



# Carve-out transactions (Must's and Don'ts)

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# Agenda

- **Introduction**
- **Must's and don'ts**
  - **from a corporate perspective**
  - **from an employment perspective**
  - **from a tax perspective**
- **Conclusions**

# Introduction

- Due diligence
- Identifying transaction object (what's in, what's out)
  - Identifying assets, employees and liabilities
  - Implementation and structure
  - Risk allocation between seller and purchaser
- Functionality of carve-out business

# The Corporate Perspective



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# Transaction Object and Rationale

- Dismissal of a portion of business (direct transfer or demerge and transfer)
- Separation at operational/business level (same shareholders - different businesses) or at shareholder level (different shareholders - different businesses)
- Temporary/partial carve out (overcapacity, lack of resources/business skills etc.)(market risk vs. cost)
- Overcome transfer restrictions

# Certain Alternative Structures

- **Transfer of selected assets**
- **Transfer of a branch of business**
- **Transfer of assets/contracts by financial institutions**
- **Demerger**
- **Contractual carve out (outsourcing / back to back)**

## Identifying Assets and Liabilities (may vary depending on structure)

- Debts (balance sheet items/off balance items)
- Contracts
- Criminal/administrative liabilities (monetary sanctions/injunctive sanctions)
- Tax liabilities
- Employees liabilities
- Additional joint and several liabilities

# Consent

- **Regulatory Consent**
- **Third Party Consents and Change of Control  
Clauses**



# Deferred Closings

- Seller continues to operate the local business after completion
- Protects completion of the global deal
- Ensures as much of the global purchase price is received at global completion as possible
- Small part of the transaction – TSA
- Large part of the transaction – purchase price escrow arrangement

# Agreements and Licences

- **Transitional Services Agreement (TSA)**
- **Licences**
- **Software Licences**
- **Supply Agreements**
- **Lease Agreements**

# Tips

- **Consider whether regulatory approval is required**
- **Pay close attention to contracts with change of control clauses**
- **Consider whether a deferred closing is beneficial**
- **Ensure all services required for transition are included in TSA**
- **Confirm consent of software providers**
- **Confirm position on commercial property**

# The Employment Perspective



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# Due Diligence

## Key questions

- What is the transaction object and what is the functionality of the carve-out business?
- Carve-out business: organizational unit and/or economic entity?
- How many employees are involved and what roles they play?
- Representation of employees?
- Carve-out business employees:
  - Employee, employee benefits and related liabilities? Other employment related documentation?

# Identifying Employees and Employees' Liabilities

## Carve-out business employees

- Law
  - applicable law? EU Member State? TUPE?
  - employee consultation and participation rights?
- Contractual Obligations
  - employment agreement
  - collective bargaining agreement
  - employee benefits plans
  - pension
  - post termination restrictive covenants (non-compete, IP-clause)

# Structure

## Consent of third parties (authorities etc.)

- Consultation requirements with works councils or employee representatives
- Notification requirements

# Risk Allocation Between Seller and Purchaser

- **Keeping employees: which efforts and/or incentives needed from seller and/or purchaser?**
- **Pension**
- **Opt out employees**
  - **EU Member State? TUPE? Same working conditions?**
  - **Statutory severance entitlement? Severance plan? Golden parachute?**



# Tips

1. Information in order to respond proactively on functionality of the carve-out business
2. Planning of personnel (e.g. assessment of TUPE, negotiations, incentives for employees to stay)
3. Planning of process (avoid delays)
4. Control information and communication employees
5. Check consultation and notification requirements and consequences for timing
6. Use of TSA in view of sufficient employees for continuity of business parent and carve-out business
7. Data privacy aspects personal data of personnel

# The Tax Perspective



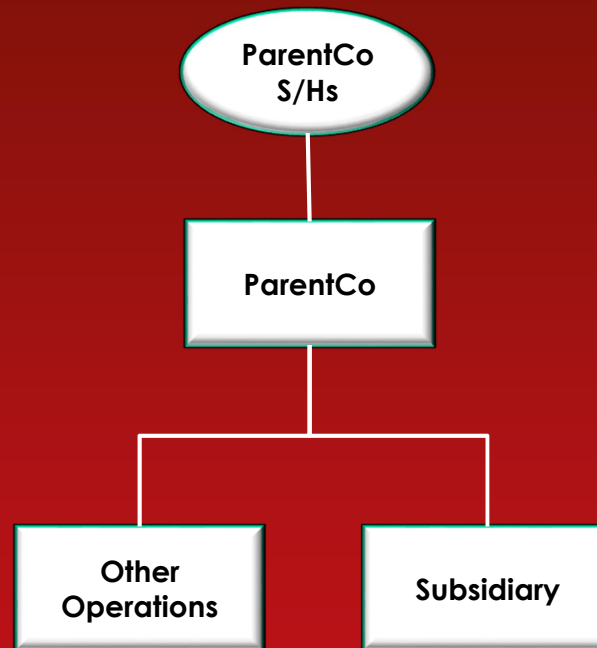
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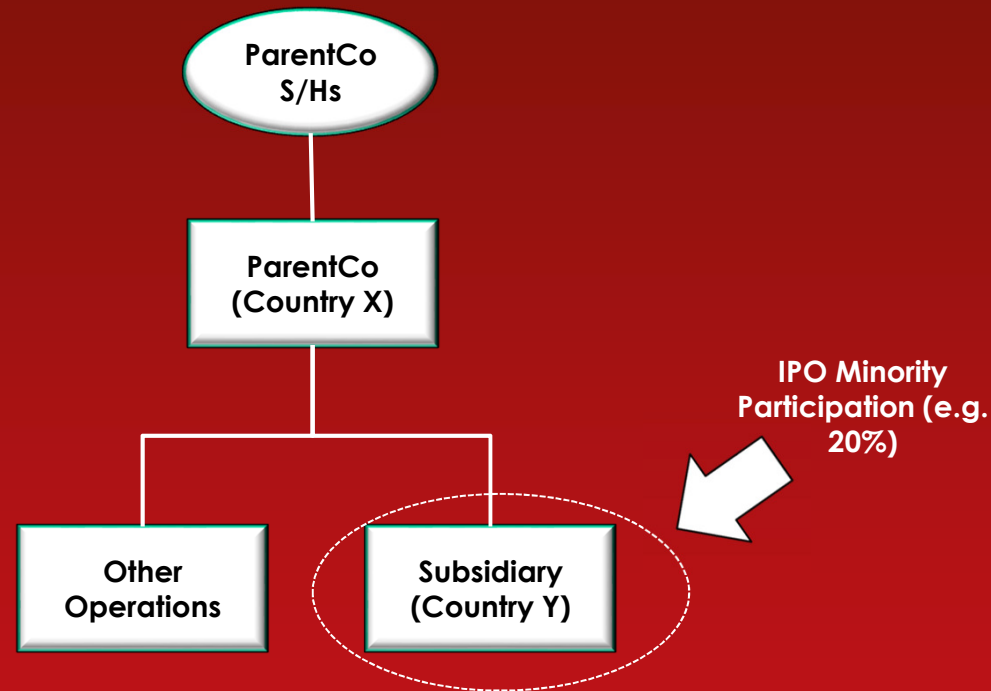
# Due Diligence

- Proper and timely payment of taxes due
- Provisions for taxes
- Tax compliance up to date
- Detection of aggressive tax positions
- Existence of litigation or claims with the competent tax administration
- Tax due diligence report → basis for investment decision and/or price negotiation?

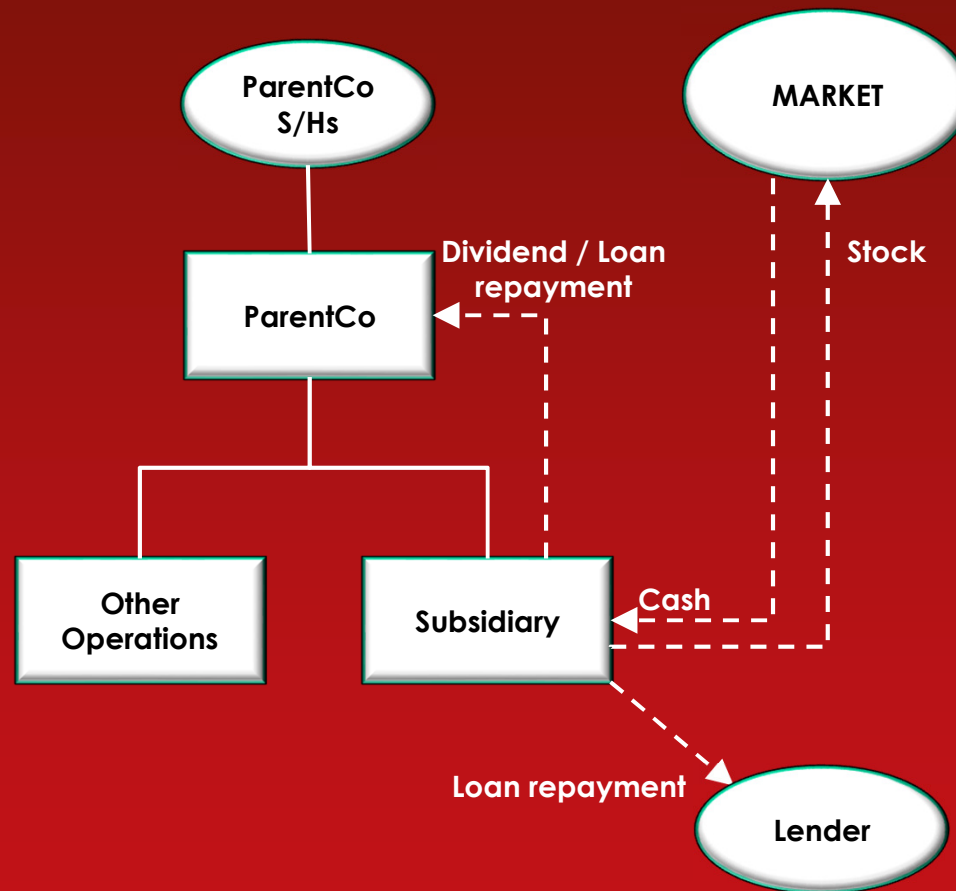
# Legal provides options, tax decides: Equity Carve-Out



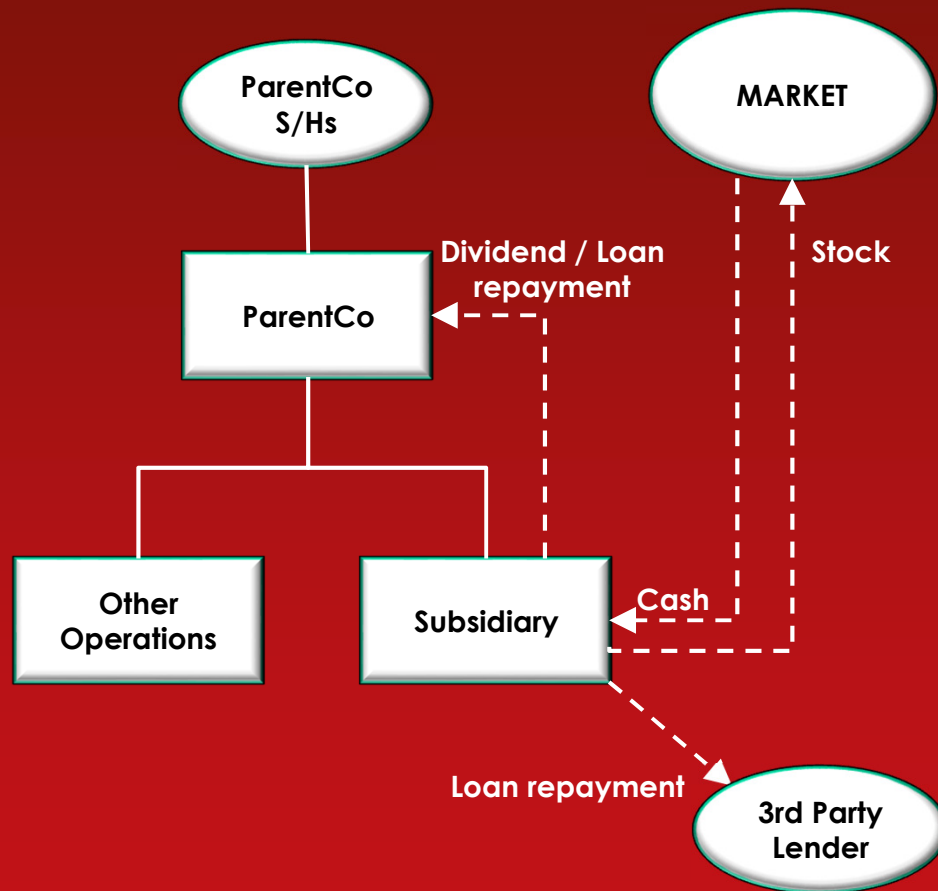
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# Legal provides options, tax decides: Equity Carve-Out – issue of shares



# Legal provides options, tax decides: Equity Carve-Out – issue of shares



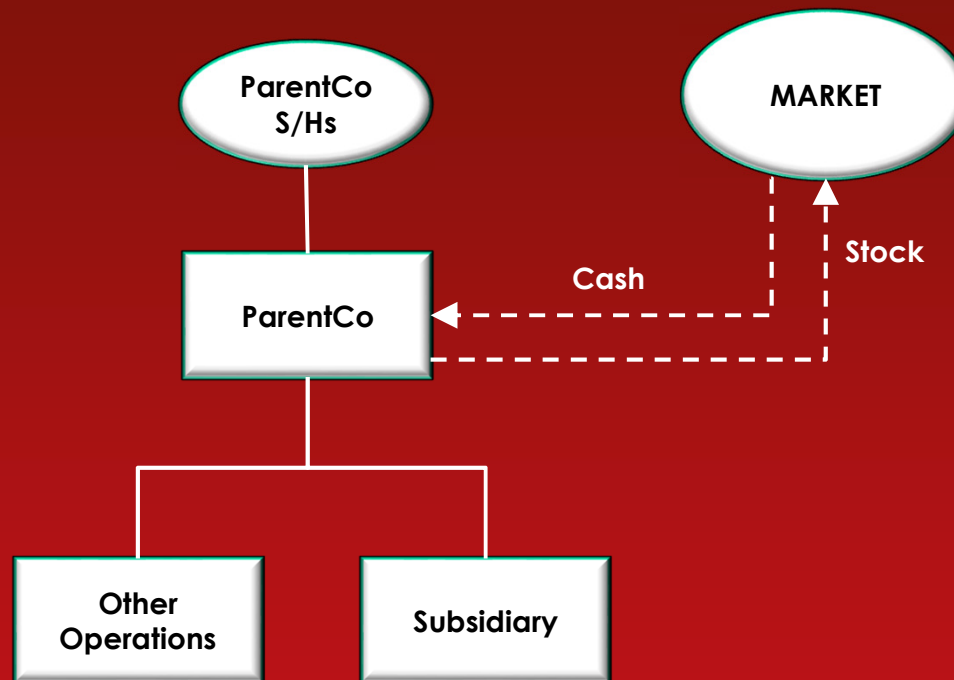
## Tax issues to be considered:

- Withholding tax on interest payments or principal repayments
  - EU – Interest and Royalties Directive
  - Tax treaties
  - Transfer pricing
- Withholding tax on dividend distributed by Subsidiary
  - Participation exemption
  - EU Parent – Subsidiary Directive
  - Tax treaties
- Taxation of the dividend received by ParentCo
  - Participation exemption
  - EU Parent – Subsidiary Directive
  - Tax treaties

### *Point of attention:* Minimum participation after the 'dilution'

- Minimum participation for tax consolidation / fiscal unity
- Minimum participation for tax free restructurings (e.g. upstream mergers under the EU Merger Directive)

# Legal provides options, tax decides: Equity Carve-Out – sale of shares

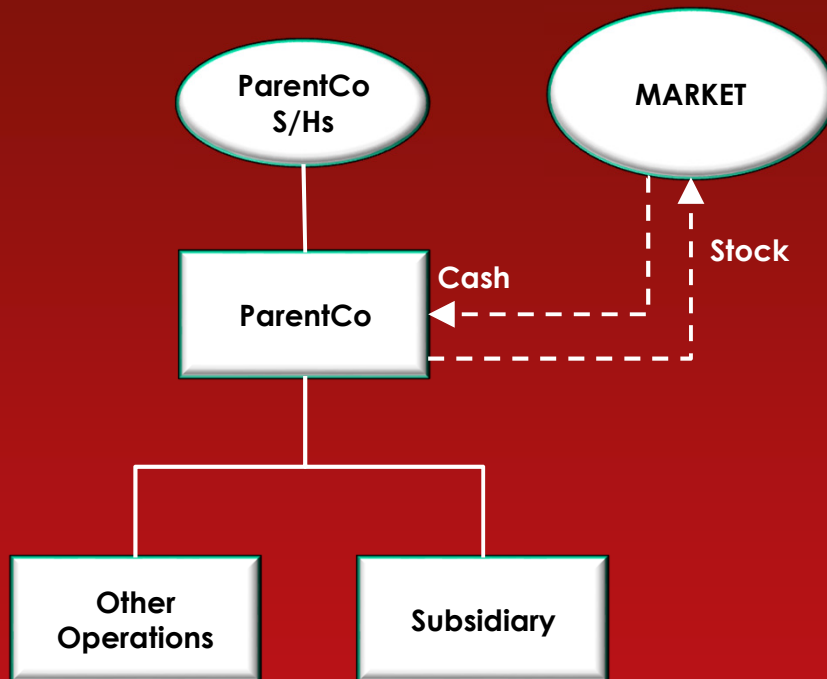




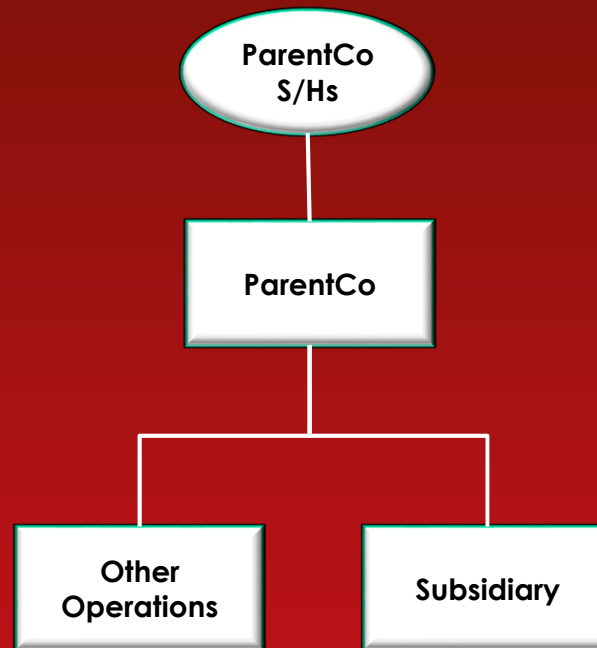
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Tax issues to be considered:

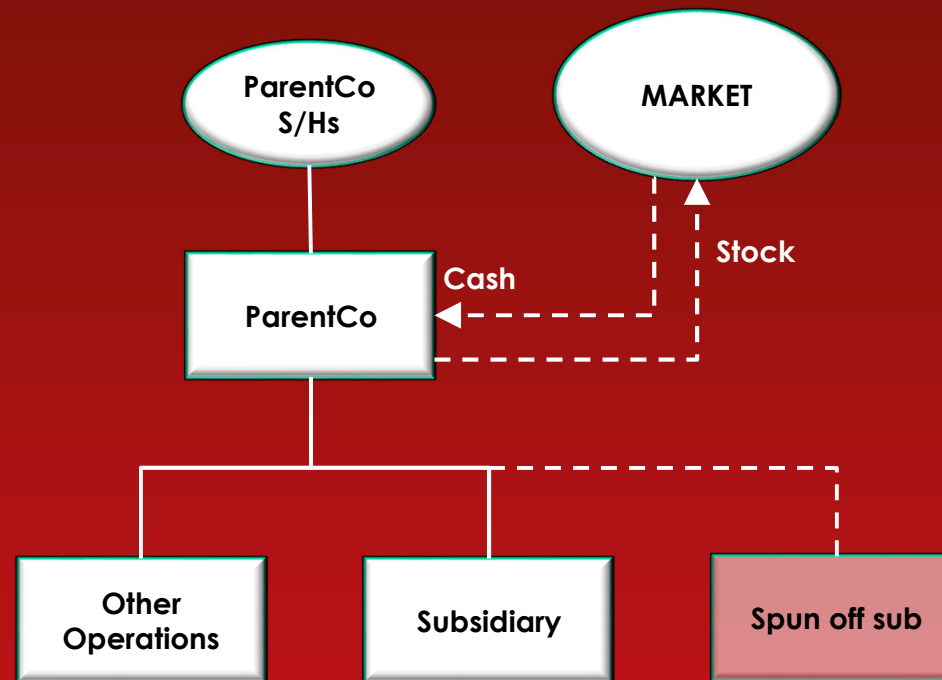
- Taxation on capital gain derived by ParentCo
  - Participation exemption
  - Tax treaties
  - Real estate in the country of the Subsidiary?
- Otherwise, deductibility of tax loss



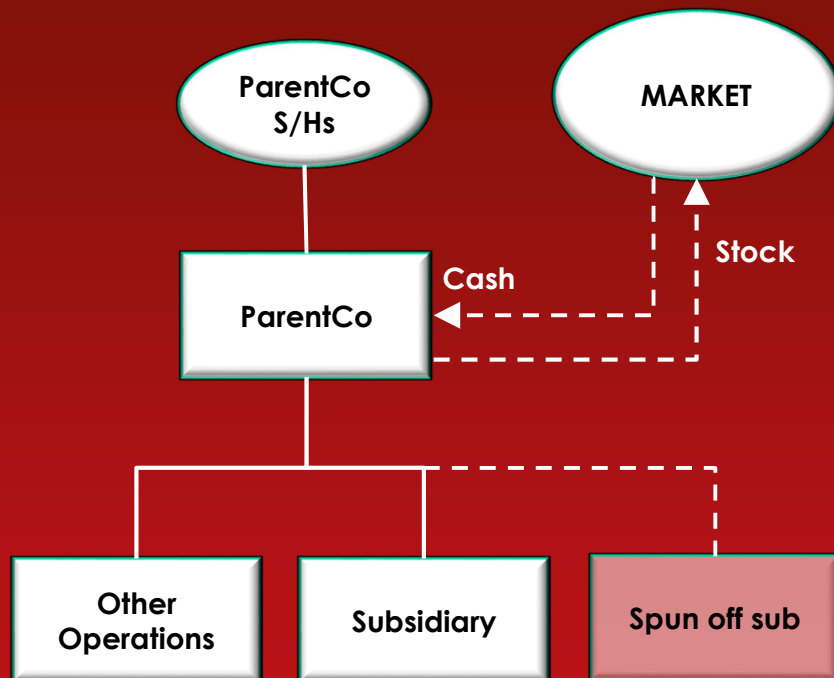
# Legal provides options, tax decides: Legal provides options, tax decides: Business Carve-Out



# Legal provides options, tax decides: Business Carve-Out



# Legal provides options, tax decides: Business Carve-Out



## Tax issues to be considered:

- Whether the spin off may take place on a tax neutral basis
  - EU Merger Directive
  - Domestic exemption
- Taxation on the capital gain derived by ParentCo
  - Participation exemption
  - Tax treaties
  - Real estate in the country of the Subsidiary?
- Otherwise, deductibility of tax loss

## Legal provides options, tax decides

- Taxes may reduce significantly the proceeds derived from the Carve-out (both corporate income taxes and withholding taxes)
- Tax efficient alternatives must be evaluated, and decided, in light of the business purpose of the Carve-out

# Thank you

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