The Mergers & Acquisitions Review

Seventh Edition

Editors
Simon Robinson and Mark Zerdin

Law Business Research

The Mergers & Acquisitions Review

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The publisher would like to welcome Mark Zerdin, also a partner at Slaughter and May, as current and future editor of *The Mergers & Acquisitions Review*. We are delighted to have Mark on board, and we look forward to future editions in Mark's very capable editorial hands.

Gideon Roberton
Publisher, The Law Reviews
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CONTENTS

Editor's Preface xiii
Mark Zerdin

Chapter 1 EUROPEAN OVERVIEW 1
Mark Zerdin

Chapter 2 EUROPEAN COMPETITION 13
Götz Drauz and Michael Rosenthal

Chapter 3 EUROPEAN PRIVATE EQUITY 20
Thomas Sacher, Steffen Schniepp and Guido Ruegenberg

Chapter 4 US ANTITRUST 33
Scott A Sher, Christopher A Williams and Bradley T Tennis

Chapter 5 US ENERGY TRANSACTIONS 53
Sarah A W Fitts, Adam Hankiss and Christopher R Aung

Chapter 6 SHAREHOLDERS AND BOARDS OF DIRECTORS IN US MERGERS & ACQUISITIONS 69
George A Casey and Cody L Wright

Chapter 7 CROSS-BORDER EMPLOYMENT ASPECTS OF INTERNATIONAL M&A 83
Marjorie Culver

Chapter 8 AUSTRALIA 93
Nicola Wakefield Evans and Lee Horan

Chapter 9 AUSTRIA 107
Christian Herbst

Chapter 10 BAHRAIN 120
Haifa Khunji and Maryia Abdul Rahman

Chapter 11 BELGIUM 135
Olivier Clevenbergh, Gisèle Rosselle and Carl-Philip de Villegas

Chapter 12 BRAZIL........ 144
Marcus Fontes, Max Fontes, Paulo de Tarso Ribeiro and Juliana Huang

Chapter 13 BRITISH VIRGIN ISLANDS 155
Jacqueline Daley-Aspinall and Murray Roberts

Chapter 14 BULGARIA........ 169
Yordan Naydenov and Nikolay Kolev

Chapter 15 CANADA........ 179
Robert Yalden, Ward Sellers and Emmanuel Pressman

Chapter 16 CAYMAN ISLANDS 196
Wendy L Lee

Chapter 17 CHINA 219
Fred Chang and Wang Xiaoxiao

Chapter 18 COLOMBIA........ 232
Sergio Michelsen Jaramillo

Chapter 19 COSTA RICA 247
John Aguilar Jr and Alvaro Quesada

Chapter 20 CYPRUS 255
Nancy Ch Erotocritou

Chapter 21 CZECH REPUBLIC........ 261
Lukáš Ševčík, Jitka Logesová and Bohdana Pražská

Chapter 22 ECUADOR 269
Diego Pérez-Ordóñez

Chapter 23 EGYPT 279
Omar S Bassiouny and Mohamed Oweis

Chapter 24 ESTONIA 287
Sven Papp and Karl-Erich Trisberg

Chapter 25 FINLAND 300
Jan Ollila, Anders Carlberg and Wilhelm Eklund

Chapter 26 FRANCE 311
Didier Martin

Chapter 27 GERMANY 326
Heinrich Knepper

Chapter 28 GIBRALTAR 338
Steven Caetano

Chapter 29 GREECE 348
Cleomenis G Yannikas, Vassilis-Thomas G Karantounias and Sophia K Grigoriadou

Chapter 30 GUATEMALA 361
Jorge Luis Arenales and Luis Pedro Del Valle

Chapter 31 GUERNSEY 369
Caroline Chan

Chapter 32 HONG KONG 379
Jason Webber

Chapter 33 HUNGARY 390
Levente Szabó and Réka Vízi-Magyarosi

Chapter 34 INDIA 405
Justin Bharucha

Chapter 35 INDONESIA 425
Yozua Makes

Chapter 36 IRELAND 439
Fergus Bolster

Chapter 37 ISRAEL 447
Clifford Davis and Keith Shaw

Chapter 38 ITALY 456
Maurizio Bernardi, Roberta Di Vieto and Luca Occhetta

Chapter 39 JAPAN 471
Hiroki Kodate and Kenichiro Tsuda

Chapter 40 KAZAKHSTAN 481
Aset Shyngyssov and Klara Nurgaziyeva

Chapter 41 KENYA 489
Joyce Karanja-Ng'ang'a and Wathingira Muthang'ato

Chapter 42 KOREA 499
Jong Koo Park, Bo Yong Ahn, Sung Uk Park and Sung Il Yoon

Chapter 43 LITHUANIA 513
Giedrius Kolesnikovas and Emil Radzihovsky

Chapter 44 LUXEMBOURG 523
Marie-Béatrice Noble and Stéphanie Antoine

Chapter 45 MALAYSIA 537
Janet Looi Lai Heng and Fariz Abdul Aziz

Chapter 46 MALTA 548
Jean C Farrugia and Bradley Gatt

Chapter 47 MEXICO 558
Aarón Levet V and Alberto Solís M

Chapter 48 MONTENEGRO 567
Slaven Moravčević and Nikola Babić

Chapter 49 NETHERLANDS 577
Onno Boerstra and Guus Kemperink

Chapter 50 NIGERIA 596
Lawrence Fubara Anga

Chapter 51 NORWAY 601
Ole K Aabø-Evensen

Chapter 52 PANAMA 639
Julianne Canavaggio

Chapter 53 PERU 649
Emil Ruppert and Sergio Amiel

Chapter 54 PHILIPPINES 659
Rafael A Morales, Philbert E Varona, Marie Corinne T Balbido and Hiyasmin H Lapitan

Chapter 55 POLAND 669
Paweł Grabowski, Rafał Celej and Agata Sokołowska

Chapter 56 PORTUGAL 680
Martim Morgado and João Galvão

Chapter 57 ROMANIA 692
Andreea Hulub, Alexandra Malea and Vlad Ambrozie

Chapter 58 RUSSIA 707
Hannes Lubitzsch and Ekaterina Ponka

Chapter 59 SERBIA 715
Matija Vojnović and Luka Lopičić

Chapter 60 SINGAPORE 725
Lee Suet-Fern and Elizabeth Kong Sau-Wai

Chapter 61 SOUTH AFRICA 739
Ezra Davids and Ashleigh Hale

Chapter 62 SPAIN 752
Christian Hoedl and Javier Ruiz-Cámara

Chapter 63 SWEDEN 769
Biörn Riese, Eva Hägg and Anna Brannemark

Chapter 64 SWITZERLAND 778
Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon, Harun Can and David Mamane

Chapter 65 THAILAND 790
Troy Schooneman and Jeffrey Sok

Chapter 66 TURKEY 799
Tunç Lokmanhekim and Nazlı Nil Yukaruç

Chapter 67 UKRAINE 808
Anna Babych and Artem Gryadushchyy

Chapter 68 UNITED KINGDOM 819
Mark Zerdin

Chapter 69 UNITED STATES 845
Richard Hall and Mark Greene

Chapter 70 VENEZUELA 882
Guillermo de la Rosa, Juan D Alfonzo, Nelson Borjas and Adriana Bello R

Appendix 1 ABOUT THE AUTHORS 895

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 941

EDITOR'S PREFACE

This past year has seen some surprising twists and turns, not only in the mergers and acquisitions markets but also in the economic and political environments. November saw the re-election of Barack Obama, although this had less of an impact on the markets than an announcement by Ben Bernanke in May that the US Federal Reserve would consider a slowdown in its programme of quantitative easing. On the other side of the Pacific, Xi Jinping has outlined a new communist doctrine – the 'Chinese dream'. The doctrine reflects the changing economic outlook in China where growth will be increasingly consumer rather than investment-led. A new political rhetoric has also emerged in Japan as Shinzo Abe, elected in a landslide December victory, seeks to reinvigorate the Japanese economy. Both rebrandings flirt with nationalist sentiment and the attitude of these two countries towards one another will continue to bear on the region's business environment.

In Europe, despite an awkward Cypriot bailout, the sovereign debt crisis showed signs of stability and government bond yields are falling. Europe also improved its attractiveness in the eyes of investors and remains the largest destination for foreign direct investment. However, there has yet to be a return to growth. Investors seem split fairly evenly between those who believe Europe will emerge from the crisis in the next three years, and those who believe it will take five years or more. In any event, a return to the boom years is unlikely in the near future, particularly as the emerging markets see a relative slowdown. The IMF data for 2012 shows that the combined growth rate of India and China is at its lowest in over 20 years while global growth fell below 2.5 per cent in the second half of 2012. This global slowdown continues to pull M&A figures down making 2012 the fifth consecutive year in which deal values fell globally.

There are reasons for optimism though, particularly in the US market which has seen some substantial deals (the acquisitions of Heinz and Virgin Media being particular highlights). These deals have been made possible by the return of debt financing where the right deal can attract very favourable terms. Equities have also performed much more strongly over the past year. In May 2013 both the Dow Jones and the FTSE 100 hit record highs – validating to some extent the aggressive monetary policies pursued in

the US and the UK. Whether political will can start to lift the markets more broadly still remains to be seen.

I would like to thank the contributors for their support in producing the seventh edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2013

Chapter 62

SPAIN

Christian Hoedl and Javier Ruiz-Cámara[1]

I OVERVIEW OF M&A ACTIVITY

During the second half of 2012 and the first quarter of 2013, the reforms implemented by the government (reform of the financial institutions, reduction of the budget deficit and labour market reform) seem to have steered Spain in the right direction. The risk premium of Spanish bonds as compared to German bonds has fallen back to pre-crisis levels. A total of 38 financial institutions (mainly savings banks, the Spanish *cajas*) have been merged, banks in general have been recapitalised (in part with the €41 billion support from the European bailout fund) and impaired real estate assets and loans worth €55 billion have been transferred to the SAREB (popularly known as the 'bad bank'). Furthermore, Spain has gained competitiveness with a sharp decrease in unit labour costs and a first-time-ever foreign current account surplus.

This notwithstanding, the Spanish economy continues in recession, the budget deficit at 7 per cent of GDP, unemployment at a record 27 per cent, the level of public and private debt is unsustainable in the medium term, and many (in particular small and medium-sized) Spanish companies continue to suffer the consequences of a severe credit crunch.

As a consequence, Spanish companies and banks must continue the deleveraging and recapitalisation process started in 2011 and 2012, which has heavily influenced M&A activity over the last 12 months. The main drivers for transactions (as summarised herein) have been:

a the continued restructuring of the savings banks, the takeover of some of the resulting financial institutions by Spain's big banks, and the divestment of performing and non-performing loan portfolios (NPL portfolios), bancassurance businesses, industrial shareholdings and other non-bank related assets;

1 Christian Hoedl is a partner and Javier Ruiz-Cámara is a counsel at Uría Menéndez.

b the first disposals by the SAREB of real estate-backed loans and properties;
c the sale of non-core assets by Spanish corporations;
d privatisations by the Spanish government and regions;
e a (limited) number of exits by private equity funds from their pre-2008 investments;
f a decrease in valuations with prices starting to meet investors' expectations; and
g as a consequence, an increased appetite for Spanish assets by foreign investors (both strategic and private equity, including opportunistic funds), from Europe and the United States, and more recently by Chinese and other Asian private or sovereign investors and Latin American family offices and multinationals.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

i Corporate law

The basic Spanish legal framework for corporate acquisitions, mergers and other types of corporate restructuring includes both contract and corporate law.

Spanish contract law is mainly contained in the Civil and Commercial Codes. However, since 2006 the General Codifying Commission has been working on a new 'Mercantile Code', the aim of which is to gather the entire body of law on commercial contracts in one piece of legislation. In fact, the Minister of Justice has announced that the government will introduce the bill in Parliament during this term.

The Companies Law governs, *inter alia*, the corporate aspects of the acquisition of joint stock companies (*sociedades anónimas*) and limited liability companies (*sociedades de responsabilidad limitada*), which is the most common type in Spain. It also sets out the basic legal framework for listed companies.

The Law on Corporate Restructuring regulates corporate restructurings such as mergers, spin-offs, conversions or *en bloc* transfers of assets and liabilities of all types of companies. The Law on Corporate Restructuring specifically regulates leveraged buyouts (LBO) (i.e., mergers between two or more companies where one has incurred debt during the preceding three years in order to acquire control or the essential assets of the target company). The law requires that an independent expert determine whether the LBO merger constitutes financial assistance (which, in general terms, is prohibited by the Companies Law). It does not, however, establish the effects of an independent expert finding that there has been financial assistance; a circumstance that creates uncertainty in LBO mergers (particularly due to the interpretation of the law by companies registries in Spain, which has not been as consistent as would have been desirable).[2]

The Stock Market Law regulates public offerings, official listings of securities, transactions related to listed securities and takeovers, whereas the legal framework for

2 Translations (into English and French) of these laws are available at www.mjusticia.gob.es (the webpage of the Spanish Ministry of Justice).

listed companies is now contained in the Companies Law. The Stock Market Law is developed by a number of additional pieces of legislation.[3]

ii Insolvency law

The general legal framework on insolvency is primarily contained in the Insolvency Law.

The Insolvency Law created a single insolvency procedure that is applicable to all insolvent debtors (i.e., a debtor that is unable to, or will imminently be unable to, regularly comply in a timely manner with its payment obligations). The single procedure has a joint phase and two different outcomes: (1) a creditors' agreement (the purpose of which is for the debtor and the creditors to reach an agreement on the payment of outstanding claims to enable the debtor to restructure its business); or (2) the liquidation of the debtor's assets to satisfy its debts. The Insolvency Law has also helped to clarify the risks associated with the clawback (rescission) of acts carried out within the two years preceding the declaration of insolvency that are considered detrimental to the debtor's estate.

The Insolvency Law is generally seen as a positive development since it replaced the outdated insolvency regulations of the 19th century Commercial Code. Nevertheless, it must be kept in mind that the law was passed in a more favourable economic climate in which few insolvency proceedings were initiated. Indeed, the Insolvency Law has only really been tested in practice during the turbulent past few years, during which time the number of insolvency proceedings has increased dramatically. As a consequence, the Insolvency Law was recently amended by Law 38/2011 of 10 October. The reform aims to bring the Insolvency Law into line with current practice and improve certain technical aspects that have been criticised by judges, scholars and lawyers alike.

In this regard, the reform introduced a mechanism by virtue of which refinancing agreements may be recognised by judges (*homologación judicial*), in order to provide the Spanish pre-insolvency law with an alternative to avoid the declaration of insolvency of a company and its liquidation.

The Insolvency Law sets forth that the insolvency procedure for credit institutions and investment service companies is that set out in the Insolvency Law adapted to the special insolvency rules established in their specific legislation; in this regard, once the court adopts a preliminary decision on an insolvency, the court clerk must serve notice of the insolvency on the Bank of Spain and on the National Stock Exchange Commission (CNMV).

In fact, in recent years the Bank of Spain, the Deposit Guarantee Fund and the Fund for Orderly Bank Restructuring (FROB) have been granted sufficient powers to address the difficulties that credit entities face when applying rationalisation and reorganisation measures with the intention that this will avoid certain banks being declared insolvent.

3 All of these are available for consultation at www.cnmv.es (the webpage of the National Stock Exchange Commission, the agency in charge of supervising and inspecting the Spanish stock markets).

Going forward, the Spanish government recently approved Royal Decree-Law 24/2012 of 31 August on the Restructuring and Dissolution of Credit Entities[4] (Royal Decree-Law 24/2012), which includes: (1) early action measures for those entities that breach, or are likely to breach, solvency, liquidity, organisational structural or internal control requirements, provided that it is foreseeable that such institutions will be able to overcome the situation themselves (i.e., through exceptional and temporary financial assistance); (2) restructuring actions for those entities that require public financial support to ensure their viability but are objectively considered as being able to repay the amount of the assistance within the term granted; and (3) the orderly dissolution of entities that are unable to pay back the funds received within a reasonable term and thus do not comply with solvency requirements, but which insolvency is considered detrimental to the general interest.

In the case of orderly dissolutions, Royal Decree-Law 24/2012 provides for the sale of the relevant entity's business, along with the transfer of some or all of its assets and liabilities either to a 'bridge bank' or to an asset management company.

iii Other regulations

Other matters relating to tax, employment, antitrust, unfair competition, administrative and regulatory issues, alternative dispute resolution and other laws and regulations also form part of the M&A legal framework (see below).

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Structural reforms: credit entities

Three of the key milestones of the reforms introduced by the Spanish government since mid-2012 have been: (1) the Memorandum of Understanding on Financial-Sector Policy Conditionality signed by the Kingdom of Spain, the Bank of Spain and the European Commission on 23 July 2012 (MoU), (2) the Master Financial Assistance Facility Agreement signed by the Kingdom of Spain, the Bank of Spain, the FROB and the European Financial Stability Facility (which was subsequently assigned to the European Stability Mechanism) on 24 July 2012 to make up to €100 billion available to rescue Spain's ailing banks, and (3) the 2013–2016 Stability Programme and the National Reform Programme, both approved in April 2013, for submission to the European Commission.

The MoU laid out the foundations of the policies to be implemented by the Spanish government as a condition for Spanish credit entities to have access to the financial assistance scheme for their restructuring and recapitalisation. The MoU has resulted in several pieces of legislation affecting various areas of the Spanish legal system, in particular financial and banking regulation.

4 Subsequently ratified by Congress as Law 9/2012 of 14 November on the Restructuring and Dissolution of Credit Entities.

One of the pieces of legislation deriving from the MoU is the aforementioned Royal Decree-Law 24/2012, which sets out the regulations applicable to the three different scenarios described, depending on the seriousness of the difficulties faced by the credit entity and the likelihood of it becoming insolvent.

One of the most important commitments that was given in the MoU and is addressed by Royal Decree-Law 24/2012, is the creation of a partially state-owned company to manage real estate assets, the Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria, SA or SAREB (popularly known as the 'bad bank'). The purpose of SAREB is to acquire real estate-related assets held by credit entities under the control of, or that have received financial assistance from, the FROB (note that SAREB is not to be confused with the real estate asset management companies to be created pursuant to Law 8/2012 of 30 October on the Restructuring and Sale of Real Estate Assets of the Banking Industry,[5] by entities that are not controlled and have not received assistance from the FROB), namely: foreclosed assets and loans or credits granted to real estate developers and controlling corporate holdings linked to the real estate sector.

Another forthcoming piece of regulation enacted to comply with the commitments contained in the MoU is the law addressing the future of the savings banks sector. The government is currently working on the Draft Bill on Savings Banks and Bank Foundations, which sets out (1) the new legal framework for savings banks that maintain their status as such (focused on the traditional model and aimed at savers and SMEs); and (2) the conversion of those savings banks that hold a stake in a bank into bank foundations to be run in a professional manner pursuant to strict requirements on corporate governance.

The main novelty of this draft bill is the introduction – mirroring the Italian model of the *fondazioni di origine bancaria* – of a new type of financial institution into the Spanish legal system: the bank foundation. During the first stage of the Spanish financial sector consolidation process, the financial businesses of most savings banks were segregated into new banks, and the savings banks became shareholders of the new banks. Under the new law, those savings banks will have to convert into bank foundations.

To increase the independence of those banks owned by bank foundations and to clearly separate the charitable works of the savings banks from the financial business of the new banks, two measures are proposed: (1) bank foundations that control a bank will be obliged to give up such control; and (2) the members of boards of trustees of the bank foundations will be prevented from holding office on the board of directors of the participating bank.

ii Venture capital and private equity funds and fund managers

The government is currently working on the Draft Bill on Venture Capital and Private Equity Entities (the Draft Bill), which implements Directive 2011/61/EU on Alternative

5 Originally enacted as Royal Decree-Law 18/2012 of 11 May on the Restructuring and Sale of Real Estate Assets of the Banking Industry (mentioned in the 2012 edition of *The Mergers & Acquisitions Review*) and subsequently ratified by Congress as Law 8/2012 of 30 October on the Restructuring and Sale of Real Estate Assets of the Banking Industry.

Investment Funds Managers (AIFMD). Venture capital and private equity entities are regulated at present by Law 25/2005 and will continue to exist, but they will be adapted to the new provisions of the AIFMD. In addition, the Draft Bill creates a new type of entity, called 'other investment companies' or OIC, which are closed-ended entities that do not meet the definition of venture capital entities because of their purpose, investment policy or other characteristics. In addition, legal recognition is given to the new European venture capital funds (EuVECA) and to the European social entrepreneurship funds (EuSEF), created by EU Regulations 345/2013 and 346/2013.

The Draft Bill underwent public consultation until 3 June 2013 and is expected to be presented to Congress this year. The deadline for implementation of the AIFMD is 22 July 2013, so Spain's compliance remains uncertain and there may be some delay.

iii Corporate, mergers and other corporate restructuring laws

In contrast to the changes that took place between 2011 and the first semester of 2012 (mainly designed to eliminate formalistic provisions and to simplify requirements and procedures set out in the Companies Law and the Law on Corporate Restructuring), this year has not seen major changes in corporate, mergers and other corporate restructuring laws.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i Cross-border transactions by strategic investors

In the past year Spain has witnessed a decrease in M&A transactions in terms of both volume and value. Inbound deals exceeded outbound deals over the period.

The following are some of the most important cross-border deals that have taken place in the second half of 2012 and the first half of 2013:

a In February 2013, Royal Dutch Shell (an energy and petrochemicals company) agreed to acquire from Repsol (a listed Spain-based company engaged in the exploration, development and production of crude oil and natural gas) its LNG portfolio outside North America for $6.7 billion. The assets acquired include Repsol's minority stakes in the liquefaction plants of Atlantic LNG (based in Trinidad & Tobago), Peru LNG and Bahia de Bizkaia Electricidad (based in Spain), as well as its marketing, shipping and trading businesses.

b In November 2012, Ferrovial (a Spain-based company operating in the transportation and infrastructure sectors) transferred a stake of 10.62 per cent in BAA Airports (a UK-based owner and operator of airport facilities) to Qatar Holding (the Qatar-based investment arm of Qatar Investment Authority, the sovereign wealth fund) for €607 million within the framework of a larger transaction. In fact, Qatar Holding acquired a total stake of 20 per cent in BAA Airports from Ferrovial, the Government of Singapore Investment Corporation and Britannia Airport Partners. Following the acquisition, Ferrovial still owns 39.37 per cent of BAA Airports and Britannia Airport Partners holds 15.55 per cent.

c In July 2012, Public Sector Pension Investment Board (the Canada-based pension fund manager) agreed to acquire an undisclosed stake in Isolux Infrastructure (the

Brazil-based company that operates as a construction and engineering company) from Grupo Isolux Corsan for €500 million.

d In May 2013, Banco Sabadell (a listed Spain-based commercial bank) agreed to acquire almost 50 per cent of Mediterráneo Vida (an assurance and reassurance company) from Aegon for €450 million.

e In April 2013, HNA Group (a China-based company providing services in the air transportation, real estate, retailing, financial, tourism and logistics sectors) acquired a 20 per cent stake in NH Hoteles (a listed Spain-based company that owns and operates hotel chains) for €234 million through a capital increase excluding preferential subscription rights.

f In January 2013, Mitsui & Co (the listed Japan-based conglomerate with operations in the metal and minerals, financial services, transportation and logistics sectors) agreed to acquire from Gestamp Automoción (a Spain-based company engaged in the design, development, manufacture, and supply of metal components and structural systems for the automotive industry) a 30 per cent stake in controlling companies of the company's North and South American operations (the US-based auto parts supplier business unit) for €300 million.

ii Private equity transactions

Investments by venture capital and private equity firms in Spain in 2012 amounted to approximately €2,472 million in more than 540 transactions. This represents a 23.5 per cent fall with respect to 2011 (€3,233 million, in almost 600 transactions). It is important to highlight that 72 per cent of the total invested corresponds to deals for less than €1 million and 83 per cent was in SMEs with fewer than 100 employees (particularly start-ups).

The following are some of the most important private equity deals that have taken place in the second half of 2012 and the first half of 2013:

a in December 2012, Bain Capital acquired Atento (a Spain-based company engaged in process outsourcing and customer relationship management) from Telefónica (a Spain-based telecommunications operator specialising in mobile and fixed-line telephone services) for €1,039 million;

b in August 2012, Bridgepoint acquired Borawind (a company holding a portfolio of wind energy assets, mainly in the Castilla-León region) from listed Spanish construction conglomerate ACS for €596.5 million;

c in December 2012, Investindustrial and Trilantic Capital Partners acquired a 48 per cent stake in Euskaltel (a Basque telecoms operator) from Kutxabank, Iberdrola, Endesa, Corporación Mondragon and the Basque government for a minimum consideration of €200 million; and

d in January 2013, the management of Probos - Plasticos (a Portugal-based company that produces thermoplastic edges for the furniture industry worldwide) acquired the company in a secondary management buyout, backed by N+1 Capital Privado (a Spain-based private equity firm), from Explorer Investments (a Portugal-based private equity firm) for €75 million.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Over the period, M&A has been largely driven by the ongoing restructuring of Spanish financial institutions and the need for these entities and many corporations to deleverage and shrink their balance sheets through the disposal of non-core assets, NPL portfolio and other assets. As a side effect of this process, this year has also seen a redefinition of the bancassurance sector.

We will also address the wide-ranging privatisation programme announced by the Spanish government, as well as the situation in the energy, construction and private equity industries, which should continue to be a source of M&A transactions.

i M&A related to financial institutions

The ongoing restructuring of the Spanish financial industry will continue to fuel the Spanish M&A market over the following months on two fronts: bank consolidation and the sale of non-core assets.

During 2012, the Spanish banking industry has kept up with its restructuring and concentration process in what is considered the second stage of the banking sector concentration process initiated in 2010. This second stage has starred (i) the auction of entities bailed out during the first stage of the process by the FROB, and (ii) the acquisition of first stage-born banks or parts of their commercial network by solid Spanish banks. For example:

a Banco Sabadell acquired Banco Mare Nostrum's network and business in Catalonia and Aragon (462 branches including 2,000 employees) for €350 million, and also acquired Banco Gallego from the FROB;

b Caixabank took over Banca Cívica and also acquired Banco de Valencia from the FROB; and

c Unicaja Banco and Ibercaja Banco finally announced the integration of Banco CEISS and Caja 3, respectively, after long and troubled negotiation processes.

Three significant corporate transactions (not directly resulting from the concentration process encouraged by the government, but related thereto) took place in the financial industry:

a Banco Santander integrated its subsidiary Banesto as part of the internal reorganisation of the group;

b BBVA integrated its subsidiary Unnim Banc (previously acquired from the FROB) as part of the internal reorganisation of the group; and

c Liberbank went public to give liquidity to the shares resulting from the conversion of debt instruments issued to recapitalise the entity.

Additionally, financial institutions have continued with their programmes of divesting non-core assets. Depending on the motivations driving such divestments, these programmes can be divided as follows.

Financial entities bailed out by the FROB tend to hold important stakes in public 'big caps' and 'mid caps' and in private companies that will most likely be sold, sooner rather than later, to repay the funds made available by the FROB. For instance, Bankia

holds stakes in a wide array of listed companies such as Iberdrola (an energy company), IAG (the company resulting from the merger of Iberia and British Airways), Mapfre (an insurer), BME (the owner of all Spanish stock markets), Indra (an engineering company), Realia (a construction company) and Deoleo (a food company), as well as important stakes in many private enterprises. Now, as a bailed-out bank, Bankia is obliged to divest its portfolio in order to increase its capital resources and focus on retail banking.

Healthy financial entities that have participated in this concentration process (e.g., Banco Sabadell, Caixabank or Kutxabank) have seen their industrial portfolios significantly enlarged and oversized as a result of the integration of entities like CAM, Banca Cívica or the three main Basque savings banks, respectively. Meliá (hotels), Tubacex (pipes manufacturer) or CAF (train manufacturer) are examples of companies in which the integrated banks hold interests. Consequently, the integrating entities are now unravelling positions considered non-strategic in order to both reduce risk exposure according to Basel rules and increase capital resources. Some examples are the recent sale by Banco Sabadell of the 7 per cent stake in Meliá it inherited from CAM, and the sale by Kutxabank of part of its stake in Euskaltel mentioned above.

This ongoing restructuring and divestment process should be seen as an opportunity for foreign investors interested in acquiring strategic interests in Spain.

ii Bancassurance

The recent crisis in the financial sector did not prevent the bancassurance model from growing until it became the main insurance industry distribution channel. Now, as an indirect consequence of the banking concentration process implemented since 2009, most banks have two or even more bancassurance partners. A clear example of this is Caixabank, whose partners are Mutua Madrileña (non-life insurance) and Segurcaixa (life insurance). After integrating Banca Cívica, Caixabank must now dissolve the four bancassurance partnerships entered into by Caja Navarra, Caja Canarias, Caja de Burgos and Cajasol (the former shareholders that created Banca Cívica, which was subsequently acquired by Caixabank).

Such dissolution derives from the applicable regulations, which oblige financial entities to have a single bancassurance partner per class (life insurance or non-life insurance). With the banking sector concentration process coming to an end, the expected sale of approximately 15 Spanish bancassurance joint ventures in 2013 could involve transactions worth up to €2.5 billion: for instance, in December 2012 Bankia paid Aviva €608 million for its 50 per cent stake in Aseval (the bancassurance joint venture that the British insurer created with Bancaja, one of the founding members of Bankia).

iii Divestments by Spanish corporations

In addition to banks, many Spanish corporations are looking to divest non-essential assets to be able to rebuild balance sheets and focus on their core businesses.

These divestments will continue to create a range of M&A opportunities. Good examples of this trend are Iberdrola, Repsol and Telefónica.

In contrast to 2011, when Iberdrola acquired the Brazilian energy distributor Elektro (which, considering Iberdrola's stake in Neoenergia, turned the Spanish

company into one of the biggest players in the Brazilian electricity market), it is currently implementing an aggressive divestment plan aimed at generating €2 billion in cash from non-strategic assets over the next three years. In May 2013, the electricity company had already passed the midpoint of such objective, with divestments of €1.1 billion. In wind energy assets alone, Iberdrola recently announced the sale of 32 on-shore wind farms in France to a consortium led by EDF, Munich RE and General Electric for €350 million; seven on-shore wind farms in Germany to MVV Energy AG for €53 million; and five on-shore wind farms in Poland to Energa Hydro and PGE Polska Grupa Energetyczna for €203 million. Additionally, Iberdrola sold its 20 per cent stake in Medgaz (natural gas pipeline between Algeria and Spain) for €146 million (December 2012) and its US electricity and gas distribution subsidiaries Energetix and NYSEG Solutions to Direct Energy for US$110.2 million (July 2012).

In turn, Repsol is carrying out an ambitious €4.5 billion divestment programme over the period 2012–2016, which has so far included the sale of Repsol Butano Chile to a Chilean consortium led by LarrainVial for US$540 million (July 2012), the sale of NGL assets to Shell for US$6.7 billion (as explained above), as well as the sale of a 5 per cent treasury shares stake to Temasek (the Singapore sovereign investment fund) for €1.04 billion (March 2013).

As far as Telefónica is concerned, it has transferred Atento to Bain Capital (as explained above) for €1,039 million. The transaction is in line with Telefónica's divestment strategy to increase financial flexibility and includes a nine-year framework agreement governing Atento's role as a service provider to Telefónica.

iv Privatisations

The Spanish government also intends to reduce its budget deficit and sovereign debts through privatisations. The Minister of Economy announced an ambitious €30 billion privatisation plan that is expected to include the total or partial sale of some of the most important state-owned enterprises such as Renfe (the Spanish train operator), Aena (the owner and manager of Spanish airports), Puertos del Estado (which manages 46 ports throughout Spain), Paradores (a hotel chain) and LAE (the Spanish lottery operator). The Ministry of Economy also intends to dispose of its shareholdings in listed companies such as EADS (aircraft constructor), IAG (the company resulting from the merger of Iberia and British Airways), Ebro Foods (the world's largest seller of rice and the second-largest producer of pasta), Navantia (naval construction), Hispasat (satellites), and Red Eléctrica de España (which operates the national electricity transmission system and electricity grid in Spain). Spanish regional governments also intend to privatise water management and supply services (such as the Agencia Catalana del Agua or Canal Isabel II), hospitals and public health institutions.

Nevertheless, the government has slowed down its privatisation projects given current market conditions, which would not allow it to maximise its return on divestments in companies such as Aena or LAE.

v Construction and energy-related M&A

As we mentioned in the previous edition of *The Mergers & Acquisitions Review*, the second half of 2012 and the first half of 2013 have represented a period of post-merger

integration, stabilisation and downsizing for the Spanish construction industry, with companies focusing on creating synergies from previous acquisitions and restructuring activities. The case of the constructor Metrovacesa is significant: it went private in May 2013 with the purpose of downsizing and focusing on its traditional business model (real estate renting). Additionally, those construction companies that diversified in the past into numerous activities to complement their construction businesses are continuing with their divestments to reduce leverage to more acceptable levels. As an example of how these divestment processes will continue over the coming months, the FCC recently approved its strategic plan for 2013–2015, which includes the divestment of €2.4 billion in assets.

On the other hand, the energy industry is expecting a significant regulatory change that might lead to market consolidation. Companies in the renewable energy industry (in particular, wind farms) have witnessed a significant number of (mid-market) M&A transactions. The large Spanish energy groups (Repsol, Iberdrola, Endesa and Gas Natural-Fenosa) should also continue to be active as acquirers and potential targets for foreign strategic investors. As examples, we have already referred to Iberdrola and Repsol in Section IV.ii, *supra*.

vi Private equity

The results of private equity activity in 2012 (a 23.5 per cent fall compared with 2011) reflect the tough economic situation that Spain is in.

However, in recent years private equity firms have become important players in Spanish M&A transactions and they should continue to be so in 2013. NPL portfolios and foreclosed real estate assets held by SAREB and financial entities, on the one hand, and non-strategic businesses and stakes belonging to banks and mid-large corporations, on the other hand, are some examples of potential targets for investors.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

i New acquisition financing

Although the number of acquisition finance transactions experienced a slowdown in the first quarter of 2012, during the last quarter of 2012 and more importantly the first quarter of 2013, they slowly started to recover. The reason behind this recovery is mainly the stabilisation of financial markets after the sovereign debt crisis that affected the Spanish economy, especially during the second half of 2012, and which led to the signing of the Master Financial Assistance Facility Agreement (referred to above) for a maximum amount of €100 billion to rescue Spain's ailing banks.

Some large transactions have been closed recently, although they were mainly refinancing transactions and sales of NPL portfolios or other distressed assets. There are still quite a few transactions that have failed to close due to the lack of financing derived from the strict conditions still being imposed on banks. For example, banks were required to take fresh provisions of more than €80 billion before the end of 2012.

The funds available from Spanish financing entities continued to be rather scarce in the first quarter of 2013, not only because of the financing entities' greater needs for tier 1 capital and 'principal capital', but also because of the continuing reorganisation

of the Spanish banking industry that is now being monitored by the European Union. Furthermore, the implementation during the last quarter of 2012 of legislative reforms regarding the accounting provisions associated with real estate financing transactions, as well as the latest recommendations issued by the Bank of Spain in April 2013 dealing with the reclassification, in certain circumstances, of refinancing and restructuring transactions as substandard loans, will probably also have a negative effect on the availability of funds for new transactions.

In addition to the strict conditions that are still being imposed on banks, borrowers must deal with the limitation on the tax deductibility of financial expenses that was introduced in 2012 and that is likely to have an adverse effect on shareholders' returns as well as the fulfilment of business plans.

Alternative financing sources and financing by debt funds also continue to be limited. However, by way of example, KKR Asset Management recently provided €320 million in new financing to Uralita, a Spanish multinational in the building materials sector.

Finally, although high-yield and other debt issuances continue to be rare in Spain due to the drought in the capital markets (that, as we already mentioned, still continues) and Spain's strict legal limits (limited liability companies, the most commonly used vehicles for such transactions, may not issue or guarantee debt instruments and the maximum amount of the issuance is limited by the issuing company's equity), there has recently been a slight increase in debt issuance transactions of Spanish companies in the more flexible and liquid Anglo-Saxon markets.

ii Financing conditions

Apart from these general trends, the following are the main features of acquisition financings during 2012 and 2013:

a The range of financing products available to borrowers remains limited: second-lien facilities, ancillary facilities, bridge-to-equity facilities and equity-like facilities are disappearing from the Spanish market and the amount of mezzanine and payment-in-kind (PIK) facilities has decreased (except in specific restructurings when borrowers do not generate sufficient cash to service all the debt and part of the term loan facilities are converted into partial PIK facilities). In contrast, vendor loans continue to be frequently used to finance acquisitions.

b Banks generally reject debt-to-asset transactions. In certain extreme circumstances they may ultimately capitalise their loans to ensure the borrower's solvency; however, banks analyse the capitalisation of debt on a case-by-case basis.

c Banks still refuse to agree to the 'certainty of funds' provision in commitment letters, whereas the inclusion of material adverse change clauses and 'diligence out' provisions continues to be essential. Limits to changes in pricing that can be arranged without the borrower's consent have been widened under the 'market flex' provisions, and 'reverse flex' provisions have disappeared. Facility agreements almost always include widely drafted 'market disruption' clauses. In contrast, LMA provisions concerning defaulting lenders are still uncommon in the Spanish market.

d Compared with previous years, the economic terms of acquisition finance transactions currently contemplate a reduction in the terms and an increase in margins and fees, especially agency fees, which is mainly intended to make the ratio between risk and returns more appealing to banks. Leverage ratios have been reduced and banks tend to include amortising term loans rather than bullet loans (which approach, to a certain extent, ties banks to the future refinancing of the bullet loan). Due to the wide 'unanimous consent clauses' that were introduced in the financing agreements entered into during 2008, 2009 and 2010, forward start loans and the judicial recognition of refinancing agreements (*homologación judicial*), introduced by the latest reform of the Insolvency Law (referred to above), have become common refinancing instruments despite the fact that there are still certain aspects of this refinancing alternative that are yet to be clarified.

e Banks continue to reject specific provisions which were common in a more favourable economic environment. Banks are currently focused on anticipating insolvency given that agreements can only be terminated due to breaches that occurred after the declaration of insolvency (and not as a result of the borrower being insolvent).

f Security packages requested in acquisition finance continue to be robust in Spain as a consequence of financial assistance restrictions, among other factors.

g Some of the companies acquired by private equity companies in LBOs that closed at high prices between 2005 and 2007 are facing financing difficulties as the 'wall of debt' approaches (leveraged loans due to mature between 2013 and 2014). Similar difficulties have arisen for other companies, which during the same period financed ambitious recaps out of new subordinated bank facilities. The base cases, which assumed constant growth, have been breached due to the crisis, and companies are unable to service their debt. We have even witnessed large and medium-size private equity firms fail to support their vehicles, leaving the financing banks with the dilemma of whether to seek a new purchaser, acquire the shares of the vehicle in exchange for its debt, or request the vehicle be declared insolvent. Private equity firms have taken advantage of this opportunity to buy back their vehicles' debt.

iii Refinancings

The volume of large refinancings and restructurings has steadied during the second half of 2012 and the first quarter of 2013. Most of these are still second or third-round refinancings and restructurings of those agreed during 2008, 2009 and 2010 that failed to meet their business plans.

VII EMPLOYMENT LAW

Law 3/2012 of 6 July has confirmed the previous modifications of the Spanish labour regulations introduced by Royal Decree-Law 3/2012 of 10 February. The new regulations are based on two main axes: promoting 'internal flexibility' and amending regulations concerning terminations of employment based on business grounds (redundancies).

Amendments have been approved in the following areas to promote 'internal flexibility' within companies as an alternative to terminating employment contracts:

a geographical and functional mobility;

b substantial changes to employment conditions, including salary cuts;

c suspension of contracts or reduction of working hours due to economic, technical, organisational or production reasons, removing the need to obtain an administrative authorisation and extending unemployment benefits;

d the non-application of certain employment conditions set out in applicable collective bargaining agreements is no longer limited to salary conditions and, in the event of a disagreement, either party may take the dispute to arbitration;

e the company's collective bargaining agreement prevails for certain matters over inter-professional agreements, or state or regional industry-specific collective agreements; and

f collective agreements are not automatically extended after the agreed date of termination.

Authorisation from the labour authorities is no longer required for collective redundancies. The collective redundancy is justified if the company is making, or is likely to make, losses, or is facing a decrease in income or sales. A decrease exists when there is a reduction in the level of income or sales in three consecutive quarters. Finally, compensation for an unfair dismissal is reduced from 45 days of salary per year of service to 33 (with no back-pay awards).

Companies carrying out collective redundancies must pay a contribution to the Spanish Treasury if the measure has a significant impact on employees aged 50 or over and the company or its group is making a profit.

VIII TAX LAW

As in recent years, the main new tax measures in Spain for 2013 have been primarily aimed at increasing the Treasury's income and fighting tax fraud. Amendments have also been made to the tax regulations to foster investment and the real estate market.

The most relevant tax measures for M&A practice are the following as follows.

i New indirect taxation rules applicable to the transfer of shares in companies whose assets are mainly real estate

As from 31 October 2012, the transfer of shares in companies whose assets are mainly real estate located in Spain may only be subject to VAT or transfer tax when the transfer is intended to avoid the payment of such taxes. For these purposes, the law assumes (unless there is evidence to the contrary) that there is an intention to avoid the payment of VAT or transfer tax when, as a consequence of a transfer of shares in a company whose assets are mainly real estate located in Spain that is not used in a business activity (real estate companies); or which has a stake in a real estate company; the acquirer gains control (or if it already had control, it increases its stake) of the real estate company; and when there is a transfer of shares that had been received in exchange for the contribution of real estate less than three years earlier, provided that the real estate is not used in a business activity.

ii Step up of book value of assets

Companies and individuals who carry out business activities are exceptionally allowed to step up the book value of certain assets, according to a special procedure and subject to certain requirements, by paying a special 5 per cent tax. The step-up procedure must be completed before the end of the term for the approval of the first balance sheet closed after 28 December 2012, and in the case of individuals, before 30 June 2013.

iii New tax lease regime

As from 1 January 2013, corporate income tax (CIT) taxpayers may benefit from a special accelerated depreciation regime for qualifying assets acquired under a financial lease. CIT taxpayers acting as lessees will be entitled to seek authority to apply this regime from the Spanish tax authorities, which will allow them to register tax-deductible expenses for the relevant assets as from the moment they start to be built, if certain requirements are met.

iv Temporary limitation of tax-deductible depreciation of assets of large companies

During tax periods initiated in 2013 and 2014, the tax-deductible amortisation of certain assets by large companies has been partially limited: tax deductibility of amortisation expenses of tangible and intangible fixed assets and real estate investments will be capped at 70 per cent of those that are registered and that would have been deductible otherwise. This limit will not apply to those cases specifically approved by (or notified to) the Spanish tax authorities through a special procedure. The amortisation expenses that are not deducted from the 2013 and 2014 CIT taxable income as a consequence of this cap will be deductible on a linear basis over a 10-year period starting in 2015.

v Application of the 2011 and 2012 temporary restrictions to offsetting carried-forward losses and goodwill depreciation

The restrictions on offsetting carried-forward losses and the deductibility of goodwill depreciation, introduced and amended in 2011 and 2012, are also applicable in 2013 and it cannot be ruled out that they will also be extended to 2014.

vi Amendment of the tax regime applicable to Spanish real estate investment trusts

The tax regime applicable to Spanish real estate investment trusts (SOCIMI) has been extensively amended. Among other changes, the requirements to qualify for the SOCIMI tax regime have been significantly reduced, and the taxation of income deriving from a SOCIMI's ordinary business has been reduced to zero per cent.

vii VAT

After the increase in VAT rates approved in the summer of 2012 (which saw the general and reduced VAT rates increased from 18 per cent to 21 per cent and from 8 per cent to 10 per cent, respectively), the main amendments have related to the broadening of

the situations in which the reverse charge mechanism applies; and the special VAT rules applicable during insolvency.

viii Disclosing of assets located abroad

Law 7/2012 of 29 October established an obligation on all taxpayers to disclose information regarding certain assets located abroad, including the 'real owners' of assets, as defined by Spanish anti-money laundering regulations. Stiff penalties may be imposed for the breach of this obligation, which relates to the following assets:

a accounts held in foreign banks or credit entities;

b any assets, securities or rights representing the share capital or equity of any entity, or the assignment of funds to third parties, which are deposited or located abroad, as well as any policyholder position in life or disability insurances, and any life or temporary annuities deriving from the payment of a lump-sum amount or from the transfer of any moveable or immoveable property, and contracted with entities located abroad; and

c real estate and rights over real estate located abroad.

IX COMPETITION LAW

During 2012, the total number of filings was lower than in 2010 and 2011. A significant number of transactions have resulted in simplified filings (21 cases, representing approximately one-third of the total). The areas where most transactions have taken place are the financial and insurance sector, the health industry (including medical devices, drugs, etc.), the energy sector (especially in relation to the sale of distribution assets) and supermarkets.

2012 saw the first intervention of the Council of Ministers in a merger control case since the entry into force of the Competition Law in 2007. The Council of Ministers intervened to modify the conditions imposed on a merger in the audiovisual sector. It is worth noting that the Council of Ministers' decision mentions the current market contraction as one of the grounds for changing the conditions of the merger authorisation, as well as the budgetary restrictions on advertising. This constitutes a precedent that may open the door to government intervention in competition matters.

In terms of antitrust enforcement policy, in 2012 the National Competition Commission (CNC) focused on monitoring companies' compliance with its decisions, which resulted in the creation of a specialised division within the Investigation Directorate to conduct such investigations. In merger control this new priority has resulted, also for the first time, in the opening of proceedings for potential infringements of conditions imposed by the CNC in two merger control decisions. These two proceedings resulted in the imposition of fines in both cases. Given the low number of conditioned decisions in Spain, the fact that two proceedings have been opened in a year evidences the authority's intention to pursue this monitoring activity seriously.

These enforcement activities in merger control have also resulted in three gun-jumping decisions, where the CNC has imposed fines ranging from €89,700 to €286,000 on companies that were found to have neglected a filing obligation.

X OUTLOOK

The outlook for M&A transactions in the second half of 2013 and especially for 2014 continues to be promising.

Spanish banks and corporations are under increased pressure to reduce their balance sheets and repay debt. Banking regulatory changes will also force banks to sell their shareholdings in industrial companies and insurance businesses. Sellers' need to divest non-strategic assets and their willingness to accept lower valuations should fuel the deal flow and help meet buyers' price expectations.

The SAREB is expected to finalise the current due diligence review of the contributed assets and to start selling loan and real estate portfolios to institutional investors (through banking asset funds that enjoy a very favourable tax regime).

The Spanish energy sector will probably undergo significant restructuring and market consolidation due to regulatory changes.

The Spanish government and regions will accelerate their privatisations programmes to meet the budget deficit target (which has been extended for two years).

Finally, Spanish construction, waste and water treatment, infrastructure and other corporations are expected to continue diversifying internationally and growing in foreign markets, in particular Latin America but also the United States, Europe and Asia.

Appendix 1

ABOUT THE AUTHORS

CHRISTIAN HOEDL

Uría Menéndez

Christian Hoedl was educated at the Universidad Autónoma de Madrid and holds master's degrees from the Centro de Estudios Tributarios y Financieros and the Universidad Complutense de Madrid. He joined Uría Menéndez in 1987 and became a partner in 1998. From 1999 to 2001, he was the resident partner in the firm's Bilbao office.

Mr Hoedl focuses his practice on privatisations, mergers and acquisitions and private equity. He is secretary or vice secretary to the boards of various companies.

During 1998, he lectured on commercial law at the Universidad Pontificia de Comillas in Madrid. From 2000 to 2001, he lectured at the Universidad de Deusto in Bilbao, and since 2009 he has lectured at the Universidad Autónoma de Madrid and the Universidad de Navarra. He is also a regular speaker and commentator at law seminars and conferences.

He is fluent in German, English and French.

JAVIER RUIZ-CÁMARA

Uría Menéndez

Javier Ruiz-Cámara was educated at the Business, Economics and Law School (ICADE) of the Universidad Pontificia de Comillas. He joined Uría Menéndez in 1999 and was seconded to Slaughter and May from 2004 to 2005. From June 2005 until September 2007 he was head of the firm's Santiago de Chile office. He became a counsel in 2011 and he is currently the head of the M&A and private equity department at Uría Menéndez's Bilbao office.

Mr Ruiz-Cámara focuses his practice on mergers and acquisitions, private equity and financing, and speaks fluent English and German.

He has lectured on company law at ICADE and on commercial contracts at the Universidad Nebrija. He has also contributed to various publications specialised in matters pertaining to his field of expertise.

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