Global Public M&A Guide - Spain

Effecting a Takeover

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# 4. Effecting a Takeover

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**4.1 Types of public takeover bids in Spain**

Mandatory takeover bids

This category includes all the different types of mandatory takeover bids deriving from a voluntary act by the bidder aimed at obtaining a controlling interest in the relevant target company by any of the following means:

the acquisition of shares or other securities conferring voting rights on their holders which causes the bidder to obtain a stake equal to or greater than 30% of the target company's voting rights;

the acquisition of a stake below 30% together with the appointment, within the next 24 months, of a number of members on the target company's board of directors that, together with any directors previously appointed by the bidder, represent a majority of the members on said board; or

the signing of shareholder agreements with other holders of securities which results in any of the aforesaid situations.

In all such cases, the takeover bid must be carried out as a total takeover (see 4.2 below) and at an equitable price (see 4.3 below). It must also be structured as an irrevocable and unconditional bid subject to no conditions, with the exception of any prior authorizations that may need to be obtained from competition authorities, foreign investment authorities or other administrative authorities.

Indirect mandatory takeover bids

The obligation to launch an indirect mandatory takeover bid arises when the bidder acquires an indirect controlling interest in the target company as a result of a merger or takeover of a third company or entity with a direct or indirect holding in the target company.

The same procedure as the one mentioned for ordinary mandatory takeover bids is applicable here. However, the mandatory launch of the bid can be avoided if the share capital in excess of the relevant threshold is disposed of within three months of acquiring the controlling interest, provided the voting rights inherent to such share capital in excess are not exercised in that timeframe.

Incidental mandatory takeover bids

An incidental mandatory takeover bid (*OPA obligatoria sobrevenida*) is one that must be carried out whenever a controlling interest in a target company is acquired in an "incidental" manner, that is to say as a result of any of the following events:

a decrease on the share capital of the target company;

an exchange, subscription, conversion or acquisition of shares derived from securities or other instruments conferring such rights;

an increase on the interest held derived from a rise in the target company's treasury stock; or

an acquisition of shares resulting from underwriting agreements or an initial public offering.

Similar to indirect takeover bids, an incidental takeover bid must observe the compulsory and irrevocable procedure established for mandatory takeover bids, unless the share capital in excess (or the excess in treasury stock giving rise to the incidental takeover bid) is disposed of within three months, and provided the voting rights inherent to such share capital in excess are not exercised in that timeframe.

Voluntary takeover bids

A voluntary takeover bid can be launched at the discretion of the bidder, provided said bidder is not under the obligation to launch a mandatory takeover bid, either because the bidder (i) has not previously acquired a controlling interest requiring a mandatory takeover bid; or (ii) already controls the target company and may therefore freely increase its holding without being subject to the rules governing mandatory takeover bids.

The legal regime governing voluntary takeover bids is more flexible and includes the following features:

Partial takeover bids. Unlike mandatory takeover bids, voluntary ones may be partial, provided that: (i) the bidder does not acquire a controlling interest as a result of the bid; or (ii) the bidder already holds a controlling interest in the company and can therefore increase its interest without having to launch a mandatory takeover bid.

Freedom to determine price. Voluntary takeover bids are not subject to a minimum equitable price requirement and can therefore be made at the price determined by the bidder.

Voluntary takeover bid conditions and withdrawal of bids. Voluntary takeover bids may be conditioned by the bidder to a range of requirements, including the passing of certain resolutions at the general shareholders' meeting of the target company, the acceptance of the bid by a particular number of securities and, in general, any other condition deemed valid by the CNMV. With regard to the withdrawal of a bid, the regulations applicable to voluntary takeover bids are much more flexible than those governing mandatory ones.

The acquisition of a controlling interest resulting from a voluntary takeover bid would not require the bidder to launch a subsequent mandatory bid in any of the following scenarios: (i) the voluntary takeover bid was launched at an equitable price; or (ii) the voluntary bid was accepted by at least 50% of the shares to which it was addressed, not including those already owned by the bidder and/or shareholders that had reached an agreement with the bidder in relation to the bid.

Takeover bids resulting from the acquisition of treasury stock for redemption

RD 1066/2007 establishes that the takeover bid regime and procedures shall apply to capital decreases executed by listed companies by means of the acquisition of treasury stock for its redemption. It also establishes an exception to the rule when the treasury stock purchased does not exceed 10% of the share capital and is based on European Regulation 2273/2003 (current Commission Delegated Regulation (EU) 2016/1052) governing share buyback programs and stabilization of financial instruments.

Delisting takeover bids

RD 1066/2007 sets forth specific regulations and requirements for those takeover bids that ought to be launched in case of a delisting. For further information, see 8 below.

**4.2 Scope of the public takeover bid**

As a general rule, the takeover bid must be addressed to:

all the shareholders of the target company, including those without voting rights who, upon authorization of the takeover bid, held voting rights according to the provisions of the applicable regulation; and

any person or entity that holds either preferential acquisition rights over the shares, or convertible or exchangeable bonds, if any.

In addition, voluntarily and at the discretion of the bidder, the takeover bid may also be extended to all owners of warrants or other securities that confer their holders the option to acquire or subscribe shares, i.e., atypical securities, different from the convertible or exchangeable bonds mentioned in (b) above.

In practice, and even though RD 1066/2007 only regulates it in regards to delisting takeover bids, it is not necessary to extend the bid to the owners of securities that have undertaken not to accept the bid and who have blocked their shares until the liquidation of the bid is concluded, thus enabling a limit on the scope of the takeover bid and lower guarantee-related costs in relation to the bid.

**4.3 Equitable price and takeover bid consideration**

General procedure

Unlike voluntary takeover bids, mandatory takeover bids must be launched at a price not lower than the so-called equitable price, as defined in RD 1066/2007, which essentially follows the concept established in the Takeover Directive. The definition of equitable price in accordance with RD 1066/2007 is:

the highest price or consideration paid or agreed upon by the bidder or any person acting in concert with the bidder in regards to the same type of securities during the reference period, which is understood as the 12 months immediately prior to the takeover bid announcement; or

if no acquisition or agreement to acquire took place in the reference period, the equitable price may not be lower than the one obtained by applying the rules for calculation and objective settling established in regards to delisting takeover bids (see 4.1.f) above).

In any case, one must bear in mind that the term 'equitable price' is a legal concept that does not necessarily coincide with that of 'fair value'. It is intended to ensure that the principle of equal treatment to all the target company's shareholders is applied and, particularly, to ensure an equitable distribution of the control premium.

Total amount and amendment of equitable price

For the purpose of determining the equitable price, the total amount of the consideration or price paid or offered by the bidder must be taken into account, and special rules are established in case of acquisitions resulting from the execution of options or other financial instruments, situations of swapping or the redemption of shares, and agreements that include additional compensation or deferral of payment.

In addition, and according to the provisions of the Takeover Directive, the determination of an equitable price according to the aforementioned criteria and, particularly, according to the rules regarding the highest price paid or agreed, is established in RD 1066/2007 for those situations in which the acquisition or the agreement to acquire may have taken place under normal or ordinary market circumstances, thereby establishing various situations where the equitable price can be modified by the CNMV. Said situations are the following:

Objective corrections and modifications of the equitable price.

In cases where the equitable price must be objectively corrected, typically to maintain a financial equivalency, or when it may be substituted by an alternative and predetermined price, including the following cases:

when the traded price for the securities may have been affected in the reference period by dividends, corporate transactions or extraordinary events that would allow the equitable price to be objectively corrected;

when the equitable price is lower than the range of quotation prices for the day of acquisition that determines said price, in which case the price may not be less than the lowest price in said range; and

when the equitable price refers to a non-significant acquisition in relative terms and provided such acquisition was carried out at the quotation price, in which case the price would be the highest amount paid or agreed upon in the remaining acquisitions carried out in the reference period.

Amendments to increase or decrease the equitable price.

This refers to situations where the equitable price is modified in accordance with objective appraisal criteria and on the basis of the relevant appraisal report issued by an independent expert. Such situations include:

when the quotation price has been affected in the period of reference by events that point to market abuse manipulation, which may have caused the CNMV to initiate disciplinary proceedings. In such cases, the price would be determined according to objective appraisal criteria, which would have to include the consideration paid by the bidder in the reference period; and

when the target company can be proven to be undergoing serious financial difficulties, in which case the equitable price would be determined according to the objective appraisal criteria for delisting takeover bids (see 4.1(f) above).

Amendments to increase the equitable price, as established in the SMA.

The SMA contemplates various situations where the equitable price may be modified pursuant to different extraordinary events that may have occurred in the 2-year lapse preceding the takeover bid, extending the procedure not only to mandatory takeover bids but also to voluntary ones which, if they fall under the situations mentioned, must necessarily be carried out using a price that is calculated according to the rules indicated below. Said situations are the following:

when the quotation prices for the shares point to there being reasonable proof that market abuse manipulation has occurred, which would be cause for the CNMV to initiate penalty proceedings;

when market prices in general, or the price of the target company in particular, have been affected by extraordinary events, such as natural disasters, wars, calamities or other events caused by *force majeure*; and

when the target company is subject to expropriation, confiscations or other circumstances of a similar nature which could imply a change in its real net worth.

These cases always imply an increase of the equitable price so that the takeover bid price cannot be less than the highest price of either the price calculated according to the aforementioned general criteria for establishing equitable prices, or the price calculated according to objective appraisal criteria (including therein, the consideration paid by the bidder in the reference period).

Consideration

With regard to the consideration offered, takeover bids may be structured as a purchase deal (cash), a swap or exchange deal (securities) or a combination of both. However, certain cases will require the consideration to be paid in cash, or that said consideration is included as an alternative to the option granted to the shareholders of the target company, for an amount that represents the financial equivalent of the exchange offered.

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