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ANALYSIS



Securities Market

Standing to challenge Spanish Securities Market Authority decisions when shares are acquired following a voluntary takeover bid

Supreme Court Judgment no. 1021/2026, of 17 September, sets a legal precedent regarding the principle of legitimate interest where a claimant acquires shares after the announcement of a voluntary takeover bid (Art. 19 of the Judicial Review Act) to challenge the Securities Market Authority's decision authorising the delisting of the shares.

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1. The Supreme Court, in Judgment no. 1021/2026 of 17 September, pronounces itself in similar terms to its previous ruling of 29 June 2026, regarding the standing of a shareholder who acquired shares after the announcement of a voluntary takeover bid — regardless of the number of shares held — to challenge decisions of the Securities Market Authority (CNMV) related to a voluntary takeover bid.

2. The legal doctrine established by the Supreme Court is set out in the fourth point of law of Judgment no. 1021/2026: "In accordance with the ruling in the Judgment of 29 June 2026 (Case No. 1577/2024), we reiterate that: a shareholder of a company has standing to challenge the approval of a voluntary takeover bid before judicial review courts, regardless of the number of shares held, and even if the shares were acquired after the takeover bid was announced or sold prior to the delisting." However, as indicated in the fifth point of law of the September 2026 judgment, the appeal here is directed against the CNMV decision authorising the delisting of all shares at the issuer's request following the completion of the voluntary takeover bid. Apart from this judgment, it should be noted that one of the exceptions to the obligation to launch a delisting takeover bid is the prior completion of a voluntary full takeover bid in which the intention to delist the shares was stated and, furthermore, the price is justified by a valuation report, and the sale of all the securities is facilitated through a purchase order for them, at the same price as the previous offer, for at least one month during the six-month period following the completion of the preceding offer (Art. 11 — titled "Exceptions to the delisting bid" —, subparagraph *d*, of the Royal Decree on the regime governing public takeover bids for securities).

3. The relevant facts of the case, as detailed in the statement of facts of the judgment, are as follows:

   — On 29 July 2020, the CNMV authorised a voluntary takeover bid by a single-shareholder public limited company for all the shares of MásMóvil Ibercom, S.A., "the price per share offered and the corresponding prospectus, which stated the offeror's intention to delist the shares in the event the takeover bid was successful."

   — Following the relevant resolution at MásMóvil shareholders' meeting — with the appellants voting against it — and at the request of the issuer, on 30 October 2020, the Executive Committee of the CNMV authorised the delisting of all shares from the four Spanish stock exchanges.

   — The company that launched the voluntary takeover bid, in compliance with takeover bid legislation, facilitated the sale of all MásMóvil shares through a buy order initiated on 23 September 2020, at a price of 22.50 euros per share, which is the price of the previously launched voluntary takeover bid.

   — A number of foreign entities (most of them private equity firms and funds, others closed-end collective investment schemes, some of which could be classified as *hedge funds* under U.S. law) are appealing the CNMV's 30 October decision authorising the delisting request. These entities had acquired MásMóvil shares between 5

> and 15 October 2020 —that is, after the announcement of the voluntary takeover bid, whose prospectus, as we recall, referred to the intention to request delisting.

4. The application for judicial review concluded with the *Audiencia Nacional*'s judgment of 21 December 2023, which held the application inadmissible and ordered the applicants to pay the costs. In the second point of law of this judgment (Case No. 2346/2020), the following argument is made to deny the applicants standing:

> On 24 September 2020, the applicants were not yet shareholders of MásMóvil, since [...] the purchase of shares by the applicant funds took place between 5 and 15 October 2020, at which time the applicants were already fully aware of all the terms of the delisting takeover bid. That being the case, it should be noted that in a joint deliberation and vote by this court on the six applications in which the administrative actions relating to the aforementioned takeover bid process are adjudicated, we have held (see the judgment given in application no. 2170/2020, as well as the judgment given in application no. 991/2020) as follows, which, for the obvious reasons noted above, is applicable, *mutatis mutandis*, to the present application.

5. The *Audiencia Nacional* states that the applicant acquired four thousand shares of MásMóvil following the announcement of the takeover bid and sold them prior to the delisting (the prospectus indicated the intention to delist the company). "To the foregoing must be added the fact that a ruling in favour of the applicant in this application would yield little or no benefit to the same, given that the recalculation of the amount sought at first instance is unfeasible, as the case at hand involves a voluntary takeover bid".

The *Audiencia Nacional* understands that, while ownership of shares initially confers the necessary interest to have standing as an applicant in an application for judicial review concerning takeover bids, this statement of principle is not sufficient to resolve specific cases, which must be decided based on their particular circumstances. Thus, it states that the situation of the applicant, who acquired ownership of the shares after the announcement of the takeover bid, "is not comparable to that of those who were already shareholders prior to said announcement and whose investment position was unexpectedly affected by the announcement of the takeover bid. [...] Without needing to engage in a judgment of intent, the applicant purchased a small number of shares while knowing the terms of the already-announced takeover bid; therefore, the applicant was not caught off guard by the takeover bid but must have been aware of its circumstances. In this context, one cannot overlook the small number of shares acquired by the applicant, its knowledge of the essential circumstances of the takeover bid — which allowed it to assess the risk it was assuming with said purchase — and the minimal or no benefit it could derive from a potential favourable judgment, given the impracticability — since this is a voluntary takeover bid — of the request for recalculation contained in the plea-in-law; all of these factors lead to the conclusion that the applicant's interest is not real, effective,

and legitimate to qualify as an applicant in the current proceedings". Therefore, the *Audiencia Nacional* finds that the ground for inadmissibility provided for in Article 69(b) of the Judicial Review Act (LJCA) applies. As a "further" argument, it considers that the applicant's lodging of this application would constitute an abuse of rights (Art. 7(2) of the Civil Code).

It also raises the issue of the requirement to hold at least one per thousand of the share capital in order to challenge company resolutions in a listed company (Art. 495(2)(b) of the Companies Act). This one-per-thousand threshold, according to the *Audiencia Nacional*, was introduced "to prevent situations of abuse of rights that could disrupt corporate life". This threshold cannot be automatically applied to applications for judicial review, as locus standi is a public-policy procedural requirement that is not provided for in Judicial Review Act; therefore, the threshold should not be considered in the context of locus standi. "However, on the other hand, we cannot ignore the unity of the legal system and the need for its internal consistency, which requires taking the aforementioned threshold into account when assessing the possible existence of an abuse of rights. In this regard, we cannot ignore that the applicant's four thousand shares fell far short of the minimum threshold required to establish standing under the provisions of the Companies Act, to which must be added the circumstances surrounding the sale and purchase of such shares [...] and the equally significant fact that the applicant would derive little or no benefit from a potential favourable judgment, given the impracticability of the claimed recalculation, as well as the serious harm that such a judgment would cause to third parties, all of which constitute a clear abuse of rights in the pursuit of this legal action, which appears contrary to the legal system — a circumstance that would have led to a judgment dismissing the case had the application not already been deemed inadmissible due to lack of standing".

6. The judgment includes a dissenting opinion (similar to those issued in other cases concluding applications for judicial review in which the applicants' standing was denied) that rejects the majority view and recognises the standing to challenge through judicial review proceedings the resolution regarding the takeover bid.

7. By order dated 18 April 2024, the Supreme Court agreed to hear the appeal lodged by C. H. Opportunity Fund LP and others against the judgment of 21 December 2023, (Case No. 2346/2020), and to declare that the issue raised in the appeal that is of objective interest for the development of case law consists of interpreting Articles 19(1)(a) and 69(b) LJCA, in order to determine whether the holder of the shares has standing to challenge before the judicial review courts the approval of a voluntary takeover bid, even though the shares were acquired after the bid was announced and regardless of the number of shares held.

8. The appellants request that the Supreme Court confirm and clarify the legal doctrine regarding standing to make an application for judicial review, and declare that the shareholder has standing to challenge before the judicial review courts the approval of a voluntary takeover bid, "and/or the delisting of a company subject to a takeover bid with the setting of a fair price, even if the shares were acquired after the

announcement and regardless of the number of shares held". They also request, "assuming the role of the lower court", that the Supreme Court uphold the claim and declare that the fair price for the delisting is, based on the expert report provided, 34.01 euros per share (and not the 22.50 euros set in the voluntary takeover bid and subsequently in the delisting).

9. The Supreme Court, in its 17 September ruling, establishes — as we have indicated — legal doctrine regarding a shareholder's standing to challenge the resolution authorising delisting following a voluntary takeover bid, regardless of the number of shares held and even if the shares were acquired after the takeover bid. The Court partially adopts the arguments set out in the aforementioned dissenting opinion to *Audiencia Nacional* Judgment no. 6318/2023, of 21 December 2023 (Case No. 2346/2020), opinion issued regarding all the judgments that dismissed the cases due to lack of standing on the part of the various financial institutions appealing in this *MásMóvil* case — judgments that did not address the merits of the case (recalculation of the share price in the delisting procedure).

10. The Supreme Court bases its September ruling on the earlier ruling of 29 June 2026 (Case No. 1577/2024), which it partially reproduces and whose reasoning it adopts. Thus, it states that Article 19(1)(a) LJCA — by virtue of which natural or legal persons holding a right or legitimate interest have standing to bring proceedings before this Court — does not establish any minimum threshold or quantitative requirement for access to this jurisdiction. Consequently, the Supreme Court clarifies that the reference made by the *Audiencia Nacional* is without merit; although this is not a requirement that can be extended to applications for judicial review, the Companies Act establishes a threshold of one per thousand of the share capital for challenging company resolutions of listed companies (Art. 495(2)(b) LSC). Furthermore, the Supreme Court states in several paragraphs of the June 2026 ruling — reproduced in this September ruling — that a quantitative threshold would not be compatible with the interpretation that the Constitutional Court and this same Supreme Court provide of the right to effective judicial protection as it pertains to access to the courts.

11. Another argument raised by the *Audiencia Nacional* concerns the time at which the applicant acquired the shares of the listed company: this occurred after the announcement of the takeover bid, and therefore it was aware of its terms, such that its situation is not comparable to that of shareholders prior to the announcement of the takeover bid who "were caught off guard". In this regard, although the *Audiencia Nacional* refers to *opportunistic funds* only once in the 21 December 2023 ruling, as the judge notes in his dissenting opinion to that ruling, "the applicants are companies and funds that meet the definition of professional investors, in accordance with Article 205 of the Securities Market Act"; various private entities participated in the negotiations during the takeover bid process — investment entities that are "legitimately speculative and are guided, also legitimately, by the criteria of maximum profit and minimum cost. 'Opportunistic' funds exist on both sides of the process. And it is perfectly legitimate for them to legally take advantage of the economic opportunities that arise", such that the dissenting

judge considers it contrary to law to "derive the applicants' standing from the moment of the purchase of the shares". The Supreme Court continues this line of reasoning by stating that, while acknowledging that the purchase of shares in the listed company after the takeover bid was announced might have been motivated by a specific intent (to acquire shareholder status in order to challenge the takeover bid once it was authorised), this hypothesis does not allow for the conclusion that shares acquired for that purpose do not confer the standing to challenge the bid that belongs to every shareholder. "No provision prohibits or restricts the acquisition of shares during the period between the announcement of the takeover bid and its authorisation by the CNMV; nor is there any provision stipulating that shares acquired during that specific period should be considered of inferior status and do not confer upon their holder the standing that is recognised for other shareholders".

No provision prohibits or restricts the acquisition of shares during the period between the announcement of the takeover bid and its authorisation by the CNMV

12. A final argument in the lower court's judgment for denying standing to the applicants is, as noted above, the minimal or non-existent benefit to them of a favourable ruling, since the claim for recalculation of the price per share "is unfeasible because the takeover bid at issue is a voluntary one". The Supreme Court considers that the appropriateness of the recalculation is one of the points at issue in the substantive dispute; therefore, it is not appropriate to prejudge this matter in order to deny the appellant standing.

13. Finally, the Supreme Court criticizes the *Audiencia Nacional*'s "additional" argument that all the circumstances, considered together, "could lead to a finding of a possible abuse of rights. While it cannot be ruled out that challenges such as those examined in both Supreme Court rulings could involve an abuse of rights, "the existence of such a hypothetical abuse cannot be inferred from the circumstances referred to in the ruling: the small number of shares held by the appellant, the time at which they were acquired, and the meagre benefit that the appellant could derive from a possible ruling allowing the appeal.

14. Consequently, the Supreme Court allows the appeal and sets aside the *Audiencia Nacional* judgment of 21 December 2023, in a ruling identical to that of its Judgment of 29 June 2026 (Case No. 1577/2024). It orders the case to be returned to the *Audiencia Nacional* so that it may issue a new judgment regarding the substantive issues raised in the proceedings, namely, where applicable, the recalculation of the price of the shares at the time of delisting.

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