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New Securities Market Law: developments concerning takeover bids

The Law on Securities Markets and Investment Services (the “SML”), which was approved by the Congress of Deputies on 9 March 2023 and is pending publication in the Official State Gazette (using the Spanish acronym, “BOE”), constitutes the new framework law for securities markets, repealing Royal Legislative Decree 4/2015, of 23 October, approving the consolidated text of the Securities Market Law (the “CTSML”), which in turn was the successor to Law 24/1998, on Securities Markets.

This Legal Briefing analyses the main developments in the SML relating to takeover bids.

1. Takeover bid exemption

The power of the National Securities Market Commission (using the Spanish acronym, “CNMV”) to exempt a company from the obligation to launch a delisting takeover bid when its shares are listed on another trading venue domiciled in the European Union has been extended.

As a general rule, following the adoption by a listed company of a resolution to delist its shares, the company will be obliged to launch a delisting takeover bid. The offer must be for all the affected securities, and must be made at a price equal to the highest of the following: (a) the fair price; and (b) the price resulting from the application, jointly, of the valuation methods provided for in Article 10(5) of Royal Decree 1066/2007, of 27 July, on the regime governing takeover bids (the “RD on takeover bids”).

Prior to the reform, the CTSML already exempted the case in which a takeover bid had previously been launched for all the securities, with a consideration equal to or higher than that required for a delisting takeover bid, and where the bidder had obtained, as a result of this takeover bid, at least 75% of the voting capital of the company concerned.

In addition, the RD on takeover bids already regulates three other situations in which the launching of a delisting takeover bid is not required: (i) situations in which a squeeze-out is exercised, in accordance with Article 47; (ii) when a unanimous resolution to delist is adopted by the holders of the affected securities, renouncing the sale of their securities under the takeover bid regime; and (iii) situations of dissolution of the company concerned through a corporate transaction, granting the affected shareholders shares in another listed company.

On the other hand, and without prejudice to the above exceptions, the CNMV has until now had the power to waive the obligation to launch a delisting takeover bid in the event that an equivalent procedure is established to ensure the legitimate interests of the holders of shares, convertible bonds and other securities entitling them to subscription. The reform retains this exemption and adds a new one.

Section four of the new Article 65 (“Voluntary delisting”) empowers the CNMV to exempt a company that has agreed to voluntarily delist its shares from the obligation to launch a delisting takeover bid, provided that, at that time, the security is listed on another trading venue domiciled in the European Union.

In this regard, the amendment has extended the CNMV's powers already provided for by Royal Decree-law 21/2017, of 29 December, on urgent measures for the adaptation of Spanish law to European Union securities market regulations ("**Royal Decree-law 21/2017**") in article 22 ("Common rules for delisting or suspension by regulatory bodies and the CNMV") with respect to the suspension or delisting of financial instruments traded on other trading venues domiciled in the European Union, where such suspension or delisting had originally been adopted by the corresponding regulatory body of the home Member State, inter alia, in the case of a takeover bid, and the CNMV has been notified of the corresponding resolution.

2. Concerted action

The possible cases of concerted action between holders of securities of listed companies that give rise to the obligation to launch a takeover bid due to acquiring control of a listed company have been extended.

The new Article 108 ("Mandatory takeover bid"), as in the repealed legislation, establishes the obligation for anyone acquiring control of a listed company to launch a takeover bid for all the shares or other securities which, directly or indirectly, may give the right to subscribe or acquire them. The bid must be made to all holders at a fair price. For these purposes, the legislation prior to the reform established that control could be understood to be acquired (i) through the acquisition of shares or other securities that directly or indirectly confer the right to subscribe or acquire shares with voting rights; (ii) through shareholders' agreements; or (iii) as a result of other similar circumstances determined by regulation.

As a new feature, the new Article 108(b) now provides that control may be acquired not only through shareholders' agreements, but also through "other" agreements or pacts.

The future regulatory development of the rule and its practical application by the CNMV should shed some light on how this new provision will be applied. However, in light of the latest statements by the CNMV in this regard, it seems that the reform could be aimed at limiting possible cases of fraud by including other forms of acquisition of control through mechanisms other than the formal shareholders' agreements regulated by Article 530 of Royal Legislative Decree 1/2010, of 2 July, approving the consolidated text of the Companies Act.

3. Scope of application

The scope of application of the rules on takeover bids has been extended to multilateral trading facilities ("**MTFs**"). In line with the above, MTFs are also subject to the rules relating to the voluntary delisting of a financial instrument.

The SML expressly mentions these markets in two separate articles: (i) Article 65(6) ("Voluntary delisting") under Chapter I ("Trading venues") of Title IV; and (ii) Article 109(1) ("Scope of application") under Chapter V ("Takeover bids") of Title IV.

In both cases, reference is made to the fact that the extension of the regime to this type of company will be carried out "under the terms established by regulation". However, with respect to voluntary delisting only, the third transitional provision establishes that this regime will not be applicable to MTFs until the entry into force of the corresponding regulations.

In the absence of any equivalent rule on the entry into force, with respect to MTFs, of Chapter V of Title IV, it seems to be concluded that (with the sole exception of delisting takeover bids) the

takeover bid rules would start to apply to these companies twenty days after the publication of the SML in the BOE.

However, it remains to be seen how the CNMV will ultimately interpret this wording, which is asymmetrical regarding the entry into force of Articles 65 and 109. It would not seem reasonable that it would lead to these provisions entering into force at different times.

Until now, the regime applicable in relation to takeovers and delistings of issuers listed on MTFs has been set out in the rules of the MTF itself. For companies listed on BME Growth (the main MTF operating in Spain), in accordance with the reference and content of the market's Circular 1/2020, this regime is embodied in a mandatory provision in the articles of association, which must regulate, for these purposes: (i) the obligation of a shareholder who receives an offer for a shareholding that allows the potential acquirer to obtain a stake of more than 50% of the capital to extend the offer on the same terms to the remaining shareholders (which in practice has come to be interpreted more as a tag-along right than as an obligation to launch a takeover bid); and (ii) the obligation of the company, in the event of adopting a non-unanimous delisting resolution, to offer to acquire the shares of shareholders who have not voted in favour of such resolution at a fair price in accordance with the criteria set out in the regulations applicable to delisting takeover bids (except in the event that the company agrees to list its shares on a Spanish regulated market at the same time as delisting).

The reform means, among other things, that takeovers and the voluntary delisting of companies whose shares are admitted to trading on MTFs and whose registered office is in Spain will now be subject to the regime that previously had applied only to companies listed on the Spanish stock exchanges. However, since the new SML includes a reference in both Article 65(6) ("Voluntary delisting") and Article 109(1) ("Scope of application") to the fact that such application will be "under the terms established by regulation", it is possible that the regime to be applied to companies listed on MTFs will eventually include special features with respect to the regulation under the current RD on takeover bids.

4. Special events

"Declared pandemics" have been expressly included as one of the possible exceptional events that may give rise to the application of the special rules on takeover bids launched in extraordinary circumstances that affect market prices in general or the share price of the target company in particular.

Specifically, the new SML maintains the old obligation for the offeror to provide an independent expert report on the valuation methods and criteria applied in determining the consideration for the takeover bid when, within the two years prior to the announcement of the takeover bid, certain exceptional circumstances apply.

The new wording of Article 117(3) ("Voluntary takeover bids") elevates declared pandemics to the category of specific exceptional cause, assuming and integrating the interpretation of the CNMV in July 2021¹ of the now repealed Article 137(2) of the Securities Market Law in relation to the COVID-19 pandemic and its effects on the Spanish markets. These special rules will apply not only

1. "Questions and answers on takeover bids"
https://www.cnmv.es/docportal/Legislacion/FAQ/QAs_OPAs.pdf

to voluntary takeover bids, but also to mandatory takeover bids where the exceptional situations referred to above apply, in accordance with the new Article 113 (“Other provisions”).

5. Fair price

Finally, with regard to the concept of fair price, the legislation includes the reference, already contained in Article 9 of the RD on takeover bids, that the fair price is to be understood as the highest price that the person obliged to launch the takeover bid (or the persons acting in concert with them) had agreed to pay for the same securities during the 12 months prior to the bid (prior to the reform, the Securities Market Law only referred to the price paid).

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