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M&A

SPACs: Growth opportunity for Spanish companies?

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1. Definition

SPACs (Special Purpose Acquisition Company) are companies with no operational activity or specific corporate purpose whose shares are issued on a stock market with the aim of raising investment capital through an Initial Public Offering (IPO) and participating in merger or acquisition processes of companies in a specific sector and before a specific expiry date.

These companies are also known as "blank check companies" as they are empty investment vehicles controlled by a team of managers with a strong track record in a particular sector, which are floated on the stock exchange, which creates a situation known as a "reverse merger". Once the acquisition process is completed, the new company emerges and replaces its predecessor in its place on the Stock Exchange, thus becoming another listed company.

The scale of SPACs in the market today: in 2020 alone, 248 SPACs were formed in the United States, raising more than $83 billion, surpassing the $78 billion raised last year by traditional IPOs. More than half of the IPOs in the US market in 2020 were SPACs.

2. How they work

The funds that SPACs acquire in the IPO are held in an interest-bearing escrow or trust account, which can only be used to make investments in the compromised sector (with the prior approval of the investors). However, if the SPAC management fails to make the investment within a specified time, typically 2 years, the company must be wound up and the amounts paid in must be returned to the investors. This repayment mechanism is implemented through "redeemable shares", whose legal regime in Spain is currently in evolution.

Typically, SPACs investors have the right to vote for or against the acquisition of the target company, and in the event that a minority of investors vote against, they have a right of separation, with a pro rata return of the funds deposited carried out by the company.

3. Pros

SPACs allow retail investors to access transactions that would normally be beyond their reach, with leveraged buyouts, complexity, and higher returns. Moreover, as listed vehicles, investors can liquidate their investment at any time.

Moreover, SPACs allow company owners to take their companies public, which saves time, paperwork and costs previously borne

by the SPAC. Once the transaction is completed, the resulting company replaces the SPAC on the stock market, thus gaining easier access to financing.

4. Cons

In Spain, the main obstacle for SPACs is the corporate regulatory framework, which severely limits the standard operation of a SPAC. Spanish law imposes restrictions on share buybacks in listed companies, which are limited to a maximum of 10% of capital and must be executed at a market price (Article 509 of Royal Legislative Decree 1/2010 of 2 July, approving the consolidated text of the Capital Companies Act). These restrictions make it impossible to replicate the operation of SPACs in other countries, where investors are granted the right of separation if they do not agree with the acquisition of the target company by repurchasing their shares at the IPO price.

Furthermore, managers are only remunerated as long as the SPAC makes an investment within the agreed timeframe. This may create an incentive for the manager to carry out a transaction that is not expressly in the interests of the shareholders.

Finally, the owners of the absorbed companies assume that the SPAC will keep part of the resulting capital (typically 20%), with the corresponding dilution that this involves.

> "SPACs allow retail investors to access transactions that would normally be beyond their reach [...] Investors can liquidate their investment at any time."

5. Regulation

Spanish legislation is restrictive and does not currently allow the full potential of the investment vehicle represented by SPACs to be developed.

However, following their international success, the Spanish Ministry of Economic Affairs and Digital Transformation is currently drafting proposals for regulatory changes to boost SPACs on the Spanish Stock Exchange.

Specifically, proposals have been submitted to reform Royal Legislative Decree 1/2010, of 2 July, approving the consolidated text of the Capital Companies Act, which includes, among other measures:

i. reduction by half of the minimum capitalisation threshold of a listed company, to 50 million euros, with a minimum of 50 investors;

ii. recognition of the right of separation for shareholders who do not agree with the takeover of the target company, through the issue of redeemable shares with no issue limit;

iii. and elimination of the obligation to launch a takeover bid for the entire share capital in the event that the right of separation would result in a single shareholder achieving a controlling position in the capital of the listed company.

6. Conclusions

SPACs are an interesting model for promoting corporate operations and covering the financing and size needs of Spanish companies, especially in the most innovative sectors, and have become a highly current vehicle in international financial markets. However, for SPACs to be developed and implemented in Spain, they require a favourable regulatory framework, which so far has not been the case.

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CORPORATE

Changes in the Penalty Regime for failure to deposit Annual Accounts

(Royal Decree 2/2021 of 12 January)

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In force since 31 January, Royal Decree 2/2021 of 12 January - which approves the Regulations for the development of Law 22/2015 of 20 July on the Auditing of Accounts (RD 2/2021), among other aspects - introduces new features regarding the penalty regime applicable to the late filing of the Annual Accounts with the corresponding Companies Registry.

1. Obligation to file Annual Accounts

Article 279 of the *Ley de Sociedades de Capital* (LSC) (Spanish Companies Act), in line with Article 365 of the Companies Registry Regulations, regulates the obligation of the directors to file the annual accounts of the company (and, where applicable, the consolidated accounts of the group) with the Companies Registry within one month of their approval by the General Meeting (i.e., for companies whose financial year ends on December 31, no later than July 31 of the following year).

2. Penalty Regime

Failure to file the company's annual accounts within the specified period will result in the closure of the company´s registration page, with the exceptions relating to the registration of the cessation or resignation of directors, revocation, or renunciation of powers of attorney and dissolution and appointment of liquidators of the company.

Furthermore, the LSC provides for a penalty payment ranging from Euro 1,200.00 to Euro 60,000.00, which may reach Euro 300,000.00 for each year of delay in the case of companies (or groups of companies) with an annual turnover of more than Euro 6,000,000.00 (Article 283 LSC, paragraphs 1 and 2). The final amount of the penalty to be imposed will be determined based on the specific circumstances of the defaulting company. The Law also provides for the application of the minimum fine with a 50% reduction if the annual accounts are filed prior to the initiation of the sanctioning procedure, respecting in all cases the three-year limitation period for this type of infringement (article 283 LSC, sections 3 and 4).

Without prejudice to the foregoing, it is well known that the *Instituto de Contabilidad y Auditoría de Cuentas* (ICAC) has to date exercised its power to impose penalties on companies that fail to comply with the obligation to file their annual accounts on

time on a rather sporadic basis. As a result, the consequences of such non-compliance have been reduced in practice to the closure of the registration page, with the application of the financial penalties described being virtually symbolic in nature to date.

3. Royal Decree 2/2021 of 12 January

With the aim of reinforcing the sanctioning procedure provided for in the LSC, the eleventh additional provision and the tenth additional provision, both of RD 2/2021, establish both the deadline for processing the sanctioning procedure and the criteria for imposing sanctions for failure to comply with the obligation to file accounts, all by regulating new features aimed at facilitating the sanctioning work conferred on the ICAC. Namely:

a. The possibility is introduced of entrusting the commercial registrars of the domicile of the obligor with the management and proposal of a decision in disciplinary proceedings for failure to comply with the obligation to deposit their annual accounts.

b. A total period of six months is established for resolving and notifying the resolution of the sanctioning procedure under article 283 LSC. The period shall be calculated from the resolution to initiate the procedure adopted by the Chairman of the ICAC, respecting the rules on suspension and extension of the period regulated in the Law on Common Administrative Procedure for Public Administrations.

c. The criteria for fixing the specific amount of the sanction are determined, within the limits indicated in paragraph 2 above:

   (i) The penalty shall be 0.5 per thousand of the total amounts of the asset items, plus 0.5 per thousand of the entity's sales figure included in the last declaration submitted to the Tax Administration, the original of which must be provided in the processing of the procedure.

   (ii) In the event of failure to provide the tax declaration referred to in the previous paragraph, the penalty shall be set at two per cent of the share capital according to the data recorded in the Commercial Register.

   (iii) If the tax return is submitted and the result of applying the aforementioned percentages to the sum of assets and sales is greater than two (2) per cent of the share capital, the penalty shall be calculated on the latter reduced by 10 per cent.

Consequently, a change of paradigm can be predicted when it comes to relativising the obligation to present the annual accounts within the legally established deadline, given the reinforcement of the ICAC's sanctioning powers with the entry into force of Royal Decree 2/2021.

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COVID-19

Guide to the measures to support business solvency in response to Covid-19 under Royal Decree-Law 5/2021

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On 13 March 2021, Royal Decree-Law 5/2021, of 12 March, on extraordinary measures to support business solvency in response to the COVID-19 pandemic (hereinafter, "RDL 5/2021") was published in the Official State Gazette, approving, among other measures, a line of direct aid to the self-employed and companies with a total allocation of 7,000 million euros with the aim of reducing debt taken on between 1 March 2020 and 31 May 2021.

The following aspects are worth highlighting here:

Recipients:

The recipients of this direct aid shall be non-financial companies and those self-employed most affected by the pandemic, provided that they have their tax domicile in Spanish territory or in the case of non-resident non-financial entities operating in Spain through permanent establishment. Furthermore, the activity they carry out must be included in one of the codes of the *Clasificación Nacional de Actividades Económicas* (National Classification of Economic Activities) -CNAE 09- set out in Annex I of RDL 5/2021, and the annual volume of operations declared or verified by the Administration, in the Value Added Tax or equivalent indirect tax in 2020 should show a drop of more than 30% with respect to 2019.

RDL 5/2021 does not include as recipients those company owners or professionals, entities and consolidated groups that meet the requirements set out above and that in the Personal Income Tax return corresponding to 2019 have declared a negative net result for the economic activities in which the direct estimation method had been applied for their determination or, where applicable, the taxable base for Corporate Income Tax or Non-Resident Income Tax, before the application of the reserve for capitalisation and compensation of negative taxable bases, has been negative in said financial year.

Requirements for receiving aid:

i. Not having a registered office in a tax haven.

ii. Not having been sentenced by final judgment to the loss of the possibility of obtaining public subsidies or aid or for crimes of prevarication, bribery,

embezzlement of public funds, influence peddling, fraud and illegal exactions or urban planning offences.

iii. Not having been found guilty of the termination of any contract entered into with the Administration.

iv. Being up to date with the payment of obligations for the reimbursement of subsidies or public aid.

v. Being up to date with the payment of obligations for the reimbursement of subsidies or public aid.

vi. Not having requested the declaration of voluntary insolvency proceedings, nor to have been declared insolvent in any proceedings, not to have been declared bankrupt, unless an agreement has become effective in this, not to be subject to judicial intervention or to have been disqualified in accordance with the Insolvency Act.

Obligations and commitments:

i. Not to distribute dividends or increase the salaries of the management team for a period of two years.

ii. To maintain the activity that gives rise to the benefit until 30 June 2022.

iii. To use the aid to meet debt obligations and payments to suppliers, financial and non-financial creditors, as well as the fixed costs incurred, provided that these obligations were generated between 1 March 2020 and 31 May 2021 and derive from contracts prior to 13 March 2021. First, payments to suppliers will be satisfied, in order of seniority and, where appropriate, the nominal amount of bank debt will be reduced, with priority being given to reducing the nominal amount of publicly guaranteed debt.

Amount of the aids:

The RDL 5/2021 establishes the basic framework for setting the amount of aid, but it will be the Autonomous Communities and the Cities of Ceuta and Melilla that will establish the criteria for aid per recipient. In any case, the following maximum limits are established:

- 40 % of the amount of the drop in the volume of operations in 2020 with respect to 2019 that exceeds the said 30%, in the case of entrepreneurs or professionals who apply the direct estimation regime in Personal Income Tax, as well as entities and permanent establishments that have a maximum of 10 employees.

- 20% of the amount of the drop in the volume of operations in 2020 with respect to 2019 that exceeds 30%, in the case of entities and entrepreneurs or professionals and permanent establishments that have more than 10 employees:

In both cases, the aid shall not be less than €4,000 or more than €200,000.

- 3.000 euros in the case of business owners or professionals who apply the objective estimation regime in the Personal Income Tax.

Call for applications:

It will be possible to apply for the calls made by the Autonomous Communities, in accordance with the following:

- In the case of business owners, professionals, or entities whose volume of operations in 2020 has been less than or equal to 10 million euros and not included in the system reserved for group companies in Corporate Income Tax, they may only apply to the call for applications made by the Autonomous Community in which their tax domicile is located.

- Groups and business owners, professionals, or entities with a turnover in 2020 of more than 10 million euros that carry out their economic activity in more than one Autonomous Community or in more than one Autonomous City may participate in the calls for applications made in all the territories in which they operate. In these cases, the Order of the Ministry of Finance implementing RDL 5/2021 will establish the criteria for distributing the drop-in activity across the different territories in which they operate, taking into account the weight of the personal remuneration paid to the workers they have in each territory.

Validity:

The granting of aid will end on 31 December 2021.

Call for applications, procedures, and formalities:

The Autonomous Communities will carry out the call for applications, processing, and establishment of the criteria for the aid per recipient, so if the framework established in RDL 5/2021 is to be complied with, attention must be paid to the publication of the corresponding call for applications by the corresponding Autonomous Community.

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REAL ESTATE

Commercial lease contract: urgent precautionary measures

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Madrid Court of First Instance no. 59 has issued an interesting ruling to observe the potential effectiveness and importance of the application of the doctrine of the rebus sic stantibus clause in contracts in different areas, in this case in a set of lease contracts with Aena.

First, we should focus on the urgent precautionary measures: this is a judicial incident, prior to filing a lawsuit, in which the judge is asked to grant a certain precautionary measure as a matter of urgency, without notifying the defendant before ruling, that is, *inaudita parte*.

This incident is exceptional, and the law requires three elements to be accredited:

1. The appearance of a good right, that is, that the plaintiff has the title and right to what they are claiming.

2. The danger of procedural delay, that is, that there is a risk that should the precautionary measure not be adopted, the judgement that may be handed down in the main proceedings will not have the desired effectiveness.

3. The urgency for which it is advisable to take the measure immediately without first informing the defendant.

In this specific case, the application for urgent precautionary measures was submitted by two companies of the same group which have a number of leases of commercial premises contracts with Aena, and they based the urgency on the fact that if the payment of the mandatory minimum rent of the leases was not suspended, these companies would become insolvent and would have to file for bankruptcy. It is worth noting that the mandatory minimum rent of these contracts is based on the expected business or expected sales, according to the projection made in 2012 when the contracts were signed.

The court granted the urgent injunction *inaudita parte* because it considered the urgency to have been proven, and here the expert report provided by the plaintiffs is essential, which analyses the situation and determines that there has been a 72% decrease in air passenger traffic and that the effort rate, which would be the percentage of the actual sales figure that the company allocates to pay rents, has varied from 34/47% in previous years, to 216%, the current rate, which would obviously cause important losses to the lessees.

It also considers that the rebus sic stantibus doctrine is applicable, which allows the courts to modify and adapt the contractual

obligations when abnormal circumstances (force majeure) occur that imply an important modification of the business expectation and create an imbalance between the parties. In this case, the cause of force majeure would be the pandemic and the consequent fall in the number of travellers going to airports; the effect that modifies expectations would be the drop in income of the premises; and the imbalance between the parties would be the contractual obligation to pay a minimum rent based on unrealistic figures given the circumstances.

Based on all the above, the court agreed to suspend payment of the contractual mandatory minimum rent, although the rent proposed by the plaintiffs must be paid, which is the rent that was agreed with Aena for the last quarter of 2020 but which Aena then ceased to apply, all with retroactive effect. And the court also agreed that Aena cannot execute the guarantees, cannot file for eviction against the plaintiffs, and that no interest or penalties are accrued.

In short, this is a highly interesting ruling given that it opens a path to the possibility of requesting these urgent precautionary measures in similar or analogous cases and thus filing a rebus sic stantibus clause claim.

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