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LAW AND PRACTICE: p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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Authors

Pablo González Mosqueira is a partner in the corporate practice. Pablo has published articles and interviews for specialist legal magazines. Pablo lectures on matters of corporate and business law for the LLM on International Legal Practice from Universidad Carlos III in Madrid. He has also lectured for several years on matters of corporate and business law for the Bachelor in Business Administration of the Madrid IE Business School, on legal transactions and due diligence matters for the Venture Capital Program at the Madrid Stock Exchange Studies Institute (Instituto de Estudios Bursátiles - IEB), on corporate governance transparency and shareholders' agreements for IFAES (International Faculty for Executives), and on public M&A transactions for the Masters in Private Equity and Entrepreneurial Business (Máster de capital riesgo y emprendimiento) at the Fundación Rafael del Pino and the Instituto de Capital Riesgo.

Javier Gómez is a partner in the corporate practice. Javier regularly writes and contributes to articles for the specialist legal press, as well as for the financial press. Javier lectures for the Master's degree in Business Legal Advice at Universidad Carlos III of Madrid, the Official Master's degree for Access to the Legal Profession at ICADE and the degree in Law and Master's degree in International Law at ISDE.

1. Trends

1.1 M&A Market

M&A activity in Spain in 2016-17 has consolidated the positive trend that began in 2014, fostered by factors such as ample liquidity in financial markets, recovery of the Spanish economy and growing investor and consumer confidence, plus favourable future growth prospects, etc.

Actually, up to the third quarter of 2017, the Spanish M&A market was one of the most active markets among developed economies in terms of volume and transactions. Up to 1,298 mergers and acquisitions were reported up to July 2017 for an aggregate amount of EUR70,611 million. These figures represent an 8.26% increase in the volume of transactions and an 18.06% increase in the number of transactions compared to the same period last year.

The period of domestic political turmoil in Spain, caused by the illegal Catalan secessionist challenge in October 2017, is likely to have an impact on investments in Catalonia and the rest of Spain, at least in the short term, until there is more certainty regarding the outcome of this situation.

1.2 Key Trends

As in previous years, the real estate industry continues to lead the ranking of M&A activity in Spain with more than 510 transactions in 2016 and a considerable increase in 2017. The largest reported real estate transaction was the acquisition of Metrovacesa by Merlin Properties which made it the largest real estate company in Spain, with assets totalling more than EUR9 billion.

Concentration in the banking sector has also played an important role, with the landmark transaction of the acquisition of Banco Popular by Banco Santander, and the merger between Bankia and Banco Mare Nostrum leading the ranking of major transactions.

In connection with the food and beverage industry, it should be noted that the transaction regarding the integration of the European bottling business The Coca-Cola Company (Germany), Coca-Cola Enterprises (USA) and the Spanish company Coca-Cola Iberian Partners (the strategic bottling partner of The Coca-Cola Company in Spain, Portugal and Andorra) was finally closed in the first half of 2016.

On the other hand, the energy sector has also been highly significant in terms of transactions and volume. The merger of the wind-power generation company Gamesa with Siemens resulted in it becoming the leading company in this sector globally and the second largest manufacturer of wind turbines in the world.

Other industries also experiencing significant M&A activity in 2016-17 were infrastructure, energy (oil & gas, wind and electric), technology and internet.

With regard to the infrastructure sector (roads and highways), a takeover bid launched on Abertis by the Italian infrastructure group Atlantia in June 2017 could be one of the largest transactions in Spain in recent years.

1.3 Key Industries

In terms of both the number and volume of deals, real estate was the most significant sector for M&A activity in 2016-17. Spanish Real Estate Investment Trusts (REITs) (Sociedades Cotizadas Anónimas de Inversión en el Mercado Inmobiliario – SOCIMIs) are highly consolidated, while banks continue to divest themselves of real estate assets.

The banking industry has been very active, as proven by the concentrations carried out between Santander and Banco Popular, on the one hand, and Bankia and Banco Mare Nostrum on the other hand.

As a result of certain asset valuation or environmental factors, the renewable energy sector continues to be very active and attracts much investment.

Other industries to experience significant M&A activity in 2016-17 include the technology, internet and financial and insurance industries, largely driven by private equity and venture capital funds.

2. Overview of Regulatory Field

2.1 Acquiring a Company

A non-listed company may be acquired in a number of different ways in Spain. However, the most common forms of acquisition are the following:

- cash acquisitions: where a purchaser acquires the shares of a target company, or part or all of the assets (and eventually also the liabilities) of a target company for a price payable in cash; or
- share-issue acquisitions: where a purchaser acquires the business of a target company for a price payable in shares issued by the purchaser. Share-issue acquisitions are generally in one of the following forms:
  (a) statutory mergers and demergers;
  (b) share contributions; or
  (c) contributions of assets and liabilities; or
- co-operation agreements (creation of joint-venture companies, for instance).

In order to acquire control of a Spanish listed company it is normally necessary to launch a takeover bid. However, control gained through a merger may be exempt from the obligation to launch a takeover bid if certain requirements are met.

2.2 Primary Regulators

The primary regulators/supervisors for M&A activity in Spain are the following:

- if a target is a listed company, the Comisión Nacional del Mercado de Valores (CNMV), ie the Spanish securities market supervisor/regulator; and/or
- if a deal is subject to merger control clearance, the Spanish local or EU antitrust authorities which, depending on the features of the purchaser and the deal, may be either the European Commission or the Comisión Nacional de los Mercados y la Competencia (CNMC); and/or
- if a target company operates in a regulated sector (mainly finance, insurance, energy or telecoms), the relevant Spanish governmental agency or authority (eg, the Bank of Spain and the CNMV for the finance sector, the Dirección General de Seguros y Fondos de Pensiones for the insurance sector, the CNMC and the Ministry of Energy, Tourism and Digital Agenda for the energy sector and again the CNMC for the telecoms sector).

2.3 Restrictions on Foreign Investments

As a general rule, M&A transactions carried out by foreign buyers are not subject to any significant restrictions in Spain. However there are still a few sectors, mainly those related to national defence, where foreign involvement is restricted on the basis of public interest. Another example is foreign investment in airline companies, which is subject to specific

EU and local regulations that limit the ability of foreign investors to hold stakes in them.

In addition, foreign investments in Spain must be reported to the General Directorate for Trade and Investments, but only for administrative, statistical and financial purposes.

2.4 Antitrust Regulations
When a business combination does not have a community dimension, the main antitrust laws and regulations applicable are Law 15/2007, of July 3rd, on the Defence of Competition, and its development regulation approved by Royal Decree 261/2008, of February 22nd. When a business combination has a community dimension the provisions of EU Council Regulation No 139/2004 on the control of concentrations between undertakings are applicable.

2.5 Labour Law Regulations
Acquirers should primarily be concerned about the labour law regulations provided for in the Workers' Statute and in applicable collective-bargaining agreements (if any). Moreover, the form of acquisition chosen for a particular deal (eg a merger, demerger, spin-off or global assignment of assets and liabilities) may require a purchaser to observe certain additional provisions set forth in Law 3/2009, of April 3rd, on structural modifications of capital companies. Likewise, the Spanish takeover-bid regulations provide for particular rules in the case of a takeover bid for the shares of a listed company.

2.6 National Security Review
There are certain restrictions on foreign investments in sectors directly related to national defence (namely manufacturing or trading of weapons, ammunitions, explosives or other war materials). In addition, the government has the power to establish general or specific limitations on investments in activities related to public order, national security or public health. They have not used this power so far, so it is not a real issue for M&A transactions at present.

3. Recent Legal Developments

3.1 Significant Court Decision or Legal Development
The most significant legal developments that have affected M&A activity in the last three years are the following:

- entry into force of Article 348 bis of the Spanish Companies Act, approved by Royal Legislative Decree 1/2010, of July 2nd, governing the right of minority shareholders to leave a company (under certain circumstances) by exchanging their shares in a company for fair compensation should the company not distribute at least one third of the profits made from its ordinary business in a given year;
- Royal Legislative Decree 4/2015, of October 23rd, approving the consolidated text of the Securities Market Law which was passed in order to reinforce the clarity and consistency of the regulations applicable to the securities market, to reduce their division and to consolidate the system;
- Law 11/2015, of June 18th, on the recovery and resolution of credit institutions and investment services companies, which partially implemented the Bank Recovery and Resolution Directive (Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014) in Spain in order to implement a resolution framework which sets forth the responsibilities, instruments and powers to enable Spanish authorities (the Bank of Spain and the FROB) to facilitate the orderly resolution or restructuring of failing banks by protecting material functions and without assuming access to extraordinary public financial support and exposing taxpayers to the risk of loss;
- Law 5/2015, of April 27th, on the promotion of company financing, which has increased flexibility in debt financing for companies by, among other things, reducing the former limits and corporate requirements applicable to bond issuances; and
- Law 31/2014, of December 3rd, amending the Capital Companies Law in order to improve corporate governance, which has introduced significant changes to matters such as directors' liability and remuneration, minority shareholders' rights in listed companies, shareholders' conflicts of interest and other corporate governance issues.

As regards court decisions, a recent important court order dealt with the sale of assets and business units within the framework of an insolvency procedure. This court order clarifies the treatment of a purchaser in these types of transactions, which have become quite common in recent times.

3.2 Significant Changes to Takeover Law
There have been no significant changes to takeover legislation in recent years.

While Spanish takeover legislation may be modified slightly due to the transposition of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017, relating to certain aspects of company law, it is unlikely at this stage that it will result in significant changes to takeover legislation, since the purpose of the aforementioned directive is to codify the existing legislation on this matter in the interests of clarity and rationality.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies
There are certain precedents where stakebuilding strategies have been carried out as a defence measure in the context of hostile takeover bids. However, stakebuilding by a bid-

der prior to launching an offer, while possible, is unusual in Spain. There are a number of possible reasons for this:

- a stakebuilding process entails the risk of a press leak that could jeopardise the success of a transaction;
- stakebuilding may also have an impact on the share price of a target company, particularly when the trading volume is low, which could in turn force a bidder to increase the bid price; and
- if a bid is launched after building a stake equal to or higher than 5% during the preceding 12 months, a bidder must provide a full cash alternative as consideration under that bid.

Stakebuilding is normally aimed at ensuring the result of the subsequent bid by first setting up a strong shareholding position in a target company. In practice, in Spain, bidders usually try to achieve that same goal by obtaining irrevocable commitments to tender from the main shareholders of a target company (see **6.11 Irrevocable Commitments**).

4.2 Material Shareholding Disclosure Threshold

As a general rule, purchases or sales of shares in a listed company must be publicly disclosed to both a target company and the CNMV when they result in the stake of the relevant shareholder reaching, or falling below the following thresholds: 3%; 5%; successive multiples of 5% up to 50%; 60%; 70%; 75%; 80%; and 90% of a company's total voting rights.

Moreover, in the context of a takeover bid, the following transactions have to be publicly disclosed:

- any acquisition reaching or exceeding 1% of a target company's voting rights; and
- any increase or decrease in the stake held by holders of 3% or more of the voting rights in a target company.

A bidder (or the person acting in concert with them) is also obliged to disclose any purchase of target shares made outside the takeover bid procedure to the CNMV. Additional rules apply to transactions carried out by directors of a target company, to acquisitions of treasury stock and to transactions with shares of a target company carried out from tax havens.

4.3 Hurdles to Stakebuilding

The reporting thresholds referred to in **4.2 Material Shareholding Disclosure Thresholds** are mandatory and therefore cannot be unilaterally increased by a company. However, there is no legal obstacle to a company introducing more stringent rules in their by-laws (ie reporting thresholds lower than those provided by the law). Nevertheless, any such reduction in reporting thresholds through a company's by-laws might be difficult to enforce in practice, as their breach could not give rise to any administrative sanctions.

4.4 Dealings in Derivatives

Dealings in derivatives ia allowed, and are actually commonplace in Spanish M&A practice.

4.5 Filing/Reporting Obligations

Dealings in derivatives have to be publicly disclosed to a target company and to the CNMV whenever its holder is contractually granted a unilateral and discretionary right to acquire voting shares in a listed company up to, exceeding or falling below the following thresholds: 3%; 5%; successive multiples of 5% up to 50%; 60%; 70%; 75%; 80%; and 90% of the total voting rights.

There are no specific filing/reporting obligations in relation to derivatives' transactions as far as competition laws are concerned. However, to the extent that the registered shareholder under a derivative appears as a mere nominee who exercises their voting rights according to the instructions of the shares' beneficial owner, notification to the antitrust authority may be required when the volume of voting rights involved may confer control on that beneficial owner.

4.6 Transparency

Shareholders that intend to take control of a listed company (or that have already acquired control and are therefore obliged to launch a mandatory takeover bid) are obliged to disclose the purpose of their acquisition and their intention regarding the control of a company in the prospectus of the takeover bid, subject to the prior approval of the CNMV.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Generally, a listed target company is required to disclose a deal once the definitive agreements have been signed. Indeed, Spanish inside information regulations set forth that, during the phases of analysis and preparation of potential transactions, any party holding inside information regarding a transaction or a target listed company is obliged not to use and not to disclose that information to third parties, unless it is strictly necessary for the analysis, preparation or execution of a potential transaction. However, if the quotation of the shares undergoes abnormal alterations, a target company is obliged to disclose publicly the status of the deal in order to avoid market disruption.

5.2 Market Practice on Timing

In practice, deal disclosures tend to be made when required to be carried out by law, but very rarely do they occur beforehand. It is also worth noting that applicable regulations allow for the disclosure to be delayed when the information may be detrimental to the interests of the disclosing party, but this is not common practice.

5.3 Scope of Due Diligence

When a bidder and a target company agree to conduct a due diligence process in a public M&A transaction they normally agree to conduct high-level and limited reviews which focus on key matters, and which must be carried out in a time-sensitive way. The areas covered vary depending on the case at hand, but normally include business, financial and legal aspects, and focus on information reasonably required by a bidder in order to confirm price hypothesis, strategic fit, risks, management adequacy, change of control or regulatory issues, as well as the appropriateness of a bidder's financing structure.

Due diligence should be carried out under a confidentiality agreement. Information may only be used for the purposes of a takeover bid. If a company allows a bidder to conduct due diligence it should give equal access to information to potential competing bidders. Due diligence combined with stakebuilding (as opposed to launching a bid) is risky, since it may be considered to have contravened regulations on inside information.

5.4 Standstills or Exclusivity

In public M&A, agreements between a target company and a potential bidder are not unusual in the context of friendly bids. These agreements may regulate, among others, exclusivity undertakings from a target (ie agreeing not to negotiate with any other potential bidder) and standstill provisions (an agreement by an offeror not to purchase shares of a target for a limited period). Moreover, time-limited binding exclusivity agreements are very common in private M&A transactions.

5.5 Definitive Agreements

There is no obstacle to a bidder reaching an agreement on a tender offer with a target company or their principal shareholders. However, the definitive terms and conditions of an offer should be documented in a prospectus that a bidder must prepare in accordance with the requirements of Spanish takeover-bid regulations and which must be approved by the CNMV.

6. Structuring

6.1 Length of Process for Acquisition/Sale

There is no standard duration for a takeover-bid process as it depends on a large number of factors (ie compliance with conditions precedent, a possible need for a bidder to issue securities in an exchange offer, administrative authorisations in regulated sectors, the existence of competing bids, etc). Broadly speaking, a plain and simple takeover bid (ie a cash consideration, with no administrative authorisations required other than CNMV and antitrust clearance, and no competing bids) could take from 90 to 120 days to be completed from the time it is filed with the CNMV.

6.2 Mandatory Offer Threshold

Generally, the threshold triggering the obligation to file a mandatory takeover bid for 100% of the outstanding share capital of a target company is 30% of the voting rights. This threshold can be reached or exceeded by any of the following means:

- an acquisition of shares or other securities that confer, directly or indirectly, the voting rights in a target;
- entering into a shareholders' agreement or acting in concert with other shareholders; or
- an indirect or subsequent acquisition of control (eg a merger with a listed company, a takeover of a company that directly or indirectly holds a stake in a target company or a share capital reduction, among others).

A mandatory takeover bid is also triggered in the event that a person acquires less than 30% of the voting rights but appoints a number of directors that represent more than half of the board members within 24 months of the date of the acquisition.

6.3 Consideration

A cash consideration, at least as an alternative, is legally required in mandatory takeover bids. As far as voluntary bids are concerned, the use of cash as consideration is more common but there are also a number of precedent-setting offers structured as exchanges of shares, particularly in large transactions with a high acquisition value.

6.4 Common Conditions for a Takeover Offer

A mandatory takeover bid cannot be subject to conditions precedent, except for clearance by antitrust authorities. However, the effectiveness of a voluntary takeover bid can be subject to any kind of conditions that may be verified at the end of a bid acceptance period, typically including:

- the approval of amendments to by-laws, corporate restructurings or any other resolution by the general shareholders' meeting of a target company;
- a minimum acceptance threshold; and/or
- approval of the takeover bid at the general shareholders' meeting of a bidder.

6.5 Minimum Acceptance Conditions

The minimum acceptance condition is often set at 50% of a target voting capital, which is the lowest shareholding that ensures undisputed control of a company; or more commonly at 75% of the target voting capital, which is the threshold for tax consolidation purposes.

6.6 Requirement to Obtain Financing

It is perfectly acceptable for private M&A transactions to be conditional on a bidder obtaining financing (and in fact they often are). However, these kinds of conditions are not permitted in the context of takeover bids, since finance, when required, must be committed to at the time of the filing of a bid with the CNMV. Likewise, a bidder must provide a bank guarantee covering the whole bid value in order to ensure the completion of a transaction.

6.7 Types of Deal Security Measures

A target company may agree to pay break-up fees as compensation for the costs incurred in preparing a bid, subject to the following conditions:

- break-up fees are only available for the first bidder;
- the amount of the break-up fee cannot exceed 1% of the total consideration of a bid;
- the break-up fee must be approved by a target company's board of directors with a favourable report from their financial advisers; and
- the break-up fee is to be disclosed in the bid prospectus.

Additionally, a bidder can, in principle, come to any kind of agreement in relation to a bid with a target company, including forcing the vote or requiring non-solicitation provisions. However, if a competing bid, albeit unsolicited, is launched by a third party the board of directors and the management of a target company are expressly prohibited from doing anything to disrupt the competing bid, unless authorised by the general shareholders' meeting.

6.8 Additional Governance Rights

Under Spanish law, governance rights are linked to the shareholding in a company, generally on a pro rata basis. A bidder can only obtain 'additional' governance rights (ie rights in excess of those corresponding to its pro-rata interest in a company) by entering into a shareholders' agreement with other shareholders or by means of a special class of shares conferring additional rights (as far as is legally possible).

6.9 Voting by Proxy

Voting by proxy is perfectly possible and commonplace in Spanish corporate practice.

6.10 Squeeze-out Mechanisms

Spanish takeover bid regulations recognise a squeeze-out right for bidders that have launched a takeover bid for all the shares in a target company but have not achieved a 100% acceptance level. By virtue of this right, a bidder is entitled to purchase all remaining shares at the price of the bid, thereby gaining complete control of a target company. Two conditions must be met in order for this squeeze-out right to be applicable:

- a bidder must reach at least 90% of the voting share capital in a target company; and
- a bid must have been accepted by shareholders representing at least 90% of the voting rights to which the bid was addressed (ie excluding the voting rights previously held by the bidder, if any).

6.11 Irrevocable Commitments

Irrevocable commitments to tender are quite common in Spanish takeovers. They are used in order to ensure the result of a bid as an alternative to stakebuilding strategies. The negotiation of these commitments is usually undertaken at a very early stage in a transaction process. Friendly bids are normally first agreed by a bidder with a target's main shareholders (either directly or through their representatives on a target board) and then filed and discussed with the CNMV.

As a general rule, these commitments are binding agreements between a bidder and the main shareholders of a target company, and provide for:

- the obligation of a bidder to launch a takeover bid, subject to pre-agreed terms and conditions, within a certain period of time (typically one month, which is the maximum term to file a bid with the CNMV once it has been publicly announced); and
- the commitment of shareholders to tender their shares in a bid. Finally, opt-out provisions entitling shareholders to accept a better offer, thereby being released from their commitment, are normally refused by bidders, and as such are relatively rare in practice.

7. Disclosure

7.1 Making a Bid Public

Mandatory takeover bids must be made public immediately after the occurrence of the triggering event (normally the acquisition of a 30% stake in a target company).

Voluntary bids must be made public as soon as a formal resolution to launch an offer has been passed by the bidder management body, provided that financing of a bid has already been committed or that a bidder can otherwise cope with its payment obligations under a bid.

The announcement of a bid must be made through the website of the CNMV, following a standard form established by takeover bid regulations. Once a bid has been announced, a bidder must file the bid prospectus with the CNMV within one month.

7.2 Type of Disclosure Required

If a bid consideration consists of shares to be issued by a bidder, the level of disclosure is the same as the level required

for public offers of securities by Directive 2003/71/EC and national implementing legislation. Therefore, the prospectus to be filed in the event of an exchange bid must include all the information about a bidder and a bidder's securities required by the Spanish public offer regulations, unless this information is already available to the public because a bidder has a registration document in force.

7.3 Producing Financial Statements

If the consideration for the takeover bid is cash the bid prospectus must include some financial information on a bidder, but there is no requirement to produce complete financial statements.

However, a bidder's financial statements are required if the consideration for a bid consists of shares or other securities issued by a bidder, given that the transaction is then treated for these purposes as a public offer of securities. In this case, a bidder's financial statements must be prepared according to International Financial Reporting Standards (IFRS) or, if not applicable, according to the accounting standards in force in a bidder's country, provided that they are equivalent to IFRS. If they are not, IFRS restated financial statements would be required.

7.4 Transaction Documents

As a general rule, transaction documents relating to a takeover bid, including in particular any agreement by a bidder with a target company's main shareholders or directors, must be fully disclosed to the CNMV and described in detail in the bid prospectus.

8. Duties of Directors

8.1 Principal Directors' Duties

There is a general duty for directors to act in the best interests of a company, which is applicable to all kinds of business combinations, whether public or private. Although widely debated, the interests of a company in these instances is generally considered to be interests common to all shareholders, and not necessarily the interests of other stakeholders. Specifically, directors' duties include diligence, loyalty and confidentiality. The general duty of loyalty includes specific provisions regarding the misuse of an influential position, conflicts of interest and shareholdings in competing companies.

Furthermore, in the context of public M&A, the board of directors and the management of a target company are prohibited from taking any action that could frustrate or disrupt the success of a takeover bid launched against a company. This is to ensure that the interests of shareholders prevail over the interests of directors and management. This is generally known as the "passivity duty" of directors.

The board and the management of a target company cannot adopt any of the following defensive measures, from the date of the announcement of a bid, until its results are made public:

- issuing or initiating the issuing of any securities that may frustrate a bid;
- carrying out or promoting any transaction affecting the shares in a target that could impair a bid (including promoting stakebuilding strategies as a shield against a bid);
- selling, renting to third parties or setting liens or encumbrances on the real property or other assets of a target company to the extent that any such transaction may disrupt a bid; and
- distributing extraordinary dividends to shareholders, except when these dividends have been approved and announced prior to a bid.

As an exception to these prohibitions, the board and the management of a target company can search for a competing bidder (called a "white knight") and, generally, take up any defensive measures against a bid with the prior authorisation of the general shareholders' meeting. An authorisation of this kind should be granted through a resolution adopted by a reinforced majority.

8.2 Special or Ad Hoc Committees

In private M&A it is fairly common practice to create joint supervisory committees composed of representatives of a buyer and a target company. This is done to ensure that a target company is managed within the ordinary course of business during the transition period between the signing and closing of a transaction.

However, the establishment of ad hoc committees within the board of directors is not very common in the context of public M&A, although it is not unheard of. In any case, conflicts of interest experienced by directors are not usually the driving force behind the creation of these kinds of committees. Conflicts of interest are generally dealt with by prohibiting the relevant director from participating in the corporate resolutions related to the transaction in which the conflict of interest arose.

8.3 Business Judgement Rule

There is little case law on takeover situations in Spain, and what little there is mainly relates to injunctive relief against a bidder. However, given the passivity duty of target directors in a takeover bid (see **8.1 Principal Directors' Duties**), it can be concluded that the business judgement rule is unlikely to be applied by Spanish courts in a legal action brought against the directors.

8.4 Independent Outside Advice

In a standard takeover-bid process, the board of directors of a target company will normally request outside advice from:

- lawyers, particularly with regard to directors' duties during a bid process; and
- an independent financial expert, in order to issue a fairness opinion on the consideration offered in a bid.

Generally, this opinion is used to support the directors' report on a takeover bid to be issued to target shareholders once a bid has been approved by the CNMV (see **9.1 Hostile Tender Offers**).

8.5 Conflicts of Interest

There is some case law in Spain on conflicts of interest of directors and managers, but there is very little regarding shareholders and advisers. However, this case law appears mainly in relation to the challenge of corporate resolutions rather than in the context of public or private M&A.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers (ie offers that are not supported by the board of directors of a target company) are permitted under Spanish law, but are usually quite rare. The reason for this is that the rejection of a tender offer by a target board very often results in the failure of a takeover bid.

Although the board and management of a target company are subject to a passivity duty in relation to a bid (as further explained in **8.3 Business Judgement Rule**), they still retain the ability to beat a bidder by, for instance, searching for a competing offer or engaging in transactions designed to bring about the failure of a bid, provided that the general shareholders' meeting approves any such transactions.

In addition, a target company's board of directors must issue a report on a takeover bid (once it has been authorised by the CNMV), which must state whether they are in favour of a bid or against it. This report can have an important impact on the decision made by a target company's shareholders.

Finally, while the procedures and time periods applicable to hostile and friendly transactions are the same, the process can be significantly delayed in a hostile scenario due to the following factors:

- the potential adoption by a target company of defensive measures approved by the general shareholders' meeting;
- the potential search by a target board for a white knight alternative bidder, which would trigger a competing bids process; and/or
- any potential injunctive relief against the unsolicited bid that may be obtained by a target from a competent court.

9.2 Directors' Use of Defensive Measures

The directors of a target company must obtain prior approval at their general shareholders' meeting before taking any defensive measures that could result in the frustration of a bid, other than seeking a competing bid.

9.3 Common Defensive Measures

As a result of the passivity duty of target directors, defensive measures during a bid period are limited to judicial claims seeking potential injunctive relief or the search for a white knight prepared to launch a competing and more favourable takeover bid.

However, the inclusion of preventive defensive measures in the by-laws (ie provisions designed to discourage unsolicited bids) is relatively common among listed companies. The following are examples of typical preventive measures included in the by-laws of Spanish listed companies:

- limiting the number of votes that a single shareholder may cast; this is probably one of the most effective and widely used anti-takeover measures. This kind of voting restriction is ineffective in the context of a takeover bid if 70% or more of the voting shares are tendered in a bid;
- establishing supermajority quorum and/or voting requirements; and
- eligibility requirements for directors; for instance, seniority as shareholder, or being an employee of a target company prior to a bid, can be required in order to be able to be appointed as a director.

9.4 Directors' Duties

Directors cannot enact defensive measures against an unsolicited takeover bid unless they have obtained the prior approval of the shareholders' meeting.

To this end, directors must prepare a detailed written report justifying the agreement to be adopted by such shareholders' meeting.

9.5 Directors' Ability to "Just Say No"

In Spain, directors of a target company cannot just say no and take action that prevents a takeover bid from being successful.

10. Litigation

10.1 Frequency of Litigation

Litigation is quite rare in takeover situations except in the context of hostile bids, where target directors may try to obtain some kind of injunctive relief from the courts in order

to impede a takeover. Disputes are more frequent in private M&A, generally in relation to representations and warranties claims, purchase price adjustments or earn-out clauses.

10.2 Stage of Deal

A distinction should be made between private and public M&A in regard to litigation. In private M&A, disputes usually arise after the closing of a deal due to the subject matter of claims (this generally refers to representations and warranties, price adjustments or earn-out clauses). In public M&A, litigation is a lot less common and, if it occurs, it is usually related to hostile bids and is brought soon after the announcement of a bid.

Pérez-Llorca
Paseo de la Castellana, 50
Madrid
Spain 28046

Tel: +34 91 436 04 20
Fax: +34 91 436 04 30
Email: pll@perezllorca.com
Web: www.perezllorca.com

Pérez-Llorca

11. Activism

11.1 Shareholder Activism

Although shareholder activism has become more and more visible in the last few years, it is still not particularly significant in terms of M&A activity. When it exists, shareholder activism focuses mainly on valuation/pricing matters and on the protection of minority rights.

11.2 Aims of Activists

It is very rare in Spanish practice to see activists encouraging companies to enter into M&A transactions. As previously mentioned, shareholder activism is mainly focused on valuation/pricing matters and on the protection of minority rights within the context of transactions that have been decided separately from an activists' initiative.

11.3 Interference with Completion

Activists generally seek to obtain better bid terms for the group of shareholders they represent, but the effectiveness of their actions is rather limited.