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M&A deal practice in Spain and the UK

Whilst mid-market transaction volumes involving UK and Spanish parties are lower than activity between the UK and France or Germany (for example), the UK is an important market for Spanish acquirers (and vice versa) especially now that the post-Brexit landscape has become clearer.

The commercial drivers of course vary between industries and transactions, but the UK remains an accessible launchpad into the English-speaking world for Spanish buyers, and similarly expansion into Spain can be a steppingstone for UK businesses into historically overlooked Latin American markets. Moreover, the UK and Spain are of course large markets in their own right for many industries looking to expand internationally.

Despite the important cultural and legal differences between the two countries, the big picture in terms of the M&A process is surprisingly similar. For example:

- the scope of the warranties and indemnities in the SPA will be broadly similar in both jurisdictions, with differences depending more on the industry sector of the target company and on the parties' relative bargaining power;
- the financial and time limitations on warranty and indemnity, such as the overall cap, thresholds, baskets and de minimis, are also generally similar with differences flowing more from the parties' bargaining position;
- in both the UK and Spain, institutional sellers would expect to give very limited warranties usually extending only to ownership of shares or assets and legal capacity to sell them;
- whilst the use of warranty insurance has historically been more widespread in the UK, its use is now becoming more common in Spain with policy structures and terms similar in both countries;
- the use of locked box structures versus completion accounts is also similar across both countries, with locked box deals typically arising on controlled auction sales where the seller has increased bargaining strength; and
- the scope and duration of non-compete and non-solicitation undertakings in SPAs is also similar in UK and Spanish deals.

However, there are some important differences in the legal and tax regimes in the UK and Spain which cross-border buyers should consider, as they may have a significant bearing on the choice of structure for the transaction (i.e., share deal versus asset deal) or on the complexity and length of the transaction process. As well as any sector-specific considerations that may be relevant, a buyer thinking of expanding into the UK or Spain (as the case may be) bid should be aware of the following:

- **Transaction structure**: in the UK, any acquisition will take the form of either a purchase of the shares in a company or the purchase of a business and its related assets. With very limited exceptions, none of the jurisdictions within the UK recognise the concept of a true merger or fusion of two companies, where the entire business and related assets and liabilities of Company A are transferred by operation of law to Company B with Company A then ceasing to exist. Likewise, in Spain, most transactions are structured as share purchases or as business and asset purchases, although they can also be structured as "true" mergers. In both countries, the choice of structure will depend on:
    - the nature of the assets comprised in the underlying business. For example, it may be very time-consuming to transfer individual contracts or licences used in a business, and it may be quicker and easier to buy the shares in the target company and thereby acquire its contracts and licences (subject to any change of control restrictions of course).
    - the extent to which the buyer is able to conduct due diligence – a business and assets deal may be less risky than a share deal or a merger/fusion where the buyer doesn't have full visibility of the target's liabilities.
    - tax considerations (see below).

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- **Tax**: the differences in the tax regimes between the two countries means that buyers and sellers may have different preferences in terms of acquisition structures. In addition to any transaction-specific considerations, the following general factors are likely to be relevant:
  - in the UK, sellers often prefer share disposals for tax reasons. On smaller deals, owner-manager sellers will generally prefer a share sale in order to qualify for Business Asset Disposal Relief (formerly known as Entrepreneurs Relief) on Capital Gains Tax, which can reduce the effective rate of tax on the first £1m of taxable lifetime gains per person to 10% rather than the headline rate of 20%. Corporate sellers may prefer share sales in order to qualify for the Substantial Shareholding Exemption from corporation tax on the transaction, rather than being subject to potential corporation tax on an asset sale. Similarly, the tax treatment of share sales in Spain may be more advantageous to sellers than for business and asset sales. In either country, detailed tax structuring advice will be required at an early stage in any transaction.
  - stamp or transfer taxes may be an important consideration for buyers of companies and businesses whether in the UK or Spain. Stamp duty is payable on acquisitions of shareholdings in UK companies at the rate of 0.5% of the purchase price, whereas stamp taxes on business acquisitions will depend on the nature of the assets on the balance sheet. Many asset classes (such as IP rights, goodwill and contracts) are not subject to any stamp taxes, but any real property (i.e., land and buildings) will be subject to Stamp Duty Land Tax (or its Welsh or Scottish equivalents) at marginal rates (which depend on the value of the property) of up to 5% in England, 6% in Wales and 12% in Scotland. In Spain, as a general rule, share transfer tax is not payable in the transfer of shares in an unlisted company, but notarial fees of between 0.25% and 2% (depending on the region of Spain) will be payable on such transfers. On a business and assets deal, transfer taxes of 4% (on moveable assets) and up to 8% are payable. Careful analysis will be required to work out whether a share deal or an asset deal is cheaper with regard to stamp and transfer taxes.
- **Employee consultation:** employee consultation requirements are similar in Spain and the UK. As a general rule in both countries, the acquisition of the shares in a company (or the shares of its parent) will not trigger any employee consultation obligations, unless there is a specific agreement in place with the workforce or a trade union. The acquisition of a business and assets in both countries will trigger an obligation to inform the workforce in all cases, but it will only trigger a consultation obligation if the buyer plans certain defined “measures” such as redundancies, changes to employee location or changes to employment terms.
- **Merger control procedure:** although the substantive merger control criteria in the UK and Spain have certain similarities, there is an important procedural difference. In Spain, a merger control notification is mandatory above certain financial thresholds but in the UK it perfectly legal in most cases (see below) for parties not to notify a merger to the authorities which meets the statutory jurisdictional thresholds and to complete a merger without any prior clearance. The practical effect of the UK regime is that the parties to a merger can in most cases decide to run the risk of not notifying the transaction on the basis that they are confident that the Competition and Markets Authority would either not investigate or would clear the merger, and therefore avoid the mandatory waiting period that arises in many jurisdictions. However, if the CMA picks up on the deal through its own market intelligence activities or the transaction is notified to the CMA by a third party, then it could call in a transaction that has already been completed which is undesirable to say the least given that the CMA may ultimately require that the transaction be “undone”. In Spain, the mandatory notification procedure is less flexible but on the other hand its mandatory nature removes some of the difficult discussions that sometimes arise on UK transaction where seller and buyer have differing views on whether to make a notification.
- The major exception to the voluntary notification regime in the UK is under the National Security Investment Act 2021, which sets out certain sectors (all related to defence, technology, energy, communications and transport) where a notification is mandatory. Many share and asset acquisitions in those sectors will need to be referred to the UK Government for approval once the National Security Investment Act 2021 comes into force (probably later this year). The assessment will be by reference to the effect of the merger on UK national security rather than on conventional competition law grounds.

Specific advice should be sought from appropriate legal and tax advisers in the UK or Spain in relation to any transaction, as the comments above are intended as general observations only and (in the case of tax in particular) are subject to frequent changes.

Lewis Silkin’s Spanish Desk works regularly with Spanish buyers on UK-focused M&A deals across a wide range of sectors. We’d be delighted to discuss any questions you may have regarding UK deal practice at an early stage in any discussions you may be having in relation to possible UK acquisition.