

# Regulation of Tender Offers in Europe – Incorporation of XIII Directive

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# Introduction

- Article 20 of XIII Directive – Perspective 2011
- The social and political concern about takeover activity: interests in conflict
- Takeover activity in Spain (authorised):
  - 2006: 21
  - 2007: 16
  - 2008: 7

# Introduction

- Regulatory systems of Takeovers
  - USA: Publicity – Voluntary bid
  - UK: Publicity + Equal treatment – Compulsory bid
- Overview and regulation of process: SEC / City Panel / Commission
- XIII Directive – UK system

# Regulation of Tender offers in Spain

- Law 24/1988 of Stock Markets
- Royal Decree 1197/1991:
  - Threshold: 25% / “intentional” system / Partial offer admitted / passivity rule
- 2003 reform:
  - Sales of 2002 - 24,9% stakes / new rule: compulsory offer if appointment of majority of directors
- Incorporation of XIII Directive:
  - Law 6/2007 modification of regime of tender offers
  - Royal Decree 1066/2007 regulation of tender offers

# Main trends of XIII Directive regulation

- General principles
- Supervisory body and applicable Law
- Compulsory bid: total / fair price
- Proceeding and content of Prospectus
- Passivity rule
- Implicit admission of preventive anti takeover measures
- Public information of matters relevant for takeover bidders
- Optional break through rule
- Squeeze out / sell out
- Other relevant issues not addressed in XIII Directive:
  - Admission of conditional bid
  - Competitive offers

## General principles – art. 3

- Equal treatment
- Sufficient time and information to adopt decision
- Management and supervisory bodies of target must act in the best interest of the company and permit shareholders decision
- No creation of false markets
- Guarantee of payment of price
- No disruption of target's activities during more time than reasonable

## Supervisory Body – Art. 4

- Member states must appoint the supervisory body to overview takeovers – Art. 4.1
  - Germany: BaFin (German Federal Financial Supervisory Authority)
  - France: Autorité des Marchés Financiers
  - Italy: Consob (Commissione Nazionale per le Società e la Borsa)
  - UK: Panel on Takeovers and Mergers
  - Spain: CNMV
- Rules of International Law: competent authority and applicable Law – Art. 4.2

# Compulsory offer

- Rules art. 5 XIII Directive:
- When a person or a concerted group of persons acquires control:
  - Spain:
    - Threshold 30% of voting rights (what about equity swaps? / options? – article 5.1 RD)
    - Or appointment of majority of directors: article 6 RD – Independents do not count
  - Thresholds: Germany 30% / France 33,3% / Italy 30% / UK 30%
- They must launch an offer for all the shares (including non voting shares and convertible bonds)
- At a fair price: highest paid in prior 6 to 12 months (art. 5.4) – Spain: 12 months - article 9 RD
- Consideration in cash or securities (or cash alternative if the offeror has acquired more than 5% in period 6 to 12 months) (art. 5.5) – Spain: cash (article 14 RD) + guarantee – (article 15 RD)
- Term (Spain): 1 month since acquisition of control



## Other offers

- Exclusion offer: art. 10 RD
- Acquisition of own shares: art. 12 RD
- Voluntary offer: art. 13 RD
  - Consideration:
    - cash or
    - shares quoted in OCDE country
    - any other consideration requires cash alternative
  - Price – free unless bidder has acquired in cash more than 5% in 12 preceding months (art. 14.2 a RD) – art. 5.5 XIII Directive

# Proceeding and content of Prospectus

- Articles 6-7-8 and 9.5 XIII Directive
- Proceeding:
  - Announcement art. 6.1 – Spain: voluntary (art. 16.1 RD) – compulsory (art. 16.2 RD)
  - Presentation of offer – Spain: 1 month as from announcement (art.17 RD)
  - Authorization – Spain: art. 21 RD
  - Publishing Art. 8.1 – Spain: art. 22 RD
  - Acceptation period art. 7.1 – Spain: (art. 23 RD) – no < 15 days / no > 70 days (Germany – no < 4 weeks / no > 10 weeks / France no < 25 trading days / no > 35 td / Italy no < 15 days / no > 40 with particular rules / UK no < 21 days)
  - Report of directors and possible report of workers representatives: art. 9.5 – Spain: art. 24 RD
  - Information to workers: arts. 6.1, 6.2 and 8.2 – Spain: art. 25 RD
  - Authorization competition bodies/other supervisory bodies – Spain: art. 26 RD
- Content of Prospectus:
  - Art. 6.3 – Spain: Arts. 18-20 RD + annex

# Passivity rule (I)

- Article 9 XIII Directive
- Need of authorization by the GSM of any action that could threaten the success of the offer – except search of competing bids
- But – Art. 12: Art. 9.2 and 9.3 Optional
- Spain:
  - Passivity rule - particularly (article 28.1 RD):
    - Issue of new shares
    - Promote purchase of shares (Metrovacesa)
    - Sale of assets (Crown Jewel)
    - Distribution of extraordinary dividends (Endesa)
  - Reciprocity rule arts. 12.3 and 12.5 – Spain: article 28.5:
    - No equivalent rule in country of origin
    - Prior authorization by GSM

## Passivity Rule (II)

- Germany: no mandatory application of passivity rule (companies may opt in)
- France: mandatory application of passivity rule
- Italy: no mandatory application of passivity rule (companies may opt in)
- UK: mandatory application of passivity rule

# Preventive defensive measures

- Spain:
  - Most common:
    - Limitation of vote
    - Requirements to be a director
    - Requirements to be a managing director
  - Recommendation:
    - article 1 of 2006 Unified Code of Good Governance – elimination
    - but 8 companies of IBEX 35 maintain them (Telefónica, Iberdrola, Repsol, B.Popular, B. Sabadell)
  - Golden shares in privatized companies (Repsol, Iberia, Telefónica, Endesa) – eliminated in 2006
- Other countries

# Public Information of matters relevant for takeover bidders

- Article 10 XIII Directive
- Art. 116 bis LMV

# Break through rule

- XIII Directive - Art.11
- Spain: No mandatory application
  - Voluntary adoption by companies: art. 60 ter LMV – art. 29 RD
  - None has adopted – (except partially Iberdrola)
  - Possibility of non application of neutralization measures on grounds of reciprocity (art. 29.6 – art. 12.3 and 12.5 XIII Directive)
- Germany: No mandatory application - Voluntary + Reciprocity
- France: No mandatory application
- Italy: No mandatory application - Voluntary + Reciprocity
- UK: No mandatory application

# Squeeze Out / Sell Out

- XIII Directive – arts. 15-16 Squeeze Out / Sell out - Spain  
arts. 47-48 RD
  - Reciprocal rights
  - After takeover bid
  - If bidder has acquired + 90%
  - Same price as takeover bid
  - Announcement in takeover offer
  - Term of three months
- Thresholds: Germany 95% / France 95% / Italy 95% / UK 90%



## Spain: Admission of conditional offer

- Voluntary offers can be subject to conditions precedent (art. 13.2):
  - Modification of articles of association / other decisions by GSM of target - System of neutralization of defensive measures
  - Acceptance of offer by minimum number of shareholders
  - Approval by GSM of bidder
  - Others subject to CNMV approval
- Authorization by competition authorities or other regulatory authorities (art. 26)

# Spain: Competing bids

- They must improve the previous offer – increasing price (appraisal if non cash offer) or extending the shares to which the bid is addressed (art. 42.1)
- Admission of break fees – 1% (art. 42.4)
- Presentation of simultaneous last bids (art. 45.3)
- Advantage of initial bidder if difference under 2% -  
Chance of improvement (art.45.6)
- Equal right of information (art. 46) (Endesa)
- Prohibition of announcement of voluntary bid (art. 16.4)  
(Endesa)