Global Private M&A Guide - Limited External Content - Spain

Common deal structures

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# What are the key private M&A deal structures?

Spanish M&A practice is increasingly internationalized and Spain can be considered a sophisticated market for M&A transactions. Business acquisition agreements are not regulated by any specific law and their structure and content can and will vary greatly depending on the particularities of the transaction and the covenants, agreements and undertakings of the parties to the agreement.

Share acquisitions and asset acquisitions are the key deal structures used in Spanish private M&A transactions. Other types of acquisition methods, such as mergers, may also be suitable depending on the circumstances. Schemes of arrangement are not contemplated by Spanish law.

*Share/asset deals*

In Spain, share purchases are generally more common than asset purchases. However, an asset purchase has advantages that may, in certain circumstances, make it more attractive to a buyer, for example, the buyer might favor an asset purchase in order to limit the inheritance of liabilities to the assets acquired, rather than to the whole company (although the buyer may, in any case, be liable for certain pre-transfer liabilities in relation to labor, tax and environmental matters).

Spanish M&A practice is familiar with both bilateral sales and auction sales. Auction processes are normally governed by a process letter prepared by the seller's advisers and structured in several phases: in an early stage of the process, bidders are normally asked to submit an indicative (nonbinding) offer on the basis of preliminary information and due diligence; as the process moves forward, those bidders that are preselected after the initial phase are normally requested to submit (after appropriate due diligence) a binding offer, together with a mark-up of the acquisition agreement previously delivered by the seller for these purposes.

*Mergers*

Under Spanish law, two or more companies can merge either by incorporation or by absorption.

In mergers by incorporation, the merging companies are wound up without going into liquidation and are succeeded by a new company, incorporated as a result of the merger, which acquires, by universal succession (transfer by operation of law), all assets and liabilities (including contracts, except where the contract itself prevents such a transfer). The former shareholders of the extinguished companies become shareholders of the successor company in accordance with the share exchange rate agreed as part of the merger.

In mergers by absorption, one or more companies (the absorbed companies) are wound up without going into liquidation and are absorbed by another company (the surviving company), which acquires, by universal succession, all their assets and liabilities. The former shareholders of the absorbed companies become shareholders of the surviving company in accordance with the share exchange rate agreed as part of the merger.

Mergers can thus be used in Spain as an alternative business transfer method, and Spanish law additionally regulates other reorganization operations, including partial or total demergers or spin-offs and global assignments of assets and liabilities, which also have the advantage of universal succession.

Spanish law allows and regulates all of such reorganization operations cross-border.

# Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

Spanish corporate law provides for a wide range of company types. The most commonly used are limited liability companies, in the form of either:

Sociedades Anónimas (SA), i.e., "corporations"

Sociedades de Responsabilidad Limitada (SRL or SL), i.e., "limited liability companies"

Sole shareholder companies are permitted under Spanish law and no major restrictions apply to them, other than the requirement of adding the word "unipersonal" (i.e., "sole shareholder") or its abbreviation "U" (so we often see "SLU" or "SAU") to the corporate name and the obligation to keep a special book to record agreements between the company and the sole shareholder.

SAs are the most common corporate vehicle in Spain for multinationals and listed companies. However, the use of SLs is more frequent since Spanish corporate law establishes more stringent requirements for operating an SA, including an increase of the minimum capital required to incorporate a company.

# What are the different types of limited liability companies?

Spanish limited liability companies generally take the form of: (i) an SA; or (ii) an SL.

In general terms, SL are more suitable than SA for small and medium size companies and SA are normally used for larger companies, such as listed companies (where the use of SA is mandatory). However, apart from some differences with respect to specific items (such as the minimum share capital, the valuation of the contributions in kind or the term of the directors appointment), in practical terms both types of companies are flexible enough to accommodate to different investment structures, including the possibility to set up restrictions to the transfer of shares (such as rights of first refusal, rights of first option, drag along rights and tag along rights) and the allocation of different economic rights to the shares.

# Is there a restriction on shareholder numbers?

There is no restriction on the number of shareholders. Therefore, both SAs and SRLs can have as many shareholders as convenient on the basis of the particular circumstances of the relevant transaction.

# What are the key features of a share sale and purchase?

Spanish practice is familiar with the main international standards with respect to the structure and content of the agreements governing the acquisition of shares. An SPA is usually prepared and it is fairly common to face provisions relating to price determination and adjustment (cash-free debt-free/normalized working capital adjustment, NAV adjustments, locked box structures, earn-outs, etc.), conditions precedent to completion, including mandatory (such as merger control, if applicable) and voluntary conditions (such as material adverse effect conditions or waiver to change of control provisions), interim period obligations, representations and warranties, and indemnity undertakings.

In terms of transfer formalities, the following applies:

Shares in SA companies may be represented by either share certificates or accounting entries and may be freely transferred (unless the bylaws set out otherwise when shares are registered, e.g., specific transfer restrictions, such as first refusal rights in favor of other shareholders or the company itself). If shares are represented by share certificates, they can be transferred by the endorsement of the relevant share certificates to the buyer. Transfer of unregistered (bearer) shares is performed by handing over the relevant certificates, but the transfer will not be effective vis-à-vis third parties until notarized before a notary public (for transfers carried out without the intervention of a financial institution or securities broker). Notarizing transfers of shares (even if not legally required) is common practice. Transfers of registered shares must also be recorded in the shareholders' register.

SL share capital is represented by quotas, which are not "negotiable securities" and cannot be represented by share certificates or accounting entries. An SL cannot be listed on the securities markets. SL quotas must be transferred by means of a notarial deed (and the transfer recorded in the quotaholders' register).

Share deals are not subject to consultation or approval by employees, although it is common practice to inform employees as a matter of courtesy. However, if, as part of the share deal, it is envisaged that employment-related measures will be adopted that will imply material changes in the working conditions, geographical mobility, dismissals, etc. of the employees, it will be necessary to open a consultation with employee representatives to inform and negotiate with those representatives regarding the measures to be taken and their effect on employee working conditions — following the procedures set out in the Spanish Workers' Statute.

Share deals may be subject to the approval of the general shareholders' meeting. In this regard, Article 160 of the Spanish Companies Act requires that any acquisition, sale or contribution to another company of material assets must be approved by the general shareholders' meeting. The Companies Act presumes that an asset is material when the amount of the transaction exceeds 25% of the total value of the assets in the last approved balance sheet.

# What are the key features of an asset sale and purchase?

An asset purchase agreement is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction. In asset deals, it is common to see most of the topics described above in respect of the share deals, including purchase price adjustments, conditions precedent to completion, interim period obligations and warranties and indemnities.

In relation to transfer formalities, each individual asset, liability and contractual position within the scope of the agreement must be transferred in accordance with the particular transfer formalities that apply to it. In this sense, the following should be highlighted:

For some assets, the transfer formalities will be fulfilled simply by delivering the asset to the buyer, but in other cases, the formalities are more prescriptive and may require notarization and registration with public registries, as is the case with respect to real property, in rem rights (e.g., mortgage, pledge) or intellectual property (e.g., trademarks).

Permits and licenses are not automatically assigned in transfers of the business' entire assets (i.e., transfers of going concerns), so an application for consent to assign will have to be made to the relevant authority, or a new license or permit will be required, which may be a disadvantage for some asset deals.

Contracts are not automatically assigned, unless the assignment is specifically permitted under the relevant contract.

In some cases, particularly when the asset transfer refers to a business unit that is transferred as a "going concern," tax, labor and environmental liabilities may be transferred to the buyer as a matter of law.

Asset deals do not require prior consultation with or approval of employees, although there is an obligation to inform employees where an entire business is being sold. As with share acquisitions, if, as part of the asset deal, it is envisaged that employment-related measures will be adopted (e.g., material changes in working conditions, geographical mobility, dismissals, etc.), it will be necessary to open a consultation with employee representatives to inform and negotiate with those representatives regarding the measures to be taken and their effect on employee working conditions — following the procedures set out in the Spanish Workers' Statute.

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