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Structuring a Successful Foreign Investment in Spain

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By Rubén Ferrer, Resident Partner and David Riopérez, Gómez-Acebo & Pombo, New York

Overview

Transactions are never one and the same. Each target and every seller has their own particular set of peculiarities that require a bespoke approach to increase the chances of a successful closing. However, certain issues commonly arise in Spanish transactions from the perspective of a foreign, particularly non-EU or US-based investor.

This Quick Counsel aims to briefly highlight a number of such issues, notably the notification and public interest exceptions and key tax considerations, to thus provide foreign investors with the practical advice they need to help them pursue a successful M&A investment in Spain.

Notification requirement

As a general rule, there are no restrictions on foreign investment in Spain. However, a type of control and review process does exist to gather administrative, statistical and economic information concerning foreign transactions, as well as to take measures, where appropriate, for the purposes of safeguarding public order and security.

Such a control and review process may be carried out in the form of a mere notification (either before or after the transaction has taken place) or it may take the shape of a review and approval procedure prior to entering into the transaction. The process is applicable to both public and private foreign investors, including State-owned companies.

1. - Ex-post notification: On the whole, Spanish legislation requires foreign investments to be notified after the transaction is closed. The relevant form must be filed with the Foreign Investments Registry, at the Spanish Ministry of Economic Affairs and Competitiveness (www.mineco.gob.es); within one month from the date the investment was made or paid, as applicable. There are two exceptions to this rule when the total value of the investment does not exceed €3,005,060.52: (a) investments in real estate assets located in Spain; and (b) creation or participation in shared accounts, foundations, groupings of economic interest or cooperatives. In both cases no notification is required, unless the relevant investment is made through a tax haven.
2. - Ex-ante notification: Investments made through a tax haven must be notified beforehand, regardless of the amount, provided that such investment (a) results in a stake of more than 50% in the Spanish company; or (b) is not made in Spanish-listed securities or interests in mutual funds registered with any special registry at the Spanish Securities and Exchange Commission ("CNMV" www.cnmv.es). Once the ex-ante notification is made, the foreign investor may proceed with the envisaged transaction without further waiting or additional authorizations being required, except for the aforementioned ex-post notification.

Public interest exceptions

Very exceptionally, with respect to foreign investments involving the exercise of a public authority or activities that may affect public order, national security or public health, the Spanish Government may suspend the existing liberalization and restrict, or even forbid such investments. Once liberalization has been suspended, foreign investors must request prior administrative approval to carry out investments.

Further restrictions exist (mostly industry-specific) for foreign investments, although they are limited and, in general, similar to other EU member states. In some cases, restrictions apply to the stakes non-EU investors can hold in companies active in certain sensitive sectors such as air transportation, railways, telecoms, and private security. Moreover, these restrictions even apply to EU investors (e.g. mining rights, national defense).

A US investor must also bear in mind that:

1. - Certain businesses are subject to special filing/licensing regulations at an EU-level, which means that non-EU investors will have to first be approved in an EU-member state (not necessarily Spain) to be able to fully operate in such sectors (e.g. the investment services industry).
2. - Certain activities in Spain are regulated and entail specific compliance obligations that are applicable to all investors, be they Spanish or foreign investors. For example, an approval may be required to obtain a significant stake in a credit entity, an insurance company or a university. Such approvals generally aim to protect particularly significant services, ensuring that investors have the necessary expertise and financial means that such services require or that no relevant competition issues exist.
3. - When certain thresholds are met and control over the target company is acquired, investments in Spain are subject to EU or Spanish merger control:

   - EU merger control: Ex ante mandatory filing with the European Commission is required if (a) the combined aggregate worldwide turnover of the companies involved exceeds €5 billion and the aggregate EU-wide turnover of each of at least two of the companies involved exceeds €250 million; or (b) the combined aggregate worldwide turnover of the companies involved exceeds €2.5 billion (in each of at least three EU member States), and the combined aggregate turnover of all the companies exceeds €100 million as well as the aggregate turnover of each of at least two of the companies exceeds €5 million, plus the aggregate EU-wide turnover of each of at least two of the companies exceeds €100 million; in either case unless each of the companies achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU member State (http://ec.europa.eu/competition/mergers/procedures_en.html).
   - Spanish merger control: Ex ante mandatory filing with the Spanish National Markets and Competition Commission ("CNMC" www.cnmc.es) is required if the EU-level thresholds are not met but (a) as a result of the transaction, a market share equal to, or over 30% of the relevant product or service market within the relevant territory in Spain, is either acquired or increased, unless the target's turnover in Spain of the latest financial year does not exceed €10 million and the individual or joint market share of the companies is less than 50% in the relevant market; or (b) the companies' aggregate turnover in Spain of the previous financial year exceeds €240 million and the turnover in Spain of at least two of said companies exceeds €60 million.

4. Investments in listed companies entail certain particularities, among the most important:Disclosure obligations:

- An investor must notify the relevant listed company as well as the CNMV of any investment where such investor reaches any of the following thresholds in the target's voting rights: 3%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 60%, 70%, 75%, 80% or 90%. However, if the investor is a tax-haven based company, such disclosure obligation is triggered when reaching1% and any subsequent multiples.

- Mandatory takeover bids: In general, an investor is obliged to launch a public takeover bid for all the shares of the target company at an equitable price, when such investor (a) directly or indirectly acquires a percentage of voting rights equal to or in excess of 30%; or (b) appoints, within 24 months following any investment, a number of directors which, together with those already appointed by said investor, if any, represent more than 50% of the Board members.

Tax considerations

A foreign investor must also take into consideration – once a deal's structure is known as well as the nationality of the parties (and any SPV) involved – advice on potential tax issues. Very broadly, a US-based investor, for example, should note the differences between the tax implications in a (i) share deal where the purchaser acquires the entire target's assets and liabilities (except for those that are specifically carved out), and those in an (ii) asset deal where liabilities are limited to the assets and liabilities being expressly transferred. Certain tax breaks may also apply if the acquisition is implemented by means of a merger or a demerger.

Generally, asset deals involve the acquirer inheriting any tax liabilities attached to the acquired assets, although such liabilities can be materially limited if certain certificates are obtained from the seller in due course. In a share deal, careful attention should be paid to the assets of the company since, if real estate makes up more than 50% of such assets, transfer tax may be levied.

Generally, no VAT or transfer tax is levied in a share deal. VAT may be levied in an asset deal if the relevant assets do not constitute a stand-alone business or other conditions are met. In a share deal, if a post-acquisition merger between the special purpose vehicle ("SPV") and the target is envisaged, careful attention should be paid to such merger in order to ascertain whether any goodwill would be tax deductible as well as whether the beneficial tax regime for mergers in Spain would be applicable.

Conclusion

As in any other jurisdiction, M&A deals in Spain require careful preparation and strategic planning in order to anticipate any potential hurdles that could jeopardize the transaction and to ensure a successful closing.

Generally, a due diligence review (limited or extensive) is a necessary step in most transactions in Spain. No seller of a Spanish company ought to be surprised if a foreign or non-EU investor requests to carry out such an exercise. Normally, due diligence would focus mainly on financial, legal and tax aspects, although depending on the size of a target a commercial due diligence review may also be carried out. Virtual data rooms have been the norm for a number of years.

The matters described encompass a few of the key issues a foreign, including a US-based, investor and their legal counsel must bear in mind when approaching a potential deal in Spain. The input of experienced Spanish legal counsel is, also, advised in order to know how best to anticipate and overcome any potential hurdles along the way.

Useful Links

- Foreign Investments Registry, Spanish Ministry of Economic Affairs and Competitiveness
- Spanish Securities and Exchange Commission
- Spanish National Markets and Competition Commission
- Spanish Mercantile Registry
- European Commission