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Contents

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1. Trends

1.1 M&A Market

In 2018, M&A in Spain experienced significant growth compared to 2017, which was already a good year for M&A activity, thus continuing the upward trend that began in 2014. This growth is largely due to the existing liquidity in both the national and international financial markets, low financing costs and the context of economic growth, among other circumstances.

According to specialist sources, 2,454 transactions were announced or closed in 2018, which is an increase of 6% compared to the previous year. Likewise, the volume of transactions has also increased by 19.04%, reaching EUR115.91 billion.

These figures were buoyed up by large transactions such as the joint acquisition of Abertis by Atlantia and ACS for a total consideration of EUR16.5 billion, and the acquisition by CVC Capital Partners (acting in concert with Corporación Financiera Alba) of Repsol's 20.07% stake in Gas Natural for EUR3.82 billion.

1.2 Key Trends

As the political and economic conditions were favourable, the Spanish M&A market performed very well in 2017 and 2018. As a result of low interest rates, low inflation and improved global economic growth, the main deals in Spain in 2017 and 2018 were carried out by private equity and infrastructure funds, as well as key industrial players.

1.3 Key Industries

Following the same trend as previous years, the most targeted sectors in 2017/2018 were energy and real estate. Important deals such as the acquisition of Testa Residencial by Blackstone (EUR1.89 billion), the acquisition of Hispania Activos Inmobiliarios by Blackstone (EUR1.9 billion) and the acquisition of the Apple Portfolio by Cerberus Capital Management (EUR1.55 billion) show the prevalence of real estate transactions in the Spanish M&A market.

Examples of large transactions in the energy sector in 2018 include the acquisition of a 20% stake in Gas Natural by CVC Capital Partners (EUR3.8 billion), the sale by Oaktree of Eolia to AIMCo (EUR1.4 billion) and the acquisition by USS Investments of a 50% stake in Redexis from GSIP (EUR1.5 billion).

Other industries that have experienced significant M&A activity in 2018 are banking and financial services, technology, healthcare and the internet sector, all of which are well placed to keep growing in the years to come.

2. Overview of Regulatory Field

2.1 Acquiring a Company

A non-listed company may be acquired in a number of different ways in Spain. The most common forms of acquisition are as follows:

- cash acquisitions, where a purchaser acquires the shares of a target company, or part or all of the assets (and eventually also the liabilities) of a target company for a price payable in cash;
- share-issue acquisitions, where a purchaser acquires the business of a target company for a price payable in shares issued by the purchaser. Share-issue acquisitions are generally in one of the following forms:
  (a) statutory mergers and demergers;
  (b) share contributions; or
  (c) contributions of assets and liabilities; and
- co-operation agreements (the creation of joint venture companies, for instance).

In order to acquire control of a Spanish listed company, it is normally necessary to launch a takeover bid. However, control gained through a merger may be exempt from the obligation to launch a takeover bid if certain requirements are met.

2.2 Primary Regulators

The primary regulators/supervisors for M&A activity in Spain are as follows:

- if the target is a listed company, the *Comisión Nacional del Mercado de Valores* (CNMV) – ie, the Spanish securities market supervisor/regulator;
- if a deal is subject to merger control clearance, the Spanish local or EU antitrust authorities, which, depending on the features of the purchaser and the deal, may be either the European Commission or the *Comisión Nacional de los Mercados y la Competencia* (CNMC); and/or
- if a target company operates in a regulated sector (mainly finance, insurance, energy or telecoms), the relevant Spanish governmental agency or authority (eg, the Bank of Spain and the CNMV for the finance sector, the *Dirección General de Seguros y Fondos de Pensiones* for the insurance sector, the CNMC and the Ministry of Industry, Trade and Tourism for the energy sector, and again the CNMC for the telecoms sector).

2.3 Restrictions on Foreign Investments

As a general rule, M&A transactions carried out by foreign investors are not subject to any significant restrictions in Spain. However, in some sectors (mainly those related to national defence), foreign involvement is restricted on the basis of public interest.

Another example is foreign investment in airline companies, which is subject to specific EU and local regulations that limit the ability of foreign investors to hold stakes in them. In addition, foreign investments in Spain must be reported to the General Directorate for Trade and Investments, but only for administrative, statistical and financial purposes.

2.4 Antitrust Regulations

When a business combination does not have a community dimension, the main applicable antitrust laws and regulations are Law 15/2007, of 3 July, on the Defence of Competition, and its development regulation approved by Royal Decree 261/2008, of 22 February. When a business combination has a community dimension, the provisions of Council Regulation (EC) 139/2004 of 20 January on the control of concentrations between undertakings are applicable.

2.5 Labour Law Regulations

Acquirers should primarily be concerned about the labour law regulations provided for in the Workers' Statute and in any applicable collective bargaining agreements. Moreover, the form of acquisition chosen for a particular deal (eg, merger, demerger, spin-off or global assignment of assets and liabilities) may require a purchaser to observe certain additional provisions set forth in Law 3/2009, of 3 April, on structural modifications of capital companies. Likewise, Spanish takeover bid regulations provide for particular rules in the case of a takeover bid for the shares of a listed company.

2.6 National Security Review

There are certain restrictions on foreign investments in sectors directly related to national defence (namely the manufacturing or trading of weapons, ammunitions, explosives or other war materials). In addition, the government has the power to establish general or specific limitations on investments in activities related to public order, national security or public health. This power has not yet been used, so it is not a real issue for M&A transactions at present.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

The most significant legal developments that have affected M&A activity in recent years are as follows:

- the amendment of Article 348 bis of the Spanish Companies Act, governing the right of minority shareholders to separate from a company if said company does not distribute profits made from its business in a given year. The main changes are that:
  - (a) this right can now be limited in the bylaws of a company, to the extent that it can now be waived;
  - (b) the minimum percentage of profits that must be distributed to prevent the separation right from being triggered has been reduced to 25% (the previous amount to be distributed was one third of the profits); and
  - (c) the separation right requires the existence of profits during the previous three years;
- the approval of the consolidated text of the Securities Market Law, which was passed in order to reinforce the clarity and consistency of the regulations applicable to the securities market, to reduce their division and to consolidate the system (Royal Legislative Decree 4/2015, of 23 October);
- Law 11/2015, of 18 June, on the recovery and resolution of credit institutions and investment services companies, which partially implemented the Bank Recovery and Resolution Directive (Directive 2014/59/EU of the European Parliament and of the Council of 15 May) in Spain in order to implement a resolution framework that sets forth the responsibilities, instruments and powers to enable Spanish authorities (the Bank of Spain and the FROB) to facilitate the orderly resolution or restructuring of failing banks by protecting material functions and without assuming access to extraordinary public financial support and exposing taxpayers to the risk of loss; and
- Law 5/2015, of 27 April, on the promotion of company financing, increasing flexibility in debt financing for companies by, among other things, reducing the former limits and corporate requirements applicable to bond issuances.

As regards court decisions, the Supreme Court passed an important judgment on 26 February 2018 regarding the remuneration of directors of non-listed companies, in which it essentially ruled that non-listed companies must include both the remuneration system of the members of the Board and the remuneration system of executive directors in their bylaws.

3.2 Significant Changes to Takeover Law

There have been no significant changes to takeover legislation in recent years.

While Spanish takeover legislation may be modified slightly due to the transposition of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017, relating to certain aspects of company law, it is unlikely at this stage that it will result in significant changes to takeover legislation, since the purpose of the aforementioned directive is to codify the existing legislation on this matter in the interests of clarity and rationality.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

There are certain precedents where stakebuilding strategies have been carried out as a defence measure in the context of hostile takeover bids. However, stakebuilding by a bidder prior to launching an offer, while possible, is unusual in Spain. There are a number of possible reasons for this:

- a stakebuilding process entails the risk of a press leak that could jeopardise the success of a transaction;
- stakebuilding may also have an impact on the share price of a target company, particularly when the trading volume is low, which could in turn force a bidder to increase the bid price; and
- if a bid is launched after building a stake equal to or higher than 5% during the preceding 12 months, a bidder must provide a full cash alternative as consideration along with that bid.

Stakebuilding is normally aimed at ensuring the result of the subsequent bid by first setting up a strong shareholding position in a target company. In practice, in Spain, bidders usually try to achieve that same goal by obtaining irrevocable commitments to tender from the main shareholders of a target company (see **6.11 Irrevocable Commitments**, below).

4.2 Material Shareholding Disclosure Threshold

As a general rule, purchases or sales of shares in a listed company must be publicly disclosed to both a target company and the CNMV when they result in the stake of the relevant shareholder reaching, or falling below the following thresholds: 3%; 5%; successive multiples of 5% up to 50%; 60%; 70%; 75%; 80%; and 90% of a company's total voting rights.

Moreover, in the context of a takeover bid, the following transactions have to be publicly disclosed:

- any acquisition reaching or exceeding 1% of a target company's voting rights; and
- any increase or decrease in the stake held by holders of 3% or more of the voting rights in a target company.

A bidder (or the person acting in concert with them) is also obliged to disclose any purchase of target shares made outside the takeover bid procedure to the CNMV. Additional rules apply to transactions carried out by directors of a target company, to acquisitions of treasury stock and to transactions with shares of a target company carried out from tax havens.

4.3 Hurdles to Stakebuilding
The reporting thresholds referred to in **4.2 Material Shareholding Disclosure Thresholds**, above, are mandatory and therefore cannot be unilaterally increased by a company. However, there is no legal obstacle to a company introducing more stringent rules in their bylaws (ie, reporting thresholds that are lower than those provided by the law). Nevertheless, any such reduction in reporting thresholds through a company's bylaws might be difficult to enforce in practice, as their breach could not give rise to any administrative sanctions.

4.4 Dealings in Derivatives
Dealings in derivatives are allowed, and are actually commonplace in Spanish M&A practice.

4.5 Filing/Reporting Obligations
Dealings in derivatives have to be publicly disclosed to a target company and to the CNMV whenever the holder is contractually granted a unilateral and discretionary right to acquire voting shares in a listed company up to, exceeding or falling below the following thresholds: 3%; 5%; successive multiples of 5% up to 50%; 60%; 70%; 75%; 80%; and 90% of the total voting rights.

There are no specific filing/reporting obligations in relation to derivatives transactions as far as competition laws are concerned. However, to the extent that the registered shareholder under a derivative appears as a mere nominee who exercises their voting rights according to the instructions of the shares' beneficial owner, notification to the antitrust authority may be required when the volume of voting rights involved may confer control to that beneficial owner.

4.6 Transparency
Shareholders that intend to take control of a listed company (or that have already acquired control and are therefore obliged to launch a mandatory takeover bid) are obliged to disclose the purpose of their acquisition and their intention regarding the control of the company in the prospectus of the takeover bid, subject to the prior approval of the CNMV.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal
Pursuant to the EU Market Abuse Regulation, inside information generally has to be publicly disclosed as soon as possible (including information related to processes or phases of preparation or negotiation, which the Market Abuse Regulation refers to as "protracted processes that occur in stages").

However, an issuer may, on its own responsibility, delay disclosure to the public of inside information, provided that all of the following conditions are met:

- immediate disclosure is likely to prejudice the legitimate interests of the issuer;
- delay of disclosure is not likely to mislead the public; and
- the issuer is able to ensure the confidentiality of the information.

Where an issuer has delayed the disclosure of inside information for these reasons, it must inform the CNMV that disclosure of the information was delayed. Moreover, where disclosure of inside information has been delayed and the confidentiality of that inside information is no longer ensured, the issuer must disclose the inside information to the public as soon as possible.

5.2 Market Practice on Timing
Deal disclosures regarding listed companies tend to be made when transaction documents have been entered into, and not before, unless there are leaks or abnormal alterations to the listing price.

5.3 Scope of Due Diligence
When a bidder and a target company agree to conduct a due diligence process in a public M&A transaction, they normally agree to conduct high-level and limited reviews that focus on key matters, and must be carried out in a time-sensitive way. The areas covered vary depending on the case at hand, but normally include business, financial and legal aspects, and focus on information reasonably required by a bidder in order to confirm price hypothesis, strategic fit, risks, management adequacy, and change of control or regulatory issues, as well as the appropriateness of a bidder's financing structure.

Due diligence should be carried out under a confidentiality agreement. If any inside information is disclosed as part of due diligence, in order to qualify as legitimate behaviour under the Market Abuse Regulation, it may only be used by the bidder for the purposes of proceeding with a takeover bid or a merger with a company, and provided that, by the time the takeover bid is accepted or the merger is approved, such inside information has been made public or has otherwise ceased to constitute inside information. If a company allows a bidder to conduct due diligence, it should give potential competing bidders equal access to information. Due diligence combined with stakebuilding (as opposed to launching a bid) is more risky, since the Market Abuse Regulation's legitimate behaviour provisions do not apply to stakebuilding.

5.4 Standstills or Exclusivity
In public M&A, agreements between a target company and a potential bidder are not unusual in the context of friendly bids. These agreements may regulate exclusivity undertakings from a target (ie, agreeing not to negotiate with any other potential bidder) and standstill provisions (an agreement by an offeror not to purchase shares of a target for a

limited period), among other things. Moreover, time-limited binding exclusivity agreements are very common in private M&A transactions.

5.5 Definitive Agreements

There is no obstacle to a bidder reaching an agreement on a tender offer with a target company or their principal shareholders. However, the definitive terms and conditions of an offer should be documented in a prospectus, which a bidder must prepare in accordance with the requirements of Spanish takeover bid regulations and which must be approved by the CNMV.

6. Structuring

6.1 Length of Process for Acquisition/Sale

There is no standard duration for a takeover bid process as it depends on a large number of factors (ie, compliance with conditions precedent, a possible need for a bidder to issue securities in an exchange offer, administrative authorisations in regulated sectors, the existence of competing bids, etc).

Broadly speaking, a plain and simple takeover bid (ie, a cash consideration, with no administrative authorisations required other than CNMV and antitrust clearance, and no competing bids) could take from 90 to 120 days to be completed from the time it is filed with the CNMV.

6.2 Mandatory Offer Threshold

Generally, the threshold triggering the obligation to file a mandatory takeover bid for 100% of the outstanding share capital of a target company is 30% of the voting rights. This threshold can be reached or exceeded by any of the following means:

- an acquisition of shares or other securities that confer, directly or indirectly, the voting rights in a target;
- entering into a shareholders' agreement or acting in concert with other shareholders; or
- an indirect or subsequent acquisition of control (eg, a merger with a listed company, a takeover of a company that directly or indirectly holds a stake in a target company, or a share capital reduction, among others).

A mandatory takeover bid is also triggered if a person acquires less than 30% of the voting rights but appoints a number of directors that represents more than half of the board members within 24 months of the date of the acquisition.

6.3 Consideration

A cash consideration, at least as an alternative, is legally required in mandatory takeover bids. As far as voluntary bids are concerned, the use of cash as consideration is more common but there are also a number of precedent-setting offers structured as exchanges of shares, particularly in large transactions with a high acquisition value.

6.4 Common Conditions for a Takeover Offer

A mandatory takeover bid cannot be subject to conditions precedent, except for clearance by antitrust authorities. However, the effectiveness of a voluntary takeover bid can be subject to any kind of conditions that may be verified at the end of a bid acceptance period, typically including:

- the approval of amendments to bylaws, corporate restructurings or any other resolution at the general shareholders' meeting of a target company;
- a minimum acceptance threshold; and/or
- approval of the takeover bid at the general shareholders' meeting of a bidder.

6.5 Minimum Acceptance Conditions

The minimum acceptance condition is often set at 50% of a target voting capital, which is the lowest shareholding that ensures undisputed control of a company. More commonly, it is set at 75% of the target voting capital, which is the threshold for tax consolidation purposes.

6.6 Requirement to Obtain Financing

It is perfectly acceptable for private M&A transactions to be conditional on a bidder obtaining financing (and in fact they often are). However, these kinds of conditions are not permitted in the context of takeover bids, since finance, when required, must be committed to at the time a bid is filed with the CNMV. Likewise, a bidder must provide a bank guarantee covering the whole bid value in order to ensure the completion of a transaction.

6.7 Types of Deal Security Measures

A target company may agree to pay break-up fees as compensation for the costs incurred in preparing a bid, subject to the following conditions:

- break-up fees are only available for the first bidder;
- the amount of the break-up fee cannot exceed 1% of the total consideration of a bid;
- the break-up fee must be approved by a target company's board of directors with a favourable report from their financial advisers; and
- the break-up fee is to be disclosed in the bid prospectus.

Additionally, in principle a bidder can come to any kind of agreement in relation to a bid with a target company, including forcing the vote or requiring non-solicitation provisions. However, if a competing bid, albeit unsolicited, is launched by a third party, the board of directors and the management of a target company are expressly prohibited from doing anything to disrupt the competing bid, unless authorised at the general shareholders' meeting.

6.8 Additional Governance Rights
Under Spanish law, governance rights are linked to the shareholding in a company, generally on a pro rata basis. A bidder can only obtain 'additional' governance rights (ie, rights in excess of those corresponding to its pro rata interest in a company) by entering into a shareholders' agreement with other shareholders, or by means of a special class of shares conferring additional rights (as far as is legally possible).

6.9 Voting by Proxy
Voting by proxy is perfectly possible, and commonplace in Spanish corporate practice.

6.10 Squeeze-out Mechanisms
Spanish takeover bid regulations recognise a squeeze-out right for bidders that have launched a takeover bid for all the shares in a target company but have not achieved a 100% acceptance level. By virtue of this right, a bidder is entitled to purchase all remaining shares at the price of the bid, thereby gaining complete control of a target company. Two conditions must be met in order for this squeeze-out right to be applicable:

- a bidder must reach at least 90% of the voting share capital in a target company; and
- a bid must have been accepted by shareholders representing at least 90% of the voting rights to which the bid was addressed (ie, excluding the voting rights previously held by the bidder, if any).

6.11 Irrevocable Commitments
Irrevocable commitments to tender are quite common in Spanish takeovers, and are used in order to ensure the result of a bid as an alternative to stakebuilding strategies. The negotiation of these commitments is usually undertaken at a very early stage in a transaction process. Friendly bids are normally first agreed by a bidder with a target's main shareholders (either directly or through their representatives on a target board), and then filed and discussed with the CNMV.

As a general rule, these commitments are binding agreements between a bidder and the main shareholders of a target company, and provide for:

- the obligation of a bidder to launch a takeover bid, subject to pre-agreed terms and conditions, within a certain period of time (typically one month, which is the maximum term in which to file a bid with the CNMV once it has been publicly announced); and
- the commitment of shareholders to tender their shares in a bid.

Finally, opt-out provisions entitling shareholders to accept a better offer, thereby being released from their commitment, are normally refused by bidders, and as such are relatively rare in practice.

7. Disclosure

7.1 Making a Bid Public
Mandatory takeover bids must be made public immediately after the occurrence of the triggering event (normally the acquisition of a 30% stake in a target company).

Voluntary bids must be made public as soon as a formal resolution to launch an offer has been passed by the bidder management body, provided that financing of a bid has already been committed or that a bidder can otherwise cope with its payment obligations under a bid.

The announcement of a bid must be made through the CNMV website, following a standard form established by takeover bid regulations. Once a bid has been announced, a bidder must file the bid prospectus with the CNMV within one month.

7.2 Type of Disclosure Required
If a bid consideration consists of shares to be issued by a bidder, the level of disclosure is the same as the level required for public offers of securities by Directive 2003/71/EC and national implementing legislation. Therefore, the prospectus to be filed in the event of an exchange bid must include all the information about a bidder and a bidder's securities required by the Spanish public offer regulations, unless this information is already available to the public because a bidder has a registration document in force.

7.3 Producing Financial Statements
If the consideration for the takeover bid is cash, the bid prospectus must include some financial information on the bidder, but there is no requirement to produce complete financial statements.

However, a bidder's financial statements are required if the consideration for a bid consists of shares or other securities issued by a bidder, given that the transaction is then treated for these purposes as a public offer of securities. In this case, a bidder's financial statements must be prepared according to International Financial Reporting Standards (IFRS) or, if not applicable, according to the accounting standards in force in a bidder's country, provided that they are equivalent to IFRS. If they are not, IFRS restated financial statements would be required.

7.4 Transaction Documents
As a general rule, transaction documents relating to a takeover bid – including in particular any agreement by a bidder with a target company's main shareholders or directors – must be fully disclosed to the CNMV and described in detail in the bid prospectus.

8. Duties of Directors

8.1 Principal Directors' Duties
The general duty for directors to act in the best interests of a company is applicable to all kinds of business combinations, whether public or private. Although widely debated, the interests of a company in these instances are generally considered to be interests that are common to all shareholders, and not necessarily the interests of other stakeholders. Specifically, directors' duties include diligence, loyalty and confidentiality. The general duty of loyalty includes specific provisions regarding the misuse of an influential position, conflicts of interest and shareholdings in competing companies.

Furthermore, in the context of public M&A, the board of directors and the management of a target company are prohibited from taking any action that could frustrate or disrupt the success of a takeover bid launched against a company. This is to ensure that the interests of shareholders prevail over the interests of directors and management. This is generally known as the 'passivity duty' of directors.

The board and the management of a target company cannot adopt any of the following defensive measures, from the date of the announcement of a bid, until its results are made public:

- issuing or initiating the issuing of any securities that may frustrate a bid;
- carrying out or promoting any transaction affecting the shares in a target that could impair a bid (including promoting stakebuilding strategies as a shield against a bid);
- selling, renting to third parties or setting liens or encumbrances on the real property or other assets of a target company to the extent that any such transaction may disrupt a bid; and
- distributing extraordinary dividends to shareholders, except when these dividends have been approved and announced prior to a bid.

As an exception to these prohibitions, the board and the management of a target company can search for a competing bidder (called a "white knight") and, generally, take up any defensive measures against a bid following prior authorisation at the general shareholders' meeting. An authorisation of this kind should be granted through a resolution adopted by a reinforced majority.

8.2 Special or Ad Hoc Committees
In private M&A, it is fairly common practice to create joint supervisory committees composed of representatives of a buyer and a target company. This is done to ensure that a target company is managed within the ordinary course of business during the transition period between the signing and closing of a transaction.

However, the establishment of ad hoc committees within the board of directors is not very common in the context of public M&A, although it is not unheard of. In any case, conflicts of interest experienced by directors are not usually the driving force behind the creation of these kinds of committees. Conflicts of interest are generally dealt with by prohibiting the relevant director from participating in the corporate resolutions related to the transaction in which the conflict of interest arose.

8.3 Business Judgement Rule
There is little case law on takeover situations in Spain, and what little there is mainly relates to injunctive relief against a bidder. However, given the passivity duty of target directors in a takeover bid (see **8.1 Principal Directors' Duties**, above), it can be concluded that the business judgement rule is unlikely to be applied by Spanish courts in a legal action brought against the directors.

8.4 Independent Outside Advice
In a standard takeover bid process, the board of directors of a target company will normally request outside advice from:

- lawyers, particularly with regard to directors' duties during a bid process; and
- an independent financial expert, in order to issue a fairness opinion on the consideration offered in a bid.

Generally, this opinion is used to support the directors' report on a takeover bid to be issued to target shareholders once a bid has been approved by the CNMV (see **9.1 Hostile Tender Offers**, below).

8.5 Conflicts of Interest
There is some case law in Spain on conflicts of interest of directors and managers, but there is very little regarding shareholders and advisers. However, this case law appears to relate mainly to the challenge of corporate resolutions rather than to public or private M&A.

9. Defensive Measures

9.1 Hostile Tender Offers
Hostile tender offers (ie, offers that are not supported by the board of directors of a target company) are permitted under Spanish law, but are usually quite rare, because the rejection of a tender offer by a target board very often results in the failure of a takeover bid.

Although the board and management of a target company are subject to a passivity duty in relation to a bid (as further explained in **8.3 Business Judgement Rule**, above), they still retain the ability to beat a bidder by, for instance, searching for a competing offer or engaging in transactions designed to bring about the failure of a bid, provided that the general shareholders' meeting approves any such transactions.

In addition, a target company's board of directors must issue a report on a takeover bid (once it has been authorised by the CNMV), which must state whether they are in favour of a bid or against it. This report can have an important impact on the decision made by a target company's shareholders.

Finally, while the procedures and time periods applicable to hostile and friendly transactions are the same, the process can be significantly delayed in a hostile scenario due to the following factors:

- the potential adoption by a target company of defensive measures approved by the general shareholders' meeting;
- the potential search by a target board for a white knight alternative bidder, which would trigger a competing bids process; and/or
- any potential injunctive relief against the unsolicited bid that may be obtained by a target from a competent court.

9.2 Directors' Use of Defensive Measures
The directors of a target company must obtain prior approval at their general shareholders' meeting before taking any defensive measures that could result in the frustration of a bid, other than seeking a competing bid.

9.3 Common Defensive Measures
As a result of the passivity duty of target directors, defensive measures during a bid period are limited to judicial claims seeking potential injunctive relief or the search for a white knight prepared to launch a competing and more favourable takeover bid.

However, the inclusion of preventive defensive measures in the bylaws (ie, provisions designed to discourage unsolicited bids) is relatively common among listed companies. Examples of typical preventive measures included in the bylaws of Spanish listed companies include the following:

- limiting the number of votes that a single shareholder may cast – this is probably one of the most effective and widely used anti-takeover measures, but is ineffective in the context of a takeover bid if 70% or more of the voting shares are tendered in a bid;
- establishing supermajority quorum and/or voting requirements; and
- establishing eligibility requirements for directors – for instance, seniority as shareholder, or being an employee of a target company prior to a bid, can be required in order to be able to be appointed as a director.

9.4 Directors' Duties
Directors cannot enact defensive measures against an unsolicited takeover bid unless they have obtained prior approval at the shareholders' meeting. To this end, directors must prepare a detailed written report justifying the agreement to be adopted at this shareholders' meeting.

9.5 Directors' Ability to 'Just Say No'
In Spain, directors of a target company cannot just say no and take action that prevents a takeover bid from being successful.

10. Litigation

10.1 Frequency of Litigation
Litigation is quite rare in takeover situations except in the context of hostile bids, where target directors may try to obtain some kind of injunctive relief from the courts in order to impede a takeover. Disputes are more frequent in private M&A, generally in relation to representations and warranties claims, purchase price adjustments or earn-out clauses.

10.2 Stage of Deal
A distinction should be made between private and public M&A with regard to litigation. In private M&A, disputes usually arise after the closing of a deal due to the subject matter of claims (this generally refers to representations and warranties, price adjustments or earn-out clauses). In public M&A, litigation is a lot less common and, if it occurs, it is usually related to hostile bids and is brought soon after the announcement of a bid.

11. Activism

11.1 Shareholder Activism
Some of the largest activist funds in the world are increasing their presence in the share capital of European companies, including in Spain. However, it is still not particularly significant in the context of the overall Spanish M&A activity. When it exists, the main focus of shareholder activism tends to be on valuation/pricing matters and the protection of minority rights, rather than on influencing the strategic decisions of the company or changing the management body.

11.2 Aims of Activists
It is very rare in Spanish practice to see activists encouraging companies to enter into M&A transactions. As previ-

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ously mentioned, the main focus of shareholder activism is normally valuation/pricing matters and the protection of minority rights within the context of transactions that have been decided separately from an activist's initiative.

11.3 Interference with Completion

Activists generally seek to obtain better bid terms for the group of shareholders they represent, but the effectiveness of their actions is rather limited.