

SPAIN: CHANGES IN THE REGIME ON TAKEOVER BIDS FOLLOWING THE LMVSI

The new Spanish Act 6/2023 on Securities Markets and Investment Services (*Ley de los Mercados de Valores y de los Servicios de Inversión*, "LMVSI", which enters into force on April 7) does not contain any substantial amendments to the legislation currently in force in Spain on takeover bids, which remains virtually unchanged. But apart from some minor changes, there are others that will have a somewhat greater impact.

GENERAL ASSESSMENT

The regulation of takeover bids contained in the new LMVSI reproduces and maintains, for the most part, the previous regime. Apart from some formal changes (such as replacing old references to official secondary markets by the EU law notion of regulated markets), it contains some amendments and clarifications that are of limited practical relevance overall.

Fair price

This is the case with the definition of the "fair price" at which mandatory takeover bids must be made, which was previously defined as the highest price *paid* by the bidder or by the persons with whom they are in concert, and which is now determined in relation to the highest price that has been *paid* or *agreed* (Art. 110.1 LMVSI). This is a rule already established in the Royal Decree on takeover bids (Art. 9), which has been given the status of law because it affects such an important obligation, so restrictive of contractual freedom, as the price at which takeover bids for the entire share capital must be made.

Price of the takeover bid in exceptional circumstances

The LMVSI has also maintained the former provision requiring the price of voluntary and mandatory takeover bids to be justified in accordance with some valuation criteria equivalent to those for de-listing takeover bids, when, in the two years preceding the announcement of the takeover bid, an exceptional *force majeure* event has occurred which has affected market prices or the equity value of the company concerned. This is a provision that the CNMV, the Spanish Securities Market Commission, considered to apply between 12 March 2020 and 12 March 2022, as a result of the impact of the Covid-19

Key issues

- The new LMVSI maintains, for the most part, the previous regulation on takeover bids, apart from some minor changes
- It enlarges the scope of mandatory takeover bids in case of concerted exercise of voting rights
- It extends the application of the takeover bid regime to companies listed on a multilateral trading facility (MTF)

pandemic on the market and on share prices (CNMV Q&A on takeover bids, 10 February 2022, section 11).

In view of this experience, the LMVSI has not resisted adding, to the exceptional circumstances already envisaged (evidence of share price manipulation, natural disasters, war or calamity situations, expropriations or confiscations, etc.), a new one consisting of "declared pandemics", despite that these could be already reclassified without great interpretative stress into the pre-existing category of *force majeure*.

LEGAL OBLIGATION TO LAUNCH A TAKEOVER BID IN CASES OF CONCERTED EXERCISE OF VOTING RIGHTS

- From the perspective of listed companies, the most relevant change brought by the LMVSI concerns those cases that trigger the legal obligation to launch a takeover bid for a company's entire share capital. The cases in which control is acquired "through the acquisition of shares" in a percentage equal to or greater than 30% of the voting rights remain unchanged, as does the (atypical) case of the mandatory takeover bid to be launched by a party acquiring a smaller stake and appointing more than half of the members of the board of directors, within a time frame that the Royal Decree on takeover bids sets at 24 months from the acquisition date.
- But in addition to these cases, Spanish law also required that a takeover bid be launched in cases of simple concert in the exercise of voting rights by shareholders who together exceed the 30% threshold, even if no share purchase is made. This case had been associated until now with the shareholders concerned signing a "shareholders' agreement", which, according to the Royal Decree on takeover bids, should also refer to the management of the company concerned or to exerting a significant influence on it. But the LMVSI has enlarged the objective scope of this type of mandatory takeover bid, referring now to the signing of shareholder agreements or agreements "of another type" with other shareholders [Art. 108.b)].
- Although the legislator has not specified the other types of agreements that trigger the obligation to launch a takeover bid, the fact is that this new provision may add considerable and undesirable legal uncertainty to our market, because of the risk that ordinary and usual forms of collaboration between shareholders may end up being considered as "acting in concert" and trigger an obligation as onerous and exorbitant as that of launching a takeover bid for 100% of the capital. This is a risk that has arisen with full intensity in many European countries, which led ESMA, the European Securities and Markets Authority, to publish, at the European Commission's request, a Public Statement on "Information on shareholder cooperation and acting in concert under the Takeover Bids Directive" (updated 8 January 2019). This Public Statement identifies a "White List" of cooperation activities between shareholders which, on their own, would not constitute concerted behaviour. But even so, this enlargement of the scope of mandatory takeover bids in case of voting concert may end up seriously interfering with the ordinary processes of formation and changes of majorities in listed companies and create dangerous uncertainty as to the forms of cooperation between shareholders that are considered admissible.

EXTENSION OF THE TAKEOVER BID REGIME TO APPLY TO COMPANIES LISTED ON AN MTF

- Until now, the regulation of takeover bids applied exclusively to listed companies that, in addition to having their registered address in Spain, listed their shares on a Spanish regulated market, that is, on Spain's *Bolsas de Valores* or stock exchanges. This regime did not apply, however, to companies listed on an "alternative market" or multilateral trading facility (MTF), as was the case with BME Growth or Portfolio Exchange. In the case of BME Growth in particular, only a limited mandatory takeover bid regime or "tag along" clause must be included in the articles of association, forcing those who acquire more than 50% of the capital to direct an offer to the other shareholders under the same conditions. In relation to Portfolio Exchange, no similar requirement is even established.
- But the LMVSI has established that the legal regime on takeover bids also applies to companies having their registered address in Spain whose shares are traded on an MTF, "in the terms established by secondary legislation" (Art. 109.1). In theory, we understand that this application should not take place until the new secondary implementing regulations have been approved. But this issue could be open to discussion, considering that the LMVSI includes certain clear and unconditional obligations (such as the obligation to launch a takeover bid when the 30% threshold of voting rights is exceeded) and that it does not include any specific transitional provision in this regard (unlike, for example, the voluntary de-listing of companies from an MTF, considering that the LMVSI's third transitional provision establishes expressly that the corresponding regulation does not apply until the law's implementing regulations enter into force).

CONTACTS



Javier García de Enterría
Off Counsel
T +34 91 590 4102
E Javier.Garciadeenterría@cliffordchance.com



Luis Alonso
Partner
T +34 91 590 4147
E Luis.Alonso@cliffordchance.com



Javier Olabarrí
Senior Associate
T +34 91 590 9455
E Javier.Olabarrí@cliffordchance.com



Patricia Puertas
Associate
T +34 91 590 9436
E Patricia.Puertas@cliffordchance.com



Miguel Barredo
Associate
T +34 91 590 7593
E Miguel.Barredo@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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