The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research

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THE MERGERS AND ACQUISITIONS REVIEW

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth 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 2014

Chapter 61

SPAIN

Christian Hoedl and Javier Ruiz-Cámara[1]

I OVERVIEW OF M&A ACTIVITY

The second half of 2013 and the first quarter of 2014 have confirmed the positive expectations anticipated in this chapter's last edition. The profound reforms in the Spanish financial sector and labour market introduced by the Spanish government are leading to a steady recovery. In the last months of 2013 the Spanish economy emerged from technical recession, and now shows a GDP increase by 0.5 per cent year-on-year, with the government foreseeing an increase by the end of 2014 of 1.2 per cent and of 1.5 per cent for 2015. This GDP growth is mainly driven by an increase in exports and in private domestic demand, the easing of the financial tensions (Spain's credit rating has improved significantly), and the structural reforms that are being implemented since 2011.

In addition, the labour market has moderately improved in the last months, both in the rate of employment and in the social security affiliations, lowering the unemployment rate to a still excessive 25.9 per cent. On the negative side, public debt reached a record of 94 per cent over GDP at the end of 2013, with the European Commission estimating a rate over 100 per cent by the end of 2014, and private debt is decreasing but still high.

In line with the improvement of the Spanish economy over the last months, M&A activity in Spain has increased both in number of deals and in deal volume since the end of 2013. In the year to date, the volume of transactions has increased by 20 per cent and the number of transactions by 10 per cent (as compared to the same period in 2013). The milestones of M&A activity in the last months have been the following:

a The financial sector has been the most active in the Spanish M&A market, both in number and volume of deals. Under significant regulatory pressures and in a

1 Christian Hoedl and Javier Ruiz-Cámara are partners at Uría Menéndez.

clear trend towards back to basics, Spanish banks and other financial institutions have sold non-core assets and branches (such as servicing platforms), divested performing and non-performing loan (NPL) portfolios and exited from industrial shareholdings. Real estate, energy, IT and telecommunications have also attracted significant investments.

b Foreign strategic and financial investors have been very active. Europe is the main source of these investments, followed by the United States. The increase of Latin American investments, mainly coming from Mexico and Brazil, has been remarkable.

c Private equity in particular, has boosted the number of transactions in the second half of 2013, accounting for 90 per cent of the year's total investment, due to the improvement in the macroeconomic landscape and the perception that the Spanish market provides for interesting investment opportunities.

d IPO's have returned strongly to the Spanish market, both on the traditional Continuous Market and on the Mercado Alternativo Bursátil (MAB). Newly introduced Spanish real estate investment trusts (SOCIMIs), have also been relatively popular.

e Outbound foreign investments have also increased, focusing Spanish investments mainly on Europe and Latin America, and to a lesser extent on the United States and Asia.

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 elements of 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', whose aim is to gather the entire body of law on commercial contracts into a single piece of legislation. The Minister of Justice announced that the government would introduce the bill in Parliament during this term. The first draft was summited to public consultation back in June 2013 and the draft bill was passed by the government in May 2014. The bill still has to pass through Parliament.

Spanish corporate law, on the other hand, is primarily based on the Companies Law and the Law on Corporate Restructuring.

The Companies Law governs, among others, 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. It specifically regulates leveraged buyouts (LBO) (i.e., mergers between companies where one has incurred debt during the preceding three years to acquire control or the essential assets of the target). 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 company registries in Spain, which has not been as consistent as would have been desirable).[2]

As far as the main regulated markets are concerned, rules such as the Stock Market Law[3] (public offerings, official listings of securities, transactions related to listed securities and takeovers), the Law on Discipline and Intervention of Credit Institutions[4] (regime for qualifying holdings in credit entities) or the Private Insurance Supervisory Law[5] (regime for qualifying holdings in insurance companies) must be taken into account.

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 (whose purpose is for the debtor and the creditors to reach an agreement on the payment of outstanding claims), or (2) the liquidation of the debtor's assets to satisfy its debts. It 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. Nevertheless, the law was passed in a more favourable economic climate. 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 subsequently amended by Law 38/2011 of 10 October, Law 14/2013 of 27 September and Royal Decree-Law 4/2014 of 7 March (RDL 4/2004).[6]

These reforms aim to align the Insolvency Law with current practice and insolvency regulations of other comparable jurisdictions, as well as to remove certain rigidities and improve some technical aspects that were criticised by judges, scholars and lawyers alike.

In this regard, the above-mentioned reforms first introduced and then improved the regime of refinancing agreements (the Insolvency Law now distinguishes between

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

3 The securities market is overseen by the National Stock Exchange Commission (CNMV).

4 The credit market is overseen by the Bank of Spain (BdE).

5 The insurance market is overseen by the General Insurances and Pension Funds Directorate (DGSFP).

6 RDL 4/2014 was ratified by Parliament on 26 March 2014 and is now Draft Bill No. 121/000089 which is passing through Parliament. To follow this process, go to www.congreso.es.

'collective', 'non-collective' and judicially endorsed 'collective' refinancing agreements, i.e., cram-down mechanism), in order to provide the Spanish pre-insolvency law with an alternative to avoid the declaration of insolvency of a company.

In particular, the main reforms introduced are (1) the paralysation of judicial enforcement actions on assets necessary for the borrower's continuity upon filing a pre-insolvency notice, (2) the protection, under certain circumstances, from clawback of individual refinancing agreements that do not comply with the requirements imposed on collective refinancing agreements, (3) the elimination of the independent expert report for the purposes of protecting a collective refinancing agreement from clawback, which has been replaced by a certificate issued by the auditor of the company in connection with the fulfilment of the required majority (three-fifths of the liabilities of the debtor), and (4) an extensive amendment of the provisions regulating the judicially endorsed refinancing agreements that include, among other measures, the reduction of the required majority for the approval of this type of refinancing agreements (51 per cent of the financial liabilities) and the extension of certain effects of the refinancing agreement to both unsecured and secured dissenting lenders, in the latter case for the unsecured portion of their loans, even on secured creditors for the secured amounts of their loans, depending on the majority obtained.

iii Other regulations

Other matters relating to, among others, tax, employment and antitrust 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

Since mid-2012 to date, Spain has conducted a major legal reform of the banking sector. In addition to the new European legal framework for financial entities, Spain has also implemented further changes due to the conditions imposed by 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), the Master Financial Assistance Facility Agreement signed by the Kingdom of Spain, the Bank of Spain, the Fund for Orderly Bank Restructuring (FROB) and the European Financial Stability Facility (which was subsequently assigned to the European Stability Mechanism) on 24 July 2012, and the 2013–2016 Stability Programme and the National Reform Programme, both approved in April 2013, for submission to the European Commission. This legal reform has run in parallel with a notable concentration process in the banking sector.

The MoU has resulted in several pieces of legislation affecting financial and banking regulation. For instance, Royal Decree-Law 24/2012, which, among other things, regulated the creation of a partially state-owned company to manage real estate assets, called SAREB (popularly known as the 'bad bank').

The most recent novelty is Law 26/2013 of 27 December on Saving Banks and Bank Foundations, which sets out the new legal framework for the savings banks that will maintain their status as such (small and traditional ones with a small market share), and the mandatory conversion into bank foundations of the major savings banks, which, as a consequence of the process of concentration, are now shareholders of ordinary banks. In order to increase the independence of the ordinary banks owned by bank foundations and to clearly separate the charitable work from the financial business, the new regulations establish that: bank foundations that control a bank will be obliged to give up such control, and members of boards of trustees of the bank foundations will be prevented from holding office on the board of directors of the participating bank. Kutxabank, Ibercaja Banco, Unicaja Banco and Caixabank, and their controlling shareholders (BBK, Ibercaja, Unicaja and La Caixa, respectively) have been the main entities affected by this reform (only La Caixa has to date been converted into a bank foundation).

On the other hand, Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms (the Regulation) and Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (the Directive) were enacted in June 2013 to incorporate the Third Basel Accord in the European legal framework. While the Regulation became directly applicable in Spain on 1 January 2014, the Directive was partially transposed into the Spanish legal framework by Royal Decree-Law 14/2013 of 29 November. In order to fully transpose the Directive, a draft bill on regulation, overseeing and solvency of credit institutions is currently under discussion in the Spanish senate and expected to be enacted before the summer. The importance of this draft bill is not only that it will transpose the Directive, but also that it will help to consolidate the various Spanish regulations on credit institutions, which is a traditional demand of the financial sector.

ii Venture capital, private equity funds and fund managers

The government continues working on the draft bill on Venture Capital and Private Equity Entities, which implements Directive 2011/61/EU on Alternative Investment Funds Managers (AIFMD). Among other novelties, the draft bill introduces a new type of entity, called 'other investment companies', 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, the draft bill recognises the new European venture capital funds and the European social entrepreneurship funds created by EU Regulations 345/2013 and 346/2013. With the public consultation stage ended, the draft bill is currently under review by the Council of State.

iii Corporate laws

This year we have seen two major novelties in corporate laws.

Firstly, in June 2013 the General Codifying Commission made the first draft of the Mercantile Code public. As mentioned above, the government is expected to submit the corresponding bill to Parliament during this term.

Secondly, the government approved on 23 May the submission to Parliament of the Bill amending the Companies Law for the enhancement of corporate governance. Based on a draft prepared by Spanish experts on corporate governance, the bill intends to clarify some grey areas of the Companies Law and to raise the corporate governance standards of the listed and unlisted Spanish companies. By way of example, this bill fosters the intervention of the general shareholders' meeting in the ordinary business of the company, provides a hardened regime for the conflict of interests of directors and shareholders and contains a new regulation for the approval and monitoring by the general shareholders' meeting of the remuneration policy. Particularly for listed companies, the bill reduces the percentage required to exercise certain minority rights (from 5 per cent to 3 per cent). The bill is expected to be enacted before the end of 2014.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i Cross-border transactions by strategic investors

M&A transactions in Spain in 2013 decreased compared to the previous year, although, as stated above, since the end of 2013 there has been an upturn in such M&A transactions. An encouraging sign is the increase in cross-border M&A value and volume in the first quarter of 2014. In 2013 inbound deals (approximately €18.8 billion) exceeded outbound deals (approximately €10.3 billion).

The following are some of the most important cross-border deals that have taken place in the second half of 2013 and first half of 2014:

a In June 2014, Metrovacesa (a Spanish-based company principally engaged in the real estate sector and currently controlled by its creditors – Santander, Bankia, BBVA, Sabadell and Banco Popular) agreed to sell its 26.7 per cent stake in Gecina (a France-based real estate investment trust) to a series of entities and investment funds (Norges Bank, Crédit Agricole, Blackstone and a joint venture created jointly by Blackstone and Ivanhoe Cambridge) for approximately €1.55 billion.

b In December 2013, the Canadian manufacturer of products based on fibres, Domtar Corporation, acquired Laboratorios Indas (a Spanish leading company in the manufacture of sanitary and hygienic products) from Vista and Portobello Capital (stakes of 73.2 per cent and 21.8 per cent, respectively) for approximately €400 million.

c In November 2013, Alfa (the Mexican-based conglomerate) agreed to acquire 45.5 per cent of the share capital of Campofrio Food Group (the Spanish-based Madrid-listed food company) through its wholly owned subsidiary, Sigma Alimentos, from certain shareholders (Ballvé Family, Oaktree and Caixabank) for approximately €386 million.

d In October 2013, Goldman Sachs (the US-based global investment bank) and Azora (the Spanish-based private investment firm) acquired 3,000 social houses under lease agreements from IVIMA (the Madrid Housing Institute) for approximately €205 million.

ii Private equity transactions

During the first quarter of 2014, investments channelled by private equity almost doubled the amount accounted for in the same period in 2013, although the number of transactions remained almost the same.

The following are some of the most important private equity deals that have taken place in the second half of 2013 and first half of 2014:

a In April 2014, Crown Holdings (the US-based world market leader in packaging systems) acquired from N+1 Mercapital (Dinamia) and Blackstone a 100 per cent stake in Mivisa Envases (a Spanish-based company engaged in the business of manufacturing tinplate packaging) for approximately €1.2 billion.

b In March 2014, Vodafone (the UK-based telecommunications giant) acquired ONO (the Spain's largest cable company) from, among others, CCMP (15.2 per cent), Providence (15.2 per cent), Thomas H Lee (15 per cent) and Quadrangle (9 per cent) for approximately €7.2 billion.

c In March 2014, Eurazeo agreed to acquire a 10 per cent stake in the Spanish entity holding the 'Desigual' brand (a Spanish-based retail giant) for approximately €285 million.

d In January 2014, Santander (the Spanish-based international bank) transferred a stake of 85 per cent of its platform for recovery of credit in dispute and real estate management (i.e., Altamira Asset Management) to Apollo (the global alternative investment manager) for approximately €664 million.

e In January 2014, NTT Data Corporation (the Japan-based global IT services provider) acquired Everis (one of the largest independent Spanish consulting and IT services providers) from, among others, 3i Group (a UK-based fund) for approximately €569 million.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As outlined in late editions, M&A has been influenced by the 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. Nevertheless, with such restructuring coming to an end, the M&A sector has seen the return of the traditional private equity investments and portfolio sales.

i M&A related to financial institutions

The restructuring of the Spanish financial industry has continued influencing the Spanish M&A market on two main fronts: bank consolidation and the sale of non-core assets.

During the second half of 2013 and the start of 2014, the Spanish banking industry has kept up with its restructuring and concentration process in what is considered the final stage of the banking sector concentration process initiated in 2010. This final stage has starred by the auction of entities bailed out during the first stage of the process by the FROB, more than by the acquisition of first stage-born banks or parts of their commercial network by solid Spanish banks. For example:

a In February 2014, the FROB placed a 7.5 per cent stake of Bankia (Madrid-listed) among UK and US institutional investors for €1.3 billion.

b In December 2013, the Venezuelan-based Banesco (owner of the Spanish Banco Etcheverría) acquired NCG Banco from the FROB for €1 billion.

c In September 2013, Apollo Management acquired Evo Bank (a segregated unit of NCG Banco, an entity bailed out by the FROB) for €60 million.

Additionally, financial institutions have continued with their programmes of divesting non-core assets. On the one hand, financial entities bailed out by the FROB have continued divesting their important stakes in public 'big caps' and 'mid caps' and in private companies to repay the funds made available by the FROB or to comply with the conditions set out in the MoU. Some of the most representative transactions of this trend have been:

a Bankia sold, among others, its 12 per cent stake in IAG (airline) for €695 million, its 20.1 per cent stake in Indra (civil and defence technology company) for €377 million, a 12 per cent stake in Mapfre (insurance) for €976 million, its 38.48 per cent stake in Inversis (online bank) for €87 million, its 12.6 per cent stake in NH Hoteles for €192 million, and its 16.51 per cent stake in Deoleo (olive oil and food) to CVC for €72.4 million.

b Banco Mare Nostrum sold, among others, its 2.32 per cent stake in NH Hoteles for €20 million and a 4.85 per cent stake in Deoleo to CVC for €21.2 million.

c NovaCaixa Galicia sold its 5.2 per cent stake in Sacyr (infrastructure) for €49 million, a 2.32 per cent stake in NH Hoteles for €20 million, and its 30 per cent stake in cable operator Cable R to CVC for €130 million.

On the other hand, those healthy financial entities that, due to their participation in the concentration process, ended up with oversized industrial portfolios, have also continued unravelling positions with the dual purpose of reducing risk exposure according to Basel rules and increasing capital resources.

ii Real estate

Stigmatised as one of the major causes of the Spanish crisis, real estate has come back as one of the prominent fields of M&A activity after years of adjustment. Attractive prices along with the creation of the SAREB and the banks' need to take their real estate assets out of their balance sheets (foreclosures following the housing bubble turned the banking sector into the main real estate owner) have catalysed the resurgence of real estate transactions in the Spanish market. To foster this resurgence, the government made the tax regime applicable to the Spanish REITS (real estate investment trusts) more attractive.

As for the SAREB, the Bull Portfolio and the Teide Portfolio were awarded to HIG Capital and Fortress for €100 million and €146 million, respectively. On the other hand, several credit institutions have sold their real estate units to private equity firms and investment funds: the sale of a 51 per cent stake in Aliseda (Banco Popular) to Värde Partners and Kennedy Wilson, the sale of Bankia Habitat (Bankia) to Cerberus, the sale of Catalunya Caixa Inmobiliaria (Catalunya Caixa) to Blackstone, the sale of a 51 per cent stake in Servihabitat (La Caixa) to TPG and the sale of a 85 per cent stake in Altamira Asset Management (Santander) to Apollo signal this trend. In addition, Santander sold the emblematic Madrid-located building 'Edificio España' to a company controlled by the prominent Chinese businessman Wang Jianlin.

Outside of the SAREB and the banking sector, some significant transactions have also taken place, such as the sale of the Barcelona-based building 'Torre Agbar' to Emin Capital for €150 million and the sale by CBRE and Sonae of an important shopping centre in Asturias (region in northern Spain) to Canadian pension fund CPPIB and UK developer Intu Properties for €162 million.

Finally, as from today, the most prominent transaction is the sale of the Spanish branch of the real estate German bank Eurohypo (€4.5 billion in assets), which is about to be completed with the consortium formed by Lone Star and JPMorgan (after a competitive process in which bidders such as Deutsche Bank and Blackstone or Apollo and Santander were unsuccessful).

iii Privatisations

In addition to the austerity packages passed these last years, the government intends to reduce its budget deficit for 2014 through privatisations and the sale of significant stakes in important companies. This circumstance, together with the current favourable scenario, could reactivate the privatisation plans announced in the past and slowed down by the government itself to maximise returns.

The main privatisation plans affect 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).

As regards the disposal of shareholdings, in July 2013 the government completed the sale of a 16.42 per cent stake in Hispasat to Abertis for €172.5 million. Other participating companies are 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 the Canal Isabel II).

iv Construction and energy-related M&A

As mentioned in the previous editions of *The Mergers & Acquisitions Review*, since mid-2012 we have seen a stabilisation and downsizing of the Spanish construction industry, with companies focusing on creating synergies from previous acquisitions, focusing on core businesses and restructuring activities. For instance, within a debt restructuring process and a strategic plan for 2013–2015 targeting divestments of €2.4 billion, FCC sold:

a in March 2014, Cemusa (outdoor urban advertising) to JCDecaux for €80 million;

b in February 2014, FFC Logística (FCC's logistics division) to Corpfin Capital for €32 million; and

c in August 2013, Alpine Energy to Triton Capital for €92 million. On the other hand, FCC has been recently reinforced with the entrance in its capital of Bill

Gates (who acquired a 6 per cent stake of treasury stock for €113 million) and George Soros (who acquired a 3 per cent stake for €55 million).

Another important example of the trend in the construction sector is ACS, whose divestment plan could include wind farms, thermo-solar power plants, desalination plants, grid facilities in Brazil, toll roads in Spain, its 5 per cent stake in Iberdrola (power), its 17 per cent stake in Yoigo (cell phone operator) and its infrastructure division.

On the other hand, the energy sector has recently suffered a significant regulatory change that will affect its results and, therefore, will entail new divestitures. For instance, Iberdrola sold:

a in February 2014, its 22.6 per cent stake in Itapebi (a company that owns an electricity plant in Brazil) to Neoenergia for €98.86 million;

b between January and May 2014, its 6.66 per cent stake in Energias de Portugal for €662 million; and

c in December 2013, its 50 per cent stake in NuGen (a company that is developing a nuclear plant in the UK) to Toshiba Corporation for €101 million.

v Private equity

In parallel with the new scenario of confidence and existing opportunities in the Spanish economy, the results of private equity activity in the last month point towards the recovery of the sector: in 2013 there were 43 buyouts valued at €10.7 billion, 154.8 per cent higher in terms of value than in 2012. As mentioned above, during the first quarter of 2014, investments channelled by private equity increased (in value) to almost twice the amount accounted for in the same period in 2013, although the number of transactions remained about the same. The new context has led many equity firms to open offices in Spain or expand their teams to pursue opportunities (e.g., Värde, Anchorage, Carlyle, Blackstone, HIG Capital, BC Partners, Springwater and Palamon Capital Partners).

After some years of low market prices and uncertainty, private equity firms are taking advantage of the new situation of the Spanish economy by selling portfolio companies that, in some cases, had surpassed their maturity investment period. By way of example, as a strong sign of market confidence, the Spanish stock market has witnessed two exits through IPOs in 2014: Applus+ and eDreams Odigeo.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

i New acquisition financings

During the last quarter of 2013 and especially during the first semester of 2014 the acquisition finance market has consolidated the tentative recovery that began in 2013. The stabilisation of the financial markets and the legislative reforms adopted by the government has made the outlook for the acquisition finance debt market looks much brighter than a year ago.

Although it seems that investment grade borrowers are starting to recover their strong position in the acquisition finance market, the availability of funds from Spanish financing entities (especially for non-investment grade borrowers) continues to be rather low in the first quarter of 2014. In addition, borrowers must still cope with the limitation on the tax deductibility of financial expenses that was introduced in 2012 that has also had an adverse effect on shareholders' returns and the fulfilment of business plans.

On the other hand, during this first quarter of 2014, debt issuance transactions of Spanish companies in the more flexible and liquid Anglo-Saxon markets have consolidated their slight increase of 2013. Furthermore, certain Spanish companies (including financial entities) have also started to use the Spanish market for their debt issuances, some of a considerable volume, and probably the forthcoming reforms will boost this market in the near future.

Lastly, due to the incipient recovery of the financial markets and, in some cases, the tough conditions that may have been imposed, certain strong borrowers are starting to experience an increase of bridge bank financings granted to partially refinance the above-mentioned debt issuances. The remaining borrowers are still using equity contributed by strong sponsors to at least partially refinance their debt issuances.

ii Financing conditions

Apart from these general trends, the following are the main features of acquisition financings in 2013 and 2014:

a The range of financing products available to the borrowers remains limited: second-lien facilities, ancillary facilities, bridge-to-equity facilities and equity-like facilities continue to be missing 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 serve all the debt and part of the term loan facilities are converted into partial PIK facilities). In contrast, vendor loans and, more recently, non-banking loans (e.g., those coming from hedge funds) continue to be frequently used to finance acquisitions.

b Banks generally reject debt-to-asset transactions. Under 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 although as discussed above, following the recently approved reform of the Insolvency Law introduced by RDL 4/2014, banks may be faced, under certain circumstances, with debt capitalisations.

c Banks still refrain from agreeing to the 'certainty of funds' provision in commitment letters, whereas the inclusion of material adverse change clauses and 'diligence out' provisions continue 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 always include widely drafted 'market disruption' clauses. In contrast, LMA provisions concerning defaulting lenders are still uncommon in the Spanish market except when international financial sponsors with a stronger negotiation position participate in the deal.

d Although in recent years (2011 and 2012), the economic terms of acquisition finance transactions contemplated reductions in the terms and increases in margins and fees, especially agency fees, compared with previous years, during the last quarter of 2013 and the start of 2014 the market has begun to return to longer terms and lower prices. Leverage ratios have been reduced and banks tend to include amortising term loans rather than bullet loans (which approach, to a certain extent, commits 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 as well as the judicial recognition of refinancing agreements, whose effects have been improved by the latest reform of the Insolvency Law implemented by RDL 4/2004, have become common refinancing instruments and will most probably be mainly used in the near future as a consequence of the improvements that have been introduced by RDL 4/2004.

e Banks continue to reject specific provisions that were common in a more favourable economic environment and security packages requested continue to be robust. Banks also continue to be 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 Some of the target companies acquired by private equity companies in leveraged buyouts that closed at high prices between 2005 and 2007 continue to be faced with financing difficulties as the 'wall of debt' approaches (leveraged loans due to mature between 2014 and 2016). Similar difficulties have arisen for other companies, which during the same period financed ambitious recaps out of new subordinated bank facilities. We have even witnessed (and will probably continue to witness in the near future, especially following the impending energy reform in Spain) large and medium-sized private equity firms failing to support their vehicles, leaving the financing banks with the dilemma of whether to seek out a new purchaser, acquiring the shares of the vehicle in exchange for their debt, or whether to request the declaration of the vehicle's insolvency. Private equity firms have taken advantage of this opportunity to buy back their vehicles' debt.

g Finally, there seems to be a change in the market players. Investment funds that were very active between 2004 and 2007 are currently divesting in Spain, whereas in the last two years we have witnessed the arrival in Spain of funds seeking investment opportunities by taking advantage of the low prices. In addition, entities performing shadow banking activities have increased their presence in the Spanish market, and traditional private equity players are entering into new investment activities such as direct lending.

iii Refinancings

The volume of large refinancings and restructurings continues to be steady during the second half of 2013 and first quarter of 2014 although we are probably facing the final stage of this trend.

VII EMPLOYMENT LAW

Law 3/2012 on urgent measures to reform the labour market (Law 3/2012) was enacted on 7 July 2012. Law 3/2012 replaced Royal Decree-Law 3/2012 of 10 February, on urgent measures to reform the labour market (RDL 3/2012).

RDL 3/2012 and Law 3/2012 introduced a significant set of measures aimed at improving the Spanish labour market, which was hit hard by the economic crisis and showed very high unemployment rates. Among those labour measures, the following can be highlighted for their relevance:

The compensation for unfair dismissal was reduced from 45 to 33 days of salary per year of service. However, there are transitory rules preserving the entitlement to 45 days of salary per year of employment under the former regulations.

As regards collective dismissals, before RDL 3/2012 and Law 3/2012 the previous authorisation from the labour authorities was required in order to conduct a collective dismissal. Now, an administrative authorisation is no longer required. Notwithstanding this, collective dismissals are subject to review by the labour courts.

On the other hand, after this reform, collective bargaining agreements (CBAs) that had expired remained in force until a new CBA was entered into by the relevant employers or employers' association and the employee representatives, unless otherwise provided in the CBA. This was called 'ultra-activity' and worked as a mechanism preventing the lowering by subsequent CBAs of the conditions of employment established in the previous CBA. Law 3/2012 set a maximum ultra-activity period of one year, in order to promote the entry into new CBAs better suited to the changing market conditions. Thus, pursuant to the new regulations, if after that period the parties have not entered into a new CBA, the CBA with a broader scope of application will apply (e.g., if after one year from the expiry date of the CBA of a bank, the bank and the works council do not enter into a new CBA, the general CBA for the banking industry will apply).

Two years after the entry into force of RDL 3/2012 and Law 3/2012, there are a number of court decisions applying and interpreting the new provisions. The most significant issues are as follows.

Labour courts are showing a very stringent approach in respect to compliance with the formalities of collective dismissals. Thus, courts have put an emphasis on the company's obligation to provide the employee representatives with all the information and documents not only as required by the law but also that may be reasonably required in order for them to have all the necessary information in order to soundly negotiate with the company. The lack of provision of the relevant information and documents could result in the collective dismissal being classified as void, so that all the employees must be reinstated.

Courts and scholars are in debate over a controversy that has arisen in connection with the ultra-activity of CBAs in respect to which there is no broader-scope CBA when the parties do not enter into a new CBA before the end of the one-year ultra-activity period. Opinions are divided between those who argue that the CBA remains applicable until replaced by a new CBA, in a similar way as applied under the previous regulations, and those who think that, in that scenario, no CBA at all applies.

VIII TAX LAW

A significant set of amendments to the Spanish tax regulations was approved during the final months of 2013. Most of these amendments refer to corporate income tax (CIT), having retrospective effect as of 1 January 2013. We would highlight the following as most relevant for M&A practice.

i Non-deductibility of impairment losses

Impairment losses on shares in any sort of entity (whether or not resident in Spain) are no longer deductible for CIT purposes, regardless of the percentage of the share.

ii Non-taxation of dividends upon evidence that an equivalent amount was taxed in a previous share transfer

This measure basically consists in CIT payers receiving dividends being allowed to deduct from their taxable income corresponding to such dividends the taxes paid by the former shareholders of the company on any gains derived from the transfer of the relevant shares in the past, under certain conditions. This can be applied simultaneously and in addition to a tax credit to avoid double taxation on the relevant dividends.

iii Non-deductibility of losses from permanent establishments abroad or temporary business associations (UTEs) operating abroad

Spanish CIT payers can no longer deduct the losses they incur through permanent establishments or temporary business associations (UTEs) operating abroad.

iv Deferral of deductibility of losses deriving from intragroup transactions on shares or permanent establishments

A new general rule is established according to which losses derived from the transfer of shares or permanent establishments between companies within the same group (considering as such those under the same controlling unity) are not deductible upon accrual, but are deferred for tax purposes up to the moment when the relevant shares or permanent establishment are transferred out of the group, or when the transferor or the acquirer leaves the group.

There has been a deduction of tax deductible losses deriving from the transfer of shares or permanent establishments when the transferor previously obtained exempt income from them.

When a Spanish CIT payer has obtained exempted dividends from a share in a company (whether or not a Spanish resident) losses triggered upon the subsequent transfer of the relevant share, up to the amount of the exempted dividends previously received, can no longer be deducted. This also applies, *mutatis mutandis*, in the case of permanent establishments that have generated exempted income before being transferred.

v Amendment to the 'patent box' regime

After being amended, the 'patent box' regime essentially consists of the possibility of applying a CIT reduction of 60 per cent on the net income derived from transferring the ownership or licencing the use or exploitation of patents, designs or models, plans, secret formulae or processes, or information concerning industrial, commercial or scientific expertise, provided that the relevant assets have been created by the transferor under certain conditions.

vi New VAT cash-flow regime

With effects as of 1 January 2014, those VAT payers whose turnover does not exceed €2 million may choose to be subject to the 'cash-flow VAT special regime', under certain requirements. This consists of (1) the accrual of output VAT corresponding to transactions carried out by these taxpayers being deferred to the date when the relevant price is paid to them; and (2) the deductibility of input VAT borne by these taxpayers being deferred to the date when they pay the price of the relevant transaction.

vii Extension of temporary measures to increase tax collection

Most of the temporary measures approved in the last years to increase tax collection and enhance tax consolidation have been extended to 2014 and 2015. This includes certain limitations to the offsetting of carried-forward losses and the deductibility of goodwill depreciation.

Additionally, an exhaustive tax reform has been announced for 2015. Although there is no draft of the reform law or a specific proposal from the government yet, this reform is expected to introduce significant changes to the CIT regulations, including a reduction of the general CIT rate from 30 per cent to 25 per cent (likely to be introduced progressively in two or more years).

IX COMPETITION LAW

The main development in 2013 was the creation of the National Markets and Competition Commission (NMCC) that combines in a single regulatory body the functions of the former National Competition Commission (CNC) and the regulators of the energy, telecommunications, media, post, railway transport, air transport and gambling sectors.

This institutional change has not led to an increase in the waiting periods in merger control proceedings. In particular, as regards mergers in regulated industries where two different authorisations from the NMCC may be required (regulatory and merger control), merger control proceedings are expected to be swifter.

In 2013, the total number of filings was lower than in 2012 and 2011. The areas with the most transactions are the manufacturing sector, the financial and insurance sector, the health industry (including medical devices, drugs, etc.), the chemical industry and information society services sector.

In terms of antitrust enforcement policy, in 2013 the NMCC continued to closely monitor companies' compliance with its decisions, through a specialised division within the Competition Directorate to conduct such investigations. In merger control, several proceedings to review the compliance of the conditions imposed on mergers have been initiated. Within such proceedings requests for information to third parties as regards compliance by the companies with the conditions imposed are usually sent. Indeed, these proceedings have resulted in the imposition of significant fines to two companies for breach of the conditions imposed.

These enforcement activities in merger control have also resulted in one gun-jumping decision in which the former CNC imposed a hefty fine on a company for closing a transaction without obtaining the mandatory merger control authorisation.

X OUTLOOK

M&A prospects for the coming months are moderately optimistic. The sustained improvement of the Spanish economy, the additional reforms announced by the government, the continued de-leveraging process and the increased access to credit and other financing for Spanish corporations and private equity, strengthen the belief that the volume and number of M&A transactions will progressively increase in the short and medium term.

Spanish banks, in their back-to-basics strategy, will continue to be the main source of M&A transactions, divesting their non-core assets, such as their participations held in industrial companies, and the Spanish banks currently controlled by the state will be sold to the private sector.

The growing number of foreign investors in the Spanish economy, as well the global improvement of the economy and the high activity of M&A transactions worldwide will continue to affect the high number of transactions involving foreign investors in Spain. European and US investors will continue to be the main players, with an increase of the activity of investors from China, the Middle East and Latin America.

Lastly, foreign private equity funds continue to focus on Spain (although they consider the market to be overheating) to seek opportunities in the financial, real estate or telecommunications sectors. Other foreign and Spanish funds will be forced or tempted to divest from their past investment and to rotate their portfolios.

Appendix 1

ABOUT THE AUTHORS

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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 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.

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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 partner in 2014 and he is currently the head of the M&A and private equity department at Uría Menéndez's Bilbao office.

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

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