FINANCIAL SERVICES M&A

Spain

LEXOLOGY
Getting The Deal Through

Consulting editor
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Financial Services M&A

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Quick reference guide enabling side-by-side comparison of local insights, including into the market and policy climate; key legislation; required regulatory consents and filings; ownership restrictions; directors and officers' issues; foreign investment restrictions; competition law and merger control issues; deal structures and strategic considerations; tax; ESG, public relations, political and policy risk management; shareholder activism; due diligence, including in relation to emerging technologies; pricing and financing; purchase price adjustments; deal terms (including reps and warranties, indemnities and closing conditions); dispute resolution; and current trends.

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MARKET AND POLICY CLIMATE

Market climate

How would you describe the current market climate for M&A activity in the financial services sector in your jurisdiction?

Although not to the extent of other sectors such as energy or real estate, 2021 has been quite a good year for financial services M&A.

According to TTR's Iberian Market Annual Report 2021, M&A transactions within the financial and insurance industry in Spain have increased by 36 per cent from 2020; recorded deals in 2021 amounted to 226. This places the financial and insurance industry as one of the leading subsectors in Spain M&A activity-wise. M&A activity in financial services is predominantly domestic, although the number of cross-border deals in the financial and insurance sector shows important activity involving foreign players in 2021.

With a longer (eg, 10-year) term perspective, the sector has shown a remarkably stable – and relatively high – level of M&A activity, partly due to the intense process of restructuring of the banking segment.

Law stated - 21 February 2022

Government policy

How would you describe the general government policy towards regulating M&A activity in the financial services sector? How has this policy been implemented in practice?

The Spanish government does not have a permanent, formulated policy in connection with M&A in the financial sector. The matter is left to supervisory authorities in charge of the different subsectors (the European Central Bank, the Bank of Spain, the National Securities Markets Commission, etc) which, in turn, take a neutral approach, playing their role as supervisors (normally, by issuing the necessary regulatory permits) but not getting actively involved.

That said, the latest economic crisis in Spain (2008–2012), created a need to restructure the Spanish financial system – which, due to the absolute predominance of banks as intermediaries, is, to a large extent, another way to refer to the banking system – to secure its sustainability in the long run. In this regard, Spanish (and European) authorities took action (both direct and in the form of regulatory amendments) to facilitate restructuring and concentration, not so much as a matter of policy but as a response to circumstances.

Restructuring needs have been a key driver of M&A in the financial sector recently. The same applies to technological change (in particular, in certain subsectors such as payment services), which is fostered from EU instances.

Law stated - 21 February 2022

LEGAL AND REGULATORY FRAMEWORK

Legislation

What primary laws govern financial services M&A transactions in your jurisdiction?

Primary laws are as for all M&A transactions: the rules set out in the Civil Code, the Companies' Act and the Commercial Code and, in fact, general international M&A standards that operate as a sort of lex mercatoria.

In addition, Act 3/2009 of 3 April on structural modifications of companies governs structural changes in companies, comprised of, among others, mergers and spin-offs, and applies to financial institutions too.

That said, the statutes governing the different intermediaries (banks and other credit institutions, payment services providers, e-money institutions, investment services providers, asset managers, insurers, etc) and their respective activities are of critical importance as to the substance of matters and for a good understanding of deal dynamics. Spain lacks a general financial intermediaries' code along the lines of that in France, Italy or Portugal. Although structurally similar, each type of intermediary has its own governing statute which, in turn, when not directly an EU statute (in the form of an EU regulation, such as the credit institutions solvency rules provided by Regulation (EU) 575/2013) derives from EU statutes in the form of directives. As an example, the most relevant would be the Banking Act .

Law stated - 21 February 2022

Regulatory consents and filings

What regulatory consents, notifications and filings are required for a financial services M&A transaction? Should the parties anticipate any typical financial, social or other concessions?

It depends on the target and deal structure. When targets are parent companies of other financial institutions or are active in different business segments or jurisdictions (something that frequently occurs), multiple regulatory controls may apply cumulatively.

When the target is a credit institution: (1) asset deals and reorganisations (ie, mergers and spin-offs) require the authorisation by the Ministry of Economic Affairs, and (2) acquisitions of a qualifying holding require authorisation of the European Central Bank (ECB) through the Bank of Spain.

Acquisitions of a qualifying holding in payment services providers, e-money institutions, asset deals or reorganisations involving such require the non-opposition or prior authorisation, respectively, of the Bank of Spain.

When targets are investment services firms or asset managers, acquisition of qualifying holdings, asset deals or reorganisations require non-opposition or authorisation, respectively, of the Spanish National Securities Market Commission (CNMV).

The Spanish Directorate-General of Insurance and Pension Funds' (DGSFP) non-opposition is required to acquire a qualifying holding in insurance or reinsurance companies (by any means, including by merger, share capital increase, spin-off or otherwise).

As a rule, direct or indirect acquisitions above 5 per cent of the share capital or voting rights, and up to 10 per cent, in a financial services undertaking require notice to be served on the relevant supervisor. Exceeding those thresholds would trigger the need to request non-opposition.

Prospective acquirers must meet the suitability criteria set forth in applicable regulations and ultimately contained in the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector issued by the European Insurance and Occupational Pensions Authority, the European Banking Authority and the European Securities and Markets Authority (the Guidelines), which apply on a cross-sector basis.

Clearance from supervisors may be conditional. Conditions may be imposed along the process (ex ante, as a requirement to obtain clearance) or in the resolution (ex post, as a requirement to validly hold the stake). Supervisors have wide discretion to set conditions, although, typically, they would (1) require amendments to the acquisition structure (eg, that certain jurisdictions are avoided as places of incorporation of holding companies or that the recourse to debt to fund the acquisition is limited); (2) impose covenants in connection with the subsequent operation of the institution (eg, limits of operations with certain affiliates); (3) make certain requests with regard to corporate governance (eg, that independent directors are appointed even when not mandatory or that certain candidate appointees receive specific training); or (4) ask for guarantees. In this regard, parties to an M&A deal should generally (1) evaluate the chances of execution (ie, of meeting regulatory expectations); (2) anticipate potential issues to avoid conditionality; and (3) if need be, be prepared to amend initial terms to adapt to requirements or, at least, have a clear view of what requirements may be acceptable and what others should not be (and adapt language in the agreements accordingly).

Law stated - 21 February 2022

Ownership restrictions

Are there any restrictions on the types of entities and individuals that can wholly or partly own financial institutions in your jurisdiction?

Subject to supervisory clearance, and as a matter of principle, no category of persons is excluded from the acquisition of shareholdings in financial institutions and, in fact, there are examples of nearly every form of ownership, from listed companies to family or individual-owned institutions, including institutions that are controlled by private equity funds.

Law stated - 21 February 2022

Directors and officers – restrictions

Are there any restrictions on who can be a director or officer of a financial institution in your jurisdiction?

In accordance with Spanish and EU regulations, a director or key officer must be (1) reputable, (2) knowledgeable, and (3) able to deliver good governance. All three notions are developed in the Guidelines and internal regulations.

Being 'of good repute' is an essentially negative criterion – in the absence of evidence to the contrary, a person should be deemed 'of good repute'. Further to the absence of criminal records, this implies no traces of disrespect for banking, commercial and company laws and good standing with regulators.

'Knowledgeability' translates into a combination of academic record and experience. The skills required will depend on (1) the size and complexity of the institution and (2) the role the candidate is going to perform.

Finally, 'ability to deliver good governance' means (1) absence of conflicts and (2) actual availability to provide the dedication that the role requires.

Clearance from the relevant regulator must be obtained before the director or key officer takes office but the requirements must be complied with on a continuous basis, throughout the whole term they are in office. Appointments, resignations and any amendments to the qualifications of directors and senior management are subject to registration with the Bank of Spain, CNMV or DGSFP.

Law stated - 21 February 2022

Directors and officers – liabilities and legal duties

What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of financial services M&A transactions?

Under Spanish law, directors and officers in a company owe their duties exclusively to the company. This is particularly remarkable in the case of financial institutions since the interest of the company is by no means limited to or a proxy of the shareholders'; there are other stakeholders – depositors, in particular – whose interest is connected with the company's.

It follows from above that directors and officers are, generally, under no obligation to cooperate with any M&A

transaction involving their company as a target. Notwithstanding, in practice, shareholders usually get said cooperation to the extent it does not clash with the directors' duties (eg, for due diligence purposes). That active cooperation, in certain circumstances, may be incentivised by recourse to bonuses which, to the extent not payable by the company and in compliance with remuneration rules, are acceptable to supervisors.

As a remarkable exception to the 'non-involvement rule', in the financial sector it is not so strange that directors, in exercise of their duties, must – even prompted by regulators – contemplate M&A (with the company as target) and actively promote it when it appears as a need to ensure business continuity or is an alternative to be contemplated under restructuring plans.

In this regard, in addition to generally applicable civil and criminal liability rules (vis-à-vis the company, shareholders and third parties) the directors and officers of a financial institution also face potential administrative liability for their own misbehaviour or the misbehaviour of their companies for which they are found responsible. Some infringements may relate to M&A activity or, sometimes, failure to engage in M&A activity – or to seek that engagement by shareholders – when said activity appears to be necessary (eg, under a restructuring plan).

Law stated - 21 February 2022

Foreign investment

What foreign investment restrictions and other domestic regulatory issues arise for acquirers based outside your jurisdiction?

From 1992, when capital flows were entirely liberalised, foreign investments in Spain only required filing ex post (in some cases, ex ante) declarations, for mere statistical purposes, with the Directorate General for International Trade and Investments.

However, on 18 March 2020, Royal Decree-Law 8/2020 on urgent extraordinary measures to deal with the economic and social impact of covid-19 declaring the state of emergency in Spain was enacted. This Royal Decree-Law, as amended, and in line with EU resolutions, re-introduced a foreign investment control regime in Spain. While other covid-19 related measures were subsequently reversed or eased, it was not the case of the new controls and there do not seem to be plans to reverse them in the foreseeable future.

Under the current regime, investors from outside the EU or EFTA need prior authorisation to acquire, directly or indirectly, control of a stake equal to or greater than 10 per cent of the share capital of a Spanish company active in a 'strategic sector'. Neither the financial sector as a whole nor any subsector are expressly labelled as 'strategic', but the rules deem 'strategic', among others, sectors with access to sensitive information (in particular, personal data) or sectors that operate 'critical infrastructures', which includes financial ones (eg, payment systems). Banking activities fall within the scope and, at least as far as personal data are concerned, the same can be said about most other financial industries. The reasonable assumption is thus, in principle, that non-EU/EFTA investors in financial institutions – no matter which subsector – shall be subject to prior authorisation under these rules provided the investment exceeds materiality thresholds.

Law stated - 21 February 2022

Competition law and merger control

What competition law and merger control issues arise in financial services M&A transactions in your jurisdiction?

The Spanish financial system is highly competitive so, perhaps it is worth starting by saying that M&A activities have not raised significant competition issues in the past. That said, whereas competition rules may have not been an issue, state aid rules have, in connection with the complex process of restructuring, and the status quo may change in the future, at least in the banking sector, since the concentration process has significantly reduced the number of actors and, conversely, increased their market share (and, as a matter of fact, the National Markets and Competition Commission (CNMC) has already imposed conditions on the recent Caixabank/Bankia merger).

That said, like in any M&A deal, financial services transactions that may involve an 'economic concentration of undertakings' as defined in the Competition Defence Act 15/2007 of 3 July must be authorised (whether expressly or tacitly) by the CNMC (or the European Commission) prior to completion.

The specificities of the financial sector in this regard relate to the definition of markets and relevant business volume drivers (eg, interest income, income from securities, operating income or value of premiums; all these, after deduction of taxes, as applicable).

Law stated - 21 February 2022

DEAL STRUCTURES AND STRATEGIC CONSIDERATIONS

Common structures

What structures are commonly used for financial services M&A transactions in your jurisdiction?

M&A transactions are usually structured by way of sale and purchase, either of shares or assets and liabilities (the latter is relatively common given the significant number of credit institutions operating in Spain under an EEA passport through branches and the number of deals that involve transfers of part of a business, as opposed to a business as a whole).

Given the relatively low number of listed companies (and the relatively low number of deals that involve a company's business as a whole), mergers, properly speaking, are not that frequent, although there have been a couple of very remarkable examples in the recent past (Caixabank/Bankia and Liberbank/Unicaja). Corporate modifications (mergers, spin-offs, etc), generally subject to simplifications available under corporate law, are, however, often used as structuring tools, ancillary to the main deal.

The main advantage of share deals or deals subject to corporate modification rules, as opposed to asset deals is the ease of transfer of the economic interest in a business. When acquiring shares, all assets, rights and obligations of the company transfer to the purchaser upon execution of the share purchase agreement. On the contrary, when acquiring assets and liabilities, further to the execution of the transfer agreement (contribution or purchase), and except when the exceptional rules of corporate modifications apply, the parties need to comply with the specific law governing the delivery of the elements making up the business.

En bloc (shares or going concern) transfers also benefit from special tax regimes that are not available for item-by-item transfers. And other matters such as labour issues are easier to deal with, either because there are no changes in employers (share deals) or because succession rules are clearer.

This general rule is particularly true for the financial sector. Although there are differences among subsectors, most of the value of financial services companies lies with relationships with customers –debtors, depositors, policyholders, asset management clients, etc – for the most part in the form of financial contracts subject to specific regulations. Transfers pursuant to general civil law rules, item by item, are particularly cumbersome and, for some business lines (eg, private banking) riskier, as they increase the chances of customer attrition.

Law stated - 21 February 2022

Time frame

What is the typical time frame for financial services M&A transactions? What factors tend to affect the timing?

The time frame depends on the deal structure and the target financial entity and is mainly driven by regulatory approvals. The law sets different time frames for different proceedings; so, for instance, the term for the Ministry of Economic Affairs to authorise an asset deal or a corporate reorganisation of a credit institution is six months (which can be extended for 12 additional months under certain circumstances), while acquisitions of a qualifying holding in any financial entity is 60 business days, albeit it can be extended by a further 30 days.

Authorisations to complete a corporate reorganisation of a non-credit financial institution are usually meant to be issued within three months.

That said, practice shows that whereas some proceedings are dealt with in shorter time frames than legally possible (as is often the case for ministerial clearance of corporate reorganisations, which are normally issued before the six-month term expires), others take longer (as is the case, in particular, of qualifying holdings' 60-business–day clearance, where the preparation of filings and informal talks with supervisors – which are not mandatory but highly advisable – results in a longer time frame).

Other than when new licences are involved (eg, joint venture agreements that require the creation of a new financial services company) – in which case time frames can be much longer – parties should expect no less than four to five months to close a sectoral deal.

Law stated - 21 February 2022

Tax

What tax issues arise in financial services M&A transactions in your jurisdiction? To what extent do these typically drive structuring considerations?

Together with regulatory constraints, tax is very often a key structure driver.

Value added tax (VAT), since it is, for the most part, not deductible for financial institutions (whose services are also, for the most part, VAT-exempt) creates a major structuring issue.

Asset transfers tend to be built up as transfers of 'business units', given that if transferring a 'business unit' or going concern within the meaning of section 7.1º of the VAT Act, it does not trigger Spanish VAT. In terms of corporate income tax (CIT), although, as a general rule, the transfer of a business by way of purchase and sale may not attach CIT-neutrality, there is an important exception for credit institutions, whereby that neutrality can be granted if the transfer, whichever the means, is carried out under bank restructuring rules.

On the side of share deals, these would, in principle, be VAT-exempt. Notwithstanding, transfer of real estate included in an ongoing business activity located in Spain not subject to VAT will be subject to transfer tax.

Law stated - 21 February 2022

ESG and public relations

How do the parties address the wider public relations issues in financial services M&A transactions ? Is environmental, social and governance (ESG) a significant factor?

ESG has not, to date, become a critical driver in Spain and so PR in connection to M&A still follows a more traditional approach.

That said, the situation is likely to change quickly as ESG is climbing high in the business agenda. Most major financial institutions are developing and implementing ESG policies and standards and, thus, in the near future, it will be increasingly common that, further to giving an account of how M&A helps meet their financial and regulatory goals, they will have to provide an ESG rationale and show how deals are consistent with their policies.

Law stated - 21 February 2022

Political and policy risks

How do the parties address political and policy risks in financial services M&A transactions?

Given the volume of regulation in financial services and its constant evolution, 'change in laws or regulations' is a sort of industrial risk that, to a good extent, investors are expected to take and factor in price. The matter becomes an issue when, in the context of a particular transaction, risk appears to be significantly above standards (eg, the purchase of a monoliner institution the business model of which is entirely dependent on the stability of a certain legal provision or that may be critically affected by court rulings).

This has happened in the past, relatively frequently, not with changes in regulation but with expected changes in Supreme Court jurisprudence with high impact on credit portfolios, for instance.

These qualified risks are usually addressed with material adverse change (MAC) clauses – whereby closing is made conditional on no MAC having occurred – or walk-away clauses to protect the purchaser from relevant changes. These types of clauses are a practical recourse between signing and closing, although do not help much after completion as reverting the transaction is virtually impossible.

Post-closing, acquirers may, and do, seek coverage in the form of price adjustments or indemnification covenants.

Law stated - 21 February 2022

Shareholder activism

How prevalent is shareholder activism in financial services M&A transactions in your jurisdiction?

Shareholder activism is not a very extended phenomenon in Spain. In addition, save some exceptions –where there is no shareholder activism either – most M&A transactions are private.

Law stated - 21 February 2022

Third-party consents and notifications

What third-party consents and notifications are required for a financial services M&A transaction in your jurisdiction?

By application of the Civil Code, in the case of asset deals, third-party consents will always be required when transferring agreements whereby the seller holds the debtor position (eg, deposits). If holding the creditor position, no consent would be required but only serving a notice acknowledging the assignment of the agreement. In M&A transactions involving banks where a substantial part of the business is deposits or other retail agreements with customers in large numbers, this is typically dealt with by tacit consent as the only feasible way forward.

Share deals would only require seeking consents if the transaction triggers change of control clauses under the target's agreements with clients or suppliers.

Transfers through demergers, global conveyance of assets and liabilities or acquisitions via merger benefit from the ‘universal succession principle’, so all assets and liabilities are transferred by operation of law, with general (not case-by-case) rights to oppose (for reason) being granted to creditors and not available to already secured creditors (eg, depositors benefiting from deposit insurance).

Law stated - 21 February 2022

DUE DILIGENCE

Legal due diligence

What legal due diligence is required for financial services M&A transactions? What specialists are typically involved?

Although legal due diligence requires the involvement of lawyers from all different practices, financial regulation specialists play a key role given that most relevant matters are those closely tied to the regulatory field. Their review focuses on whether that target holds a proper licence to conduct its business; the way products are commercialised (MiFID tests) and services rendered; and compliance with AML laws and KYC practices, among others.

In addition, diligence typically covers the review of financial statements from a regulatory perspective (ie, whether the financial entity maintains certain capital buffers and own resources, as required by CRD IV and CRR) and standing with regulators.

Law stated - 21 February 2022

Other due diligence

What other material due diligence is required or advised for financial services M&A transactions?

Corporate governance is usually another field that interests most prospective acquirers given that financial entities require higher standards of corporate governance procedures to ensure soundness of management. Diligence advisers usually examine whether the target has: (1) a clear organisational structure with well-defined, transparent and consistent reporting lines; (2) effective procedures for the identification, management and control of risks; (3) appropriate internal control mechanisms; and (4) remuneration policies and practices aligned with adequate and effective risk management.

While entirely not financial services-specific, since the industry is (1) personal data intensive and (2) increasingly relying on online business models, IT security and data protection matters play a salient role and should rank highly in the reviews.

Law stated - 21 February 2022

Emerging technologies

Are there specific emerging technologies or practices that require additional diligence?

For the time being, we have not faced the need for extending diligence to specific emerging technologies (which are still marginal in the broad context of financial services), although we are starting to see an increasing interest in financial business ventures with fintech and insurtech companies, so we should expect this in the near future.

Law stated - 21 February 2022

PRICING AND FINANCING

Pricing

How are targets priced in financial services M&A transactions? What factors typically affect valuation?

It depends on the industry and the type of deal.

Banks, which have listed comparables, may be valued on premia or discounts on book value, based on those comparables. In other industries, or for banks that run niche business models far from comparables, metrics are based on multiples of sectoral relevant drivers (eg, premiums, assets under management, etc).

In any event, valuation is greatly influenced by regulatory constraints, such as the capital requirements and additional buffers required for each type of financial entity. In a business combination, it is not only the capital and provisioning requirements of the acquiree that matter but also the acquirer's – if a financial services company itself – since the rules allow for differences on capital charges and provisioning for a given business depending on the carrier and, moreover, the decision to undertake M&A may, in itself, have an impact on the acquirer's capital position and supervisory requirements (ie, the capital requirements of the acquirer ex ante need not extend automatically to the combined business, but, rather, M&A may alter the entire calculation).

Finally, dividend discount models, although also applicable, must take into consideration that financial institutions' ability to declare and pay dividends is subject to regulatory and supervisory constraints too.

Law stated - 21 February 2022

Purchase price adjustments

What purchase price adjustments are typical in financial services M&A transactions?

In asset purchases or business transfers, the initial purchase price is often combined with earn-outs or deferred payments contingent on meeting business targets (eg, assets under custody or management, written premium, collections, etc).

In share deals, price is frequently based on locked-box mechanisms and reviewed only for leakages or misstatements on locked-box accounts prepared by the seller combined with a decrease or increase on values of specific items (eg, premiums, assets under management). Net value adjustments are also very common and often used under closing accounts mechanisms.

Hybrid approaches are not entirely uncommon either; so while for the most part a pricing scheme may be based on a locked-box, the purchaser may still seek adjustments for particularly sensitive matters regulatory-wise (eg, level of provisioning, additional capital requirements).

Earn-in schemes are, on the contrary, uncommon.

Law stated - 21 February 2022

Financing

How are acquisitions typically financed? Are there any notable regulatory issues affecting the choice of financing arrangements?

Most deals are financed with own funds or through intra-group facilities ultimately backed by own funds. Leveraged transactions are not common.

The reason for this is eminently regulatory: one of the features potential acquirers are expected to make extensive disclosure of during supervisory clearance processes is their plans to fund acquisitions and supervisors are extremely reluctant to accept significant levels of debt, since they consider that to be a potential source of instability of the holdings.

Law stated - 21 February 2022

DEAL TERMS

Representations and warranties

What representations and warranties are typically made by the target in financial services M&A transactions? Are any areas usually covered in greater detail than in general M&A transactions?

It is uncommon for a target to grant any type of warranties in share or asset deals as it is not a party to the sale and purchase agreement.

Representations and warranties in financial services M&A deals usually cover matters that are not applicable in other sectors' specific matters (eg, licences, marketing of products and rendering of services in accordance with applicable regulations, AML and KYC – absence of dealings with sanctioned customers or entities domiciled in tax heavens). The set of warranties is usually combined with strong pre-closing undertakings which often contain exhaustive lists of remedial actions accommodated to the findings of the due diligence and are commensurate with interim periods that, mainly due to regulatory clearances, take considerably longer than in other sectors.

Law stated - 21 February 2022

Indemnities

What indemnities are typical for financial services M&A transactions? What are typical terms for indemnities?

Indemnities very often revolve around tax issues (eg, transfer pricing, breaking of tax group), mis-selling (eg, abusive practices, unfair clauses, usurious rates in financial products, defective precontractual and contractual information, breach of transparency regulations and unlawful marketing practices) and defective compliance with the applicable regulations on AML and KYC.

Typically, the term for these types of indemnities is the corresponding legal statute of limitations and logically, acquirers demand for these to be uncapped, although in practice, it is customary to reach an agreement on 100 per cent of the purchase price, excluding any de minimis or baskets.

Law stated - 21 February 2022

Closing conditions

What closing conditions are common in financial services M&A transactions?

Obtaining authorisations by the relevant supervisors and merger control clearance are the most common. In addition, we often see, as closing conditions, parties having reached an agreement on the final terms of migration or transitional services agreements, or, in asset purchases, obtaining waivers or consents from counterparties to the underlying agreements (usually setting a reasonable threshold of consents out of the volume of business).

Law stated - 21 February 2022

Interim operating covenants

What sector-specific interim operating covenants and other covenants are usually included to cover the period between signing and closing of a financial services M&A transaction?

In financial services M&A transactions you would usually find interim period covenants targeted at ensuring that:

- policies, procedures and commercial strategy with respect to new or existing customers, are kept in the ordinary course (among others, in terms of (1) risk assessment (eg, scoring, ratings), (2) acceptance of guarantees; or (3) defaulting customers);
- the level of credit limit on exposures is not exceeded by a certain percentage;
- licences for the rendering of activities are maintained;
- the target does not engage in new business activities or amend the portfolio of products or services offered; and
- to the extent permissible under regulations, the potential acquirer is duly informed about relevant matters and, in particular, about any engagement with supervisors.

In addition, it is common to secure remuneration of directors and senior management is not amended and the sellers' commitment to ensure the target's cooperation with the purchaser and the relevant supervisors.

Law stated - 21 February 2022

DISPUTES

Common claims and remedies

What issues commonly give rise to disputes in the course of financial services M&A transactions? What claims and remedies are available?

Disputes over price adjustments after closing or claims for breaches covered by representations and warranties linked to regulatory issues (mainly with clients).

Spanish law, per se, does not limit the damages remedies available to a non-breaching party for breach of contract. Parties may request specific performance or terminate the agreement as a matter of law. However, except when disputes arise between signing and closing – in which case the array of remedies can include, or not exclude, specific performance – we can say that 'sole remedy' clauses whereby purchasers accept to be indemnified for damages, in cash, are the general rule to the exclusion of any other remedies.

Law stated - 21 February 2022

Dispute resolution

How are disputes commonly resolved in financial services M&A transactions? Which courts are used to resolve these disputes and what procedural issues should be borne in mind? Is alternative dispute resolution (ADR) commonly used?

Domestic deals are usually submitted to Spanish courts.

Except when certain corporate law issues are at stake, there is no specialised branch to deal with M&A matters in

Spain. Issues are left to the general civil courts. Lawsuits, irrespective of the amount, must commence at a lower court (a 'first instance court') and may be appealed before a court of appeal (there is one for each of the 50 Spanish provinces). Exceptionally, cases may subsequently be brought to the Supreme Court. While Spanish courts are fully independent and may be expected to solve technical matters correctly, resolutions can take a considerably long time. It is difficult to obtain a first instance ruling in less than two years and appeals can result in cases lasting seven or 10 years relatively easily.

However, when an acquirer or seller are foreign and do not have experience in the jurisdiction, disputes are commonly submitted to arbitration. Arbitration is often the preferred option for the parties to a complex deal as it is less time-consuming (the first instance might take as long as in courts but, in principle, there will be no appeals) and the parties tend to presume better understanding of the dispute by an arbitrator than by a Spanish judge. Language is also an advantage, since arbitration proceedings, unlike court lawsuits, need not be conducted in Spanish. The seat of the arbitration can also be anywhere, irrespective of the applicable law. Nonetheless, arbitration costs are considerably higher than court litigation – whereas the counsel fees may be similar, courts in Spain do not levy material fees and there are no arbitrators' fees involved – and, of course, except for limited circumstances, as stated, there is no right to appeal.

Arbitrations can be arranged ad hoc but, more often, parties tend to choose established courts and rules of procedures. Cross-border deals are frequently submitted to ICC rules. That said, Spain has domestic courts in Madrid and Barcelona that provide quality arbitration services and have arbitrators with wide experience in financial services on their panels.

Mediation or other forms of non-binding ADR are rare. It is not uncommon, however, for purely technical disputes, not involving a legal angle (eg, discrepancies in calculations or application or accounting or solvency rules) to be submitted for examination by experts whose report is accepted as binding on the parties.

Law stated - 21 February 2022

UPDATE AND TRENDS

Trends, recent developments and outlook

What are the most noteworthy current trends and recent developments in financial services M&A in your jurisdiction? What developments are expected in the coming year?

In the coming year we should expect an increase in partnerships of traditional financial entities with fintech or insurtech companies. As the restructuring of the Spanish financial system is reaching its end, the technological transformation will lay the ground for future M&A transactions where venture capital will have a leading role. The most coveted targets will be those able to provide technology and IT solutions in the provision of financial products or services that are rapidly changing to accommodate new market demands.

Law stated - 21 February 2022

Jurisdictions

Egypt	Soliman, Hashish & Partners
France	Bredin Prat
Indonesia	ABNR
Japan	Mori Hamada & Matsumoto
South Korea	Bae, Kim & Lee LLC
Spain	Cuatrecasas
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