the fulfilment of the closing condition to the absolute minimum and shift some measures to the time following closing. This may negatively impact the purchaser as the seller will be less incentivised to cooperate with and support the purchaser and the carved-out business – once the seller has received the purchase price, it no longer bears the economic risk of the business and can inform the market about the successful completion. Therefore, scope of carve-out measures relevant for the fulfilment of the respective closing condition will be one of the key negotiation items.

Another main discussion item is the verification of the fulfilment of the carve-out measures underlying the closing condition. While the seller will have a preference that its confirmation of completion will fulfil the condition, the purchaser, to increase its level of comfort, will prefer an audit by its employees or advisers. Audit by a neutral third party or confirmation from the management of the target business can be used as a compromise. In any case, the verification should be done by a team of subject-matter experts to ensure the various technical and operational complexities are assessed by competent persons with sufficient knowledge.

Due diligence regarding operating model, financials, employment situation and sufficiency of assets

The most important areas to be reviewed during the due diligence are the operating model, the carve-out financials and the assets that are the subject of the carve-out. While the operating model and the financials are crucial for the valuation of the business, the sufficiency of assets is, considering the services rendered by the seller post-closing, the prerequisite for stand-alone operability on day 1.

As the operating model is not yet proven on the market, it needs to be thoroughly reviewed. It forms the basis of the target business's future cost base and go-to-market model, making it a decisive factor for future earnings and profits potential. Often, the model foresees significant new hires to build up functions such as IT, accounting, HR, legal, IP management, tax, regulatory, procurement and marketing that were centralised and rendered based on intra-group service agreements. Part of the review should be the evaluation of whether all hires are required or can partially or temporarily be substituted by purchasing services. The operating model determined in the preparation stage has a significant impact on the carve-out financials. Owing to its nature as an integrated business unit, historical financial data will only be partially readily available, most notably on the cost side. Thus, pro forma consolidated financial statements need to be drawn up properly, reflecting the historical cost of the business unit in question. This is where the operating model, which usually translates the pre-carve-out set-up into the required stand-alone set-up, comes into play. In the end, for the preparation of their valuation, bidders require financial statements that provide a true and fair view of the historical situation and performance of the business to be carved out.

From a legal due diligence perspective, a review of information on the workforce (including remuneration, benefits and pensions) and assets to be transferred is essential.

A carve-out will usually entail a transfer of undertakings pursuant to section 613a of the German Civil Code, resulting in employment relationships transferring by operation of law to the entities receiving the assets transferred in the carve-out, unless employees object to their

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transfer within a period of one month from being formally informed about the transfer.⁷ The employment relationships transfer with all rights and obligations pertaining to them, including all rights and entitlements under collective agreements. Since employment conditions remain unchanged and cannot be amended without the consent of each individual transferred employee, a detailed analysis of the compensation package and employment conditions is indispensable from a legal, financial and operational perspective.

On the assets side, a key legal task is ensuring sufficiency following closing. Even following completion of the due diligence, a prospective purchaser cannot judge whether all assets required for a seamless continuation of the business on day 1 will be transferred in the carve-out. Thus, adequate comfort on the buy side can only be achieved under the purchase agreement. The seller has a better and more detailed knowledge of the asset base but is often reluctant to accept catch-all clauses relating to their transfer. Wrong pocket clauses requiring the transfer of accidentally missing assets or the transfer back of accidentally transferred assets provide comfort for both parties. From a bidder's perspective, a sufficiency of assets representation not subject to any limitations, such as a de minimis or basket or threshold amount, would be the ideal solution, providing for maximum protection. However, unqualified sufficiency of assets representations rarely exist and cannot be given in complex carve-outs without exposing the seller to potential (unlimited) liability for fraud. In this regard, German law is very strict. If any party makes a representation without having verified or been able to verify the underlying facts and circumstances, such behaviour will be considered as fraud under German law. Therefore, every seller will qualify the sufficiency of assets representation with its actual knowledge. Under warranty and indemnity (W&I) insurance, the knowledge qualifier cannot be scraped, which means that the remaining risk will need to be borne by the purchaser. If an asset pertaining to the carved-out business has not been transferred, the wrong pocket clause kicks in. If an asset required in the business, however, was also missing prior to the carve-out, the wrong pocket clause will not help and the missing assets need to be acquired or leased by the purchaser at its own cost.

Separation of employees

A carve-out not only triggers transfer of undertaking from an employment law perspective. In addition, the business unit subject to the transfer will have to be spun off and operationally separated from the remaining operations. The separation constitutes a change in operations pursuant to section 111 of the German Works Council Constitution Act and requires the negotiation of a reconciliation of interests and a social compensation plan with the local works council. Operational co-determination has very low requirements and a work council can be elected by private companies with, as a rule, at least five permanent employees entitled to vote, three of whom are eligible for election. Operational co-determination is to be distinguished from employee co-determination at the level of the supervisory board, which applies to large enterprises with more than 500 or 2,000 employees, respectively.

A reconciliation of interests basically regulates how the spin-off will be implemented, especially from an operational perspective. If no reconciliation of interests can be agreed between the employer and the works council within a reasonable period of time, each party may request

⁷ The concept of transfer of undertaking is also known in several other European jurisdictions. The safeguarding of employees' rights is governed by the Transfers of Undertakings Directive 2001/23/EC.

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mediation by the executive board of the Federal Employment Agency. Additionally or alternatively, both parties can apply for the implementation of a conciliation board to continue negotiations. The employer should request the implementation to mitigate the risk of claims for compensation for economic disadvantage.

The timeline and duration of negotiations with the works council (including those involving the conciliation board) are not regulated by law. They often take between three and six months overall but can also be shorter or longer depending on the relationship with the works council and the competitiveness of the offer made by the employer to it. The possible outcome is either an agreement on a reconciliation of interests or failure of the negotiations. In either case, the proposed change can be implemented by the employer (subject to the terms of a reconciliation of interests, if applicable).

Contrary to a reconciliation of interests, the works council can enforce not only negotiations but also the conclusion of a social compensation plan. If requested by the works council, it must be negotiated by the employer without the possibility to declare failure of the negotiations. Ultimately, the works council can enforce the conclusion of a social compensation plan in court. Its main regulations are compensation measures (including payments) for potential detrimental consequences of the spin-off on the affected employees. It will apply to transferred employees as well as to employees objecting to their transfer. The latter group might face the risk of being made redundant following the final completion of the carve-out as their services will no longer be required at the transferring entity.

Should the employer refuse to negotiate a reconciliation of interests or a social compensation plan, the employees can assert claims for compensation for economic disadvantage due to the change in operations, pursuant to section 113 of the German Works Council Constitution Act.

Subject to compliance with its consultation right, the works council cannot prevent the spin-off of operations resulting from the carve-out. However, it has the power to lengthen the procedure by prolonging the negotiations on the reconciliation of interests and the social compensation plan. Depending on the regulations stipulated in the purchase agreement, this could result in a delay in closing. However, if negotiations on the reconciliation of interest are ongoing, the spin-off cannot be implemented. If the carve-out is, nevertheless, completed, a joint operation needs to be established and the spin-off be postponed until negotiations are concluded or have failed. Since a joint operation requires a joint management and close cooperation between the two employers, which, from an operational perspective, is quite burdensome, it is quite rare in practice and represents the last option for action.

Large corporates usually try to establish and maintain a good working relationship with their employee representative bodies, as members of the works council often also sit on the supervisory board, which is responsible for the observation and control of the management board. Therefore, employee representatives are often consulted early in the carve-out process to see what their view on a contemplated transaction is. The more influential the works council of a corporate is, the more important job security and maintenance of existing employment conditions will be when negotiating a transaction. In many cases, the works council has clear expectations regarding retention periods during which a termination without good cause shall be excluded, and to what extent the purchaser shall be allowed to amend the working conditions following closing. In addition to the relationship with the works council, avoiding negative press coverage due to layoffs and deterioration of working conditions under the new ownership is also an important aspect for a seller in a carve-out transaction.

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Concessions to be made in a reconciliation of interests and a social compensation plan are usually negotiated between the seller and the purchaser prior to the start of the formal discussions and negotiations between the seller and its employee representative bodies. Owing to the current market conditions in favour of sellers, prospective purchasers are frequently asked to accept the concessions package included by the seller in the draft purchase agreement. Detrimental deviations might (pursuant to statements to be made by the seller and its advisers) put the chances of success of a bid at risk. From a purchaser perspective, expensive concessions can be deducted from the purchase price offered. A purchaser will, however, want, for various reasons, to at least retain a certain level of flexibility to change the employment conditions after closing. These reasons can include:

- alignment of the working conditions with other operations of the purchaser;
- simplifying the framework of applicable rules and regulations; and
- achieving cost savings or efficiency gains.

Once the parties have signed the purchase agreement, the seller usually negotiates the reconciliation of interests and the social compensation plan with the works council without any involvement of the purchaser. If concessions are requested by the works council that go beyond what the purchaser has accepted under the purchase agreement, the seller must usually seek the purchaser's approval prior to acceptance or implementation. For this reason, sellers usually seek to obtain the view of the works council early in the process.

Transfer of permits and authorisations

Another important aspect of transactions in regulated industries is the transfer of permits and authorisations. Company- or person-related permits, approvals or authorisations cannot be transferred but need to be newly applied for by the entity acquiring the target business in a carve-out. Depending on the permit or authorisation in question, the application can be filed or at least prepared between signing and closing of the purchase agreement.

In regulated industries where business can only be conducted upon obtainment of the required permits, a staggered closing mechanism with several local closings might be required. This means that in jurisdictions where the required permits have not yet been granted once all closing conditions are fulfilled, the local closing would be deferred until the granting of the respective permit. In the interim period between the (main) closing and the deferred local closing, the seller needs to (partially) continue to run the carved-out business for an interim period following closing in its own name but on behalf of the purchaser while operating under its existing permits. During this interim period, the economic risk of the business must consequently be borne by the purchaser.

Recent trends

Given plenty of dry powder being available and valuations looking more attractive than in a secondary or tertiary buy-out, private equity investors seem to be keener than ever to acquire their targets directly from corporates, and the number of funds exploring highly complex carve-out acquisitions is still increasing. A couple of years ago, this was certainly different with only a limited number of large cap or specialised funds seeking carve-out targets to leverage their experience, reputation and broader transaction teams. Today, the sheer insatiable deal appetite of a still-growing number of funds has resulted in carve-out transactions being

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regularly conducted as auction processes, despite the complexity and transaction cost involved for the bidders.

This sellers' market is cutting into the (theoretical) flexibility of a prospective purchaser to negotiate the scope and implementation of a carve-out. Sellers frequently prepare an operating model and carve-out plan expecting prospective purchasers to stick as closely as possible to such concepts to avoid any disadvantage in the auction process. Although the use of buy-side W&I insurance has also become market standard in carve-out transactions, the level of purchaser protection, particularly with respect to the successful implementation or functionality of the carved-out business, is usually excluded by insurers. However, recent trends indicate that insurers' appetite to insure specific carve-out risks against additional premium has increased, as most of the more complex carve-outs have been successfully implemented and function well. This trend towards a more carve-out-friendly W&I insurance environment will likely continue; however, it will be subject to a detailed due diligence with a particular focus on the specific carve-out risks.

Stricter regulatory requirements, particularly regarding foreign direct investment control and industrial policy in the context of merger control proceedings in some countries (eg, France, Germany, the United Kingdom and the United States), as well as the environmental, social and governance agenda and the demand for increased sustainability, result in additional layers of complexity to be factored in. On the other hand, regulatory hurdles result in more time being available to conduct and implement the carve-out before the regulatory approvals are received and a transaction can be consummated.

While carve-out transactions get increasingly complex, the speed of auction processes has increased significantly over the past couple of years. If the carve-out and its supporting documentation is well prepared at the time when the transaction phase is about to start, the duration of the auction process is not necessarily longer than that for a multi-jurisdictional large cap transaction or a transaction involving a stand-alone target group created via a buy and build strategy. More than ever, knowledge and experience of the various advisers involved is a key success factor for both the seller and the purchaser.

Outlook

As the markets significantly recovered during 2021, reaching a new all-time high for the German blue-chip index DAX 40 in early 2022, the outlook for 2022 was very promising. A couple of large-scale carve-outs involving leading German players that were paused during the covid-19 crisis are rumoured to have resumed and are envisaged to come on the market later in 2022. With the outbreak of the Russian-Ukrainian war and its detrimental consequences for the economies and markets, general uncertainty is back. Depending on the evolution of the Ukraine crisis and its effect on Western economies and stock markets, it might pose a risk for transactional markets not only in Germany. As regards carve-outs of global businesses with an Eastern European angle, sweeping sanctions regimes and structural measures to disentangle carve-out businesses from Russian exposure are currently being considered and play a crucial role in the preparation for upcoming auctions.

Appendix 1

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