Public to Private Deals in Spain

Key things you need to consider

The Spanish market is highly regulated, requiring expert advice to navigate. Here are the key things you need to consider in a public to private deal ("**P2P deal**") where the Spanish Takeover Code applies.

Structure and Timeline

Secrecy and Disclosure

Financing

Diligence

Special Deals and Management Incentivization

Deal Protections

Structure and Timeline

In Spain, the way to implement a P2P deal varies depending on whether the public takeover offer ("PTO") is mandatory or voluntary.

Mandatory Offer

A PTO bid is mandatory when the bidder has acquired control of a Spanish listed company prior to the launching of the PTO.

- **Key aspects** – (i) mandatory PTOs shall be addressed to all the remaining shares of target; (ii) cannot be subject to conditions (other than mandatory regulatory approvals) and (iii) shall comply with certain requirements from a pricing point of view (equitable price rules).
- **Key advantages** - P2P deals structured by way of mandatory PTOs are usually aiming to ensure the acquisition of a controlling interest by the bidder prior to the relevant PTO and to prevent potential competing bids.

Voluntary offer

A voluntary PTO may be made if the bidder does not hold control over a Spanish listed company by the time when the offer is launched.

- **Key aspects** – as opposed to mandatory offers, voluntary offers may: (i) be priced freely (no requirement for the price to be equitable); (ii) comprise a cash and/or share exchange elements; (iii) be subject to conditions (besides mandatory regulatory approvals); (iv) be addressed to some (but not all) of the target's shares carrying voting rights; (v) be withdrawn in a broader range of circumstances.
- **Key advantages** - A P2P transaction carried out by means of a voluntary PTO provides the bidder with more flexibility to the extent that the offer may be subject to conditions (*e.g.*, the achievement of a minimum percentage of acceptance in the takeover bid).

Structure and Timeline (cont'd)

Delisting

Spanish regulations set out certain rights which allow for a subsequent de-listing of the target upon completion of the PTO process. These rights can only be exercised when the offer is addressed to 100 per cent of the shares of target (or to all the remaining shares not held by the bidder).

- **Squeeze-out right**: the bidder may be entitled to force the remaining shareholders of the target to sell their shares to the bidder at an equitable price.
- **Sell-out right**: the remaining shareholders of the target may in turn be entitled to make the bidder purchase their shares at an equitable price.

  The squeeze-out and sell-out rights may be exercised provided that, as a result of a PTO, the following thresholds are reached:

  - the bidder holds at least 90% of the voting rights in the target's share capital; and
  - the bid has been accepted by at least 90% of the shareholders with voting rights to which it was addressed.

The maximum squeeze-out term is three months following the expiry of the acceptance period, and the intention of the bidder to exercise or not exercise this right must be expressly stated in the offer document.

Timeline of P2P deals

The timeline for a P2P deal is around 4 - 5 months for the PTO plus three months (plus preparation) for the squeeze-out, however the timing will largely depend on the duration of the acceptance period and the time required by CNMV to approve the offer.

Secrecy and Disclosure

Inside information

Information prior to a PTO may qualify as inside information and must be treated as strictly confidential. The bidder should therefore establish appropriate internal procedures. If the bidder intends to contact third parties at an early stage, this should be done exclusively under a non-disclosure agreement reflecting the specifics of P2P deals. The circle of insiders should be limited as far as possible on a need to know basis, but, unlike in the UK, no strict "rule of six" applies.

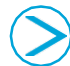
Announcement of the decision to launch an offer

Mandatory offer: a mandatory offer must be announced immediately upon the acquisition of control of the target, that is, upon acquisition of 30% or more of the voting rights of target or appointment (within 24 months following an acquisition of less than 30% of the voting rights) of a majority of target board members carrying voting rights.

Voluntary offer: as soon as the bidder makes the decision to launch a voluntary offer, it must announce it immediately.

Under the equitable price rules, the announcement is the reference date for the determination of the equitable price, (*i.e.,* the highest price or consideration paid or agreed upon by the bidder with regards to the same type of securities during the 12 months immediately prior to the PTO announcement).

In the event of a leak, an announcement may be required providing details of the status of negotiations.



Financing

Certain funds

There must be absolute certainty that the PTO consideration will be available to shareholders in the event that the offer is successful. Accordingly, the bidder must prove its ability to meet its obligations under the PTO.

Offers with full or partial cash consideration: the bidder must provide a bank guarantee or bank cash deposit (in each case, in an amount equal to the cash consideration offer assuming full acceptance of the offer);

Offers including full or partial share exchange consideration:

- Issued shares offered for exchange: the bidder must provide the regulatory authority (“**CNMV**”) with evidence that the shares are available for sale and subject to the outcome of the offer;
- Shares to be issued for exchange: in certain cases, the CNMV may request additional guarantees directly from the bidder’s board of directors.

Any required guarantee must be provided to the CNMV at the time of filing the offer (or within seven days after the filing at the latest).

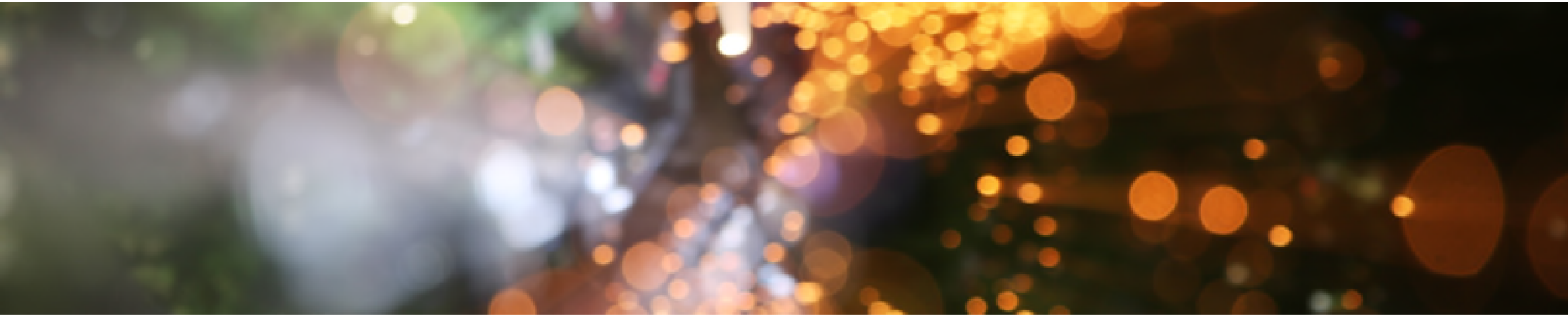
The guarantee must be provided by credit institutions, regardless of whether they are Spanish, from the EU or from third countries. If the bank is not located in the EU, CNMV may demand special requirements relating to the sufficiency and practical effectiveness of the guarantee.

Syndication and club deals

Under Spanish takeovers legislation, when two or more bidders act jointly in order to acquire control of a target company by virtue of an agreement (whether express or tacit, verbal or written), one bidder will be assigned the voting shares of the others acting jointly with it.

In the event that bidders act jointly to make an offer to acquire the control of a company, the equitable price must be equal to the highest price paid by any of the bidders acting jointly during the 12 months prior to the announcement of the offer. After an offer has been made at an equitable price, if any of the joint bidders acquires shares at a price which is higher than the offer price set out in the offer document, such acquisition will automatically trigger an increase in the offer price up to the highest price paid by such bidder.

Diligence



Diligence in P2P deals typically starts with the review of information that is publically available due to general ongoing disclosure obligations of the target under applicable capital market laws.

Prior due diligence review of certain nonpublic information of target is market practice and accepted by the CNMV.

Key aspects of the due diligence exercise:
(i) customary confidentiality agreements (NDAs) should be put in place;

(ii) target's board to approve disclosure information and necessary measures to maintain confidentiality;

(iii) customary mechanisms are applied to cope with potential market abuse and disclosure concerns, such as cleansing of potential inside information that a bidder may have access to in the context of the due diligence.

Information provided to one bidder must equally be provided to other bidders (principle of "equal amount of information for all bidders" in case of competing bids) that request it to the extent that the target board believes it is a good faith request.

Special Deals and Management Incentivization

There are no particular restrictions on management incentives, however, from the date of the public announcement of the offer, the target's board shall not take any action that would prevent the successful outcome of the offer without the target's shareholders' approval, except for the search of a white knight.

Special deals and undertakings from the target management are not customary in the Spanish market.

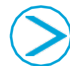
Deal Protections

In addition to offer conditions (*e.g.*, minimum acceptance threshold), irrevocable commitments or agreements with target's shareholders are commonly seen in the Spanish market, since these arrangements may contribute to the success of the offer.

Types of commitments:

- **Hard commitments**: the undertaking shareholder is obliged to accept the bid irrespective of the existence of a competing bid.
- **Soft commitments**: the undertaking shareholder may only be obliged to accept the bid provided that there is no competing bid offering a higher consideration

Any irrevocable commitments shall be disclosed upon the announcement of the bid, and therefore shall be executed beforehand.



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