



# Carve-out M&A Transactions

A Practical Guide

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LATHAM & WATKINS <sup>LLP</sup>

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# Introduction

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Cross-border carve-out transactions have been a recurring theme throughout my career. From the first transaction I led at the very start of my career to the most recent deal prior to this publication, each and every transaction has brought its own unique factual challenges. Such deals involve legal issues and risks that need to be understood, managed and apportioned, frequently bringing together a range of advisers and specialisms. I am hugely grateful to all of the specialist contributors to this volume for the giving of their time and expertise, without which this book would not exist.

While carve-out transactions are not new, what has changed in recent years is the increasing complexity and cross-border nature of these deals. This shift is largely due to:

- the greater sophistication and number of regulatory regimes, including national and regional antitrust bodies, national security bodies and other supervisors of regulated businesses; and
- the myriad of structuring solutions available to multinationals and the increasing globalisation of many industries and sectors.

Further, carve-out transactions are becoming more prevalent, with four key trends driving this growth.

- *Activist investors.* The increasing involvement of activist investors in US companies and the growing number of activists focusing on non-US markets has required boards worldwide to look more critically at their portfolio and product mix, as well as their geographical spread, either to avoid attention from activists or as a result of activist activity. If a board ultimately decides to divest non-core products or geographies, it is rare that this does not involve some kind of carve-out or separation.
- *Regulatory divestments.* In the current environment of shifting business models and the creation of new industries,

regulators have to work hard to catch up or keep up. This environment, combined with the trend towards heightened national scrutiny of transactions in sectors that were formerly not considered 'sensitive', has led to a growing number of transactions that are cleared subject to some kind of remedy. Scepticism amongst antitrust authorities regarding the effectiveness of behavioural remedies is leading to a renewed regulator focus on undertakings to divest product lines or business units, in order to secure necessary approvals.

- *Private equity.* In the recent era of easy liquidity and record amounts of available dry powder, private equity buyers are taking an expanding share of merger and acquisition (M&A) activity. This shift has increased the number of buyers chasing assets, thereby putting greater pressure on sponsors to originate primary deals internally and, ideally, away from an auction process. Many of these deals are developed through existing relationships with family-owned businesses, but also through proposing divestment ideas to large corporates – which also take the form of carve-outs.
- *Transformational mergers.* Truly transformational mergers bring together the themes of activist intervention, regulatory requirements and private equity acquisitions. For example, an activist investor will typically lobby for a merger of the target business with a competitor, in order to drive synergies etc, which leads to regulators requiring divestment of Y business division or business in X territory, that business is then acquired by a private equity purchaser. Alternatively, the purchaser may need to de-lever its balance sheet post-closing to maintain its investment grade rating or in order to persuade its shareholders to approve the transaction. The process to undertake such divestments, whether mandated by a regulator or as part of portfolio rationalisation post-closing, most often takes the form of a carve-out transaction.

Whilst these trends reflect current global dynamics, I expect that carve-out transactions will continue to play a role in M&A activity through all parts of the economic cycle – during times of distress (fire-sales), disruption (disposal of non-core or old-tech businesses), or booming M&A cycles (all of the above).

Regardless of the factors that facilitated any given carve-out, certain themes must remain at the forefront of practitioners and deal

teams' minds throughout the carve-out process. Locating, protecting and acquiring the key assets and revenue drivers of the carved-out business is the core concern and focus of the buyer. Deeply integrated businesses can pose challenges, but understanding how the business operates (which may also require the seller's transaction team to be educated as to how it operates) and how the business will continue to operate in the future will mean that both buyers and sellers can achieve their goals.

In writing and editing this book, my goal has been to produce practical and usable guidance. The book contains contributions from specialists on subjects linked to the structuring and execution of carve-out transactions, providing an invaluable insight into the legal, regulatory and practical elements in play. Topics include documentary provisions, separation pitfalls, diligence matters, transitional services, employment risks, antitrust concerns and private equity financing challenges. The appendices include short guides to help counsel prepare for and implement a carve-out; from the preparatory steps and considerations through to thoughts on how to assess the buyer landscape and, ultimately, achieve closing and then manage a smooth and pain-free separation.

Given the complexity involved in structuring and managing carve-out transactions, this book is not intended as a guide for more straightforward M&A transactions. Instead, it seeks to assist M&A practitioners engaged in complex M&A transactions, both in-house and those in private practice. The guidance focuses not only on the key differences in negotiating and drafting transaction documents, and the various legal risks practitioners must manage, but also assesses the role of in-house counsel and separation advisers. I hope that you find this book enjoyable and instructive as you navigate your next carve-out transaction.

*This introduction by Robbie McLaren is from the title Carve-out M&A Transactions: A Practical Guide, published by Globe Law and Business.*