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Law & Practice

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1 Trends

1.1 M&A Market

M&A activity in Spain in 2015 in comparison with 2014 could be said to be a consolidation of the significant and impressive recovery experienced by the M&A market in Spain in 2014. In 2014, recent trends perpetuated by the global financial crisis and the difficulties in obtaining financing from banks or the market changed; overall, the figures for this sector returned to those that we saw in the years prior to the financial crisis.

However, M&A transactions in Spain during the last quarter of 2015 were decreasing, particularly as a result of certain political factors. First, regional elections were held in Catalonia in September, in which the possibility of a secession was included in the manifestos of certain political parties. As regards these elections, a regional government had yet to be formed, and a considerable number of companies based in Catalonia began to relocate to other Spanish regions (particularly Madrid). Secondly, the Spanish national elections, which took place in December (after the time of writing), were difficult to predict due to the appearance of new political parties, set to break down the traditional two-party rotation of Spanish democracy. Such political factors led to several investors withholding their investment decisions until Spain's political landscape became clearer.

1.2 Key Trends

As in the years prior to the global financial crisis, M&A activity in 2015 was mainly focused on the real estate sector. Spanish REITs (Real Estate Investment Trusts), although created some years ago, became more consolidated; up to seven REITs were admitted to trading on the Spanish

Alternative Market (MAB). The REITs listed on the Spanish Stock Exchange (Hispania, Axiare, Lar and Merlin) were also highly active in the acquisition of real estate assets as well as of other real estate companies. Some of the most important transactions in this sector in 2015 were the EUR3.4 billion acquisition of Testa Inmuebles by Merlin, by means of a public tender offer, and the EUR1.2 billion acquisition of Realia Business by Grupo Carso.

Real estate aside, the biggest M&A transaction in Spain in 2015 (and one of the biggest transactions in Europe) was the integration of the European bottling business The Coca-Cola Company, Coca-Cola Enterprises and the Spanish company Coca-Cola Iberian Partners (the strategic bottling partner of The Coca-Cola Company in Spain, Portugal and Andorra). This transaction was announced in August and expected to conclude during the first half of 2016 (after the time of writing). The reported value of this transaction is approximately EUR20 billion.

Other significant private M&A transactions announced in 2015 were the sale of Telefonica UK by Telefonica to Hutchinson Whampoa, the acquisition of Talisman Energy by Repsol, the acquisition of Madrileña Red de Gas by PPGM, Gingko Tree and EDF Invest, and the acquisition of E.ON España by Macquarie and The Kuwait Investment Authority.

In terms of public M&A affecting listed companies, the most significant transactions were the IPOs of Aena, Saeta Yield, Cellnex, Talgo and Euskaltel, the sale of 15.5% of Abertis by CVC Capital Partners, and Orange’s public takeover bid for Jazztel.

1.3 Key Industries

Both in terms of the number and the volume of deals, real estate was the most significant sector for M&A activity in 2015. Apart from this, and as a result of the size of the integration of the bottling business The Coca-Cola Company, Coca-Cola Enterprises and the Spanish company Coca-Cola Iberian Partners, the food and beverage sector will also count as of the most active sectors. Other industries also experiencing significant M&A activity in 2015 were energy, mining & utilities, technology, telecoms, internet and financial & insurance.

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. However, the most common forms of acquisition are the following:

- 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 the target company for a price payable in cash; or
- share-issue acquisitions, where a purchaser acquires the business of the 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; or
- co-operation agreements (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 the following:

- if the target is a listed company, the Comisión Nacional del Mercado de Valores (CNMV, the Spanish securities market supervisor/regulator); and/or
- if the 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 the target company operates in a regulated sector (mainly, finance, insurance, energy or telecoms), the relevant Spanish governmental agency or authority (namely, 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, Energy and Tourism for the energy sector and again the CNMC for the telecoms sector).

2.3 Restrictions on Foreign Investment

As a general rule, M&A transactions carried out by foreign buyers are not subject to any significant restrictions in Spain. However, there are still a few sectors, mainly those related to national defence, where 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 antitrust laws and regulations applicable 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 EU Council Regulation No. 139/2004 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 the applicable collective bargaining agreements (if any). Moreover, the form of acquisition chosen for a particular deal (eg a merger, demerger, spin-off or global assignment of assets and liabilities) may require the purchaser to observe certain additional provisions set forth in Law 3/2009, of April 3rd, on structural modifications of capital companies. Likewise, the Spanish takeover bid regulations provide for particular rules in 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, 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, although they have not used this power so far, 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 the last three years are the following:

- Law 5/2015, of April 27th, on the promotion of company financing, which has increased flexibility in debt financing for companies by, amongst others, reducing the former limits and corporate requirements applicable to bond issuances;
- Law 3/2014, of December 3rd, amending the Capital Companies Law in order to improve corporate governance, which has introduced significant changes to matters such as directors' liability and remuneration, minority shareholders' rights in listed companies, shareholders' conflicts of interest and other corporate governance issues; and
- Law 1/2012, of June 22nd, on the simplification of information and documentation obligations in mergers and spin-offs of capital companies, introduced a reform of Law 3/2009, of April 3rd, on the structural modifications of capital companies (which constitutes the main body of rules governing mergers, demergers, spin-offs and global assignment of assets and liabilities), in order to simplify the information and documentation required in M&A transactions. This means that less time is now needed to execute corporate transactions and the costs are therefore reduced, thus simplifying the whole process. A recent minor amendment of one Article of Law 3/2009 was carried out by Royal Decree 4/2014, on urgent means for the refinancing and restructuring of company debts, which further removed a documentation requirement in the case of mergers.

As regards court decisions, there was a recent important court order dealing with the sale of assets and business units within the framework of an insolvency procedure. This court order gives favourable treatment to the purchaser in these types of transactions, which have become quite common in recent times.

3.2 Significant Changes to Takeover Law

The only amendment to takeover legislation in 2014 was made by the aforementioned Royal Decree 4/2014. The requirement to obtain authorisation from the CNMV to release the relevant party from the obligation to launch a takeover bid when it acquires equity in a listed company through credit capitalisation has been removed when said credit capitalisation aims to avoid an insolvency situation and is also provided for in a judicially approved refinancing agreement.

Apart from this, the most relevant amendment to the provisions on takeover bids over the last few years was introduced by virtue of the aforementioned Law 1/2012, of June 22nd. According to this amendment, which has significantly blurred the lines between mandatory and voluntary takeover bids, the price of a voluntary takeover bid must be the higher of either the equitable price or the price resulting from an independent valuation report, and must at least consist of cash as an alternative, when any of the following circumstances have occurred within the two years prior to the announcement of the bid:

- the trading prices of the target company's shares have been affected by price manipulation practices;
- market prices, in general, or the prices of the target company's shares, in particular, have been affected by exceptional events such as natural disasters, war or force majeure; or
- the target company has been subject to expropriations, compulsory confiscations or similar situations that have significantly affected the company's real value.

Furthermore, Law 1/2012 brought an important change relating to takeover defence measures in listed companies. In particular, this law removed a former prohibition for listed companies to include voting restrictions in their by-laws. As a result, it is possible for a listed company to restrict the maximum number of votes that a single shareholder is allowed to cast; however, if 70% of the shares with voting rights have been tendered in a takeover bid, any such restriction will be neutralised (subject to certain reciprocity considerations).

Finally, although not strictly related to takeover bids, the new EU regulatory framework on market abuse, comprised of the new Market Abuse Regulation and the Directive on Criminal Sanctions for Market Abuse, is likely to have an important impact on due diligence and information disclosure matters in public M&A.

4 Stakebuilding

4.1 Principal Stakebuilding Strategies

There are certain precedents where stakebuilding strategies were carried out as a defence measure in the context of hostile takeover bids. However, stakebuilding by a bidder prior to launching an offer, whilst 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 the transaction;
- stakebuilding may also have an impact on the share price of the target company, particularly when the trading volume is low, which could in turn force the 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 twelve months, the bidder must provide a full cash alternative as consideration under that bid.

Stakebuilding is normally aimed at ensuring the result of the subsequent bid by first setting up a strong shareholding position in the 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 the target company (see 6.11).

4.2 Material Shareholding Disclosure Thresholds

As a general rule, purchases or sales of shares in a listed company must be publicly disclosed both to the 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 the 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 the 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 the target company.

The 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 the target company, to acquisitions of treasury stock and to transactions with shares of the target company carried out from tax havens.

4.3 Hurdles to Stakebuilding

The reporting thresholds referred to in 4.2 Material Shareholding Disclosure Thresholds 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 by-laws, ie reporting thresholds lower than those provided by the law. Nevertheless, any such reduction in the reporting thresholds through a company's by-laws might be difficult to enforce in practice, as their breach could not give rise to any administrative sanction.

4.4 Dealings in Derivatives

Dealings in derivatives are allowed, and they are not unusual in Spanish M&A practice.

4.5 Filing / Reporting Obligations

Dealings in derivatives have to be publicly disclosed to the target company and to the CNMV whenever its holder is contractually granted a unilateral and discretionary right to acquire voting shares in the 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 on 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

Generally, the target company would be required to disclose the deal once the definitive agreements have been signed. Indeed, Spanish inside information regulations set forth that, during the phases of analysis and preparation of potential transactions, any party holding inside information regarding the transaction or the target listed company is obliged not to use and not to disclose that information to third parties, unless it is strictly necessary for the analysis, preparation or execution of the potential transaction. However, if the quotation of the shares undergoes abnormal alterations, the target company would be obliged to publicly disclose the status of the deal in order to avoid market disruption.

5.2 Market Practice on Timing

In practice, deal disclosures tend to be made when required to be carried out by law, but very rarely do they occur beforehand. It is also worth noting that applicable regulations allow for the disclosure to be delayed when the information may be detrimental to the interests of the disclosing party, but it is not common practice.

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 which focus on key matters, and which must be carried out in a time-sensitive way. The areas covered will vary depending on the case at hand, but they normally include business, financial and legal aspects, and focus on information reasonably required by the bidder in order to confirm price hypothesis, strategic fit, risks, management adequacy, change of control or regulatory issues, as well as the appropriateness of the bidder's financing structure.

Due diligence should be carried out under a confidentiality agreement. Information may only be used for the purposes of a takeover bid. If a company allows a bidder to conduct due diligence, it should give equal access to information to potential competing bidders. Due diligence combined with stakebuilding (as opposed to launching a bid) is risky, since it may be considered to have contravened regulations on inside information.

5.4 Standstills or Exclusivity

In public M&A, agreements between the target company and a potential bidder are not unusual in the context of friendly bids. These agreements may regulate, amongst others, exclusivity undertakings from the target (ie agreeing not to negotiate with any other potential bidder), and standstill provisions (agreement by the offeror not to purchase shares of the target for a limited period). 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 the target company or their principal shareholders. However, the definitive terms and conditions of the offer should be documented in a prospectus that the 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 the 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 the 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, voting rights in the 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 the target company or a share capital reduction, amongst others).

A mandatory takeover bid is also triggered in the event that a person acquires less than 30% of the voting rights but appoints a number of directors that represent 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 precedents of 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 the bid acceptance period, typically including:

- the approval of amendments to the by-laws, corporate restructurings or any other resolution by the general shareholders' meeting of the target company;
- a minimum acceptance threshold; and/or

- approval of the takeover bid at the bidder’s general shareholders’ meeting.

6.5 Minimum Acceptance Conditions

The minimum acceptance condition is often set at 50% of the target voting capital, which is the lowest shareholding that ensures undisputed control of a company, or more commonly 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 the 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 of the filing of the bid with the CNMV. Likewise, the bidder must provide a bank guarantee covering the whole bid value in order to ensure the completion of the transaction.

6.7 Types of Deal Security Measures

The 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 the bid.
- The break-up fee must be approved by the target company’s board of directors with a favourable report from their financial advisers.
- The break-up fee is to be disclosed in the bid prospectus.

Additionally, a bidder can, in principle, come to any kind of agreement in relation to the bid with the 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 the target company are expressly prohibited from doing anything to disrupt the competing bid, unless authorised by the general shareholders’ meeting.

6.8 Additional Governance Rights

Under Spanish law, governance rights are linked to the shareholding in the 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 the company) by entering into a shareholders' agreement with other shareholders or by means of a special class of shares conferring the 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 the target but have not achieved a 100% acceptance level. By virtue of this right, the bidder is entitled to purchase all remaining shares at the price of the bid, thereby gaining complete control of the target company. Two conditions must be met in order for this squeeze-out right to be applicable:

- The bidder must reach at least 90% of the voting share capital in the target company; and
- The 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. They are used in order to ensure the result of the bid as an alternative to stakebuilding strategies. The negotiation of these commitments is usually undertaken at a very early stage in the transaction process. Friendly bids are normally first agreed by the bidder with the target's main shareholders (either directly or through their representatives in the target board) and then filed and discussed with the CNMV.

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

- the obligation of the 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 to file a bid with the CNMV once it has been publicly announced); and

- the commitment of the shareholders to tender their shares in the bid.

Finally, opt-out provisions entitling the 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 the target company).

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

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

7.2 Types of Disclosure

If the bid consideration consists of shares to be issued by the 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 legislations. Therefore, the prospectus to be filed in the event of an exchange bid must include all the information about the bidder and the bidder’s securities required by the Spanish public offer regulations, unless this information is already available to the public because the bidder has a registration document in force.

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

7.4 Disclosure of the Transaction Documents

As a general rule, transaction documents relating to a takeover bid, including in particular any agreement of the bidder with the 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

There is a general duty for directors to act in the best interests of the company, which is applicable to all kind of business combinations, whether public or private. Although widely debated, the 'interests of the company' in these instances is generally considered to be the interests 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 the target company are prohibited from taking any action that could frustrate or disrupt the success of a takeover bid launched against the company. This is to ensure that the interests of shareholders prevail over the interests of the directors and management. This is generally known as the 'passivity duty' of the directors.

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

As an exception to these prohibitions, the board and the management of the target company can search for a competing bidder (called a 'white knight') and, generally, take up any defensive measures against the bid with the prior authorisation of 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 the buyer and the target company. This is done to ensure that the target company is managed within the ordinary course of business during the transition period between the signing and closing of the 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 reliefs against the bidder. However, given the passivity duty of the target directors in a takeover bid (see 8.1 Principal Directors' Duties), 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 the target company will normally request outside advice from:

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

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

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 mainly in relation to the challenge of corporate resolutions rather than in the context of 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 the target company) are permitted under Spanish law but are usually quite rare. The reason for this is that the rejection of the tender offer by the target board very often results in the failure of the takeover bid.

Although the board and management of the target company are subject to a 'passivity duty' in relation to the bid (as further explained in 8.1 Principal Directors' Duties), they still retain the ability to beat the bidder by, for instance, searching for a competing offer or engaging in transactions designed to bring about the failure of the bid, provided that the general shareholders’ meeting approves any such transactions.

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

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

9.2 Directors' Use of Defensive Measures

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

9.3 Common Defensive Measures

As a result of the 'passivity duty' of the target directors, defensive measures during the bid period are limited to judicial claims seeking potential injunctive reliefs 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 by-laws (ie provisions designed to discourage unsolicited bids) is relatively common among listed companies. The following are examples of typical preventive measures included in the by-laws of Spanish listed companies:

- 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. This kind of voting restriction is ineffective in the context of a takeover bid if 70% or more of the voting shares are tendered in the bid.
- Establishing supermajority quorum and/or voting requirements.
- Eligibility requirements for directors; for instance, seniority as shareholder, or being an employee of the target company prior to the bid, can be required in order to be able to be appointed director.

9.4 Directors' Duties

Directors cannot enact defensive measures against an unsolicited takeover bid unless they have obtained the prior approval of the shareholders’ meeting.

9.5 Directors' Ability to "Just Say No"

In Spain, directors of the 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 the 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. In private M&A, disputes usually arise after the closing of the deal, due to the subject matter of the 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 the bid.

11 Activism

11.1 Shareholder Activism

Although shareholder activism has become more and more visible in the last few years, it is still not particularly significant in terms of M&A activity. When it exists, shareholder activism focuses mainly on valuation/pricing matters and on the protection of minority rights.

11.2 Aims of Activists

It is very rare in Spanish practice to see activists encouraging companies to enter into M&A transactions. As previously mentioned, shareholder activism is mainly focused on valuation/pricing matters and on the protection of minority rights within the context of transactions that have been decided separately from the activists' 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.

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