

Newsletter



Key Issue:

Adoption of the ATAD Transposition Act brings massive tightening of regulations

Dear Readers,

It would appear that, in the current legislative period, the German government is aiming to still adopt a range of laws that had been put on hold. While, in the last issue of our newsletter, we reported on the Act on the Modernisation of Corporation Tax Law, this time, the **ATAD Transposition Act** is the Key Issue here in our May edition. The Act contains a series of extensive legal changes pertaining to income tax, corporation tax, trade tax, investment tax and international transactions tax.

Important new regulations relate to the taxation of assets for which Germany's right to tax ceases (**disjunction**) or begins (**conjunction**); furthermore, the legislation deals with **moves abroad** by natural persons and regulations for corresponding taxation at home and abroad in the case of **hybrid mismatch arrangements**. These amendments, which are still acceptable, are discussed in Part I. However, the so-called CFC rules, which we address subsequently in Part II, have failed to take reality into account insofar as Germany (still) classifies countries as low tax zones if the tax rate there is below 25%.

In the third report in the Tax section, we have compiled for you the most important **amendments to real estate transfer tax legislation** that will be applicable already **from the beginning of July**. Insofar as transfers of property-owning companies are being planned urgent action will be needed. Our fourth report in this section concerns students, many of whom have lost their jobs in the course of the coronavirus crisis. This was reason

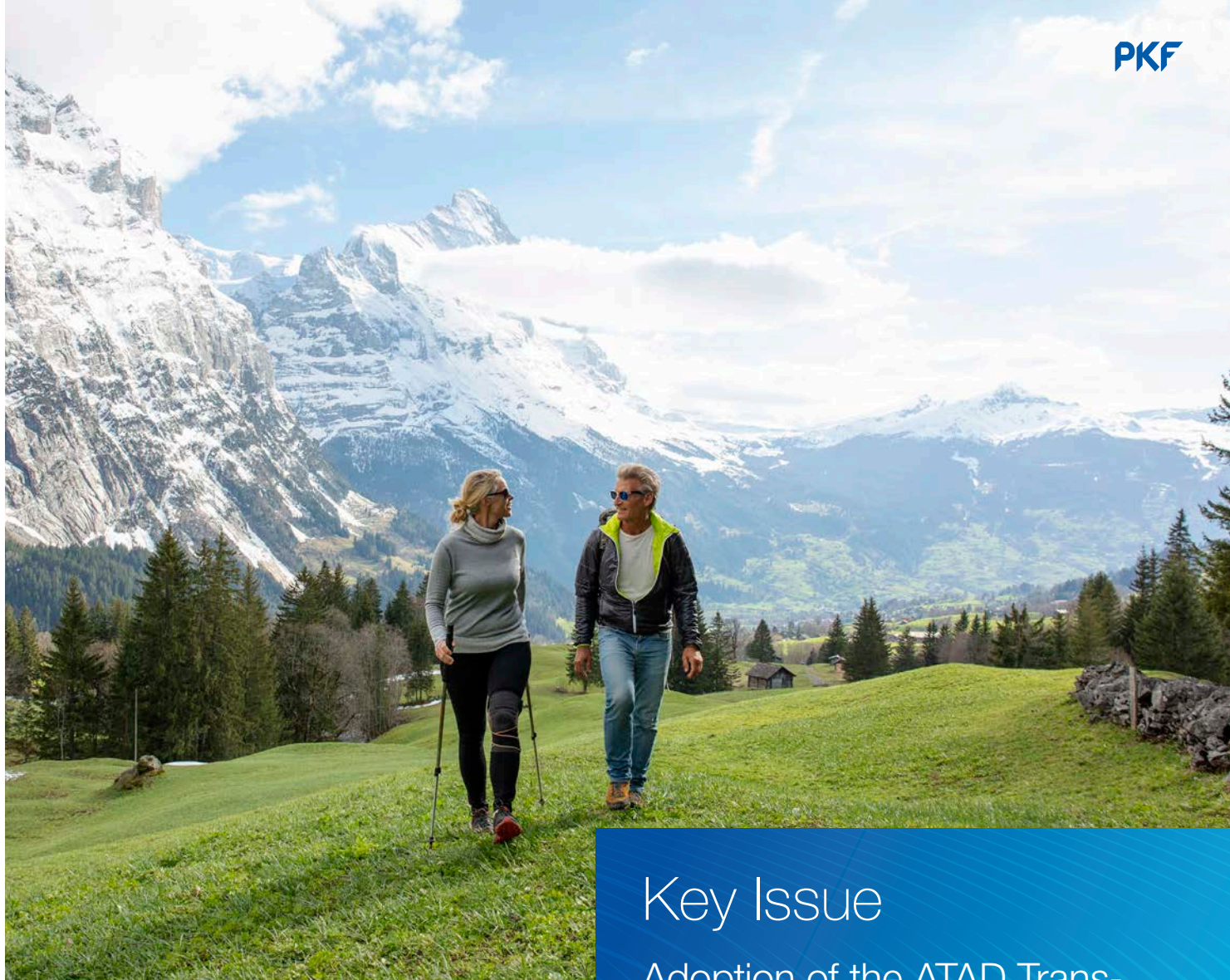
enough for us to take a look at which **maintenance payments** for or to adult children can be offset against tax even though the children are already aged over 25 years.

We start off the Accounting & Finance section with the second part of our report on **carve-outs and spin-offs** that can **enhance enterprise value**. The first part of our series of articles dealt with economic considerations and the concept of the carve-out; this time, we discuss, in particular, the tools with which carve-outs or spin-offs can be successfully implemented. Subsequently, we report on the **useful life of digital assets**. For tax policy reasons, the fiscal authority allows an instant asset write-off in the year of purchase. By contrast, the Institute of Public Auditors in Germany (IDW) is sticking with its different accounting opinion that could result in you having to deal with deferred tax liabilities in the future.

While, in the meantime, working from home has gained considerably in importance with respect to infection prevention and environmental protection, nevertheless, German lawmakers have struggled to provide legal certainty for **remote working**. In the Legal section we discuss the key points of a draft law that still appears to be very rudimentary.

With our best wishes for an interesting read.

Your Team at PKF



Key Issue

Adoption of the ATAD Transposition Act brings massive tightening of regulations

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TAX

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ATAD Transposition Act - Part I - An overview of the key areas of regulation

Exactly one year after the publication of the second draft bill by the Federal Ministry of Finance, the German government - which is now on the home straight of this legislative period - passed the Act to Transpose the Anti-Tax Avoidance Directive (*Gesetz zur Umsetzung der Anti-Steuervermeidungsrichtlinie, ATADUmsG*) on 24.3.2021. In the 1/2020 issue of our PKF newsletter, we had already reported on the latest state of the long-awaited proposed legislation in the area of international tax law. In the following section we have aimed to give an up-to-date overview of the legislation that has now been passed.

1. Introductory survey

The EU Anti-Tax Avoidance Directive 2016/1164 of 12.7.2016 (ATAD) already obliged Germany to transform this secondary legislation into national law and to adapt the respective German tax laws. By specifying minimum standards within the EU, the aim is to uniformly implement some of the outcomes of the OECD BEPS project so as to make it possible to prevent or, at least, restrict tax evasion practices in the form of aggressive tax planning as well as profit shifting.

Besides the changes in relation to CFC rules - which are subsequently discussed separately in our Part II - the Anti-Tax Avoidance Directive (ATAD) regulates the measures for disjunction and conjunction taxes, for exit tax as well as in the case of hybrid mismatch arrangements or where there are taxation incongruities and other rules. Consequently, the ATADUmsG will result in extensive legal changes pertaining to income tax, corporation tax, trade tax, investment tax and international transactions tax.

2. Disjunction and conjunction of business assets

In the case of a conjunction (*Verstrickung*), there is already a legal standard according to which the establishment of the German right to tax with respect to an individual business asset that is transferred across the border results in a notional contribution that generally has to be recognised at

fair market value. The transposition of Art. 5(5) ATAD means that, in future, the values established for assets by a foreign state for disjunction tax purposes will form the basis up to a maximum of the fair market value. This provision will likewise apply to corporations. Furthermore, there is a provision for asset transfers where the restriction of the German right to tax has been lifted (e.g., the transfer of an asset from a foreign permanent establishment for which the tax credit system applies to a German permanent establishment).

In the case of a disjunction where a business asset is transferred abroad with a loss, or if there is a restriction on the German right to tax, up to now, the statutory provision provided for the creation of an off-balance sheet balancing item for tax purposes, under Section 4g of the Income Tax Act (*Einkommenssteuergesetz, EStG*), if a noncurrent asset has been transferred by a taxpayer with unlimited tax liability to a different EU member state.

Please note: In future, even those with restricted tax liability will fall within the scope of this provision as well as current assets and situations where there are cross-border transfers to EEA states.

3. Exit tax

There will also be adjustments resulting from the EU directive and/or ATADUmsG in the area of exit tax within the meaning of Section 6 of the Foreign Transactions Tax Act (*Außensteuergesetz, AStG*) in the case of natural persons who, for example, hold shares in a GmbH [German limited company] as private assets and who move abroad. In this respect, since Germany loses the right to tax in relation to these shares as a result of the move and the associated change in residency, the final levying of tax occurs on the date of the border-crossing. In view of the fundamental freedoms guaranteed under EU law, up to now, extensive deferral arrangements took effect in the case of a move to a foreign country within the EU/EEA.

In the future, the option of deferring the tax liability, for an indefinite period of time, without interest and without



the provision of guarantees will no longer be possible. There will be a tightening of the rules to the effect that, upon application, the tax that is due will have to be paid in seven equal annual instalments and, usually, against the provision of guarantees. However, no interest will be added to the annual instalments in the future either.

Individuals affected by these changes would be those natural persons who were subject to unlimited income tax liability in Germany for a total of seven out of the last twelve years. Up to now, the statutory provision solely took into account that the natural persons were subject to unlimited income tax liability for at least ten years.

4. Hybrid mismatch arrangements

Articles 9 and 9b of the ATAD - which will be implemented for the first time via a new Section 4k EStG-E that forms part of the draft legislation passed by the German government – are aimed at restricting hybrid mismatch arrangements by not permitting business expense deductions where there are taxation incongruities; this would ensue irrespective of DTA rules.

This provision will have to be applied in the case of related persons within the meaning of Section 1(2) AStG, or

between taxable persons and their permanent establishments that use a structured arrangement to obtain a tax advantage that includes a hybrid element based on different residencies and thus, coupled with this, being dealt with by the different tax regimes.

This can be the case if, for example, the business expenses are deducted in Germany but yet not taxed in the foreign state, or other comparable constellations of circumstances in the form of hybrid mismatch arrangements.

5. Conclusion

It remains to be seen what will appear in the further course of the legislative process in the Bundestag [lower house of German parliament] and the Bundesrat [upper house of German parliament] as well as in the committees. In view of the resolution of the German cabinet in spring 2021, it is likely that the objective of the German government and the Federal Ministry of Finance is, now, to transpose the 2016 EU Directive – where the original implementation deadline was 31.12.2018 – still before the end of this legislative term.

The situation will have to be kept under review to see whether or not this can be achieved and with what

potential amendments. In particular, it is to be hoped that the relevant percentage rate for low taxation in the context of CFC rules (more on this in the subsequent report) will be adjusted downwards because a tax rate of 25% seems not to be appropriate and would unjustly cover a great number of taxpayers and situations.

The planned changes for the more broadly defined scope of application of the disjunction of assets that aim also to include current assets and likewise be opened up to those with restricted tax liability are to be welcomed.

StB [German tax consultant] Dennis Brügge

ATAD Transposition Act – Part II – The new CFC rules

After the Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*) had initially put forward two drafts for an ‘Act to Transpose the Anti-Tax Avoidance Directive’ (*Gesetz zur Umsetzung der Anti-Steuervermeidungsrichtlinie, ATADUmG*), the German government passed the ATADUmG on 24.3.2021. A key element of the draft is the much-needed reform of the German CFC rules under Section 7 ff. of the Foreign Transactions Tax Act (*Außensteuergesetz, AStG*).

1. The principles of CFC rules

The CFC rules aim to prevent a company's profits in a country with low taxes from evading taxation in Germany. The rules cover profits of a foreign company that is based in a low tax country and in which German resident taxpayers have a majority stake.

For the underlying supply relationships, a distinction is made between ‘passive’ and ‘active’ operations. Only the profits generated from passive operations will be added back to a taxpayer's taxable income and taxed in Germany. Therefore, the CFC rules break through the shielding effect of corporations abroad.

At this point, we would already like to point out that, in the course of amending the CFC rules, the reduction in the low tax threshold that had been called for by academics and practitioners did not happen. The 25% threshold still applies. From a German perspective, in global terms, a majority of states have to be classified as low tax countries accordingly in this respect.

Outlook

The legislative process has to be monitored, in particular, with respect to the planned tightening of exit tax in Section 6 AStG. The new rules would be applicable as of the 2022 assessment period. The current rules would have to continue to be applied for the deferrals and deadlines that are still ongoing on 31.12.2021 under the prevailing law.

2. Change to the conditions for application

The draft legislation of 24.3.2021 – like both of the BMF's drafts prior to it – provides for a fundamental reform of the concept of control. Under the prevailing law, the CFC rules apply if German resident taxpayers with unlimited tax liability effectively control a foreign company and it generates low-taxed passive income. From now on, however, there will no longer be a requirement for one – potentially purely random – situation where German resident taxpayers have control but, instead, actual control in the sense of coordinated use by related parties. The aim is for shareholders who are German resident taxpayers with unlimited tax liability to no longer be ‘part of the calculation’. As a result, on the one hand, some constellations will no longer be covered by the CFC rules and, on the other hand, existing structures will now fall under the rules for the first time. To determine whether or not a German resident taxpayer with unlimited tax liability controls a foreign corporation, now, the indirect shares held by him/her will also have to be taken into account.

Please note: It should also be taken into account that the draft legislation provides for ‘direct access’ to ‘downstream’ intermediary companies. As a consequence, the concept of ‘transferring add-backs’ in accordance with Section 14 AStG, will fully cease to apply.

3. Income from intermediary companies

In terms of harmful ‘passive’ income, Section 8(1) AStG currently includes a ‘catalogue of active income’ that is explicitly deemed not to be ‘detrimental’. While the ATAD



provisions for 'harmful' income provide for a so-called 'catalogue of passive income', nevertheless, the draft legislation of 24.3.2021 has also retained its 'catalogue of active income'. In this respect, there has been a modest number of specific changes. The plans for the tightening of requirements with respect to activities in the areas of trading and services and those of financial institutions – which were contained in the first draft bill of 10.12.2019 and had already partially disappeared in the second draft bill of 24.3.2020 – have now not been carried over into the governmental draft either.

Receiving profit distributions will continue to be generally considered as active income. However, this is the correlating preferential treatment for the system established under Section 8b of the Corporation Tax Act [Körperschaftsteuergesetz, KStG]; consequently, the exceptions relating to the correspondence principle for holdings in shares that are freely traded and for shareholdings in a trading portfolio will now also be established in the CFC rules.

In this respect, the BMF's first draft was problematic because only certain types of distributions were covered by the provision. By contrast, the second draft bill as well as the draft legislation that was recently passed now

cover all the payments under Section 8b(1) KStG, as a result of which the scope of application of this rule now also includes liquidation payments and payments under Section 20(1) no. 9 of the Income Tax Act (Einkommenssteuergesetz, EStG) that, as such, are not passive.

4. Substance Test

When compared already with the first of the BMF's drafts, there were no changes to the requirements of the substance test in terms of content, which is why, in the area of normal CFC rules, it is still envisaged that the use of the substance test will be restricted to EU/EEA companies. The residency of a foreign company is irrelevant solely in relation to income that is derived from investment-like capital. The reason for this is that the ATAD provisions include a corresponding option and, moreover, the new 'control' criteria would only affect the freedom of establishment.

5. The add-back amount

When compared with the first draft, the rules on the calculation, accrual and treatment of the add-back amount have only been supplemented in one point. It has now been clarified that the add-back amount may not be reduced for

trade tax purposes. Therefore, it remains the case that, when compared with the current regulations, a considerable number of the rules will also have to be applied for the first time in the area of CFC rules and it will only be possible to determine income in accordance with Section 4(1) EStG. The recognition of the add-back amount in the same reporting period is likewise still planned in the ATAD-UmsG.

For the treatment of actual distributions from a foreign (intermediary) company the current Section 3 no. 41 EStG will be replaced by a reformed procedure ("amount of reduction for profit distributions" in accordance with Section 11 AStG-E [draft]) that will no longer include, in particular, the seven-year deadline under Section 3 no. 41 EStG, which had been open to criticism.



Conclusion

The concept for reforming the CFC rules presented by the German government in the ATAD-UmsG is largely unconvincing. The main problem areas in relation to CFC rules will not be resolved by implementing the proposed legislation unaltered. In particular, a reduction in the low tax threshold to 15% as well as the implementation of an appropriate de minimis rule would be desirable. Moreover, consideration should be given to expanding the scope of application of the current counter-exception under Section 8(2) AStG to include third-country companies.

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch/ Maren Hubl

Far-reaching expansion of real estate transfer tax liability as of 1.7.2021

The amendments to the Real Estate Transfer Tax Act (*Grunderwerbsteuergesetz, GrEStG*), which have been planned for a longer time already, will now probably be implemented quickly and come into effect as of 1.7.2021. The draft law passed by the Bundestag [lower house of the German parliament] on 21.4.2021 would usher in an extensive expansion of the real estate transfer tax (RETT) liability. The stated aim is to rigorously clamp down on the share deals of real estate companies that use so-called RETT blocker structures mostly to avoid real estate transfer tax. However, the legislative changes go much further and, ultimately, will affect all companies that hold property as well as their shareholders.

1. Bundestag's resolution recommendation adopted

RETT can be triggered when shares in companies that, directly or indirectly, hold property are transferred. In practice, through the use of appropriate structures, it is possible to mostly avoid RETT when shares in compa-

nies that hold property are transferred ('share deals'). On 23.9.2019, a governmental draft was issued with the aim of curbing particular structuring methods in the RETT arena. Then, on 14.4.2021, the Finance Committee made a resolution recommendation to the Bundestag, which followed this on 21.4.2021. The core elements are:

- » the introduction of a new supplemental taxable event (*Ergänzungstatbestand*) for corporations;
- » the lowering of the shareholding threshold from 95% to 90%;
- » the extension of the time limits to 10 years or 15 years.

2. The threshold is 95% for share deals under the current law

Basically, a share deal is a frequently deployed method for avoiding RETT in the case of property transactions. Under current law, no RETT is due if less than 95% of the shares in a company that holds property are transferred. However, if at least 95% of the shares are transferred then a distinction has to be made between a company

that owns property and a property-owning partnership. In the case of corporations, in practice, a lead investor frequently acquires only 94% of a property-owning company and a co-investor the other 6%; RETT would not be incurred here. Therefore, it is possible to transfer all the shares at the same time, although not all of them may be acquired by the same person.

Please note: In the second step, the shares may not be transferred to the same investor who had already acquired shares in the first step. If this were indeed to be the case then this would trigger RETT in respect of all the shares because the taxable event of ‘unification’ of at least 95% of the shares ‘in a single holding’ would be deemed to have occurred.

3. The new legislation will bring tightening

According to the draft law, as of 1.7.2021, the distinction between a company that owns property and a property-owning partnership will no longer be made. Furthermore,

- » the threshold that triggers RETT will be lowered from 95% of the shares to 90% and
- » the blocking period during which acquisitions of shareholdings have to be added together will be extended to 10 years.

Irrespective of the legal form, it will then only be possible to transfer a maximum of 89.9% of the shares within a period of 10 years without incurring RETT. When the threshold of 90% is exceeded within the time limit then a property purchase will be simulated and RETT will arise and be based on the overall value of the property.

Another significant change has arisen for property-owning partnerships with respect to the non-levying rule under Section 6 GrEStG. Up to now it has been possible to transfer, without incurring RETT, properties from one set of joint assets to another where the shareholders are the same people if the respective property had been owned by the respective company for five years before and subsequently. In the future, the prior holding period requirement for the transferring company will be 15 years.

Recommendation

While, up to now, it has been possible to transfer up to 94.9% of shares, as of 1.7.2021 it should absolutely be ensured that, in total, no more than 89.9% of the shares are transferred. Otherwise, RETT will be charged on the transfer for both corporations and partnerships.

Recognition for tax purposes of maintenance payments for children over the age of 25 years

Many students typically have part-time jobs whilst they are studying, e.g., in the restaurant and catering industry or in the area of events. Over the last few months, such job opportunities have been severely reduced as a result of the coronavirus. Therefore, once again, parents have been called on more than ever to fund the studying and general living costs.

1. Deduction of maintenance payments as extraordinary burdens

After a child's 25th birthday, parents lose several allowances and tax-exempt amounts – these will have been taken for granted for a long time. Child benefit as well as child allowance and tax-exempt amounts for vocational training are no longer granted, although the child's general living costs and studying expenses still remain high.

However, to some extent, parents are still able to compensate for the maintenance payments that they make to their offspring after their 25th birthdays, under certain preconditions, by offsetting these sums, against tax, as extraordinary burdens. For 2020, the fiscal authority will recognise for tax purposes maintenance up to the amount of €9,408. Moreover, no ‘reasonable burden’ will be deducted from this amount so that the tax benefit will apply from the first Euro. Furthermore, the basic contributions for the child's health and long-term care insurance can likewise be offset in addition by the parents as maintenance payments, as a result of which the maximum amount would go up.

The deduction of maintenance payments will only be allowed if the parents are no longer entitled to child benefit. This would be the case once the child has reached the age of 25 years, at the very latest. Moreover, the child is not allowed to have his/her own assets or only a very

small amount – in numerical terms this means that the assets may not exceed a value of €15,500 in total, otherwise the tax deduction ceases to apply (insofar as the assets are not residential property).

2. Own income

If the child's annual own income is more than €624 then the deductible maximum amount of maintenance payments will be reduced by this amount. If the studying costs can be deducted by the child as work-related costs because the course is deemed to be subsequent vocational training (e.g., a master's degree course) then these costs would reduce the relevant income of the child; this, in turn, would decrease the reduction in the maximum amount of maintenance payments.

3. Deduction with no documentation

If the studying offspring still live in their parents' household, then the maximum amount of costs of €9,408 can be deducted without providing any supporting documentation. In such cases, the fiscal authority will assume that the costs for board and lodging will reach the maximum amount at any rate

Recommendation

If the child is studying away from home, then the expenses have to be documented for the tax office. Any amounts that are electronically transferred on behalf of or to the child should be documented,

ACCOUNTING & FINANCE

Benedict Heidbüchel / WPin [German public auditor] Julia Hörl

Carve-outs – Active portfolio management through the demerger of a business division

Part II – Influencing factors for a successful hive-off

In Part I of our series, in our PKF newsletter 04/2021, we considered the economic rationale for carve-outs and the current developments in the M&A market. There now follows, first of all, a detailed examination of two types of demerger, namely, spin-offs and equity carve-outs. We subsequently discuss the success factors for business divestitures that can make advantageous use of the above-mentioned instruments especially in volatile market conditions.

1. Types of demergers

1.1 The basic form of a carve-out

In the context of a corporate transaction, a carve-out is concerned with demerging from the group a subsidiary company or non-autonomous parts of a business. In the course of this, individual divisions, business units or lines are separated. In the case of divestitures, where individual business units are separated out from the parent company in order to make them independent, essentially, a methodological distinction has to be made between (equity) carve-outs and spin-offs.

1.2 Spin-offs

As part of a spin-off, the parent company proportionately distributes shares in the hived-off subsidiary company ('pro rata') to its current shareholders in the form of a special dividend. The existing shareholders benefit because, after the demerger, they hold shares in two separate companies.

The stock market listing of Siemens Energy AG, as the biggest spin-off on the German market to-date, has shown that the IPO of a subsidiary company can be used as an effective value-based management instrument for both the group parent company as well as for the divested business.

The example of Siemens Energy – In the case of this spin-off, each Siemens shareholder received one Siemens Energy AG share for every two Siemens shares. After the spin-off, the Siemens AG share price remained largely steady at around €108 and, by 11.3.2021, it had climbed to €136.24. Siemens Energy AG shares closed at €21.21 on their first trading day. The market capitalisation of the



company thus totalled €15bn. By 11.3.2021, the share price of Siemens Energy AG had climbed to €32.

1.3 Equity carve-out

The term ‘equity carve-out’, in the literature, is used in some cases as a synonym for the term ‘spin-off’. However, a clear distinction should be made between these methods because, unlike an equity carve-out, in a spin-off no additional capital accrues to the parent company.

In an equity carve-out, less than 50% of the shares of a subsidiary company are floated on the stock market. After the stock market flotation, the majority of the voting share capital is still held by the parent company. Consequently, the subsidiary company is still controlled and consolidated by the parent company. In the future, however, the parent company will not provide further equity, instead, the subsidiary company can raise capital on the stock market.

2. Carrying out a carve-out transaction

For everyone involved, the challenges increase according to the size and complexity of the carve-out and the

potential group of buyers or investors. A lead time of up to 12 months or even 18 months is not uncommon here. In the context of a carve-out, the challenges and milestones listed below, in particular, need to be successfully met.

- » Early identification of the operational complexity and ensuring operational performance prior to, during and after the carve-out.
- » Optimisation of the new company structural set-up for tax purposes.
- » Delineation of the relevant assets and liabilities.
- » Implementation of a coherent reporting system due to the lack of historic financial data; this entails, in particular, providing carve-out financials and fact books for a, potential, subsequent IPO including roadshows.
- » Continuous coordination with the buyer (from an anti-trust perspective between the signing and the closing).

In order to make it possible for a structured and smooth process to be set up and supported for the carve-out, normally, an external consultant facilitates the (content-related) separation of the unit that is to be hived off or divested – the so-called ring-fencing. In this respect, the main point is to define the business scope as well as to schedule the timing for the individual steps of the sep-

aration process. In the course of this, normally, advice will also be provided on the implementation and supervision of a cross-border project management office (PMO).

In view of the very high degree of integration, previously, both at the organisational level as well as with respect to financial reporting, generally, there are no financial indicators from the past for the business unit that is to be hived off. Besides delineating the relevant assets and liabilities, this is also a matter of identifying the nature and extent of the integration with the group. In the context of developing a coherent reporting system, there is a need for support, in particular, with the drawing up of the so-called carve-out financials on the basis of which it is possible to calculate not only the internal KPIs but also the 'stand-alone value' of the (transaction) object. This is necessary, especially with regard to company valuations as well as determining the purchase price and, potentially, complex (re)negotiations with the purchaser.

Following on from the operational, cross-divisional activities in all phases of the carve-out process, furthermore, preparing and ensuring so-called 'Day-1 Readiness' needs to be a working premise for (among other things) successful post-merger integration.

In view of the hitherto close integration with the group, during the period of transition to systemic and operational autonomy of the division that is to be hived off, generally, the parent company still has to provide support. The primary objective here is the so-called 'business continuity'

so that it can be ensured that the business operations can continue running.

3. Conclusion

It can be observed that, particularly for companies where it can be demonstrated that there is a greater difference between the enterprise value and the market capitalisation, in practice, portfolio management is enhanced. In a tense economic climate, divestitures can make it possible not only to generate fresh liquid funds but also to bring about a strategic reorientation of a business.

Pertinent practical experience demonstrates that equity carve-outs and spin-offs are very appropriate instruments that can be used to revitalise business divisions; their particular achievement is to reflect the ceaseless dynamics of a complex environment.

Recommendation

For carve-out transactions of different magnitudes and in various industries, we would recommend comprehensive consulting that covers the development of a concept through to the actual demerger. PKF can advise on and provide support for ensuring that all the relevant activities are transferred as well as assume the operational accounting functions on an interim basis.

RAin/StBin [German lawyer/tax consultant] Antje Ahlert

On the depreciation/amortisation of digital assets in the financial accounts

In the last issue of the PKF newsletter we reported on the option to instantly write off digital assets in the tax accounts in accordance with a Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*) circular from 26.2.2021. Now, the Expert Committee on Corporate Financial Reporting (*Fachausschuss Unternehmensberichterstattung, FAB*) of the Institute of Public Auditors in Germany (*Institut der Wirtschaftsprüfer, IDW*) has considered the ramifications for financial accounting.

1. Annual financial statements for tax purposes

The above mentioned BMF circular provides for the pos-

sibility of taking an average useful life of just one year as a basis for specific hardware and software – this is an option. In practice, this will result in an instant write-off for new purchases of such assets that is permissible under tax law.

2. Financial accounting

The 'tax dictates financial accounting' principle ceased to apply as a result of the German Accounting Law Modernisation Act, in 2009. Against this background, the FAB of the IDW takes the view that, in financial accounting, an average useful life of just one year cannot readily be used as the basis for calculating the

scheduled depreciation/amortisation of digital assets. In the context of financial accounts, the estimate of the useful life should continue to be oriented towards operational realities. This will normally amount to more than one year. An instant write-off in the financial accounts, too, would only be possible if the pre-conditions for a low-cost asset within the meaning of Section 6(2) of

the German Income Tax Act have been satisfied.

Please note: If the tax-related option is exercised then the financial accounts would differ from the tax accounts. This would mean that this difference in amount would have to be taken into account when calculating deferred taxes.

LEGAL

RAin [German lawyer] Maike Frank

New draft of a Remote Working Act

After the first draft law for the introduction of a Remote Working Act (*Mobile-Arbeit-Gesetz, MAG*) founded, in October 2020, even prior to an inter-ministerial consultation, the Federal Ministry of Labour and Social Affairs put forward a modified draft, in January 2021. Instead of a statutory right for employees to work remotely, the amended version of the draft law only provides for a requirement to have a discussion to that effect.

1. Purpose and provisions of the MAG

The aim of the proposed legislation is to establish a legal framework for remote working. Working from home would be facilitated through the introduction of legal provisions and the opportunities for accessing this should be simplified. In particular, this relates to specific provisions on occupational safety, the recording of working time as well as rules on the ongoing problem of the scope of accident insurance cover in a home office.



2. Introduction of a requirement to discuss remote working

The original draft of the legislation had still provided for a statutory right for employees to work remotely for at least 24 days per year. The amended version of the draft contains only a requirement for employers to discuss remote working. Accordingly, in the future, employers would be obliged to discuss the possibilities of remote working with employees who would like to do this with the aim of reaching an agreement that complies with the wishes of the employee. To this end, employees would have to inform employers, in text form, about the start date, duration, the extent and scheduling of the remote working no later than three months prior to the desired start date.

If an employer fails to comply with the requirement to discuss remote working, then the draft legislation provides for the creation of a legal fiction in favour of the employee; a remote working arrangement in accordance with the wishes of the employee would then be deemed to have been agreed for a maximum period of six months.

If a discussion has taken place and the employer does not intend to comply with the employee's wish then the employer has to explain to the employee the reasons for

this decision, in writing, no later than two months after the request had been made. The grounds for refusal here may not be irrelevant or arbitrary. In contrast to the original draft, the new draft no longer provides for specific conditions such as the relevant activity not being suited for the remote working environment or a conflict for operational reasons.

The employee would then only be entitled to initiate a new discussion about the possibility of remote working four months after being notified of the negative decision. If an employer fails to provide the respective explanation for the negative decision within the two-month time limit then the legal fiction would likewise apply by which the authorisation in favour of the employee and remote working would again be deemed to have been agreed in accordance with the wishes of the employee. Ultimately, this constellation strongly resembles the discussion requirement between employers and employees in the context of parental leave.

Even though the discussion requirement would not give employees any legal entitlement to remote working, nevertheless, the opportunities to access this would be facilitated, not least, by the introduction of the legal fiction in favour of the wishes of employees.



Entry Certificate – No tax exemption without documentary evidence

Since 1.1.2014, all companies that export within the EU have had to submit a so-called entry certificate (*Gelangensbestätigung*) to the tax office in order to be exempted from VAT for intra-Community deliveries. In a recent ruling, the Münster tax court confirmed that this documentary evidence cannot be dispensed with.

In the case relating to the ruling from 15.12.2020 (case reference: 5 K 1805/20 U), it had been disputed whether the sale of a vehicle was taxable or, as an intra-Community delivery, was exempted from VAT. The legal action was brought by a GmbH [a German limited company] that traded in new and used vehicles and operated a repair service. There was a dispute over the purchase of a car by an Italian company that had collected the car locally. The GmbH had treated the transaction as a VAT-exempt

intra-Community delivery. In the course of a special VAT audit, the tax office queried that the entry certificate issued by the Italian company was missing. The sale was therefore a taxable delivery.

The GmbH's claim was unsuccessful in view of the non-compliance with the requirements relating to documentary evidence in the form of accounting records and receipts for the existence of a tax-exempt intra-Community delivery. It had not been possible to produce either a confirmation that the vehicle had reached the customer in Italy or that the vehicle had been registered in Italy.

Please note: According to the case law of the Federal Fiscal Court, the registration of a vehicle abroad would not be sufficient to prove the existence of a tax-exempt intra-Community delivery.

Real estate transfer tax – A buyer's trustee status is not a justification for a tax exemption

Real estate transfer tax is generally incurred when a property is purchased. According to a decision that was recently announced by the Federal Fiscal Court (*Bundesfinanzhof, BFH*), this is also the case when a property held in trust is transferred.

In this ruling from 30.11.2020 (case reference: II B 41/20), the Munich-based BFH judges dealt with the issue of whether or not a fiduciary relationship in relation to property transfers triggers real estate transfer tax. In the above-mentioned case, the legal proceedings had been instituted by a German limited partnership (*Kommanditgesellschaft, KG*) that had purchased a multi-family house in 2018. Immediately after the conclusion of the purchase contract, the contracting parties concluded a trust agreement according to which the KG

- » acted merely as a trustee,
- » would hold and renovate the property for the account and risk of the vendor and
- » was also obliged to reassign the property at any time.

The competent tax office determined the amount of real estate transfer tax that was due. The KG argued that the plot with the multi-family house erected on it was still economically assigned to the vendor and that the latter had also retained the full power and authority over the property. In the opinion of the Lower Saxony tax court, determining real estate transfer tax was legitimate because the tax is related to civil law and under that the trustee becomes the owner – the economic perspective does not apply here.

The BFH likewise adopted this view since, under civil law, the trustee has a right to transfer the property and acquires the ownership of the property. Accordingly, the trustee status does not alter anything in relation to the imposition of real estate transfer tax since the KG had become the owner and this situation could not be changed either by the contractual agreement or the reassignment right that had been agreed at the same time.

AND FINALLY...

*“When a man opens a car door for his wife,
it’s either a new car or a new wife.”*

HRH Prince Philip, Duke of Edinburgh, 10.6.1921 – 9.4.2021.
Prince consort of the British Queen Elizabeth II.

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