Spain
Takeover Guide

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THE REGULATION OF TAKEOVER BIDS

This guide contains a summary of the main features of the Spanish regulation on takeover bids (*ofertas públicas de adquisición* or OPA) as it stands following the transposition of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the 'EU Takeover Directive'). Spanish regulation on takeover bids essentially consists of Articles 128 to 137 of the Spanish Securities Market Act (Ley del Mercado de Valores or LMV, as restated by Legislative Royal-Decree 4/2015, of October 23) (the 'LMV') and Royal Decree 1066/2007, of 27 July, on the regime governing takeover bids (Real Decreto sobre el régimen de las ofertas públicas de adquisición de valores) ('Royal Decree 1066/2007').

MANDATORY TAKEOVER BIDS

Competent regulator

The Spanish Securities Market regulator (Comisión Nacional del Mercado de Valores or CNMV) is responsible for the supervision and approval of takeover bids launched in connection with companies whose shares are listed, in full or in part, on a Spanish stock exchange and have their registered office in Spain. The CNMV's authorisation of the offer also means the approval of the takeover bid prospectus (*folleto informativo*).

Cases in which it is mandatory to launch a takeover bid

A takeover bid is mandatory for any person obtaining control of a listed company, regardless of whether control is achieved by:

- acquiring shares or other securities that directly or indirectly confer voting rights in the listed target company;

- reaching agreements, whether express or tacit, verbal or written, with other holders of securities with the aim of achieving control of the listed target company; concerted action is presumed to exist when the agreement regulates the exercise of voting rights or restricts or conditions the free transferability of shares (*pacto parasocial*) and has the purpose of establishing a common policy in relation to the management of the company or is aimed at exercising a relevant influence thereon, or any other agreement that, having the same purpose, regulates the exercise of voting rights in the company's board of directors or its executive or delegated committee (*comisión ejecutiva o delegada*); or

- as a result of an indirect or consequential acquisition of control (mergers, indirect acquisitions, capital reductions and variation of the company's treasury stock, among others).

A natural or legal person is considered to have a controlling stake in a company, either individually or jointly with those persons with whom it is acting in concert, in any of the following cases:

- when it attains, directly or indirectly, a percentage of voting rights in its share capital of 30 per cent or more; or

- when it has attained, directly or indirectly, a lower percentage of voting rights and, within the 24 months following the date of acquisition of that lower percentage, it nominates a number of directors that, together with those that it has already nominated, represent more than half of the members of the board of directors of the company.

Notwithstanding this, a mandatory takeover bid is not required when control has been attained after a voluntary takeover bid for all of the securities in any of the following circumstances (among other exceptions): (1) the initial voluntary takeover bid was made at an equitable price (*precio equitativo*); (2) the initial voluntary takeover bid has been accepted by holders of securities representing at least 50 per cent of the targeted voting rights, excluding from the computation those voting rights already held by the offeror, as well as those corresponding to shareholders who have reached an agreement with the offeror in relation to the takeover bid; (3) in the case of industrial mergers; or (4) conversion or capitalisation of credits into shares in listed companies when financial viability is in severe and imminent jeopardy, provided that the purpose is to ensure the company's long-term financial recovery.

Securities threshold above which a takeover bid must be launched

(See the preceding section.)

Securities to which the mandatory takeover bid should be addressed

Mandatory takeover bids should be launched over 100 per cent of the securities issued by the company.

Mandatory takeover bids must be addressed to:

- all the holders of shares in the listed company, including the holders of non-voting shares who, at the time the authorisation request for the takeover bid is filed with the CNMV, are entitled to vote in accordance with legislation in force; and

- if they exist, to all the holders of share subscription rights and to all the holders of bonds convertible or exchangeable for shares.

The takeover bid may or may not be addressed to all holders of warrants or other securities or financial instruments that grant an option to acquire or subscribe for shares, except for those referred to in the second paragraph above, whether already issued or yet to be issued. If the takeover bid is addressed to them, it must be addressed to all persons who hold such warrants, securities or financial instruments.

Timing of the takeover bid

The mandatory takeover bid should be publicly announced as soon as control has been reached and should be filed with the CNMV within a maximum term of one month after control has been reached.

Indirect acquisitions

In the case of a merger with, or the acquisition of control of, another company that has a direct or indirect holding in the share capital of a listed company, the following rules shall apply:

- a takeover bid must be launched when, as a result of the merger or the acquisition of control, 30 per cent of the voting rights in the listed company is reached, directly or indirectly; and

- the takeover bid must be launched within the three months following the date of the merger or acquisition of control and the rules on equitable price (as explained below) shall be applicable.

However, it is not mandatory to launch a takeover bid when, within said three months, a number of securities is sold so that the exceeding voting rights over the percentage indicated above are transferred, and provided that, in the meantime, the corresponding voting rights in excess of such a percentage are not exercised.

Other potential events of the consequential acquisition of control provided for in Royal Decree 1066/2007 are share capital reductions, variations in the listed company's treasury stock and acquisition of control in a listed company pursuant to an underwriting agreement in the context of a public offering of securities.

Consideration

Mandatory takeover bids must be launched for an equitable price (*precio equitativo*). A price is considered to be equitable where it is equal to or above the highest price or consideration that the party required to launch the takeover bid (or those persons acting in concert with it) has paid for the same securities during the 12 months preceding the announcement of the takeover bid.

When the mandatory takeover bid must be made without any prior acquisition of shares in the company having taken place by the offeror, or persons acting in concert with the offeror, within the aforementioned 12-month period, the *equitable price* may not be lower than the price calculated in accordance with the valuation rules applicable to delisting bids, which are based on the application of the following valuation methods:

- theoretical book value of the company (*valor teórico contable*) and, as the case may be, its consolidated group, calculated on the basis of the most recent audited annual accounts and, if closed at a later date, on the basis of the most recent financial statements;
- liquidation value of the company and, as the case may be, of its consolidated group;
- weighted average listing price (*cotización media ponderada*) of the securities during the six-month period immediately preceding the announcement of the takeover announcement;
- value of the consideration previously offered in the event that any other takeover bid has been launched during the year preceding the relevant announcement or launching of the offer; and
- other valuation methods applicable to the specific case at hand and generally accepted by the international financial community, such as discounted cashflows, company multiples or comparable transactions or others.

The CNMV is entitled to modify the price calculated according to the above provisions in any of the following circumstances provided they had a relevant impact on the target company's securities during the reference period (among others): (1) payment of dividends; (2) corporate transactions or other extraordinary events; (3) trading value showing reasonable signs of manipulation; (4) when the equitable price is lower than the range of trading prices of the securities on the date of the acquisition; (5) when the equitable price corresponds to a number of securities which is not significant in relevant terms; or (6) when the target company is in serious financial difficulties.

Takeover bids may be launched as a sale and purchase, as a swap or exchange of securities or as a combination of both at the same time, and they must ensure equal treatment of all the holders of securities that are equally positioned. However, mandatory takeover bids must offer, at least as an alternative, a cash consideration that is at least financially equivalent to the exchange offered (*precio en efectivo equivalente*).

Also, a cash consideration must be included in any takeover bid (either voluntary or mandatory) that is at least financially equivalent to the exchange offered in any of the following circumstances:

- when the offeror (or persons with whom the offeror acts in concert) has acquired securities in cash in the 12 months prior to announcement of the takeover bid that confer five per cent or more of the voting rights in the target company; and
- in the case of an exchange of securities, except: (1) securities admitted to trading on an Spanish regulated market or other regulated market of a Member State of the European Union; or (2) securities to be issued by the offeror company itself are offered, provided that, in the latter case, the capital stock thereof is wholly or partially admitted to trading on any of the said markets and the offeror enters into an express commitment to apply for admission to trading of the new securities within a maximum of three months from the publication of the results of the takeover bid.

Regarding guarantees for the takeover bid, when the consideration offered consists of cash, in whole or in part, the offeror must provide a bank guarantee from a credit institution, or documentation evidencing that a cash deposit has been made with a credit institution, guaranteeing payment in full of the cash consideration to the members of the market or settlement system, as well as to those shareholders accepting the takeover bid.

VOLUNTARY TAKEOVER BIDS

Takeover bids may be launched on a voluntary basis for the shares of listed companies, as well other securities that, directly or indirectly, entitle the holder to subscribe for or acquire those shares.

As opposed to mandatory takeover bids, voluntary takeover bids may be subject to certain conditions (provided that the fulfilment or non-fulfilment thereof can be verified at the end of the acceptance period): (1) minimum acceptance level; (2) modification of by-laws; (3) structural modifications or other resolutions passed by the target's general shareholders' meeting; (4) approval of the takeover bid by the offeror's shareholders' meeting; (5) as well as any other condition that the CNMV considers lawful.

Voluntary takeover bids may be partial (there is no need to launch them in respect of 100 per cent of the target company's securities, as in mandatory takeover bids) in two cases: (1) when, as a result of the takeover bid, the offeror does not obtain control of the target company (ie, 30 per cent or more of the voting rights); or (2) in the case of an offeror who already holds a controlling stake and may increase it freely without having to launch a takeover bid. Voluntary takeover bids need not be launched at the equitable price.

Voluntary takeover bids should be publicly announced as soon as the decision to launch the offer has been taken and provided that the offeror has ensured that it is able to cover in full any cash consideration or has previously taken all reasonable measures to guarantee compliance with any other type of consideration (the so-called 'certain funds' condition).

LIFECYCLE OF A TAKEOVER BID

The lifecycle of a takeover bid is as shown in Table 1.

Table 1: Lifecycle of a takeover bid

Action	Time
Announcement of the takeover bid (voluntary takeover bids)	As soon as the decision to launch it has been taken, provided there are ‘certain funds’
Filing the request for authorisation of the takeover bid with CNMV	At the latest, one month after reaching control or announcing the takeover bid
CNMV’s admission for processing (*admisión a trámite*)	Seven working days from the date on which the required documentation is complete
CNMV’s authorisation of the takeover bid (prospectus)	20 working days after the documentation filed with CNMV is complete (including after the processing of eventual further requirements from CNMV)
Publication of the offer (announcements in the stock exchanges’ trading bulletin and publication of the prospectus)	Within a maximum of five working days from CNMV’s approval
Beginning of the acceptance period	Begins on the market trading day following the date of publication of the first announcement
Acceptance period of the offer	Between 15 and 70 calendar days (as freely set by the offeror)
Possibility of extending the acceptance period of the offer by the offeror (not exceeding the maximum of 70 days)	At least three calendar days before the end of the initial acceptance period of the takeover bid
Publication of the report issued by the board of directors of the target	Within ten calendar days from the acceptance period start date
Competing bids	May be filed until the fifth calendar day prior to the end of the acceptance period of the initial/preceding takeover bid/s
Amendment of the terms of the offer (provided no competing bids have been filed)	Before the last five calendar days of the acceptance period end date
Publication of the results of the offer	After seven working days from the end of the acceptance period
Settlement of the offer	After two working days from the publication of the results

DEFENDING A TAKEOVER BID

Passivity rule

The legal regime of the restrictions to the actions of the management and executive bodies of the offeree company (and its group), or the so-called 'passivity rule', is based on the following principles: the need of prior authorisation by the target's general shareholders' meeting to carry out 'any action that may prevent the success of the offer, with the exception of the search for other offers, and particularly before launching any issuance of securities that may prevent the offeror from obtaining control over the target company'. In particular, they shall not: (1) resolve upon or initiate an issue of securities that could prevent the success of the takeover bid; (2) directly or indirectly, carry out or prompt transactions over the target securities, including any actions encouraged to the acquisition of those securities, when this could prevent the success of the takeover bid; (3) transfer, encumber or lease real estate or other assets of the company, when such transactions could prevent the success of the takeover bid; or (4) pay extraordinary dividends or in any other way give remuneration that is not in line with the company's usual policy in connection with dividend payments. The restriction is applicable during the period running from the public announcement of the takeover bid until the publication of the result. As regards any decisions passed before the beginning of the period mentioned above, but that have not been implemented, totally or partially, the general meeting of shareholders must approve or confirm all decisions that are not within the normal course of business of the target (*curso normal de actividad*), and their implementation could prevent the success of the takeover bid.

Breakthrough rule: reciprocity exceptions

(a) The European Union takeover legal regime

The EU Takeover Directive allows EU Member States to exempt the companies within their jurisdiction from applying both the *passivity rule* as established in its Article 9 (paragraphs 2 and 3) and the *breakthrough rule* (Article 11, according to which and subject to some limitations, any restrictions in effect in the target on the free transferability of securities and on the voting rights will not apply: (1) at the general shareholders' meeting deciding on anti-takeover measures; or (2) during the acceptance period of the offer; or (3) at any moment afterwards whenever the offeror has achieved 75 per cent or more of the voting rights in the target). This exemption may be applied by the EU Member States in the case in which the target company is the object of a takeover bid by a third company (or a company controlled by it) to which its own national regulations do not impose the *passivity* and *breakthrough rules*

Opting out, opting in and the application of the breakthrough rule

Spain, like most EU Member States, has made use of the opt-out right set out in Article 12.1 of the EU Takeover Directive. This allows Member States not to require companies with their registered offices within their jurisdiction to apply Articles 9 (paragraphs 2 and 3) and 11. The Spanish regulations have also adopted the requirement that the target company must have the reversible right to opt in [ex Article 12.2 of the Directive], in which case the decision has to be passed by the general shareholders' meeting with the same voting quorum as required on the occasion of the previous opt-out.

Status quo the breakthrough rule (and the passivity rule)

Pursuant to the above: (1) the passivity rule applies to Spanish targets *ex lege* (Article 134.1 of the LMV); (2) Spanish targets are not subject to the breakthrough rule unless they expressly endorse it (opt in) by means of an agreement of the general shareholders meeting (Article 135.1 of the LMV); (3) Spanish targets that have opted in for the breakthrough rule may still not apply it – nor the passivity rule – whenever the offeror itself has not similarly endorsed (opted in) the breakthrough rule or is not subject to equivalent rules (Articles 134.3 and 135.5 of the LMV); (4) any subsequent opting-out decision in that respect by the target must be passed by its general shareholders' meeting within the 18-month period prior to publication of the offer; and (5) the target company has to provide for adequate compensation to the holders of the voting and free transfer rights affected by the application of the breakthrough rule. As per any by-laws, restrictions on the number of votes that a single shareholder (or its group of companies or any concerted shareholders) can cast in a general shareholders' meeting of the target will not apply where the offeror has achieved 70 per cent of the voting rights in the target, unless the offeror is not reciprocally subject to an analogous breakthrough rule according to its own jurisdiction.

COMPETING TAKEOVER BIDS

Definition

A competing takeover bid (*oferta pública competidora*) is any takeover bid aimed at acquiring any securities for which a takeover bid has already been filed with the CNMV, the acceptance period of which has not ended, and provided that it fulfils the following requirements:

- it must have been filed after the filing date of the initial takeover bid and up to the fifth calendar day before the end of its acceptance period;
- it must be addressed to a number of securities that are at least equal to the number for which the immediately previous takeover bid has been launched (either the initial offer or a preceding competing offer);
- it must improve the terms of the initial takeover bid (or, if applicable, of the last preceding competing takeover bid filed), by addressing the takeover bid to a greater number of securities and/or increasing the price or the value of the consideration offered by the preceding takeover bid. If the consideration is improved by changing its nature, it will be necessary to provide the opinion of an independent expert evidencing such an improvement, unless the initial consideration offered was an exchange of securities and is to be replaced by a cash consideration that is higher than the amount declared in accordance with the equivalent cash price (calculated in accordance with the provisions of Royal Decree 1066/2007);
- it cannot be launched by any party related to the initial or preceding offeror (in terms of concert), belonging to the same group of companies, or directly or indirectly acting on its behalf; and
- its acceptance period has to be 30 calendar days.

Whenever it is mandatory to launch a competing takeover bid pursuant to the applicable provisions on mandatory takeover bids, such a takeover bid must also comply with any such latter provisions.

Authorisation, withdrawal of preceding offers and matching acceptance periods

Any competing takeover bid, as well as any modification of any competing takeover bid, must be authorised by the CNMV. The authorisation of a competing takeover bid implies:

- that any offerors of any preceding takeover bids may withdraw their offers; and

- that the acceptance period of the preceding offer/s is/are interrupted and modified to the extent necessary to match the acceptance period of the last competing takeover bid (30 days).

Withdrawal and improvement of previous offers

The authorisation of a competing takeover bid enables the offerors of preceding takeover bids to withdraw their offers, in which case, they must communicate this circumstance immediately to the CNMV and publish a notice in the stock exchanges' bulletin. All other offerors (including the initial offeror) that have not withdrawn their offers may improve them until the fifth trading day following the deadline to file any competitive takeover bids (any modification must entail an improvement of the terms of the offer, as in the general regime, and be authorised by the CNMV).

In any event, on the said fifth trading day following the deadline for filing a competing takeover bid, any offerors that have not withdrawn their offers must submit to the CNMV in a sealed envelope (*sobre cerrado*) a communication containing either their final offer improvement or their decision not to submit one. The initial offeror is afforded the right to additionally modify its offer within the next five trading days following CNMV's disclosure of any such improvements to the market, provided that it meets the following two requirements: (1) the consideration it has offered in the sealed envelope is not lower by more than two per cent than the highest consideration offered by any of the competing bidders; and (2) it improves the conditions of the competing offers either by improving the price or value of the consideration by at least one per cent over the price or consideration offered by the best of those takeover bids, or by extending its offer to at least five per cent more securities than the best of the competing takeover bids.

Once the CNMV has authorised the improved offers, the terms of the relevant improvements are made public simultaneously and the common acceptance period is extended for 15 additional calendar days.

Squeeze-out and sell-out

The Spanish regulations on takeover bids include provisions on the squeeze-out (*venta forzosa*) and sell-out (*compra forzosa*) rights that, respectively, assist the successful bidder and the minority shareholders when, on the settlement date of an offer addressed to 100 per cent of the securities of a listed company, these two conditions are met: (1) the bidder holds securities representing not less than 90 per cent of the share capital carrying voting rights in the target company; and (2) the offer has been accepted by owners of securities representing not less than 90 per cent of the voting rights to which the takeover bid was addressed. As a result of the exercise of the squeeze-out right, the offeror may require the holders of the remaining securities that have not accepted the offer to mandatorily sell them to the offeror at the equitable price. Likewise, as a result of the sell-out right, any of such holders may require the offeror to purchase all its securities at such an equitable price. In both cases, the price offered under the takeover bid will be deemed to be the equitable price. The maximum term to exercise the squeeze-out or sell-out rights is three months from the expiry date of the acceptance period. As a general rule, the exercise of the squeeze-out right will entail the delisting of the securities, which will be effective as from the settlement of the transaction.

THE REGULATORS

CNMV

The Spanish Securities Market Commission or CNMV, a public law entity with independent legal status, is entrusted with the supervision and surveillance of the securities markets in Spain and the activity of all those involved in them. The main objectives of the CNMV are to ensure the transparency of Spanish securities markets and the correct formation of prices, as well as the protection of investors. In particular, the CNMV is entrusted with the supervision of takeover bids over companies with securities listed on the Spanish stock exchanges and has a broad range of competencies in this area, including, among others, admission for processing, authorisation of the offer, validation of the offeror's guarantees, approval of any modifications of the terms of an offer and coordination of the settlement procedure. Its decisions are subject to appeal to the Spanish National Appellate Court (Audiencia Nacional).

The Spanish stock exchanges

The four Spanish stock exchanges (*bolsas de valores*) are located in Madrid, Barcelona, Bilbao and Valencia. All securities listed in at least two of those stock exchanges can be traded in the Spanish Automated Quoting System (Sistema de Interconexión Bursátil, SIBE or Mercado Continuo), the system that connects the four Spanish stock exchanges electronically. The governing companies (*sociedades rectoras*) of the four Spanish stock exchanges have a role in the settlement procedure of the takeover in that they gather relevant information on the number of securities tendered. This is subsequently centralised by the CNMV, which officially publishes the results of the takeover bid.

The Spanish antitrust authorities

Whenever securities sought to be acquired as a result of a takeover bid are subject to prior merger-control authorisation under the 2007 Spanish Competition Act (Ley de Defensa de la Competencia), the case must be filed with the Spanish National Competition Commission (Comisión Nacional de los Mercados y de la Competencia or CNMC), an independent public entity attached to the Spanish Ministry of Economy, within the term of five days following the filing of the takeover bid with the CNMV. In essence, a takeover bid filed with the CNMV and subject to the merger control regime according to 2007 Spanish Competition Act: (1) may be conditioned to the Spanish competition authorities' approval or non-opposition; or (2) may be carried out without conditioning the takeover bid to such approval or non-opposition (although the consequences provided for in the merger control regulations will apply in any case).

According to the 2007 Spanish Competition Act, the Spanish merger control applies to economical concentrations (mergers, acquisitions or joint-control ventures) if: (1) generally, as a result of the corresponding transaction, a market share of 30 per cent or more of the relevant market is reached at national level, or in a defined market within the national level; or (2) the aggregate turnover of the participants of the transaction in Spain exceeds €240m, if at least two of them exceed the threshold of €60m in Spain. These transactions are subject to prior notification. The procedure in front of the Spanish competition authorities includes, summarily, a first one-month period during which the CNMC may either: (1) authorise the transaction (expressly or by means of the so-called 'positive administrative silence') (*first phase*) or; (2) when it considers that the concentration may hinder the maintenance of effective competition in all or part of the Spanish market, initiate its *second phase*. In that case, the CNMC issues a final decision within the following two months in which it may either: (1) approve the transaction; (2) subject its execution to certain conditions or commitments proposed by the notifying parties; or (3) prohibit it. In the latter two cases (conditional approval or prohibition), the Spanish Government may intervene and adopt a final decision: (1) confirming CNMC's decision; or (2) authorising, with or without conditions, the concentration based on reasons of general interest.

Takeover bids that, if completed, would lead to an acquisition subject to the EC Merger Regulation (139/2004) fall under the EU merger control regime, the Spanish one not being applicable, unless the concentration is remitted by the European Commission to Spain.