Global Public M&A Guide - Spain

Takeover Tactics

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# 6. Takeover Tactics

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**6.1 Competing takeover bids**

RD 1066/2007 establishes a specific regulation for competing takeover bids, the main features of which are set forth below:

Filing period and prohibition of bids outside the timeframe

Competing takeover bids must be filed in the period commencing after the filing of the initial bid and ending on the fifth calendar day prior to the expiry of the acceptance period, including extensions and additional time. An extension will be granted in the event of a subsequent mandatory bid. In any case, the announcement of a new voluntary takeover bid after the filing period for competing bids has expired is expressly forbidden.

Improving a preceding takeover bid

Competing takeover bids must be for at least the same number of securities as the last preceding bid and must improve the preceding bid, either by increasing the price or consideration offered, or by extending the takeover bid to a greater number of securities. Nevertheless, competing bids may be subject to conditions or even to acceptance of a greater number of securities than the preceding bid. Subsequently, improved bids are also possible at any time after approval of the last competing bid and prior to the date of presentation of closed envelopes.

Acceptance period

The acceptance period is 30 calendar days following publication of the first announcement. The launch of a competing takeover bid interrupts the acceptance period for preceding bids, which are thereby automatically modified so that all takeover bids' acceptance periods expire at the same time. Acceptance of the various competing bids is expressly allowed, but the order of preference between them must be specified.

Sealed envelope procedure and initial bidder preference

On the fifth working day following expiry of the period for the filing of competing bids, all bidders that have not withdrawn their bid shall proceed to submit a closed envelope to the CNMV including, as the case may be, their improved offer. Once the envelopes have been opened, only the initial bidder, provided it has not withdrawn its bid, may subsequently improve its takeover bid, so long as:

the consideration offered in the closed envelope by the initial bidder is not 2% lower than the highest consideration offered by any other of the takeover bids; and

the initial bidder improves the conditions of the competing takeover bids, either by increasing the price or consideration offered by the best bid received by at least 1% or by extending the initial takeover bid to more than 5% of securities with respect to the best competing bid.

Break-up fee

The initial bidder is entitled to receive a fee from the target company in the event a competing takeover bid is submitted, provided such fee:

does not exceed 1% of the takeover bid price; and

has been approved by the board of directors, with a favorable report from the financial advisers to the company and described in the offer document.

Information equality

Bidders are entitled to equal information, with the target company being under a duty to provide all bidders with the information made available to all other bidders, whether current or potential.

**6.2 Target passivity rule and defensive measures**

RD 1066/2007 imposes a general duty on the governing bodies and management of the target company, any delegated or empowered body of such and their respective members, as well as the companies belonging to the target company group and any company that may act jointly with the above, to remain passive and request prior shareholder approval before performing any act that may prevent the success of a takeover bid.

Without prejudice to the generality of the abovementioned limitation, the approval of the shareholders at a general meeting of the target company shall be specifically required before any of the following actions are taken:

approve or initiate the issuance of securities that may prevent the success of a takeover bid;

carry out or promote transactions related to the securities subject to the takeover bid or other securities, in an attempt to prevent the success of a takeover bid;

dispose of, encumber or lease fixed or other company assets when the transaction could prevent the success of a takeover bid; or

pay extraordinary dividends or remuneration of any kind that is not in line with standard company policy on dividend payments to shareholders or owners of other securities in the target company, except when the necessary company resolutions have been previously passed by the relevant company body and made public.

The only exception to the foregoing is that the board of directors of the target company does not need the approval of the shareholders (i) in order to seek other offers that compete with the takeover bid originally submitted; or (ii) if such action has been expressly approved by the bidder (subject to the CNMV’s confirmation in each particular case).

The general duty to remain passive begins when a takeover bid is publicly announced and ends when the final result is published.

Notwithstanding the above, companies are entitled not to observe the preceding regulations when they are subject to a takeover bid launched by an entity whose registered company address is outside Spain and is not subject to equivalent regulations, i.e., whenever the bidder is entitled to take defensive measures without the need of approval by its general shareholders' meeting. In this case, previous approval of such regime by the general shareholders' meeting of the target company is required not later than 18 months before the takeover bid is made public.

**6.3 Common preventive measures for hostile takeover bids**

The preventive measures that may be adopted by a listed company in the event of a possible hostile takeover bid are basically of two kinds: measures contemplated in the by-laws and contractual measures.

The most effective preventive measure that may be contemplated in the by-laws of a listed company that is admissible in Spain is the limitation of the number of votes that may be cast by a single shareholder or by all shareholders belonging to the same group. Qualified quorums or voting majorities for the approval of certain resolutions, e.g., capital increases and the issue of bonds, may also be included in the by-laws of a listed company which, though they may favor the creation of a blocking minority that hinders the future plans of a possible hostile acquirer, may also affect the day-to-day management of the company. Another preventive measure that may be contained in the by-laws is the establishment of special requirements to be appointed director, for example, being a shareholder of the company over a minimum period of time prior to the appointment or to serve in key positions (chairman, chief executive officer) on the board of directors (such as, for example, a particular length of service as director of the company).

Contractual preventive measures may, in turn, be divided into two groups of measures: those provided for in contracts entered into by the company; and those arising from agreements executed by third parties. The former includes agreements which contain a change of control clause and which may affect assets, e.g., call options, financing, e.g., early redemption and interest rate increase provisions, issuances of securities, e.g., accelerated conversion clauses and clauses providing for a downward adjustment in the conversion price of convertible debentures, etc., and which, whether or not originally included for a defensive purpose, may discourage the submission of a takeover bid that has not been agreed upon. In relation to the second group, the most significant measures are possible restrictions on the transfer of shares that may be provided for in shareholders' agreements executed by the shareholders of the company, which may restrict the acceptance of the takeover bid by the parties to the shareholders' agreement.

In addition to preventive measures of a legal nature, there are measures or strategies of a financial nature, such as an increase in the company's leverage or the listing of subsidiaries, which may require a heightened financial effort in order to take control of the company by forcing the bidder to assume a greater debt or to increase the total consideration needed in view of the obligation to offer the acquisition of minority interests in subsidiaries by means of a successive takeover bid.

**6.4 Breakthrough provisions**

Listed companies that have preventive measures in place may decide that one or more of the following breakthrough measures apply in the event that the company is the target of a takeover bid:

the ineffectiveness of any restriction on the transfer of securities established in any shareholders' agreement regarding the company during the takeover bid acceptance period;

the ineffectiveness, at the shareholders' meeting at which decisions are made on the potential defensive measures to be adopted, of any restriction to the voting rights established in the company's by-laws or in any shareholders' agreement; or

the ineffectiveness of any restriction mentioned in (i) and (ii) above with regard to shareholders' agreements in the event a bidder obtains a stake of at least 75% of the voting rights after launching a takeover bid.

The decision on whether to adopt or revoke said breakthrough measures must be passed at a general shareholders' meeting of the company. When a company decides to apply breakthrough measures, it must include a provision in its by-laws for adequate compensation for the loss suffered by the holders of the neutralized rights, together with a description of the manner in which such compensation shall be paid and the method used to determine it.

In line with the comments made above on defensive measures, in the event a company is subject to a takeover bid by an entity that has not adopted equivalent breakthrough measures, the target company may decide not to apply any breakthrough measures currently in place. In such case, the previous approval of the shareholders' meeting is required (no later than 18 months prior to the time the takeover bid is made public).

Finally, regardless of the optional breakthrough regime of the anti-takeover measures mentioned above, the SCA and the SMA establish an imperative breakthrough regime by means of which any by-law provisions that either directly or indirectly establish, on a general basis, a limit to the maximum number of votes corresponding to a shareholder, companies belonging to the same group or any person acting in concert with any of the foregoing, shall have no effect after a takeover bid in the event the bidder acquires at least 70% of voting rights.

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