Questions and Answers on takeover bids

5 December 2018

The following Questions and Answers contain some of the interpretative criteria of Royal Decree 1066/2007, of 27 July, on the rules governing takeover bids for shares (Royal Decree on takeover bids), which CNMV has been applying in connection with the supervision and processing of takeover bids for shares. The aim is to make them available to all professionals involved in these types of transactions and to the general public. These "Questions and Answers on takeover bids" begin a series that CNMV intends to enrich in the future.

In any event, CNMV reserves the ability to reconsider their content or depart from it when exercising its supervisory functions, in particular taking into account the circumstances prevailing in each case.

1. What criteria does CNMV follow to determine which conditions are acceptable for the purposes of Article 13(2)(d) of the Royal Decree on takeover bids?

In general, CNMV considers acceptable a condition for the purposes of Article 13(2)(d) of the Royal Decree on takeover bids when it meets the following requirements:

a) Its fulfilment depends on events beyond the control of the bidder.

b) It is configured or defined in a sufficiently precise way so that its verifiability is feasible and simple.

c) Its fulfilment can be verified before the end of the period for acceptance of the bid.

d) It is reasonable and proportionate, and consequently does not conflict with the principle of irrevocability of takeover bids (Article 30 of the Royal Decree on takeover bids).

However, each condition to be established must be analysed on a case-by-case basis, taking into account all the circumstances of the bid.

2. Would it be acceptable as a condition for the offeror to obtain financing in order to make the bid?

No. The condition consisting of obtaining financing for the bid is not considered admissible under the provisions of Article 13(2)(d) of the Royal Decree on takeover bids, taking into account the principle of irrevocability of the bid (Article 30), the obligation to provide a guarantee or constitute a cash deposit to guarantee the bid (Article 15(2)) and that the Royal Decree on takeover bids, since it regulates the announcement of the bid, requires the offeror to have ensured that it is able to cover any cash consideration in full (Article 16(1)). The fact that obtaining financing depends on the will of the bidder also makes it difficult to accept this type of condition.

3. **What requirements must be met in order to conclude that an administrative authorisation falls within the scope of Article 26(2) of the Royal Decree on takeover bids (and, therefore, must necessarily be obtained prior to authorisation by CNMV)?**

These must firstly be authorisations "required for the bid" (a term used in Article 26(2)) of the Royal Decree on takeover bids

CNMV understands, for example, that this requirement shall be met by authorisations that are directly and globally related to the main activity of the offeree company or those whose failure to obtain them could affect the validity of the transfer of shares resulting from the takeover bid.

On the contrary, it is considered that normally, the requirement shall not be met, for example, by authorisations relating to the indirect transfer, as a result of the bid, of certain assets held by subsidiaries of the offeree company, the amount or volume of which is not significant compared with those of the offeree company.

Secondly, they must be administrative authorisations, in principle from supervisory bodies (a term used in the heading of Article 26(2)), and not mere contractual consents or equivalent acts.

On the other hand, CNMV may consider an indication that prior authorisation is required under the terms of the aforementioned Article 26(2) that the company concerned has reported it in the Annual Corporate Governance Report.[1]

In relation to the issue raised, it must be borne in mind that the Royal Decree on takeover bids itself establishes (chapter V.b of its Annex) the possibility of other authorisations that are required as a result of the acquisition of control of the offeree company (other than that relating to competence and those provided for in the above-mentioned Article 26(2)), which have not been requested or obtained when the offer was authorised, for which purposes the prospectus informs about the effects that non-fulfilment of or failure to obtain such authorisations could have.

Likewise, it is important to point out that the requirement of having prior authorisations in the terms set forth in Article 26(2) of the Royal Decree on takeover bids constitutes an exception to the principle of free transferability of the shares of listed companies. This, and the principle of Community law of free movement of capital, also advise a restrictive approach as to the scope of the provision.

4. **In which cases is joint and several liability required for the bid when it is modified? Is it necessary to be considered as a co-bidder?**

Article 31(2) of the Royal Decree on takeover bids provides for the possibility for the offeror to go into partnership or enter into an agreement with third parties to modify the bid provided that the bidder and the third parties with whom it goes into partnership or enters into an agreement jointly and severally assume responsibility for the modified bid.

Joint and several liability for the bid provided for in this article is deemed to be applicable to any person or entity that reaches an agreement with the offeror for

[1] Section A.12 of the model annual corporate governance report for listed companies, approved in accordance with CNMV Circular 2/2018, of 12 June, states that it must be indicated: "*If there is any restriction (statutory, legislative or of any kind) on the transferability of shares and/or any restriction on voting rights. In particular, the existence of any type of restriction that may makes it difficult to take control of the company by means of the acquisition of its shares on the market, as well as those systems of prior authorisation or communication that, regarding acquisitions or transfers of the company's financial instruments, are applicable to it under sectorial regulations, shall be notified*".

the purpose of making possible or favouring a modification of the bid, or that enters into a global agreement providing for the modification of the bid, regardless of whether or not this determines that the corresponding person or entity must be considered as a co-offeror.

5. **Should the voting rights held by a shareholder or significant shareholder of an entity be added to those held by that entity in the offeree company?**

   Pursuant to Article 5(1)(a) of the Royal Decree on takeover bids, the shares held by the members of the board of directors must be attributed to an entity that holds shares in a listed company unless there is evidence to the contrary. This establishes a legal rebuttable presumption of an agreement.

   The Royal Decree on takeover bids does not contain a similar provision in relation to the shareholders or significant shareholders of an entity that holds shares in a listed company. However, CNMV will normally consider a relevant indication of an agreement, for the purpose of adding voting rights, the fact that the shareholders or significant shareholders of an entity that holds a shareholding also have shares in the same listed company.

6. **Can the offeror release the offeree company's board members from what is known as the "duty of passivity" by consenting to an action that would in principle be prohibited without authorisation from the shareholders at the general shareholders' meeting?**

   Without prejudice to the analysis in each case of all the circumstances, CNMV shall normally consider excluded from the scope of the prohibition established in Article 28 of the Royal Decree on takeover bids, cases in which the offeror or offerors have expressed their consent to the adoption by the offeree company's board of directors of any action or measure that is prohibited in principle (except with the authorisation of the shareholders at the general shareholders' meeting) by said article.

7. **Can the consideration of a takeover bid be adjusted because of a distribution of dividends of the offeree company that have not been announced?**

   The offeror may adjust the price of the bid by deducting any dividends or other remuneration paid by the offeree company to its shareholders prior to the settlement of the bid, but only in the event that this is adequately provided for in the documentation of the bid (both in the announcement, if any, the application for authorisation and the prospectus).

   This criterion is applicable both in the event that the dividends or remuneration have been announced by the company prior to the submission of the bid and if they have been announced subsequently.

   In the absence of any provision in the bid documentation, an adjustment shall only be possible, with the authorisation of CNMV, in the case of extraordinary dividends or remuneration that does not follow the usual policy of distribution of dividends that were not made public prior to the announcement of the bid, under the terms set forth in Article 33(1)(d) of the Royal Decree on takeover bids.

8. **Which entities may provide a guarantee for a takeover bid?**

In accordance with Article 15 of the Royal Decree on takeover bids, these must be credit institutions, regardless of whether they are Spanish, from the European Union or from third countries, and also irrespective of whether they act directly, through a branch, under the free provision of services regime or on the initiative of the offeror-client. In the case of credit institutions without a presence in Spain at least through a branch, the guarantor must appoint a representative in Spain for notification purposes.

In any case, particularly in the event of guarantees from credit institutions not located in the European Union, CNMV may demand special requirements relating to the sufficiency and practical effectiveness of the guarantee.

As a general rule, CNMV will not accept guarantees provided by entities that form part of the offeror's group.

9. **What is the meaning of the "cash equivalent price" that the bidder must indicate in exchange bids pursuant to Article 14(4)(2) of the Royal Decree on takeover bids?**

CNMV considers that the indication of the equivalent cash price provided for in Article 14(4)(2) of the Royal Decree on takeover bids essentially serves a merely informative purpose (without prejudice to what is indicated in the response to the following question regarding the requirement for an independent expert opinion in relation to the existence of an improvement provided for in Articles 31(1), 42(1)(c) and 45(6)(b) of the Royal Decree on takeover bids).

10. **With reference to what date should the consideration offered in an exchange takeover bid be valued in order to determine whether there has been an improvement (including the case of an improvement by a competing offer)? Is it necessary to use the share price on a given day or the average share price for a period as a point of departure?**

The reference date is considered to be that of the trading session prior to the announcement of the improvement or of the competing offer (or, in the case of a previous leak, that of the trading session prior to the day on which it was made).

CNMV shall normally verify that the price or value of the consideration offered by the bidder or competing bidder is higher than the following two:

- The result of valuing the shares offered in the initial takeover bid on the basis of their market price on the aforementioned reference date;

- The result of valuing the shares offered in the takeover bid on the basis of their weighted average market price during the three months prior to said reference date.

On the other hand, pursuant to Articles 31(1), 42(1)(c) and 45(6)(b) of the Royal Decree on takeover bids, in these cases, if, on the occasion of the improvement or in the competing takeover bid, a cash consideration is offered the amount of which exceeds the equivalent cash price determined pursuant to Article 14(4) of the Royal Decree on takeover bids, the offeror shall not be obliged to provide an independent expert opinion. Notwithstanding the foregoing, the price offered by the bidder must always represent an improvement in the terms indicated, and CNMV may use any of the powers available to it deemed appropriate to verify this.