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Corporate M&A 2022

Andorra: Law & Practice
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Cases & Lacambra

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Law and Practice

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1. TRENDS

1.1 M&A Market

The M&A market in Andorra has seen encouraging activity in the past 12 months and has shown strong signs of recovery after the initial stages of the ongoing COVID-19 pandemic.

1.2 Key Trends

In 2021, local banking entities played a key role in Andorra, as well as real estate corporations interested in developing construction projects in Andorra.

1.3 Key Industries

The key industries driving M&A activity in Andorra in the past 12 months were banking, insurance and real estate. The industries that have been particularly affected by the COVID-19 pandemic are retail and tourism-related industries.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

It should be noted that there is no stock market in Andorra. Therefore, in M&A transactions, the primary technique for acquiring a company in Andorra is to enter into a share purchase agreement (SPA) between the buyer and the shareholders of the Andorran target company. The SPA sets out the main terms and conditions regarding the transaction. The transfer of the shares needs to be notarised and it is registered in the Andorran Companies' Register. Mergers are less frequent but may also be used as a means to acquire a company.

2.2 Primary Regulators

The primary regulators for M&A activity in Andorra are:

- *Autoritat Financera Andorrana* (Andorran Financial Authority or AFA) for M&A related to financial and insurance institutions;
- *Ministeri de Presidència, Economia i Empresa* (Presidency, Economy and Companies Minister) in charge of supervising merger control; and
- *Registre d'Inversions Estrangeres* (Foreign Investment Register or FIR) in charge of authorising and screening foreign investments in Andorra.

2.3 Restrictions on Foreign Investments

The foreign investment regime in Andorra qualifies as direct investment and includes investments made in Andorran companies by:

- non-Andorran persons or non-resident natural persons;
- legal persons of foreign nationality; and
- Andorran companies with direct or indirect foreign equity participation equal to or greater than 50% of their share capital or voting rights.

Specifically, the term “direct investments” covers:

- the incorporation of an Andorran company;
- the total or partial acquisition of the shares of an Andorran company; or
- the acquisition of any other rights that entitle the foreign company or natural person to participate in the share capital of the Andorran company or to acquire voting rights.

If as a result of the acquisition, the acquirer holds, directly or indirectly, a stake in the Andorran company higher than 10% of its share capital or voting rights, the foreign investment regime requires the acquirer to obtain prior authorisation from the Government of Andorra issued through the relevant ministry.

Otherwise, where the stake in the Andorran company held by the foreign company or natural person is equal to or less than 10%, it is sufficient merely to notify the Foreign Investment Register after the transaction.

2.4 Antitrust Regulations

There are no antitrust regulations applicable to business combinations in Andorra.

Nevertheless, Andorran regulations do foresee the control of economic concentrations. Economic concentrations are deemed to arise where there is stable change of control of the whole or part of one or more companies due to:

- the merger of two or more previously independent companies;
- the acquisition by a company of control of all or part of one or more companies; or
- the creation of a joint venture and, in general, the acquisition of joint control over one or more companies, where these undertakings perform on a lasting basis the functions of an autonomous economic entity.

Andorran regulations also foresee that certain economic concentrations are subject to notification to the Andorran government. Such economic concentrations are those where:

- all the companies involved in the concentration achieve, according to publicly available information, a share equal to or greater than 50% in any relevant market in Andorra; and
- at least two of the participating companies individually achieve an annual turnover in Andorra of more than EUR2.5 million.

2.5 Labour Law Regulations

If a bidder acquires a target company in Andorra with employees, to the extent that as a result of the takeover there is no change in the conditions of the workers as their employer has not

changed, the acquirers should not be concerned about any specific labour law regulations.

Notwithstanding the above if, following the acquisition, the acquirer wishes to implement restructuring measures that include the dismissal of a certain number of employees, and if such dismissals exceed certain thresholds in a certain period of time, this is considered a collective dismissal and a specific procedure has to be followed.

2.6 National Security Review

The ministry competent in matters related to foreign investment can deny authorisation for foreign investments if it considers that such investment could hinder, even occasionally, the exercise of public authority, sovereignty and national security, public order and economic order, the environment, public health or the general interests of Andorra.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

There have been no significant court decisions or legal developments in Andorra in the past three years related to M&A.

3.2 Significant Changes to Takeover Law

It should be noted that Andorra does not have a specific law controlling takeovers.

Despite this, there have been no changes to the companies' law in the past 12 months.

However, the companies' legislation and the merger and spin-off regimes are currently under review to identify gaps with comparable juris-

dictions, so significant changes in such matters could occur in the coming 12 months.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

As explained in **3.2 Significant Changes to Takeover Law**, as there is no specific law controlling takeovers, there are no legal impediments to building a stake in the target prior to launching an offer.

However, building a stake in the target prior to launching an offer is not customary in Andorra due to the relatively small size of the companies, the concentration of the share capital among a small number of shareholders, and the family character of companies in Andorra.

4.2 Material Shareholding Disclosure Threshold

There are no material shareholding disclosure thresholds or filing obligations in Andorra regarding takeovers.

However, a change in the share capital distribution of an operating entity in the Andorran financial system requires the previous authorisation of the AFA, if a shareholder:

- reaches a qualified shareholding;
- increases its qualified shareholding so it holds a share capital percentage or voting rights equal to or greater than 20%, 30% or 50%; or
- by virtue of such acquisition, controls the entity.

Additionally, a legal obligation that applies to all companies in Andorra, is the obligation to disclose information about each natural person who ultimately holds or controls, directly or indirectly, at least 25% of the capital or voting rights (a beneficial owner) to the Andorran Companies' Register (*Registre de Societats Mercantils*).

This information is accessible to any person or organisation that can prove a legitimate interest.

4.3 Hurdles to Stakebuilding

The regulatory reporting threshold is compulsory and cannot be modified by any company.

The only thresholds that companies can increase are those related to the majorities needed for the approval of certain agreements as reflected in their by-laws.

4.4 Dealings in Derivatives

Dealing in derivatives is allowed in Andorra. However, since there is no stock market in the jurisdiction, this type of dealing is not actually used as a strategy to acquire a company.

4.5 Filing/Reporting Obligations

See **4.2 Material Shareholding Disclosure Threshold**.

4.6 Transparency

As there is no stock market in Andorra, all companies are private and there is no requirement to make known the purpose of an acquisition.

The only sector where it is compulsory to request authorisation and therefore, to disclose an acquisition to the AFA, is the financial sector.

In these cases, it is common to obtain the authorisation of the AFA upon closing a transaction, among other things.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

See **4.6 Transparency**.

Under Andorran regulations, there is no obligation for a target company to disclose a deal.

However, in the financial sector, the acquisition of an operating entity in the financial sector is an act subject to prior authorisation by the AFA. Therefore, the agreement needs to be disclosed prior to closing.

Additionally, regarding mergers, the resolutions adopted by the shareholders' meetings of the companies involved need to be published in two diaries so that creditors of the companies involved can oppose the merger, and the resolutions are only effective after one month has elapsed from the date of publication of the resolutions.

5.2 Market Practice on Timing

This is not applicable in Andorra.

5.3 Scope of Due Diligence

The due diligence process is not specifically regulated in Andorra.

However, it is common to conduct a due diligence process prior to the acquisition of an Andorran target company.

The scope of due diligence usually covers all the legal aspects of a company (corporate, tax, intellectual property, litigation, real estate, financing, permits, regulatory compliance, etc).

The scope of the due diligence process has not been significantly impacted by the pandemic.

5.4 Standstills or Exclusivity

Standstills are not usually demanded in Andorra. On the other hand, exclusivity is usually required, since most Andorran companies are family controlled.

5.5 Definitive Agreements

It is permissible for tender offer terms and conditions to be documented in a definitive agreement. Usually, the tender offer contains the main terms and conditions of the transaction,

and therefore, it is documented in the definitive agreement, along with other terms and conditions derived from the due diligence process.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

The duration of the process for acquiring/selling a business in Andorra depends on several factors, such as the scope of the due diligence process or the need to obtain financing.

The duration of the process also depends on the timing of the authorisation by the Government of Andorra for foreign investments and/or the AFA, as the case may be.

Based on the above, the process for acquiring/selling a business in Andorra generally takes three to 12 months.

6.2 Mandatory Offer Threshold

Andorra does not have a mandatory offer threshold.

6.3 Consideration

Cash is more commonly used as consideration in Andorra.

In deals with high-valuation uncertainty, it is usual to fix a price upon signing and to adjust such fixed price upon closing.

6.4 Common Conditions for a Takeover Offer

As Andorran companies are all private, the offer conditions are usually negotiated directly between the parties involved in the transaction, before such terms and conditions are reflected in the SPA.

The most common conditions included in transactions in Andorra are conditions related to government approval in terms of foreign investment, communications to the Presidency, Economy and Companies' Minister regarding merger control, and the approval of other regulators such as the AFA for M&A deals involving operating entities of the Andorran financial system.

6.5 Minimum Acceptance Conditions

The relevant control thresholds in Andorra are to own more than 50% of the share capital or voting rights of the Andorran target company in order to gain control of such company.

However, due to the composition of share capital of Andorran companies, it is common for M&A transactions to aim for the acquisition of all the shares that constitute the share capital of the Andorran target company.

6.6 Requirement to Obtain Financing

In Andorra, the closing of a transaction can be subject to the bidder obtaining financing.

6.7 Types of Deal Security Measures

The usual types of deal security measures that bidders seek are break-up fees, non-solicitation provisions, non-compete provisions and confidentiality clauses.

6.8 Additional Governance Rights

If a bidder does not seek 100% ownership of a target, the bidder can secure additional governance rights by entering into agreements with other shareholders. The usual additional governance right that the bidder may seek is to have the right to appoint members of the board of directors or of the management of the target company.

6.9 Voting by Proxy

Shareholders generally have the right to designate another person, whether or not that person is a shareholder of the company, as a proxy-

holder to represent them at a shareholders' meeting and vote on their behalf.

The proxy must be granted in writing separately for each general meeting, unless a power of attorney with powers of representation has been previously granted.

6.10 Squeeze-Out Mechanisms

Squeeze-out mechanisms, short-form mergers and other similar mechanisms do not exist under Andorran law.

6.11 Irrevocable Commitments

A bidder may seek to obtain irrevocable commitments to tender or vote from the principal shareholders of the target company, as such commitments are accepted in Andorra.

7. DISCLOSURE

7.1 Making a Bid Public

See **5.1 Requirement to Disclose a Deal**.

7.2 Type of Disclosure Required

See **5.1 Requirement to Disclose a Deal**.

7.3 Producing Financial Statements

There is no obligation for bidders to produce financial statements in their disclosure documents.

In Andorra, financial statements need to be prepared in accordance with the International Financial Reporting Standards (IFRS).

7.4 Transaction Documents

See **5.1 Requirement to Disclose a Deal**.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

The principal duties with which a director needs to comply are the duties of diligence and loyalty.

Duty of Diligence

According to the Companies Act, the duty of diligence forces a director to have appropriate involvement in the performance of the company, and to apply to such activity the time, effort and knowledge that can be expected from any business person in a similar position.

Additionally, the director is required to be adequately informed about the company's performance, to participate actively in its management, and to investigate any irregularities in the management of the company.

Duty of Loyalty

According to the Companies Act, the duty of loyalty forces a director to act with the honesty that can be expected of a representative who manages the resources of others and, in particular, to refrain from competing with the company, from taking advantage of the company's business opportunities and from using the company's assets for private purposes.

8.2 Special or Ad Hoc Committees

Under Andorran legislation it is not compulsory, or common, to establish special or ad hoc committees in business combinations.

However, in complex transactions it is common to establish joint committees between representatives of the acquiring company and the target company to supervise the fulfilment of the steps and conditions established for the interim period between signing and closing.

8.3 Business Judgement Rule

Although Andorran law or case law does not expressly provide for a rule such as the business judgement rule, under Andorran legislation, the directors are required to act in accordance with their duty of diligence and loyalty.

8.4 Independent Outside Advice

The independent outside advice that it is commonly given to directors in a business combination in Andorra is legal, financial and strategic advice.

8.5 Conflicts of Interest

Conflicts of interest of directors are not expressly regulated under Andorran legislation. However, conflicts of interest can be considered a breach of the duty of loyalty and, therefore, an action influenced by a conflict of interest could be considered a breach of the duty of loyalty and may be subject to judicial scrutiny.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

Andorran law does not distinguish between hostile and friendly takeovers, so they are not regulated in this jurisdiction.

In any case, hostile tender offers are unusual in Andorra, as most companies are privately owned, mostly small or medium-sized, and managed by their majority shareholders.

9.2 Directors' Use of Defensive Measures

See **9.1 Hostile Tender Offers**.

Andorran law does not expressly define a list of defensive measures in the event of a hostile tender offer, as these are not expressly regulated.

However, in practice, the management or the board of directors of the target entity would have to respond in an attempt to protect their position in the company by implementing certain measures likely to prevent the hostile bidder from taking control of the company.

Such measures would usually require the prior approval of the shareholders' general meeting and might entail an increase in share capital, the purchase of the target company's own shares, or the search for an alternative bidder.

9.3 Common Defensive Measures

See **9.2 Directors' Use of Defensive Measures**.

9.4 Directors' Duties

If the management or the board of directors obtain the prior approval of the shareholders' general meeting to implement defensive measures against a hostile tender offer, they have a permanent duty to act in a coherent manner with the social interest of the company, understood in Andorran law to be the interest of the legal entity, pursuing its purposes in the common interest of the stakeholders and with the aim of ensuring the prosperity and continuity of the company.

9.5 Directors' Ability to "Just Say No"

Even when they are also majority shareholders, directors cannot "just say no", as they are bound to act in the best interests of the company by considering all factors that may be affected by the offer.

For example, the unjustified refusal of a tender offer when the target company is in dire straits and is liable to benefit from such offer, could make the directors liable for the target company's insolvency.

10. LITIGATION

10.1 Frequency of Litigation

M&A transactions in Andorra do not usually lead to lawsuits in the event of disputes between the parties. Such disputes are usually settled out of court in an informal and amicable manner and mainly concern the warranties granted by the parties.

10.2 Stage of Deal

In the event of a dispute between the parties, it is most likely to occur in the post-closing phase of the transaction.

10.3 "Broken-Deal" Disputes

As already noted, deal-breaking problems do not usually go to court and are settled amicably in Andorra.

11. ACTIVISM

11.1 Shareholder Activism

Shareholder activism is not a relevant force in Andorra, as most companies are small or medium-sized and they are generally controlled by only a few shareholders and/or are family-owned, with minority shareholders being mostly passive.

Exceptionally, minority shareholders who have the power to block certain important decisions, eg, a merger/spin-off of the company, can use it to obtain better financial terms in the planned transaction or a higher dividend before leaving the company.

11.2 Aims of Activists

There are no significant examples of activists seeking to encourage companies to enter into M&A transactions, spin-offs or major divestitures in Andorra.

11.3 Interference with Completion

See **11.1 Shareholder Activism**.

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services group is composed of three partners, two counsel, one senior associate and five associates, and most of the members of the team have deep knowledge of banking and finance regulations and capital markets transactions. The firm's practice also extends to capital markets, derivatives and structured finance matters.

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