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CNMV:
Ten FAQ on takeover bids

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The Spanish Securities Market Authority (CNMV) has published a document containing some interpretative criteria in respect of Royal Decree 1066/2007, of 27 July, on the rules governing takeover bids (RD 1066/2007), which the CNMV itself has been applying in connection with the supervision and processing of takeover bids (TOBs).

On 5 December 2018, the CNMV published a document setting out, in a question-and-answer format, the criteria it uses in respect of certain equivocal issues raised by the regulation of TOBs and, more specifically, RD 1066/2007.

Below follow the aforementioned criteria, notwithstanding the fact that the CNMV "reserves the ability to reconsider their content or depart from the same when performing its supervisory functions, particularly in light of the circumstances specific to each case".

1.- *Conditions of voluntary TOBs*

1.1. What requirements must a condition meet to be acceptable?

As is well known, as opposed to mandatory TOBs (cf. art. 30(2) RD 1066/2007, which leaves the provisions of art. 26 untouched), the enforceability of voluntary takeover bids may be subject to conditions (art. 13(2) RD 1066/2007), provided that fulfilment or non-fulfilment

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thereof may be verified at the end of the acceptance time limit (see also art. 36(2) RD 1066/2007). The aforementioned art. 13(2) sets out the conditions deemed acceptable (to which those contained in arts. 26 and 42(2) RD 1066/2007 must be added), including a “safety valve” clause whereby any condition that the CNMV deems to be in conformity with the law shall be acceptable.

For these purposes, the CNMV deems a condition acceptable when it meets the following requirements: (*a*) its fulfilment depends on events beyond the control of the offeror (bidder); (*b*) it is configured or defined in a sufficiently precise manner, so that its verifiability is feasible and simple; (*c*) its fulfilment may be verified before the expiry of the time limit for acceptance of the bid; (*d*) it is reasonable and proportionate, so that it does not conflict with the principle of irrevocability of takeover bids (art. 30 RD 1066/2007).

Note that the first requirement seems to be linked to the prohibition of establishing purely facultative conditions (art. 1115 of the Civil Code) and that the third requirement is somewhat surprising since art. 13(2) RD 1066/2007 requires that fulfilment or non-fulfilment of the condition may be verified upon expiry of the acceptance time limit, whereas the CNMV indicates is that it must be verifiable *before* the expiry of the time limit for acceptance of the bid. As for the second requirement, it raises some doubts, since it is not clear to what extent the conformity with the law of the condition requires its verifiability to be “simple” (it should be recalled that the CNMV cannot act discretionally, but must assess the compatibility of the condition with the legal system). All in all, the main conclusion to be reached is that the CNMV attempts to specify its criteria using expressions whose exact scope also ultimately depends on the CNMV’s own judgement, and thus not much is provided in terms of the foreseeability of the decision (when is a condition defined “in a sufficiently precisely manner”?, when is its verifiability “simple”?, when is a condition “reasonable” and “proportionate”?)

1.2. Can a voluntary TOB be made conditional on obtaining sufficient finance for performance thereof?

In connection with what has just been pointed out (see 1.1 above), the CNMV concludes that it is NOT possible to make a TOB subject to a condition such as that mentioned. This conclusion is based on different arguments. Some of these arguments (those based themselves on the existence of the obligation to provide a guarantee - or to create a cash security deposit - for the bid - art. 15(2) RD 1066/2007 - and on the requirement that the offeror ensures that it is able to meet in full any cash consideration - art. 16(1) RD 1066/2007 -) are more convincing than others such as those based on the irrevocability of the TOB (art. 30 RD 1066/2007, which does not seem to be affected by the existence of conditions) or on the consideration - somewhat arguably couched in general terms - that the obtainment of financing depends - only? - on the will of the offeror (which does not seem to take into account that it would be a simple -and not purely- facultative condition).

2.- *When does an administrative authorisation (or notification to an organisation) have to be "prior" for the purposes of art. 26(2) RD 1066/2007?*

Art. 26(2) RD 1066/2007 provides that, when prior administrative authorisation (or the non-objection of another body or the notification of the transaction to the same) is required, the CNMV shall not authorise the TOB until evidence has been given of the obtainment of said authorisation, of the non-objection of the relevant body (unless positive administrative silence can be assumed upon expiry of the appropriate time limit for said body's response) or of the required notification.

In this context, it is sometimes problematic to know exactly when a prior authorisation, non-objection or notification is required for the purposes of the application of the aforementioned art. 26(2). In order to answer this question, the CNMV offers, in summary, the following guidelines: (a) firstly, it must be an authorisation (or non-objection or notification) "required for the bid" (for example, an authorisation that is directly and globally related to the offeror's main business activity; or one whose absence could affect the validity of the transfer of shares resulting from the TOB); (b) secondly, it must be an administrative authorisation (in principle, from a supervisory body) and not a mere contractual consent or equivalent act; (c) thirdly, given that the requirement of prior authorisation for the purposes of a TOB constitutes an exception to the principle of free transferability of listed companies' shares, a restrictive interpretation is advisable.

3.- *If a TOB is modified, are third parties with whom the offeror goes into partnership or enters into an agreement liable in any event?*

According to art. 31(2) RD 1066/2007, an offeror may go into partnership or enter into an agreement with third parties in order to modify its bid, provided that the offeror and such third parties accept joint and several liability for the modified bid.

The rule seems to be primarily conceived to facilitate the modification (improvement) of a TOB by enabling third parties to be involved. Of course, it is possible for a third party to act as a co-offeror, in which case it is clear that it must accept joint and several liability for the bid.

However, it is also possible for a third party to intervene by reaching an agreement with the offeror for the purpose of making possible or favouring a modification of the TOB (or where a modification thereof is simply provided for) without assuming the role of co-offeror. The CNMV's position, in these cases too, is that such third party shall be jointly and severally liable under the terms of the aforementioned art. 31(2).

4.- *For the purposes of calculating voting rights, should one and the same person - the offeror - be assigned those held by its own significant shareholders (holding 3% or more of the voting rights) in the target company?*

For the purposes of determining whether a controlling interest has been attained, art. 5(1) RD 1066/2007 provides that the percentages of voting rights held by those who have acted in concert with one and the same person shall be assigned to said person.

In connection with this idea, the CNMV is of the opinion that, in general, the fact that significant shareholders of an undertaking holding an interest in a listed company also hold shares in that company constitutes a sign of concert. Therefore, in short (and despite the fact that there is no specific rule regarding the voting rights of significant shareholders), for the purposes of art. 4 of RD 1066/2007 the CNMV seems inclined to assign to the offeror the percentages of voting rights held in the target company by the significant shareholders of the former. Given the relevant consequences of attaining a controlling interest (activation of the legal obligation to make a takeover bid), and given that there is no express statutory or regulatory provision in this area, the CNMV will probably have to be very careful in handling this “sign”.

5.- *Is the release from the “duty of passivity” granted by the offeror effective?*

Without prejudice to the analysis in each case of all the circumstances, the CNMV will normally consider that the “duty of passivity” imposed by art. 28 RD 1066/2007 is not infringed when the offeror itself has shown its consent to the carrying out or adoption by the board of directors of the target company of any action or measure that is prohibited in principle (unless authorised by the shareholders in general meeting) by said article.

It is not clear, however, that the general criterion established by the CNMV on this point takes sufficient account of the fact that the so-called “duty of neutrality” imposed on directors has the function of preventing them from interfering in the decision of the shareholders (who must be judges of their own convenience) whether or not to accept the bid (thus safeguarding the principle of free decision of the shareholders). In other words, it is a duty that is preached primarily in respect of the shareholders of the directed company, rather than to the third party offeror. In reality, the duty of passivity is established in view of the possible emergence of a conflict between the interests of the directors and those of the shareholders on the occasion of the launch of the TOB. In this scenario, it may be excessive to presume that a measure adopted by the directors and consented to by the offeror cannot, for this very reason, disrupt the shareholders’ free decision-making process. A different matter is that, the consent of the offeror being present, the possibility of withdrawing the bid as per art. 33(1)(d) RD 1066/2007 must be understood to have been lost.

6.- Adjustment of the consideration for payment of dividends in the target company?

In the event that the target company resolves to pay extraordinary dividends (or remunerate in any other manner that does not follow the usual policy of payment of dividends to shareholders or holders of other securities), the offeror may maintain the bid and adjust its consideration as per art. 33(1)(d), second paragraph, RD 1066/2007.

However, the question arises as to whether an “adjustment” of the consideration is possible in other cases (notably, an “ordinary” payment of dividends). The CNMV responds to this question by stating that the offeror may adjust the bid price (discounting dividends or other types of remuneration paid by the target company to its shareholders prior to settlement of the consideration) but only if this is adequately provided for in the TOB documents (both in the announcement, if any, the application for authorisation and the prospectus). In this regard, it should be recalled that when the target company has announced a dividend whose payment will take place during the period for acceptance of the offer, the prospectus must state whether or not the gross amount of such dividend will be deducted from the consideration offered (Schedule to RD 1066/2007). In this regard, note that the CNMV considers that the aforementioned solution applies even if the payment of dividends or remuneration has been announced by the target company after the TOB has been made (and, therefore, after the prospectus has been drawn up), which is not evident from the Schedule.

7.- Which undertakings are able to guarantee compliance with the obligations arising from a TOB?

Where the consideration offered consists, in whole or in part, of cash, the offeror must provide a credit institution guarantee (or documents evidencing the creation of a cash security deposit with a credit institution) that guarantees payment in full of said consideration (art. 15.2 RD 1066/2007).

In this regard, the CNMV explains that the guarantee may be given by any credit institution (see art. 1 of Act 10/2014), regardless of whether it is Spanish, from the European Union or from third countries, and also irrespective of whether it acts directly, through a branch, under the freedom to provide services or on the initiative of the offeror-client. This position is consistent with the fact that art. 15 RD 1066/2007 does not allow a distinction to be made on the basis of the nationality of the guarantor.

The CNMV adds three qualifications to this general rule: (i) in the case of a credit institution without a presence in Spain (at least through a branch), the guarantor must appoint a representative in Spain for notification purposes (facilitating delivery of demands for payment and, where appropriate, enforcement); (ii) in any case (particularly where the guarantee is provided by a credit institution not located in the European Union) the CNMV may demand special requirements relating to the sufficiency and practical enforceability of the guarantee (which will probably include assessing the solvency of the credit institution providing the guarantee); (iii) as a general rule, the CNMV will not accept guarantees provided by undertakings that form part of the offeror’s group.

8.- Exchange offers

8.1. What is the function of the “cash equivalent price”?

The second paragraph of art. 14(4) RD 1066/2007 provides as follows: when TOBs are made in terms of an exchange, the offeror must indicate the “cash equivalent price” (the result of applying, to the exchange ratio, the weighted average price of the securities to be exchanged for the quarter prior to the bid announcement) [see Schedule to RD 1066/2007 concerning the contents of the prospectus].

This rule is linked to that contained in the first paragraph of the foregoing article, which requires that proposed exchanges be “clear”. This means that potential acceptors must know, among other things, the value of the property they receive in exchange for that they deliver. Therefore, the CNMV clarifies that the regulatory provision on the indication of the “cash equivalent price” of the securities offered for exchange serves, in substance, a merely informative purpose. This does not prevent us from recalling that, in certain circumstances, it may be of greater significance as a comparative element in the determination of whether there has been an improvement in the consideration in the context of operations to modify the bid or for submission of competing bids (see 8.2 below).

8.2. What listing date should be taken as a reference when determining whether there is an improvement in the consideration of a securities exchange offer?

Art. 31(1) RD 1066/2007 allows the modification of the characteristics of the TOB provided that such revision means a more favourable treatment for the addressees. For example, because the consideration offered is improved. When the consideration consists of securities (and the nature of the consideration does not change), verification that an improvement has occurred involves comparing the price of the old securities and that of the new securities offered (unless it is simply a change in the exchange ratio). The same issue arises in relation to competing bids (see art. 42(1)(c) RD 1066/2007).

One of the points discussed in relation to this assessment is that of the date to which it must refer. The CNMV is inclined to consider that the reference date must be that of the trading session prior to the announcement of the improvement or of the competing bid (or, in the case of a prior leak, that of the trading session prior to the day on which such leak occurred). In this regard, the CNMV clarifies that it will normally be verified that the price or value of the consideration offered by the offeror (in the event of modification) or by the competing offeror is higher than the following two: (i) the result of valuing the shares offered in the TOB based on their market price on the aforementioned reference date; (ii) the result of valuing the shares offered in the TOB based on their weighted average market price during the three months prior to said reference date.

Of course, the modification or the competing bid may contain the offer of cash consideration. In such cases, if the amount offered exceeds the “cash equivalent price” determined in accordance with art. 14(4) (see 8.1 above), an independent expert opinion as evidence of the improvement of the consideration will not be necessary (as it would generally if such improvement is carried out modifying the nature of the consideration: arts. 31(1), second paragraph, 42(1)(c) and 45(6)(b) RD 1066/2007).

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