

Questions and Answers on takeover bids

10 February 2022

Updated on 10 February 2022. Incorporation of questions 12, 13 y 14.

Updated 28 July 2021. Incorporation of question 11.

Updated 10 December 2018 with two corrections of question 1 (sections a) and c)).

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 (RD 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 RD on takeover bids?

In general, CNMV considers acceptable a condition for the purposes of Article 13(2) (d) of the RD 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 RD 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 RD 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 RD 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 RD 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 RD 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 RD 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.

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 make 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".

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 RD 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 RD 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 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 RD 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 RD 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 RD 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 RD on takeover bids.

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

In accordance with Article 15 of the RD 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 second paragraph of Article 14(4) of the RD on takeover bids?

CNMV considers that the indication of the equivalent cash price provided for in the second paragraph of Article 14(4) of the RD 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 RD 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 RD 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 RD 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.

11. Due to the current COVID-19 pandemic, the provisions of Article 137(2) of the Recast Text of the Spanish Securities Market Act, approved by Spanish Royal Legislative Decree 4/2015, of 23 October (TRLMV), are currently applicable to takeover bids as the circumstances set out in subparagraph 3(b) of said article have arisen, since market prices, in general, have been affected by the pandemic.

Specifically, Article 137(2) TRLMV is applicable to any takeover bid where, during the two years prior to its announcement, such circumstances exist. In this regard, as of what date should the period of application of Article 137(2) TRLMV, as a result of the current COVID-19 pandemic, be considered to end?

The CNMV has analysed various market events which have occurred since the COVID-19 pandemic began. The analyses show that in the month of March, the market suffered a series of heavy falls. Specifically, in the session of 12 March 2020, the Ibex 35 Index, the main Spanish stock exchange index, fell by 14.06%, its greatest fall since its creation.

Taking into account that the decision to apply Article 137(2) TRLMV is based on the impact on market prices, in general, or the offeree company in particular due to exceptional events, it is considered that the end date should be set with reference to the point in time when quoted market prices were affected by the pandemic.

Therefore, we consider that 12 March 2020 is the effective date of existence of the exceptional circumstance which has triggered the application of Article 137(2) TRLMV. Accordingly, unless new events arise associated with the COVID-19 pandemic, which require the reconsideration of the criterion contained herein, takeover bids announced as of 12 March 2022 will no longer be subject to the provisions of the aforementioned article.

12. After launching a takeover bid, can a shareholder or a third-party investor acquire shares of the offeree company via an accelerated share acquisition process at a set price, or through off-market acquisition of blocks of shares at a price equal to or higher than that of the takeover bid?

Pursuant to takeover bid regulations, any proposal addressed to the shareholders of a listed company whose purpose is to acquire all or part of its shares or other securities carrying voting rights in exchange for a price must be considered a takeover bid.

Chapter IX of the RD on takeover bids regulates competing offers as being those takeover bids that affect securities for which, in whole or in part, another takeover bid has been previously submitted to the CNMV, whose acceptance period has not yet expired. This regime of competing offers is applicable to both mandatory and voluntary takeover bids. Regarding the latter, Article 13(3) of the RD on takeover bids subjects them to the rules established for mandatory bids. Likewise, said regime is applicable to partial takeover bids given the literal nature of Article 40 of the RD on takeover bids.

To the extent that a takeover bid has already been submitted, any takeover bid launched at a later date must necessarily be subject to the requirements of the competing offers provided for in article 42 of the RD on takeover bids.

In this regard, any transaction or action that conveys to the market the message that an investor or a shareholder is willing to purchase a certain amount under set conditions, could constitute an offer process and shall be subject to the rules applicable to competing offers under the RD on takeover bids. Some examples of these transactions could be: an accelerated stakebuilding process where an intermediary contacts a number of shareholders or intermediaries to buy a certain amount at a single price; any block purchases made, in a similar form to that of public offerings; or any indication to the market, with greater or lesser formality, that the third party is willing to purchase a certain amount at a specific price.

Therefore, whoever intends to acquire shares of a company for which a takeover bid has already been submitted, must either launch a competing offer in accordance with the terms of Article 42 of the RD on takeover bids, or opt for a transaction under market conditions at market prices prevailing at the time of its execution, which does not constitute a takeover bid.

13. Article 24(1) of the RD on takeover bids regulates the report that the offeree company's board of directors must prepare on the bid. With regard to such report, what information must it contain relating to the shareholders of the offeree company who are represented on its board of directors by proprietary directors?

Article 24(1) (paragraph 5) states that the report of the offeree company's board of directors on a takeover bid shall include the offeror company's shares directly or indirectly held by the offeree company or by persons acting in concert, as well as the offeree company's shares held or represented, directly or indirectly, by the members of the board of the offeree company as well as any securities they may hold in the offeror company. In the CNMV's opinion, the above-mentioned rule should be interpreted as meaning that the shares of shareholders who appointed the proprietary directors should be included in the report, together with a reasoned opinion on the bid and whether or not they intend to accept it.

The above interpretation has been upheld by the CNMV for many years and is also applied, in general, by offeree companies, in the reports prepared by the board of directors for the purposes set out in Article 24 of the RD on takeover bids, including the opinion on the bid

and whether or not the shareholders represented by the offeree company's proprietary directors intend to participate in it.

Furthermore, it is important to highlight that the obligations of the offeree company and of its board of directors are independent of the fact that such directors can attend the board meetings of the company they represent or not or participate in their discussions.

Therefore, the boards of directors of offeree companies must issue a detailed and reasoned report on the bid, including the opinion on the bid of each and every one of the shareholders represented on the board of directors by proprietary directors, and whether or not they intend to accept it with their stake.

14. In the context of a partial takeover bid, is it possible for the offeror to acquire shares outside the takeover bid?

In accordance with applicable regulations (Article 13(4) of the RD on takeover bids), a takeover bid can only be launched for a number of shares that is less than the total number (partial takeover bid):

1. Whoever has not, as a result of the takeover bid, achieved a controlling interest (equal to or greater than 30 % of the voting rights).
2. Whoever, already holding a controlling interest, can increase their controlling interest without being subject to a mandatory takeover bid.

Therefore, in the partial takeover bid the offeror determines the maximum number of shares to be acquired (the maximum limit of the bid), which is an essential element for regulatory approval, such that when the total number of shares included in the statements of acceptance exceeds the maximum limit of the bid, the regulatory distribution and pro rata rules under Article 38 of the RD on takeover bids must be applied.

The acquisition of shares outside the takeover bid would change the maximum interest for which the authorisation of the partial takeover bid was granted, and accordingly, the information contained in the authorised prospectus. In addition, if the acceptance level exceeds the maximum limit of the bid, the acquisition of shares outside the bid by the offeror itself would trigger the breach of the principle of equal treatment since it acquires, outside the bid, all the shares without being subject to conditions or pro rata, while the settlement of transactions of shareholders who accept the bid are subject to the distribution and pro rata rules mentioned above, as well as to the conditions established by the offeror.

Accordingly, any transaction that the offeror intends to carry out, outside the partial takeover bid, shall be considered to be subject to the rules applicable to the amendment of the bid's specifications set out in the regulations and must be channelled through such bid.