

Chapter 13

Spain

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1. Introduction

National transposition of the Directive on Cross-border Mergers into Spanish law (2005/56/EC) was accomplished without significant parliamentary debate. Previous to implementation, Spanish national law did not refer to cross-border mergers, although it allowed mergers and transfers of company headquarters outside Spain (González and Pereda Espeso 2006). The transposition of the Cross-border Mergers Directive, which was accomplished in a single law (Law 3/2009 of April 3), by and large implements the Directive's minimum requirements. A proposal by trade unions to require an examination of the potential territorial and sectoral impacts of proposed mergers, which was introduced in the national Economic and Social Committee (ESC), was opposed by the employers and did not find its way into the legislation.

The transposed Directive introduces several safeguards with regard to employee participation. As a general rule, in Spain there is no legally enforced board-level employee participation system or rights for employees to take part in company decisions beyond information and consultation. Pursuant to the SAL (*Ley de Modificaciones Estructurales de las Sociedades Mercantiles*), the possibility to negotiate board-level employee participation rights in cross-border mergers is established explicitly for the resulting company if (at least) one of the companies involved in the merger had more than 500 employees and was governed by an employee participation system. The implementation of the Cross-border Mergers Directive also modified Law 31/2006 of 18 October on Employee involvement in European joint stock companies and cooperatives (EIL), by introducing a new Title IV (Arts. 39 to 45). Thus the implementation of the Cross-border Mergers Directive represents another mechanism for introducing worker participation into a country in which this form of worker representation has not played a significant role.

2. National background

The Cross-border Mergers Directive was implemented in Spain through Law 3/2009 of 3 April on structural amendments relating to commercial companies (*Ley de Modificaciones Estructurales de las Sociedades Mercantiles*) (SAL) (BOE No 82, 4 April 2009). The Cross-border Mergers Directive was transposed in one single legal act. Directives 2006/68/EC (on the formation of public limited liability companies and

their capital) and 2007/63/EC (on the need for an independent expert's report in the case of domestic mergers and divisions of public limited liability companies) were also transposed into national regulation by Law 3/2009. The rules applicable to cross-border mergers are provided in Articles 54–67 of the SAL, which also introduced other relevant changes in company regulation. Cross-border mergers within the European Union involving Spanish-owned companies are regulated by the SAL and, on a subsidiary basis, by the general legislation governing domestic mergers (Tapia Hermida 2007).

Cross-border mergers were in practice sanctioned and accepted in Spain inasmuch as compatibility of legislation and commercial proceedings allowed for it. The transposition of the Cross-border Mergers Directive into Spanish legislation established a common regulatory framework for companies operating in the EU and sped up the normal development of cross-border transfers of seat of Spanish-owned companies between different Member States. The Ministry of Justice was in charge of the transposition of the Cross-border Mergers Directive and the preparation of the Law. The proposed legislation was discussed by the parliamentary judiciary committee in late 2008 without controversy.¹ The Law was presented to the Parliament and discussed in plenary session on 18 March 2009.² The SAL was approved by a large majority with only a few proposed amendments, which were incorporated into the text. Those amendments did not relate to the transposition of the Cross-border Mergers Directive, but to other elements of the Law. Previous to the submission of the Law to the Parliament, the Ministry of Justice initiated a mandatory consultation with the social partners. The Economic and Social Committee (ESC) delivered an opinion on the draft legislation in December 2007, which stressed several aspects on the 'territorial and sectoral impact of corporate decisions involving cross-border mergers and transfers of seat'.³ The social partners did not agree on the terms of these impacts and how they should be addressed by the regulation. Trade unions and employers have different positions on this issue (see below). The draft law submitted to the Parliament did not include any explicit reference to these territorial and sectoral impacts. They were not incorporated into the Law during the parliamentary procedure. The SAL only establishes a number of procedures to guarantee the 'required protection' of shareholders, employees and creditors.

The following companies governed by Spanish regulation may take part in a cross-border merger within the EU: joint stock companies (*sociedades anónimas, S.A.*), limited liability companies (*sociedades de responsabilidad limitada, S.L.*), partnerships limited by shares (*sociedades comanditarias por acciones*) and the legal form of European Company (SE). In 2011, cross-border mergers between credit entities and savings banks were also included. Cross-border mergers involving a cooperative company or a company deemed a collective investment undertaking are not subject to provisions referring to cross-border mergers within the EU contained in Articles 54–67 SAL. In general, two main forms of cross-border merger can be distinguished: inbound and outbound mergers. In the case of an inbound merger, the resulting company is subject to Spanish law. In the case of an outbound merger, the resulting company is subject to a foreign

1. http://www.congreso.es/public_oficiales/L9/CONG/DS/CO/CO_163.PDF#page=2

2. http://www.congreso.es/public_oficiales/L9/CONG/DS/PL/PL_069.PDF#page=43

3. <http://www.ces.es/documents/10180/18507/Dico72007>

Member State regulation. Article 27(2) SAL regulates cross-border mergers between companies of different nationalities which are not deemed cross-border mergers within the EU. Provisions of the respective national laws are mandatory with regard to mergers with non-EU/EEA companies. The SAL has been modified several times since then. Law 27/2009 expanded the scope of the regulation to include cross-border mergers between credit entities. Law 25/2011 introduced some changes to the availability and timing of the expert's report on the draft terms of cross-border merger. Law 1/2012 simplified some general administrative procedures (Brech-Bruun and Lexidale 2013).

The government did not take into account the ESC's opinion in the draft legislation prepared by the Ministry of Justice. No clauses related to the public interest and/or social and economic impact in case of cross-border transfer of seat resulting from a merger were included in the Law Proposal submitted to the Parliament. The social partners agreed on the need to improve regulation on cross-border mobility of companies within the EU. The implementation of the Cross-border Mergers Directive was considered positively by the employers' associations represented in the ESC (CEOE and CEPYME). In their view, the Directive had some benefits for businesses. It included the principle of tax neutrality, simplified legal and administrative structures and enabled the possibility to transfer assets and liabilities from the acquired to the acquiring company with reduced risks and lower financial costs. In the case of a multinational company with two or more national units in different European countries, the cross-border merger could be used as a tool to transfer the registered seat of the company from one subsidiary to another.

However, the employers refused to accept the introduction of a sectoral and/or territorial impact clause, as had been suggested by the trade unions (UGT and CCOO). From the viewpoint of CEOE and CEPYME, capital mobility and transfer of seat were both fundamental business freedoms guaranteed by EU law, not to be bound by restrictive regulation or considerations of sectoral and/or territorial impact. The employers decided not to back the ESC's opinion. Controversy in the process of non-binding consultation with the social partners was one reason why the ESC opinion was finally not taken into consideration by the Ministry of Justice. However, from the trade union point of view the implementation of the Cross-border Mergers Directive had some positive effects. In case of cross-border mergers with EU/EEA companies, employee participation and protection rights are substantially reinforced. Furthermore, employee representatives are allowed to negotiate board-level representation rights for the resulting company.

3. Implementation of the Cross-border Mergers Directive

3.1 Procedure for a cross-border merger

The procedure for a cross-border merger under the SAL correlates broadly with that of a domestic merger. However, the protection for minority shareholders, creditors, debenture holders and employee representatives in cross-border mergers is different from that of a domestic merger. The Spanish regulation sets out the cross-border merger procedure as follows:

- **Draft terms of a cross-border merger.** The management bodies of the companies involved in the cross-border merger will elaborate the draft terms of the merger (that is, merger plan) (Art. 59.1 SAL). The general shareholders' meetings of the companies involved in the cross-border merger have six months to approve these draft terms; without this approval the merger will not take effect (Art. 30.3 SAL). The documentation is supposed to be deposited with the Commercial Registry responsible for each company involved, and a notice of this legal act will be published in the Official Gazette of the Commercial Registry. The Commercial Registry is responsible for checking whether the necessary procedures have been followed and, if satisfied, it is responsible for issuing a pre-merger certificate. The draft terms of cross-border merger will be made available to the shareholders, debenture holders, holders of special rights and employee representatives upon calling the general shareholders' meeting (Art. 39.1 SAL).
- **Management report.** The management body of the companies involved in the merger will prepare a report explaining and substantiating the legal and financial aspects of the cross-border merger, with specific mention of the share exchange ratio and the implications of the merger for the shareholders, creditors and employees (Arts. 33 and 60 SAL). The management report will be made available to the shareholders, creditors and employee representatives at least one month prior to the date of the general shareholders' meeting. Employee representatives may request the delivery or dispatch or a free copy of these documents (Art. 60.1 SAL). If the management body of the company receives an opinion from employees on the management report, this opinion should be annexed to the report (Art. 60.2 SAL).
- **Expert's report.** The management body of the companies involved in the cross-border merger will request the appointment of an independent expert (or experts). The expert(s) will issue a report on the draft terms of the cross-border merger (Art. 34.1 SAL). The Commercial Registrar corresponding to the registry offices of the companies involved in the merger will appoint its own independent expert(s). The expert report will audit the following issues: justification of the exchange ratio; validation of the methods used to set the exchange ratio and resulting values; identification of possible valuation problems; equivalence of the companies' assets and liabilities, subject to dissolution of the share capital of the resulting company (Art. 34.4 SAL). The expert's report will not be necessary if so decided by all voting shareholders of the companies involved in the merger (Art. 34.5 SAL) or if one of the companies to be merged is the direct holder of a share equal to or greater than 90 per cent of the share capital of the transferring company (Art. 34.5, 49.1.2 and 50.1 SAL). The expert's report will be made available to shareholders, debenture holders, holders of special rights and employee representatives at the time of calling the general shareholders' meeting (Art. 39.1 SAL).
- **Merger balance sheet.** The management body of the companies involved in the cross-border merger will treat their last approved sheet as their merger balance sheet (Art. 31.1.). The management body will make available its last approved balance sheet to shareholders, debenture holders, holders of special rights and employee representatives at the time of calling the general shareholders' meeting (Art 39.1 SAL).

- **General shareholders’ meeting.** Publication of the calling of the shareholders’ meeting must take place at least one month prior to the date set for it (Art. 40.2 SAL). Approval of the cross-border merger will require a vote in favour of two-thirds of the voting capital present at the general meeting, unless the company is a joint-stock company or limited partnership by shares and at least 50 per cent of the share capital is present. In the latter case a simple majority will suffice for approval. The approval of the merger by the general shareholders’ meeting will not be required if one of the companies involved is the direct holder of all share capital in the company which is to be taken over (Art. 49.1.4. SAL).
- **Registration, publication and effectiveness of the cross-border merger.** The merged company is to submit the draft merger terms (no more than six months old) and shareholders’ approval of these merger terms to the Commercial Registry. This agency is responsible for verifying performance of the procedures and formalities according to the relevant Spanish regulation, including the fulfilment of requirements on worker participation, and will issue a certificate of legality for the cross-border merger (Arts. 64 and 65.1 SAL). The cross-border merger will be effective upon registration of the resulting company with the competent Commercial Registry (Art. 46.1 SAL). The transferring companies will proceed to cancellation (Art. 66.3 SAL). In cases where employee participation is required according to Law 31/2006 of 18 October on employee involvement in European Joint Stock Companies and Cooperatives (EIL), the merger will not be effective until an employee participation agreement (or submission to the subsidiary provisions of EIL) has been presented to the Commercial Registry.

No explicit provisions for additional employee rights, for example at a hearing for the pre-merger or merger certificate or for a national merger control authority are included. No minimum required period for validity of statements regarding employment impact is considered. No explicit penalties for false statements regarding employment impact are included (Art. 64 SAL).

3.2 Protection for minority shareholders and creditors

The cross-border merger will be binding on all shareholders and creditors once approved by the general assembly of shareholders. However, minority shareholders may request the acquisition or redemption of shares and participations against a reasonable cash payment if they do not agree with terms of the cross-border merger and the registered office of the resulting company is not located in Spain (Art. 62 SAL). In inbound mergers, the cash compensation to which shareholders are entitled may not exceed 10 per cent of the nominal value of the shares and participations received in exchange (Art. 25.2 SAL). In outbound mergers, the cash payment included as part of the exchange may exceed 10 per cent of the nominal value of the shares and participations, if the legislation applicable to one of the non-Spanish companies involved in the cross-border merger allows for it (Art. 57 SAL).

Creditors' interests are also protected. The merger will not take place until a month after the publication or written notice of the last announcement of the approval of the merger resolution to all shareholders and creditors. Creditors of the companies involved in the merger may object to the merger during the month following the last announcement relating to the approval of the merger resolution. Creditors whose loans are adequately guaranteed shall not be entitled to object to the merger. In cases where creditors are entitled to object to the merger, the merger will be halted and not effective until the company provides security for the amount owed the creditor (Art. 44 SAL). Debenture holders may exercise their right to object to the merger on the same terms as the regular creditors, except in cases in which the merger is approved by the general assembly of debenture holders (Pereda Espeso and Martínez Paños 2010).

4. Worker involvement provisions

4.1 Employee participation

No additional provisions for employee participation were incorporated into Spanish law ahead of the Cross-border Mergers Directive. The implementation of the Directive pursuant to SAL also modified Law 31/2006 of 18 October on employee involvement in European Joint Stock Companies and Cooperatives (EIL), by introducing a new Title IV (Arts. 39 to 45).

As a prevailing rule, Spanish law does not recognise board-level participation rights for employees. Workers' involvement rights are confined to information and non-binding consultation. They do not include the right to designate a number of members of the management body of the company or to attend its meetings with a voting right. Board-level participation rights for employees are acknowledged only for European companies or companies resulting from a cross-border merger within the EU (Art. 67.2. SAL). The scope and terms of board-level employee participation will be determined pursuant to EIL (Art 39.2. EIL). It is possible to negotiate board-level employee participation rights in companies resulting from a cross-border merger in which at least one of the companies involved already had worker participation and employed an average number of 500 or more employees during the six months prior to the publication of the draft terms of the cross-border merger (Art. 39.1 EIL).

As foreseen by the Cross-border Mergers Directive, there are two ways to determine the form of worker participation that will apply. The first way is through negotiation between the management bodies of the companies involved in the merger and a special negotiating body (SNB) representing the employees. The members of the SNB will be elected in accordance with the domestic legislation and practices of each Member State in which the companies involved in the cross-border merger, including those subject to dissolution, had subsidiaries and workplaces (Arts. 7.1 to 7.4 EIL). The Spanish members of the SNB will be chosen by the trade unions with a majority position in the works council or works councils of the companies involved in the cross-border merger or among employee delegates. Overall, the number of SNB members per union will be in proportion to the votes received by each trade union in the works council elections.

In the case of smaller companies, with a number of employees fewer than 50, where the duties of the works council are carried out by employee delegates, the selection will be made by the trade union with a majority of delegates. The legislation makes no provision for what happens if the companies involved in the cross-border merger have no works council or employee delegates.

The negotiation of board-level employee participation rights between the competent bodies of the companies involved in the cross-border merger and the SNB will last up to 12 months (six months after the establishment of the SNB, which may be extended by six additional months). The subsidiary provisions of EIL will be applicable where the parties do not come to an agreement within the abovementioned timeframe.

An alternative way to determine the parameters of worker participation bypasses negotiations altogether. The management bodies of the companies involved in the cross-border merger may unilaterally decide to apply the rules governing employee participation in the merged company defined in the subsidiary provisions in EIL (Art 40.1 EIL) (so-called ‘standard rules’).

4.2 Other relevant provisions and rules

As a general rule, several articles of the Spanish Workers’ Statute (*Real Decreto Ley 1/1995 de 24 de Marzo sobre el Estatuto de los Trabajadores*) are relevant to employee protection in case of company mergers and takeovers.

Article 40 of the Spanish Workers’ Statute establishes special protection clauses for employees affected by transfer of facilities. The employee has the right to keep or cease working unless hired with a specific mobility condition. In case the employee chooses to cease working, a severance pay equivalent to 20 days for each year of work will be received, up to a maximum of twelve months’ salary. In case the employee chooses to keep working and doing so would involve a move, compensation for the expenses of the move will be received. Information on the move will be made available to employees by the company management 30 days before the effective date of the move. Employees may also claim against the decision to move. In case the move affects the entire workforce, a 15-day period of information and consultation with the employee representatives will be agreed. The parties will negotiate in good faith. The company management will have the final decision on the move notwithstanding the right of the workforce and their representatives to take legal action against it when considered appropriate.

Article 44 of the Spanish Workers’ Statute establishes the duty of a newly established company resulting from a merger or takeover to subrogate the rights of the employees of the transferring companies, as well as the duties and arrangements in force. The obligation also affects valid collective agreements.

5. Statistical and other data

It is difficult to find detailed statistical data and information on cross-border mergers and acquisitions by Spanish companies. No comprehensive study for the period 2009–2015 or for a sub-period within it is available. According to the corresponding UNCTAD Investment Reports, 12 mergers and acquisitions deals worth over USD 3 billion were completed in 2010–2015, which included a Spanish company as an acquired or acquiring company. Ten mergers and acquisitions deals were cross-border, while the remaining two were domestic. Four mergers and acquisitions deals worth over USD 3 billion were completed between a Spanish company and another company within the EEA/EU area. Only one was an inbound deal. In 2011, Banco Santander S.A. acquired 96 per cent of shares of the listed Poland-based bank, Bank Zachodni WBK S.A. The value of the operation was USD 5.6 billion. The other three mergers and acquisitions with Spanish components were all outbound deals. In 2011, a French group of investors acquired 100 per cent of share capital of Distribuidora Internacional de Alimentación (DIA) S.A. for USD 3.1 billion. In 2015, a UK-based investor group acquired 100 per cent of the electric services company E.ON España S.L. for USD 3.1 billion. Also in 2015, the Spanish radiotelephone and communication company Jazztel PLC was acquired by the French Orange S.A. for USD 4.3 billion.⁴

Over the period 2009–2015, mergers and acquisitions were driven mainly by the restructuring of the Spanish building, energy and financial sectors. Several large companies in these sectors divested, reducing their balance sheet by selling non-core assets and subsidiaries. More detailed information on cross-border transactions by strategic investors, private equity transactions and divestments by Spanish companies, although not an exhaustive list, can be found in the annual reports on Spain of the Mergers and Acquisitions Review (Hoedl and Ruíz-Camara 2011; 2012; 2013; 2014; 2015).

Another data source, although available only for listed companies, is provided by the Spanish National Securities Commission (CNMV). Raw data on registered legal acts regarding mergers, acquisitions and other transformations of listed commercial companies can be retrieved for 2009–2016. The information is ordered by date released.⁵

6. Assessment and conclusions

The transposition of the Cross-border Mergers Directive into Spanish law was completed without major political dispute. The national transposition was accomplished pursuant to the Structural Amendments Law (SAL), which implied a major revision of the Spanish legal framework relating to commercial companies. The law came into force in July 2009. Previous to this, Spanish national law did not refer explicitly to cross-border mergers. The national transposition of the Cross-border Mergers Directive also introduced a new Title to Law 31/2006 on employee involvement in European Joint Stock Companies and Cooperatives (EIL).

4. See UNCTAD Cross-border M&A database (www.unctad.org/fdistatistics) and UNCTAD World Investment Reports (<http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx>).

5. <http://www.cnmv.es/Portal/hr/busquedahr.aspx?division=3&idPerfil=2>

The transposed Directive introduces the possibility to negotiate board-level employee participation in companies resulting from a cross-border merger. Previously, the Spanish regulations did not legally enforce employee involvement rights ahead of information and consultation, except in the case of European Companies (SEs) and European Cooperatives (SCEs). The trade unions consider that the implementation of the Cross-border Mergers Directive has largely had a positive effect, as it broadens the scope for employee participation. Nevertheless, the trade unions were not successful in their attempt to include a specific clause on the socio-economic impact of cross-border mergers to the draft legislation in 2007. The employers refused to be bound by restrictive regulations or considerations of impact. The regulation only establishes a number of procedures on information and consultation to guarantee the protection of shareholders, creditors and employees required by the Cross-border Mergers Directive.

Statistical data (2009–2015) for mergers and acquisitions in Spain is scarce. Mergers and acquisitions were driven by the restructuring of the Spanish building, energy and financial sectors. Several large companies in these sectors divested due to the difficulties associated with the economic crisis. Nevertheless, the number of cross-border mergers have increased in recent years. Such mergers are often used for handling the internal restructuring of multinational companies operating within the EU. Cross-border merger regulation also provides a way of transferring a company's registered seat from one national subsidiary to another in the EU (Sánchez Álvarez 2008: 97).

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