

Mergers and Acquisitions Report **2016**

Lead contributor Patrick Sarch

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INTERNATIONAL FINANCIAL LAW REVIEW

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ARGENTINA



BAHRAIN



BANGLADESH

Tanjib Alam & Associates

BELGIUM



BRAZIL



CAYMAN ISLANDS



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INTERNATIONAL FINANCIAL LAW REVIEW

Fernando de las Cuevas Castresana and Ignacio de la Fuente Muguruza, Gómez-Acebo & Pombo

Section 1: GENERAL OUTLOOK

1.1 What have been the key recent M&A trends or developments in your jurisdiction?

2015 started well. However, the various elections (local, regional, national and European) introduced a degree of uncertainty regarding the traditional two-party system. This has now evolved into a four-party system.

Activity has been strong in the energy, real estate and pharmaceuticals sectors.

1.2 What is your outlook for public M&A in your jurisdiction over the next 12 months?

Once the political situation is clarified, investors will likely return to Spain's robust and dependable economy.

Section 2: REGULATORY FRAMEWORK

2.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?

Public M&A transactions in Spain are governed by:

- *Ley del Mercado de Valores* (the Securities Market Act, or SMA) of October 2015;
- Real Decreto sobre Régimen de las Ofertas Públicas de adquisición de valores (the Royal Decree on the Public Acquisition of Securities, or PAS) of July 2007;
- *Ley de Sociedades de Capital* (the Corporate Enterprises Act, or CEA) of July 2010;
- *Ley de Modificaciones Estructurales* (the Corporate Restructuring Act, or CRA) of April 2009; and
- *Ley del Impuesto sobre Sociedades* (the Corporate Income Tax Act, or CITA) of March 2004.

2.2 How, by whom, and by what measures, are takeover regulations (or equivalent) enforced?

The National Securities Market Commission (NSMC) supervises takeover transactions.

The SMA grants the NSMC broad powers to ensure that the legislation on public takeover transactions is observed.

Section 3: STRUCTURAL CONSIDERATIONS

3.1 What are the basic structures for friendly and hostile acquisitions?

There are two main ways of structuring a takeover bid:

- launching a bid to acquire all or part of the target's shares or assets; or
- a merger process according to the structure described in the CRA.

3.2 What determines the choice of structure, including in the case of a cross-border deal?

Timing, tax considerations, and the bidder's shareholding structure mean it is necessary to analyse and determine the most suitable structure on a case-by-case basis.

3.3 How quickly can a bidder complete an acquisition? How long is the deal open to competing bids?

Bids must be published and open for acceptance for at least 15 days, and at most 70 days, from the date when the first announcement is published. Competing bids may be placed during the acceptance period until the fifth day before its expiry.

In the best-case scenario, the acquisition process may be completed within three months.

3.4 Are there restrictions on the price offered or its form (cash or shares)?

According to the PAS, the price offered can be placed in cash, shares or a combination of both. The price must be higher than the price the bidder would have offered for the relevant shares in the previous 12 months. There are also specific rules that vary depending on the structure of the transaction.

3.5 What level of acceptance/ownership and other conditions determine whether the acquisition proceeds and can satisfactorily squeeze out or otherwise eliminate minority shareholders?

It is possible to squeeze out minority shareholders, provided that: (i) the bidder holds at least 90% of the target's securities with voting rights; and (ii) the bid has been accepted by at least 90% of the holders of voting rights in the target.

3.6 Do minority shareholders enjoy protections against the payment of control premiums, other preferential pricing for selected shareholders, and partial acquisitions, for example by mandatory offer requirements, ownership disclosure obligations and a best price/all holders rule?

The takeover offer issued by any potential acquirer must ensure the equal treatment of every holder of securities that are in the same class.

Additionally, a person acquiring at least 30% of the voting rights of a listed company or appointing more than half of the members of the board must issue an offer to acquire 100% of its share capital.

3.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?

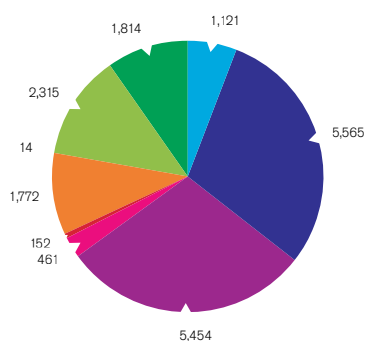
Voluntary offers may be subject to the following conditions, provided that their accomplishment can be verified at the end of the acceptance period:

- approval of corporate resolutions by the general shareholders meeting of the target;
- acceptance of the offer by a minimum number of shares;
- approval of the offer by the general shareholders meeting of the bidder; and
- any other condition deemed appropriate by the NSMC.

It is necessary to provide a guarantee or collateral when the offer is placed, or alternatively to deposit the amount offered with a financial institution.

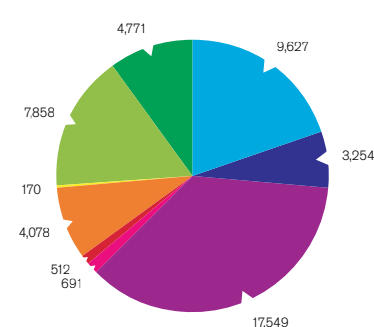
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OUTBOUND



NB only deals with publicly disclosed values are represented in the charts and infographics

INBOUND



Section 4: TAX CONSIDERATIONS

4.1 What are the basic tax considerations and trade-offs?

According to the SMA, the transfer of shares of listed and non-listed companies is tax-neutral, except when the transfer is intended to avoid tax levied on the transfer of real estate properties.

The CITA regulates a special taxation regime applicable in defined circumstances. Thus, capital gains accrued by the transferor as a result of any restatement of the company's assets and rights for accounting purposes, necessary in order to proceed with the transfer at a given price, are not included in the taxable base for corporate tax purposes whenever they result from:

- the transfer by Spanish residents of assets and rights located in Spanish territory. If the acquiring company is not a resident entity, only those capital gains pursuant to the transfer of assets attributable to a permanent establishment in Spain will be exempt;
- the transfer by Spanish resident entities of permanent establishments located in the territory of states outside the European Union (EU), when the transferees are Spanish resident entities;
- the transfer by non-resident companies of permanent establishments in Spain. If the acquiring company is not a Spanish resident entity, only capital gains arising from a transfer of assets associated with a permanent establishment in Spain will be exempt; or
- transfers by resident companies of permanent establishments in the EU, when the transferees are EU resident companies.

4.2 Are there special considerations in cross-border deals?

A special tax regime applies to enterprises that are not located in Spain. This makes it necessary for non-resident enterprises to conduct a pre-deal tax analysis to determine the tax impact of the transaction for the bidder.

Section 5: ANTI-TAKEOVER DEFENCES

5.1 What are the most important forms of anti-takeover defences and are there any restrictions on their use?

A passivity rule in Spain establishes the mandatory authorisation given by the shareholders meeting of the target to perform any action that prevents the success of the bid.

One exception allows shareholders to seek out a so-called white knight to challenge the hostile takeover bid.

5.2 How do targets use anti-takeover defences?

The shareholders must trust the target's management to implement anti-takeover defences on behalf of the target.

5.3 Is a target required to provide due diligence information to a potential bidder?

No. However, in the context of a bidding process, the company is obliged to disclose this information to all participants in the same situation.

5.4 How do bidders overcome anti-takeover defences?

The PAS provides specific measures that the target may apply to help bidders trying to avoid anti-takeover defences. These include:

- the ineffectiveness of pre-emptive rights and rights of first refusal provided in the shareholders agreements; or
- the ineffectiveness of limitations to the voting rights imposed by the target's by-laws or shareholders agreements.

5.5 Are there many examples of successful hostile acquisitions?

There are not as many examples as there are of friendly acquisitions.

Section 6: DEAL PROTECTIONS

6.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile interloper?

The PAS gives every participant in the takeover process the right to equal information. This means that the target must guarantee that all the contenders have access to the same information and that, on their request, the remaining contenders are provided with any additional documentation that could be provided to one of them.

6.2 To what extent are deal protections prevented, for example by restrictions on impediments to competing bidders, break fees or lock-up agreements?

Deal protection measures are, in general, prevented. See 6.1: target companies have limited opportunities to introduce restrictions or impediments to certain bidders and to benefit bidders that they deem preferable.

However, it is possible for a target company to look for white knights to compete with hostile bidders.

Section 7: ANTITRUST/REGULATORY REVIEW

7.1 What are the antitrust notification thresholds in your jurisdiction?

A transaction could be subject to either the EU or Spanish merger control rules. Determination of the relevant jurisdiction and therefore the competent authority (the European Commission or the Spanish antitrust authority), depends on:

- the combined aggregate turnover of the companies involved; and
- the Spanish market share of the target and the purchaser in any relevant market.

7.2 When will transactions falling below those thresholds be investigated?

When sectorial provisions state that they must be investigated.

7.3 Is an antitrust notification filing mandatory or voluntary?

Filing is mandatory.

7.4 What are the deadlines for filing, and what are the penalties for not filing?

Notification must be filed with the National Antitrust Commission prior to the transaction being completed.

Failure to notify is punishable by a fine of up to five percent of the turnover of the breaching company in the financial year preceding the infringement. If it is impossible to determine the company's turnover, a fine ranging between €500,001 (approximately \$548,450) and €10 million may be imposed. Failure to comply with the competition authorities' decisions may be sanctioned with a fine up to 10% of the turnover of the breaching company in the financial year preceding the infringement. If it is impossible to determine the company's turnover, a fine higher than €10 million may be imposed.

Notwithstanding these general rules, the National Antitrust Commission may impose fines, such as penalty payments and/or other additional sanctions (for example, publishing the resolution in the press).

7.5 How long are the antitrust review periods?

Antitrust review consists of a two-phase process. If it is resolved in the first phase, it will last up to one month from when the National Antitrust Commission receives the notification. If it is resolved in the second phase, it will take up to two months from the time the review is opened.

7.6 At what level does your antitrust authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?

The Spanish authorities can review and impose penalties if the transaction falls within the thresholds set out by law. Likewise, the EU authorities can review and impose penalties if a transaction falls within the relevant EU thresholds.

7.7 What other regulatory or related obstacles do bidders face, including national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?

Sectorial provisions provide additional procedures that must be observed in takeover processes over companies operating in regulated sectors.

Section 8: ANTI-CORRUPTION REGIMES

8.1 What is the applicable anti-corruption legislation in your jurisdiction?

Ley de Prevención de Blanqueo de Capitales (the Anti-Money Laundering Act or AMLA) of April 2010.

8.2 What are the potential sanctions and how stringently have they been enforced?

Fines for not complying with the provisions of the AMLA will be the highest of: (i) five per cent of the offender's share capital; (ii) double the economic value of the transaction; or (iii) €1,500,000.

Section 9: OTHER MATTERS

9.1 Are there any other material issues in your jurisdiction that might affect a public M&A transaction?

No.


Fernando de las Cuevas

Partner, Gómez-Acebo & Pombo

Madrid, Spain

T: + 34 91 582 91 32

F: + 34 91 582 91 14

E: fcuevas@gomezacebo-pombo.com

W: www.gomezacebo-pombo.com

About the author

Fernando de las Cuevas specialises in M&A, banking law, securities market's law, collective investment institutions, and family and private equity businesses. He is consistently recognised in all prestigious legal directories, including Best Lawyers, Chambers and Partners, and Legal500. He is particularly renowned for his commendable M&A and financial knowledge.

De las Cuevas joined Gómez-Acebo & Pombo Abogados in 1983. He was a foreign associate at Shearman & Sterling in New York from 1985 to 1986. He has been a partner of Gómez-Acebo & Pombo Abogados since 1990 and managing partner from 1998 to 2000. He holds a Master of Law, a Bachelor of Business Science and a diploma in European studies from the Universidad de Deusto (1981), and a diploma in higher European studies from the College of Europe, Bruges (1982). He received a research scholarship from the European Free Trade Association, Geneva (1982-1983), and graduated from the PIL course at Harvard Law School (1990).


Ignacio de la Fuente

Associate, Gómez-Acebo & Pombo

Madrid, Spain

T: + 34 91 582 93 87

F: + 34 91 582 91 14

E: idelafuente@gomezacebo-pombo.com

W: www.gomezacebo-pombo.com

About the author

Ignacio de la Fuente graduated in law and business sciences from the Universidad Pontificia de Comillas in Madrid, and obtained a scholarship from the University of Texas at Austin where he developed his studies in business sciences.

De la Fuente is an associate at Gómez-Acebo & Pombo Abogados, and his specialisations include M&A, family and private equity businesses and insolvency proceedings. He provides legal advice to international companies and private and equity funds in domestic and cross-border M&A transactions. He is a member of the Guipúzcoa Bar Association and he is fluent in Spanish, English, German and Basque.