



**Guide to the new legal
provisions applicable to takeover
bids for securities**

URÍA MENÉNDEZ

NOTE

This guide is intended to be used exclusively for informational purposes in connection with certain aspects of Spanish legislation applicable to takeover bids for securities. Accordingly, the information and comments included herein are of a general nature and do not constitute legal advice of any kind.

This guide has been updated as of 19 September 2007 and Uría Menéndez does not undertake any commitment to update or revise the contents hereof.

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GLOSSARY OF DEFINED TERMS

Act 6/2007: Act 6/2007 of 12 April, amendatory of Act 24/1988 of 28 July on the Securities Market, providing for the reform of the rules on takeover bids and on the transparency of issuers

CNMV [*Comisión Nacional del Mercado de Valores*]: National Securities Market Commission.

Directive 2004/25/EC: Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

Royal Decree or RD: Royal Decree 1066/2007 of 27 July on the rules applicable to takeover bids for securities

Royal Decree 1197/1991: Royal Decree 1197/1991 of 26 July on the rules applicable to takeover bids for securities

Securities Market Act [*Ley del Mercado de Valores*]: Act 24/1988 of 28 July on the Securities Market

Spanish Companies Act [*Ley de Sociedades Anónimas*]: The Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989 of 22 December

Takeover Bid [*Opa*]: Takeover bid for the securities of a company

INTRODUCTION

The approval of Act 6/2007 of 12 April, amendatory of Act 24/1988 of 28 July on the Securities Market, providing for the reform of the rules on takeover bids and on the transparency of issuers, and the approval of Royal Decree 1066/2007 of 27 July on the rules applicable to takeover bids for securities, further developing such Act, is one of the major developments in Spanish commercial law in recent years. The effect of both legal provisions is to incorporate Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids in Spain, thus concluding, albeit incompletely, the process begun over a decade ago to put in place consistent rules of the game on takeover bids for securities in Member States of the European Union. The term “incompletely” is used because, in order to secure approval, Directive 2004/25/EC had to relinquish a good portion of the ambitious goals reflected in its first drafts, contenting itself with being a “*de minimis* directive” that allows Member States to adopt positions that are protective of their national companies, provided they observe certain basic conditions.

In any event, and while Directive 2004/25/EC has not achieved its original goal of establishing a single corporate takeover market in Europe, it should be noted that the Spanish provisions enacted for the transposition of the Directive are revolutionary for the Spanish market. Act 6/2007 and Royal Decree 1066/2007 have radically changed the structure of takeover bids, and this change will have a considerable impact on the mergers and acquisitions of Spanish listed companies in the coming years. Moreover, the new provisions have not merely transposed the Community directive, but have taken advantage of all the experience accumulated during the effective period of Royal Decree 1197/1991 of 26 July to establish a more modern and sophisticated system that places Spanish law on takeover bids for securities at the forefront of countries within the European Union. The amendment thus provides the improvements that the Spanish system had long been demanding.

Following the dictates of Directive 2004/25/EC, the new rules on takeover bids for securities have made three major structural changes.

The first consists of establishing a system of mandatory *ex post* takeover bids. Royal Decree 1197/1991 established a system of mandatory *ex ante* takeover bids under which whoever intended to exceed any of the relevant thresholds for purposes of the takeover bid (basically 25% or 50% of the share capital of a listed company) could not acquire shares in the offeree company without first making a takeover bid for securities. In contrast, under the new rules, the obligation to make a takeover bid does not arise based on the intention of the offeror to exceed the established control threshold (now set at 30% of the voting share capital or the appointment of more than one-half of the members of the board), but specifically because such threshold is reached.

The second structural change made by the new rules applicable to takeover bids is the elimination of mandatory partial bids. When the obligation to make a takeover bid arises as a result of the acquisition of control of a listed company, the takeover bid must be directed to the acquisition of all the securities of the offeree company. This does away with the partial bid system provided for in Royal Decree 1197/1991, which only established the obligation of making a total takeover bid if the threshold of 50% of the share capital of the offeree company was to be exceeded. In those cases where the offeror only intended to exceed 25% of the share capital of the offeree company without reaching or exceeding 50%, the mandatory takeover bid only had to be made for 10% of the share capital of the offeree company.

The third change refers to the *ex post* takeover bid system and consists of the introduction of the notion of "equitable price". Thus, whoever is required to make a mandatory takeover bid can no longer make it at any price, but must make it at an equitable price, which is equal to the highest price that the offeror, or persons acting in concert therewith, paid or agreed to pay for the same securities during the 12 months prior to the announcement of the takeover bid.

These are only three examples of the long list of new provisions introduced by Act 6/2007 and Royal Decree 1066/2007 which includes, among other things, rules governing squeeze-outs, break-up fees and neutralisation (breakthrough) measures.

The purpose of this guide, and hence its name, is to assist our clients and guide them in this *terra incognita* of rules applicable to takeover bids for securities inaugurated in August 2007. It does not purport to be a treatise on takeover bids or to resolve all issues that may arise from Act 6/2007 and Royal Decree 1066/2007. It merely seeks to answer some of the most frequently-asked questions at this time of regulatory change.

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Regulatory framework (subjective scope,
applicable regulations, sanction system) and types
of takeover bids for securities

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1.1. What regulations apply in Spain to takeover bids for securities?

In Spain, takeover bids are governed by the Securities Market Act, as amended by Act 6/2007. The provisions of such Act are further developed by Royal Decree 1066/2007 of 27 July on the rules applicable to takeover bids for securities.

1.2. What are the supervisory authorities for takeover bids for securities?

The National Securities Market Commission [*Comisión Nacional del Mercado de Valores*] (CNMV).

1.3. To whom do Spanish regulations governing takeover bids for securities apply?

Pursuant to the provisions of Directive 2004/25/EC, article 1 of the Royal Decree establishes the scope of application of Spanish regulations on takeover bids for securities. These shall apply in the following instances:

- (a) To bids for companies whose shares are, in whole or in part, admitted to trading on a Spanish official secondary market and which have their registered office in Spain.

However, such set of provisions shall not apply to takeover bids for shares of open-ended investment companies [*sociedades de inversión de capital variable*] or to takeover bids for shares of the central banks of Member States of the European Union.

- (b) To bids for companies which have their registered office in a Member State of the European Union other than Spain and whose shares are not admitted to trading on a regulated market in such State, in any of the following cases:

- (i) when the company's shares are only admitted to trading on a Spanish official secondary market;
- (ii) when the first admission to trading of the shares on a regulated market has been the admission to trading on a Spanish official secondary market;
- (iii) when the company's shares are simultaneously admitted to trading on regulated markets of more than one Member State and on a Spanish official secondary market and the company so decides by giving notice to such markets and to the competent authorities thereof on the first day that its shares are traded; or
- (iv) in the event that as of 20 May 2006, the company's shares were already admitted to trading simultaneously on regulated markets of more than one Member State and on a Spanish official secondary market and the National Securities Market Commission has so agreed with the competent authorities of the other markets on which they were admitted to trading or, in the absence of any such agreement, when it has so been decided by the company.

The following rules shall apply to the cases contemplated in this sub-section (b):

- (1) The decision regarding the authorisation of the bid shall be the purview of the National Securities Market Commission.
 - (2) The provisions of the Royal Decree shall govern all issues in connection with the consideration or price offered in the bid procedure, the information regarding the offeror's decision to submit a bid, the contents of the offer document, the dissemination of the bid, and competing offers.
 - (3) In contrast, the applicable rules of the Member State of the European Union in which the offeree company has its registered office shall determine the information that must be provided to the employees of the offeree company and, as regards Company Law, specifically, the percentage of voting rights that gives control and the exceptions to the obligation to make a bid, as well as the circumstances in which the board of an offeree company may take action that may disrupt the development of the bid. The authorities of such State shall also be the competent authorities in connection with all such issues.
- (c) When the offeree company does not have its registered office in Spain or in any other Member State of the European Union and its shares are admitted to trading on a Spanish official secondary market, the provisions of paragraphs (b)(1) and (2) above shall be the only ones that will apply to the takeover bid for securities.
 - (d) If the offeree company has its registered office in Spain but its securities are not admitted to trading on a Spanish official secondary market, only the provisions of paragraph (b)(3) above shall apply to the takeover bid for securities.

This system of determining the law applicable to takeover bids for securities, which derives from the system established in Directive 2004/25/EC, and particularly the instances described in paragraphs (c) and (d) above could, in practice, entail enforcement problems when jurisdictions not harmonized by the Community directive come into play, and consequently where the applicable rules governing conflict could potentially differ from those existing at the European Community level. For instance, in the case of a company having its registered office in Spain, whose shares are admitted to trading on a market in a non-European Union Member State (a case contemplated in paragraph (d) above), our conflict rules provide that

Spanish regulations applicable to takeover bids govern the exceptions to the obligation to submit a bid. It might happen, however, that the law applicable to takeover bids in such country does not contain a conflict rule parallel to that of the Royal Decree, and such country declares itself competent to regulate the same subject.

1.4. What are the sanctions for failure to abide by the regulations applicable to takeover bids?

The sanctions for failure to comply with the rules applicable to takeover bids for securities are set forth in the Securities Market Act.

Article 99 of the Securities Market Act describes the following as very serious violations:

- (a) Failure to comply with the obligations established in articles 60 (relating to mandatory takeover bids when control of a listed company is reached (see 1.5 below)) and 61 (relating to voluntary takeover bids) of the Securities Market Act and in the set of provisions further developing thereof (i.e., the Royal Decree). The act provides an illustrative list of potential instances of non-compliance which include, among others: (i) non-compliance with the obligation to submit a takeover bid for securities, (ii) the submission thereof outside the maximum period or with material irregularities, (iii) to proceed with a takeover bid for securities without the required authorisation, (iv) failure to publish or send to the National Securities Market Commission the information and documents to be published or sent to such Commission, and (v) publication or provision of information or documents on a takeover bid for securities containing inaccuracies, untruths or misleading information, when such information or documentation is relevant, or the amount of the bid or the number of affected investors is significant.
- (b) Failure by the board of directors of the offeree company to comply with its passivity duties established in the Securities Market Act and in the Royal Decree (see 11 below).
- (c) Failure to comply with duties relating to de-listing (see 7 below) and neutralisation (breakthrough) measures (see 10 below) established in the Securities Market Act and in the Royal Decree.

Article 102 of the Securities Market Act sets forth a list of sanctions that may be imposed for committing very serious violations. Worthy of mention is the sanction consisting of a fine of not less than, or more than five times the amount of, the gross profit made as a result of the actions or omissions that constitute the violation; or, should such standard not apply, of up to the greatest of the following amounts: 5% of the shareholders' equity of the violating entity, 5% of the total funds of the entity or of third parties used in the violation, or € 300,506.

Without prejudice to the sanctions established in the above-mentioned article 102, the Securities Market Act (article 60.3) provides that whoever fails to comply with the obligation to submit a takeover bid for securities may not exercise the voting and related political rights attaching to any of the securities of the listed company which he is entitled to exercise for any reason, and presumes that such obligation has not been fulfilled by whoever fails to submit the bid, or submits it after expiration of the applicable period or with material irregularities. It further provides that resolutions adopted by the decision-making bodies of a company shall be null and void if the securities whose voting and related political rights are suspended for such reason needed to be computed to convene the meeting or pass the resolution,

and authorises the National Securities Market Commission to take the necessary actions to challenge the resolution.

Article 100 of the Securities Market Act provides that the following shall be serious violations:

- (a) Failure to publish or to submit to the National Securities Market Commission the information and documentation that must be published or submitted thereto as a consequence of actions requiring the submission of a takeover bid, within the course or after the completion thereof, when such failure does not constitute a very serious violation.
- (b) The publication or provision of information or documentation relating to a takeover bid in which data has been omitted or which contains inaccuracies, untruths or misleading information, when this does not constitute a very serious violation.

The Securities Market Act also establishes a list of sanctions that may be imposed by the Commission for serious violations. Of note is the sanction consisting of a fine of up to the amount of the gross profit made as a result of the acts or omissions constituting the violation; or, in the event that such standard is not applicable, of up to the greatest of the following amounts: 2% of the shareholders' equity of the violating entity, 2% of its own or third-party funds used in the violation, or € 150,253.

1.5. Types of takeover bids: mandatory and voluntary bids

Spanish regulatory provisions applicable to takeover bids for securities establish two basic categories of takeover bids: takeover bids when control of a listed company is obtained (see 3 below), and voluntary bids. The former are the prototype of mandatory bids and, generally, references to mandatory bids are references to this kind of bid. Two other instances of mandatory bids are provided for: de-listing offers and bids to reduce capital through the acquisition of a company's own shares (see 1.6 below). Technically, the latter are also mandatory bids, inasmuch as they impose the obligation to make a bid (and that is what article 2 of the Royal Decree considers them to be), although the specific circumstances that create the obligation to make them (the de-listing of the shares of a company, in one case, and the reduction of capital by a company through the acquisition of its own shares, in the other) recommend that they be discussed independently of takeover bids where control is obtained. That is because in de-listing offers, the reason for the bid lies in the fact that the de-listing entails a "change in the rules of the game" that requires that prior liquidity be given to minority shareholders, and in the case of a reduction of capital, the takeover bid is merely the channel that enables the company to carry out the purchase of its own shares by observing the principle of equal treatment of all its shareholders.

Finally, the regulatory framework introduced by Act 6/2007 and the Royal Decree no longer provides for takeover bids in the event of an amendment of the articles of association, a type of bid that proved to be of scant utility while Royal Decree 1197/1991, now repealed, was in force.

(a) Mandatory bids when control is obtained

The person or entity that obtains control of a listed company (see 3.1 below for the control thresholds relevant for such purposes) by any of the means contemplated in the Royal Decree (see 3.2 below) has the obligation to make a takeover bid for all the securities of the offeree

company (see 3.3 below) and at an equitable price (see 4.1 below). The bid must be submitted within one month of control of the listed company having been obtained (three months in the case of indirect and unexpected takeovers (see 3.7 below)).

As far as mandatory takeover bids for securities are concerned, pursuant to the provisions of Directive 2004/25/EC, Act 6/2007 and the Royal Decree have made three major structural changes that have already been mentioned in the introduction to this guide.

The first consists of introducing a system of mandatory *ex post* takeover bids. Royal Decree 1197/1991 established a system of mandatory *ex ante* takeover bids that did not allow whoever intended to exceed any of the relevant thresholds for the purposes of the bid (basically, 25% or 50% of the share capital of a listed company) to acquire shares of the offeree company without first making a takeover bid for securities. By contrast, under the new regulations, the obligation to make a takeover bid does not arise because of the intention of the offeror of exceeding the established control threshold (now set at 30% of the voting share capital or the appointment of one-half plus one of the members of the board of directors), but precisely because such threshold is reached. Thus, for instance, the obligation to make a bid will only arise when the offeror has previously acquired shares of a listed company giving it 30% of the voting rights in the offeree company.

The second structural change introduced by the new takeover bid rules is the exclusion of partial bids. Whenever the obligation to make a takeover bid exists because of the acquisition of control of a listed company, the bid must be directed to the acquisition of all the securities of the offeree company. This contrasts with the prior system, where a total takeover bid was only required when the 50% threshold of the share capital of the offeree company was to be reached or exceeded.

The third change, relating to the rules applicable to *ex post* takeover bids, is the introduction of the notion of "equitable price". Whoever is required to make a mandatory takeover bid may no longer do so at any price, but must make it at the equitable price (see 4.1 below) regulated by the Royal Decree.

(b) Voluntary bids

Even if they are not mandatory because the relevant control thresholds for such purposes have not been reached (see 3.1 below), takeover bids may be made voluntarily. Thus, for example, whoever does not hold control of a listed company and seeks to acquire it, or, while already possessing a controlling interest, wishes to increase its interest in the offeree company, may make a voluntary takeover bid. Voluntary bids are governed by the same rules as mandatory bids, with the special provisions established in sub-section 1.7 below.

Voluntary bids are thus suitable for the acquisition of shares that do not raise the interest in the offeree company to 30% of the voting rights or a higher percentage, as well as for the acquisition of an additional interest by whoever already holds more than 50%, i.e., in cases where the acquisition of the shares covered by the bid does not trigger the duty to make a mandatory bid. For the same reason, it is likewise appropriate to increase the interest of whoever already holds an interest of more than 30% and less than 50% in the offeree company and wishes to increase its holding, provided it does not fall within the special case of those who were already in that position on 13 August 2007, the date on which the new rules took effect, since they are subject to a special system (see 3.1 below).

Voluntary bids may also be used to acquire a controlling interest in the offeree company. In that case, following the voluntary bid, the offeror will have the duty to make a mandatory bid unless the exception established in article 8.f) of the Royal Decree applies (see 1.7 below).

1.6. Other types of takeover bids: de-listing and capital reduction

In addition to takeover bids where control of a listed company is obtained and voluntary bids (see 1.5 above), the Royal Decree governs two other types of bids, de-listing offers and takeover bids due to capital reduction through the acquisition of a company's own shares.

(a) De-listing offers

When a company approves the de-listing of its shares from Spanish official secondary markets, it must make a takeover bid as provided in article 10 of the Royal Decree (see 7 below), unless certain exceptions apply.

(b) Takeover bid due to a capital reduction through the acquisition of a company's own shares.

When the capital reduction of a listed company is made through the purchase of its own shares for redemption, without prejudice to the minimum requirements laid down in article 170 of the Spanish Companies Act [*Ley de Sociedades Anónimas*], a takeover bid for securities must be made. This type of bid enables the company to carry out the purchase of its own shares by observing the principle of equal treatment of all its shareholders.

When the purchase of the company's own shares is made pursuant to the provisions of Commission Regulation (EC) No. 2273/2003 of 22 December 2003, implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and the stabilisation of financial instruments, and the number of shares acquired does not exceed 10% of the capital carrying voting rights, a takeover bid shall not be required.

1.7. Do different rules apply to mandatory and voluntary bids? Must a mandatory bid be made if control is obtained through a voluntary bid?

Voluntary bids are governed by the same rules as mandatory bids, with the following special provisions:

- (a) Voluntary takeover bids may be subject to conditions (see 6.1 below).
- (b) Voluntary bids need not be made at an equitable price (see 4.1 below).
- (c) A voluntary bid for less than the total number of securities may be made (which means that partial voluntary bids are allowed) by a party that, as a result thereof, will not acquire a controlling interest or by a party that already holds a controlling interest and is free to increase its shareholdings in the offeree company.

Article 8.f) of the Royal Decree establishes as an instance excluded from the obligation to make a bid the case where control is obtained following a voluntary bid for all the securities of the offeree company upon the occurrence of any of the following circumstances: (i) the bid is made at an equitable price (see 4.1 below); or (ii) the bid has been accepted by

holders of securities representing not less than 50% of the voting rights to which it was directed, excluding from such calculation those already held by the offeror and those held by shareholders who have reached an agreement with the offeror in connection with the bid. In such case, the Royal Decree presumes that the price was equitable.

2.1. May the offeror and the offeree company or its directors reach agreements in connection with the bid, such as confidentiality agreements, exclusivity agreements, commitments to recommend the bid, etc.?

Except for the express regulation of break-up fees (see 2.2 below), the Royal Decree has not introduced any new rules on this matter. In Spanish practice, except for confidentiality agreements under which the future offeror conducts a due diligence review of the target company, it is not customary for the offeree company and the future offeror to enter into any agreements in preparation for the takeover bid. However, there is nothing to prevent the execution of such preparatory agreements. Conversely, agreements in preparation for a bid between the controlling shareholder of the offeree company (and not the company itself) and the potential offeror are relatively common: irrevocable commitments under which the latter undertakes to make a takeover bid and the former to participate therein with its controlling interest (see 2.3 below).

The contents of agreements between the offeror and the offeree company prior to the making of a takeover bid may differ widely. They may consist of the above-mentioned confidentiality agreements pursuant to which the future offeror conducts a due diligence review of the offeree company and undertakes not to use the information made available to it for any purpose other than the making of the bid. Although less common in Spanish practice, they may also consist of a framework agreement under which the offeror undertakes to submit a bid at a given price and the board of directors of the offeree company undertakes to issue a favourable report on the consideration offered (i.e., to recommend the offer).

A limitation on the agreements made prior to the making of a takeover bid derives from the principle of "equal amount of information for competing offerors" established in the Royal Decree (see 2.5 below). As a result of such principle, the offeree company may not undertake generally to make information available to one existing or potential offeror only.

2.2. May the offeree company agree on a break-up fee with the offeror?

One of the new provisions introduced by the new regulation (article 42.4 of the Royal Decree) expressly allows for the possibility of the offeree company and the first offeror agreeing on a

break-up fee. This settles a controversy pursuant to which, in practice and under the previous rules, only the shareholders of the offeree company, rather than the company itself, were allowed to enter into this kind of agreement. The Royal Decree, which considers the break-up fee as a fee payable to the first offeror in compensation for the expenses incurred in preparing the bid in the event that its bid is not successful because of such competing offers having been made, subjects such agreements to four conditions: (i) that the fee does not exceed 1% of the total amount of the bid, (ii) that it is approved by the board of directors of the offeree company, (iii) that a favourable report is obtained from the financial advisors of the offeree company, and (iv) that it is described in the offer document.

2.3. May the offeror secure from a shareholder of the offeree company an undertaking to accept the bid (i.e., an irrevocable commitment)?

While the previous system was in force, irrevocable commitments or agreements whereby the future offeror undertakes to make a takeover bid at a given price and within a given period and the controlling shareholder or shareholders undertake to accept the bid were very common in Spanish practice. Such agreements were the instrument used to get around the obstacle created by such regulation which, by establishing an *ex ante* takeover bid system, prevented the future offeror from acquiring shares of the offeree company when it already intended to exceed any of the thresholds that required that a takeover bid be made. With the legal framework introduced by Act 6/2007 and the Royal Decree, which establish a system calling for a mandatory and *ex post* takeover bid when the threshold of 30% of the voting rights of the target company is exceeded or more than one-half of the members of its board of directors are appointed, part of the reason for executing irrevocable commitments has disappeared: under the new rules, the future offeror is free to acquire shares of the offeree company before making its takeover bid (see 2.8 below).

Notwithstanding the foregoing, there are circumstances in the new system that, in some cases, warrant continuing to have recourse to the execution of irrevocable commitments as a step prior to making a takeover bid. Thus, for example, if the shareholdings sought to be acquired prior to making the bid determine that the offeror will exceed the threshold of 30% of the capital of the offeree company carrying voting rights, the future bid will be mandatory and, accordingly, may not be subject to conditions (see 6.1 below) and the price of the bid must meet the standards for an equitable price (see 4.1 below). Carrying out the purchase and sale of the shareholdings through an irrevocable commitment will make it possible, in some instances, to make the subsequent bid as a voluntary bid and, therefore, make it subject to conditions (such as the removal of defensive mechanisms contemplated in the articles of association) or to make it at a price other than the equitable price. Irrevocable commitments may also be an instrument used to facilitate the subsequent squeeze-out (see 14.3 below) or, in general, to ensure the success of the takeover bid.

2.4. May a due diligence review of the offeree company be conducted? Is there any regulatory restriction on privileged information?

As in the purchase of unlisted companies, a due diligence review of a target company may also be conducted prior to making a takeover bid for securities. However, the scope of such due diligence reviews is generally more limited than in those made of unlisted companies.

Prior to conducting a due diligence review, it is market practice for the target company and the future offeror to enter into a confidentiality agreement whereby the recipient of the information undertakes not to use the information made available by the target company for any purpose other than making the takeover bid (see 2.1 above).

From the standpoint of the regulations on privileged information, conducting a due diligence review prior to making a takeover bid raises a problem for which there is no clear answer, and the discussion of which is largely beyond the scope of this guide.

Nevertheless, some issues are well worth noting. It is clear that conducting a due diligence review prior to the submission of a takeover bid creates a two-fold asymmetry as regards information. On the one hand, with respect to the other offerors that have not conducted it and, on the other, with respect to the addressees of the bid that have likewise not had access to the information that is the subject matter thereof. In connection with the former, such asymmetry as regards information is to a certain extent solved by the Royal Decree in laying down the principle of “equal amount of information for all competing offerors” (see 2.5 below): all existing or potential offerors shall have access to the same amount of information or, at least, shall have the opportunity to have access to the same information.

The issue that is more difficult to resolve is the one regarding the asymmetry of information that is created with respect to the addressees of the bid: when making its bid, the offeror has information which they lack. In this connection, a number of issues should be highlighted that can shed some light on this point:

- (a) First, the information made available to the existing or potential offeror during the due diligence process may be confidential information of the target company (which is not always the case), but that does not mean that it is necessarily privileged information within the meaning of article 81.1 of the Securities Market Act.¹
- (b) Secondly, pursuant to article 82 of the Securities Market Act, which requires that listed companies promptly disclose to the market all information whose knowledge could reasonably affect an investor in acquiring or transferring securities and which could therefore materially influence their listing price, the offeree company should not be in possession of price sensitive information and, if it were, such information should be limited and should not be disclosed to third parties, including potential offerors.
- (c) It is entirely unthinkable that the asymmetry in information with respect to the addressees of the bid should be broken in the same manner as with respect to the other offerors (i.e., by providing them with access to it).
- (d) If the report of the directors of the offeree company is in favour of the bid, this means or should mean that the due diligence review has not given the offeror any “advantage” and that there is therefore no “hidden value” in the company for which the offeror is not paying. It is precisely these “advantages” that the rules regarding privileged information are designed to prevent.

1 Article 81.1 of the Securities Market Act defines privileged information as *“specific information relating directly or indirectly to one or more negotiable securities or financial instruments falling within the scope of this Act, or to one or more issuers of the above-mentioned negotiable securities and financial instruments that has not been made public and that, if made or had it been made public, could materially influence or would have materially influenced its listing price in a market or organized trading system”*.

- (e) Lastly, the rules and regulations regarding privileged information should be construed within the context of the legitimate expectation of the shareholders of receiving the best possible price for their shares. To obtain such price, the potential offeror often first needs to conduct a due diligence review.

Notwithstanding the foregoing, and admitting that due diligence reviews prior to takeover bids are necessary and customary, a measure that could eliminate, or at least mitigate, the risks stemming from the infringement of the rules governing privileged information would consist of the offeror expressly mentioning in the offer document that it has conducted a due diligence review of the target company and stating, in general terms, the areas covered and the main conclusions thereof. This, while not entirely removing asymmetries in information, would give the due diligence review and the bid adequate transparency.

2.5. Are competing offerors entitled to receive the same information that was provided to previous offerors?

The Royal Decree lays down the general principle of “equal amount of information for competing offerors” to put all offerors on the same footing as regards information.

To such end, the Royal Decree imposes on the offeree company the duty of guaranteeing that all competing offerors receive the same amount of information and extends such obligation to potential good-faith offerors. The availability of information to existing or potential offerors is conditional upon fulfilment of the following conditions: (i) the information being specifically requested by the existing or potential offeror, (ii) such information having been previously provided to other existing or potential offerors, (iii) the recipient of the information duly ensuring the confidentiality thereof, and such information being used for the sole purpose of making a takeover bid, and (iv) the information being necessary to make the bid.

2.6. May the offeror obtain representations and warranties to protect itself from potential contingencies of the offeree company?

Owing to the very nature of takeover bids, it is not customary for the offeror to receive representations and warranties to protect itself from potential contingencies of the offeree company. The protection of the offeror from possible contingencies is generally obtained from two sources: (i) the duty of the offeree company to make any price sensitive information public (article 82 of the Securities Market Act) and (ii) the possibility of conducting a due diligence review (see 2.4 above) of the target company.

Notwithstanding the foregoing, there is nothing to prevent the offeror and the significant shareholders of the offeree company from entering into an agreement whereby the latter give the former representations and warranties in connection with the target company (and in fact, that is sometimes the case).

2.7. What reporting obligations does the offeror have if the bid is leaked to the market before it goes into effect?

If the bid is leaked to the market, the National Securities Market Commission will normally require that the target company confirm or deny the information. The National Securities

Market Commission may also require that the potential offeror publish a “significant event” [*hecho relevante*] regarding the matter.

2.8. May the future offeror acquire shares before making the takeover bid?

Compared with the rules in place under the previous system, pursuant to which whoever intended to make a takeover bid could not previously acquire shares of the offeree company, Act 6/2007 and the Royal Decree have established a mandatory *ex post* takeover bid system. This leaves the future offeror free to acquire shares of the offeree company prior to making the bid.

However, the acquisition of shares prior to making the takeover bid may have significant consequences for the future bid. Thus, for instance, (i) if the acquisition results in the offeror reaching any of the control thresholds set in the Royal Decree (see 3.1 below), the bid will be mandatory and may thus not be subject to conditions (see 6.1 below) and the price shall comply with the equitable price requirements (see 4.1 below) and, (ii) if securities carrying 5% or more of the voting rights of the offeree company are acquired in cash and the bid is announced within 12 months following the acquisition, the consideration offered in the takeover bid must at least include a cash alternative (see 4.4 below).

3.1. What are the relevant control thresholds for purposes of takeover bids?

The relevant control thresholds for purposes of takeover bids are the following:

- (i) direct or indirect acquisition of a percentage of voting rights in the listed company equal to or in excess of 30%; or
- (ii) holding any interest carrying less than 30% of voting rights but appointing, within 24 months following the acquisition, a number of directors which, together with those already appointed by it, if any, represents more than one-half of the members of the board of directors (see 3.9 below).

There are also special rules for those who, as of 13 August 2007, directly or indirectly hold an interest carrying 30% or more, but less than 50%, of the voting rights of a listed company. In such case, the shareholder must make a mandatory takeover bid in any of the following circumstances:

- (i) if it acquires shares of the company that increase its interest by at least 5% over a 12-month period;
- (ii) if it obtains a percentage of votes that is equal to or greater than 50%; or
- (iii) if it acquires an additional interest and, within 24 months following such acquisition, appoints a number of directors which, together with those previously appointed by it, if any, represent more than one-half of the members of the board of directors of the company.

3.2. How may control of a listed company be obtained?

Control of a listed company may be obtained in any of the following manners:

- (i) by means of the acquisition of shares or other securities that directly or indirectly carry voting rights in such company;

- (ii) through shareholders' agreements [*pactos parasociales*] with other shareholders; or
- (iii) as a result of indirect or unexpected takeovers.

The acquisition of securities or other instruments entitling the holder to the subscription, conversion, exchange or acquisition of voting shares does not create an obligation to make a takeover bid as long as such subscription, conversion, exchange or acquisition does not occur. This means, for example, that the acquisition of convertible or exchangeable debentures is not relevant for the purposes of a takeover bid as long as such debentures are not converted into or exchanged for shares of the listed company.

3.3. What are the consequences of obtaining control of a listed company?

Whoever obtains control of a listed company will normally be required (except in exceptional cases, see 5 below) to make a takeover bid. Such takeover bid must be addressed to:

- (i) all the holders of voting shares of the listed company;
- (ii) all the holders of non-voting shares of the listed company who, at the time of requesting authorisation for the bid, are entitled to vote; and
- (iii) all the holders of pre-emptive rights, as well as the holders of debentures convertible into or exchangeable for shares.

The bid need not be addressed to the holders of warrants or other securities or instruments entitling the holder to acquire or subscribe for shares but, if it is, the takeover bid must afford equal treatment to all holders of such securities, and such bid must therefore be addressed to all of them.

3.4. In what cases is the submission of a bid mandatory when two or more shareholders act in concert?

Concert or concerted action is deemed to exist when two or more persons cooperate pursuant to an agreement (which may be express, implicit, oral, or written) in order to obtain control of a listed company. This means that there will be concert triggering the obligation to submit a bid when two or more shareholders who are parties to an agreement of this kind jointly obtain an interest carrying 30% or more of the voting rights or when, while holding a lesser interest, they appoint more than one-half of the members of the board of directors.

The Royal Decree presumes that concert exists when the persons in question have entered into a shareholders' agreement [*pactos parasociales*] mentioned in article 112 of the Securities Market Act, as long as such agreement is intended to establish a common policy as to the management of the company or is aimed at exercising significant influence thereon. The parties to an agreement that, while having the same purpose, governs voting rights on the board of directors or executive committee of the company are also presumed to be acting in concert. This means that:

- (a) Not all shareholders' agreements disclosed to the market as required under article 112 of the Securities Market Act mean that there is concert that is relevant for purposes of takeover bids.

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- (b) Of the shareholders' agreements described in article 112 of the Securities Market Act, only those intended to establish a common policy or aimed at exercising significant influence on the management of the company will be relevant for purposes of takeover bids.
 - (c) The reference to the agreements which, with the same purpose, govern the right to vote on management decision-making bodies should be deemed to be limited to those board-level voting trusts that may be considered lawful. Board-level voting trusts are generally considered unlawful if the purpose thereof is to determine or link the vote of directors to prior agreement among shareholders. By contrast, shareholders' agreements intended to regulate the structure of the board and the appointment to positions thereon (the appointment of the chairman, vice-chairman, chief executive officer, secretary, etc.), as well as those establishing a system of qualified majorities for the board, are entirely lawful and admissible, so that, in principle, such regulatory provision must be deemed to refer to this type of agreement. Still, it will not always be easy to argue that a lawful agreement such as those described above may, considering its limited effectiveness, be deemed to be designed to exercise a common policy in the management of the company or be aimed at exercising significant influence thereon.

3.5. May voting rights held by third parties be attributed to a shareholder? What are the rules in this respect?

The voting rights that are relevant to determine whether or not the threshold for the takeover bid has been exceeded are generally those held by the shareholder in question, including both those arising from its ownership of shares and those held by virtue of usufruct, pledge or under any other contractual provision.

In addition, the voting rights held by other persons or entities are attributed to the shareholder in the following cases:

- (a) The voting rights held by other companies of the same group (according to the concept of group provided by article 4 of the Securities Market Act).
- (b) The voting rights held by the members of the board of the shareholder and of the companies of the same group. Evidence to the contrary is admitted, for instance, in our opinion, in the case of a proprietary director [*consejero dominical*] of another group or of an independent director.
- (c) Voting rights held by a third party but that may be exercised freely and permanently under a specific power of attorney granted by the holder thereof, in the absence of express instructions.
- (d) The voting rights attaching to shares held by a nominee [*persona interpuesta*] (i.e., the person whom the person required to make the bid secures in whole or in part from the risks involved in the acquisition, transfer or possession of the shares).
- (e) The voting rights carried by the shares that are the underlying assets or the subject matter of financial agreements or swaps, when such agreements cover, in whole or in part, the risks involved in the ownership of the securities and thus have an effect similar to that of holding the shares through a nominee.
- (f) The voting rights held, directly or indirectly, by persons acting in their own name but for the account of, or in concert with, the shareholder (see 3.4 above).

3.6. What is the basis for the calculation of voting percentages? Are treasury shares included or not?

The percentage of voting rights relevant for purposes of takeover bids must be calculated on the basis of all shares carrying voting rights, even if such rights have been suspended. Non-voting shares shall only be computed if they carry voting rights under current regulations (for example, in the event of non-payment of preferred dividends).

However, shares which, in accordance with the information available on the date of calculation, are owned directly or indirectly by the offeree company will be excluded from the calculation basis. This means that, in a company where 5% of voting capital is represented by treasury shares, the threshold for takeover bids will be reached upon the acquisition of 30% of 95%, i.e., 28.5% of the entire share capital. If, as a result of changes in the treasury stock of the offeree company, a shareholder reaches any of the control thresholds that are relevant for the purposes of takeover bids, specific rules established in the Royal Decree come into play which basically require the divestment of the shareholdings that exceed 30% and, in the meantime, ban the exercise of the voting rights corresponding to the excess over such percentage (see 3.7.4 below).

3.7. Are there special rules regarding indirect or unexpected takeovers [*tomas de control indirectas o sobrevenidas*] of listed companies?

Article 7 of the Royal Decree lists five cases of indirect or unexpected takeovers of listed companies that may render the making of a takeover bid mandatory. Three of them will not normally involve the acquisition of shares of the offeree company (mergers or indirect takeovers, capital reductions and changes in the treasury stock of the listed company) while the other two (cases of conversion or exchange and acquisitions by underwriting of issuances) do involve such acquisition. Below is a more detailed description of such five cases:

3.7.1. Merger or takeover of another company or entity (“Shareholding Entity”) that holds a direct or indirect interest in a third-party listed company (“Listed Company”)

If control of the Shareholding Entity (which need not be a listed company or be domiciled in Spain) is acquired, or if the Shareholding Entity is merged such that, as a result of such takeover or merger, at least 30% of the voting rights in a third-party company (the Listed Company) are obtained, a takeover bid, directed to the whole of the share capital, must be made within three months of the date of the merger or takeover.

The takeover bid must be made at the equitable price pursuant to the rules of article 9 of the Royal Decree (see 4.1 below), so that, if the offeror or the persons acting in concert with it have not acquired shares in the Listed Company during the 12 previous months, such price shall be not less than the amount that results from using the criteria applicable to de-listing offers (see 7.2 below).

Since article 4 of the Royal Decree establishes the notion of control applicable for purposes of such Royal Decree, control of the Shareholding Entity must be deemed to be acquired in the same cases as for a listed company, i.e., (i) when a percentage of voting rights that is equal to or greater than 30% is obtained directly or indirectly or (ii) when a lesser percentage is

obtained but more than one-half of the members of the board of the Shareholding Entity have been appointed within 24 months. This provision can make sense if the Shareholding Entity is also listed, but is excessively stringent if it is an unlisted company or entity.

The making of a bid will not be mandatory in the following two cases:

- (a) If, within the three-month period following the merger or takeover, there is a transfer of the number of securities required to reduce the excess over the aforementioned percentages of voting rights and so long as the voting and related political rights corresponding to the excess over such percentages are not exercised in the meantime. The Royal Decree does not specify the percentages that must be reduced, i.e., whether it is the interest of the Shareholding Company in the Listed Company that must be reduced or whether the takeover bid may also be avoided by reducing the controlling interest acquired in the Shareholding Entity, although it seems reasonable to conclude that the takeover bid may be avoided in either of the two cases.
- (b) If a waiver is granted by the National Securities Market Commission because a third party has the same or a greater percentage of voting rights (see 5.3 below).

The fact that triggers this obligation to make a takeover bid (commonly known as indirect or unexpected takeover bids) derives from the system established under the previous regulations. However, article 7.1 of the Royal Decree makes no reference to the fact that this case is already contemplated in articles 3 and 4, which establish the general type of mandatory takeover bid when control is obtained, since it provides that takeover may occur directly or indirectly (see 3.1 and 3.2 above). As a result, the regulation on indirect takeover bids by merger or takeover of the Shareholding Entity contemplated in article 7.1 of the Royal Decree could be misleading. Thus, for instance, the acquisition of control of an unlisted company "A" whose sole asset is, in turn, its 35% interest in a third-party listed company "B" is a case that falls within both the general case of mandatory takeover bid when control is obtained and the case of indirect takeover bid described in article 7.1 of the Royal Decree. And the classification as one or the other has important consequences. In the first case, it will trigger the obligation to make a mandatory takeover bid within one month of takeover and, in the second, the period within which the takeover bid must be made is three months. In addition, such takeover bid may also be avoided by reducing the interest held in company "B" below 30%.

3.7.2. Capital reduction of a listed company

When, as a result of a capital reduction of a listed company, a shareholder obtains not less than 30% of the voting rights of the company, the shareholder in question must make a takeover bid directed to the entire share capital. Although the Royal Decree does not expressly provide it, it seems reasonable to apply the same rule to those shareholders who, as of the entry into force of the new rules (13 August 2007) hold an interest of between 30% and 50% and, as a result of the reduction, reach or exceed 50% of voting rights.

The bid shall be made within three months of the date of the capital reduction. The rules for the determination of the equitable price established in article 9 of the Royal Decree (see 4.1 below) shall apply to such bid, and accordingly, if the offeror or the persons acting in concert with it have not acquired shares of the listed company in the 12 previous months, the price shall be not less than the amount that results from following the criteria applicable to de-listing offers (see 7.2 below).

The making of a bid shall not be mandatory in the following two cases:

- (a) When, within three months of the date of the capital reduction, there is a transfer of the number of shares required to reduce the excess of voting rights over the aforementioned percentages and the political rights corresponding to the excess over such percentages are not exercised in the meantime.
- (b) When a waiver is granted by the National Securities Market Commission because a third party holds the same or a greater percentage of voting rights (see 5.3 below).

3.7.3. Conversion or exchange of securities

When shares of a listed company are acquired through the conversion or exchange of other securities or financial instruments and, as a result thereof, a shareholder obtains at least 30% of the voting rights of the company, the shareholder in question shall be required to make a takeover bid directed to the whole of the share capital of the company.

The bid must be made within three months of the date of subscription, conversion or exchange. It must also be made at an equitable price pursuant to the rules of article 9 of the Royal Decree (see 4.1 below), which will normally be not less than the highest price that the offeror or the persons acting in concert with it paid or agreed to pay for the same securities in the 12 months prior to the announcement of the bid. When the securities have been acquired by means of an exchange or conversion, the equitable price will normally be the weighted average of the market price of such securities on the acquisition date.

The making of the bid will not be mandatory in the following two cases:

- (a) When, within three months of the date of subscription, conversion or exchange, there is a transfer of the number of shares required to reduce the excess of voting rights over the specified percentages and so long as the political rights corresponding to the excess over such percentages are not exercised in the meantime.
- (b) When a waiver is granted by the National Securities Market Commission because a third party holds the same or a greater percentage of voting rights (see 5.3 below).

3.7.4. Changes in treasury stock

When, as a result of changes in treasury stock, a shareholder obtains not less than 30% of the voting rights of the company (for example, a shareholder holds 28.5% of the capital in a company that subsequently acquires 5% of its capital as treasury stock, or, as of 13 August 2007, a shareholder holds 47.5% of the capital of a company which subsequently acquires 5% of its capital as treasury stock) the shareholder in question must make a takeover bid directed to the whole of the share capital.

The bid must be made within three months of the date of notice by the company of the changes in its treasury stock. It must furthermore be made at the equitable price pursuant to the rules of article 9 of the Royal Decree (see 4.1 below) and, accordingly, if the offeror or the persons acting in concert with it have not acquired shares of the listed company in the 12 preceding months, the price shall be not less than the amount that results from following the criteria applicable to de-listing offers (see 7.2 below).

The making of a bid shall not be mandatory in the following two cases:

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- (a) When, within three months of the date of the notice by the company of the changes in its treasury stock, there is a transfer (whether by the person required to make the bid or by the listed company itself) of the number of shares required to reduce the excess of voting rights over the specified percentages and so long as the political rights corresponding to the excess over such percentages are not exercised in the meantime.
 - (b) If the National Securities Market Commission grants a waiver because a third party has the same or a greater percentage of voting rights (see 5.3 below).

3.7.5. Commitment to underwrite issuances

Financial institutions and any other person that, in compliance with a contract or commitment to underwrite an issuance or a public offer for the sale of securities of a listed company, reach not less than 30% of voting rights of the company must make a takeover bid for the whole of the share capital.

The bid must be made within three months of the date of the closing of the issuance. It must furthermore be made at the equitable price pursuant to the rules of article 9 of the Royal Decree (see 4.1 below), which will normally be not less than the highest price paid or agreed upon by the offeror or the persons acting in concert with it for the same securities in the 12 months prior to the offer.

The making of the bid shall not be mandatory in the following two cases:

- (a) When, within three months of the closing date of the issuance, there is a transfer of the number of securities required to reduce the excess of voting rights over the specified thresholds, so long as the political rights corresponding to the excess over such thresholds are not exercised in the meantime.
- (b) When the National Securities Market Commission grants a waiver because a third party has the same or a greater percentage of voting rights (see 5.3 below).

Finally, there are two issues that are common to the five cases of indirect or unexpected takeover bid which should be noted:

- (a) Until the takeover bid is authorised by the National Securities Market Commission, the offeror and those acting in concert with it may not exercise the voting rights corresponding to 30% or more of the share capital of the offeree company.
- (b) The significant event [*hecho relevante*] making public the occurrence of the event triggering the obligation to make the unexpected takeover bid (see 8.1 below) shall also announce whether the bid will be made or whether the option of reducing the interest below the threshold that triggers such obligation will be exercised.

3.8. Who is required to make the bid?

The bid must be made by the shareholder who has reached or exceeded the threshold of the respective takeover bid. In the cases of concerted action, shareholders' agreements [*pactos parasociales*] or other cases where the voting percentages corresponding to other shareholders are attributed to a given person, the bid must be made by whoever holds the greatest percentage directly or indirectly. When two or more shareholders have the same percentages, all of them shall be required to make the bid jointly.

3.9. In the case of takeover bids because of the appointment of more than one-half of the directors, how is it determined that such directors were appointed by the shareholder in question?

The regulations establish a number of rebuttable presumptions regarding the appointment of the members of the board of directors of the offeree company. In such cases, unless otherwise proven, the director is deemed to have been appointed by the shareholder. Such presumptions are the following:

- (a) When the board member has been appointed by the holder of the equity interest or by a company belonging to the same group as the holder in the exercise of its right of proportional representation.
- (b) When the appointed director is or has been over the 12 months prior to his appointment, a director, senior manager, employee of or non-sporadic provider of services to, the holder of the interest or companies belonging to the same group as such holder.
- (c) When the appointment resolution could not have been approved without the affirmative votes cast by the holder of the equity interest (or by companies belonging to the same group as such holder) or by the board members previously appointed by such holder.
- (d) When the person appointed is itself the holder of the equity interest in question or a company belonging to the same group as such holder.
- (e) When in the corporate documents (minutes, notarial instruments, etc.) or the publicly available information of the company or of the holder of the interest, the latter asserts that the director has been appointed by such holder, or that he/she represents it or that he/she is a proprietary director [*consejero dominical*] in the offeree company by reason of his/her relationship with such holder.

In no event shall a shareholder be deemed to have appointed board members that are classified as independent directors or as proprietary directors representing other shareholders that do not act in concert with the holder of the equity interest. The provisions of the Uniform Good Governance Code [*Código Unificado de Buen Gobierno*] shall be followed to determine the classification of such directors.

3.10. Is the making of a takeover bid mandatory when the acquisition of the shares of the offeree company is made within the framework of a redistribution of securities within the same group?

The making of a takeover bid is not mandatory when the relevant voting rights continue to be attributed to the same person. Thus, for example, when the controlling interest is transferred from one company of the group to another, the transferee will not be required to make a takeover bid (see 3.5 above).

Consideration for the takeover bid (minimum price, adjustments and changes, guarantees, equal treatment, etc.)

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4.1. At what price must a takeover bid be made?

As regards mandatory takeover bids because of control having been reached, the new takeover bid regulations introduce the notion of “equitable price”. The “equitable price” may not be less than the highest price that the offeror or persons acting in concert with it have paid or agreed to pay for the same securities over the 12 months prior to the announcement of the bid (see 8.1 below). When the acquisition includes any compensation in addition to the price paid or agreed, or when deferred payment has been agreed upon, the equitable price shall take into account such compensation or deferred payment. There are also special rules to calculate the consideration agreed in the cases where the shares of the offeree company were acquired through the exercise of call and put options, derivatives and exchange or conversion of other securities.

In the event that the offeror did not make any acquisitions in the 12 months prior to the announcement of the takeover bid, the equitable price may not be less than the price calculated pursuant to the valuation rules set forth in article 10 of the Royal Decree for de-listing offers (see 7.2 below).

There are cases where the National Securities Market Commission can modify the price calculated in accordance with the provisions of the two preceding paragraphs (see 4.2 below).

It is not mandatory for voluntary bids to be made at an equitable price. The price of de-listing offers is governed by the above-mentioned article 10 of the Royal Decree.

4.2. Are there exceptions to the obligation to make a mandatory takeover bid at an equitable price?

The National Securities Market Commission may modify the equitable price calculated in accordance with the provisions of sub-section 4.1 above upon the occurrence of any of the following exceptional circumstances:

- (a) The listing price of the securities of the offeree company during the reference period has been affected by the payment of dividends, a corporate transaction or any extraordinary event that warrants an objective correction of the equitable price.
- (b) The listing price of the securities of the offeree company during the reference period shows reasonable signs of manipulation, as a result of which a sanction proceeding has been commenced by the National Securities Market Commission, and provided that notice of the statement of charges has been served upon the interested party.
- (c) The equitable price was lower than the trading range for the securities on the date of the acquisition when such price was determined, in which case the bid price shall not be less than the lower price in such range.
- (d) The equitable price corresponds to an acquisition for a volume that is not significant in relative terms and provided that it was carried out at the listing price, in which case the applicable price shall be the highest price paid or agreed upon under the other acquisitions during the reference period.
- (e) The acquisitions during the reference period include any compensation in addition to the price paid or agreed upon, in which case the bid price shall not be less than the highest price that results after including the amount of such compensation.
- (f) The offeree company can be shown to be undergoing serious financial difficulties, in which case the consideration in the bid shall be such as results from applying the valuation rules established for de-listing offers (see 7.2 below).

4.3. May shareholders with whom the acceptance of a takeover bid was agreed upon in advance be offered a different price or any kind of advantage?

No. Regardless of the form of payment of the price, the equal treatment of the holders of securities in the same circumstances must be ensured.

4.4. How may payment be made? May shares be offered? On what terms?

The consideration in the bid may consist of cash, securities or a combination of both. Accordingly, shares may be offered as consideration. However, bids must include, at least as an alternative, a cash consideration that is at least financially equivalent to the value of the exchange offered in the following cases:

- (a) When the offeror or the persons with whom it acts in concert have acquired in cash, over the 12 months prior to the announcement of the bid, securities carrying not less than 5% of the voting rights in the offeree company.
- (b) In the case of mandatory bids due to control of a listed company having been reached (see 3.1 above), including bids derived from indirect or unexpected takeovers (see 3.7 above).
- (c) In the event the consideration of the bid consist of securities, unless the securities offered in exchange:

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- (i) have been admitted to trading on a Spanish official secondary market or on another regulated market of a Member State of the European Union, or
 - (ii) are securities to be issued by the offeror company itself, provided the following requirements are met, that (y) the share capital of the offeror company is admitted to trading on any of such markets, and (z) the offeror undertakes to request the admission to trading of the new securities within three months of publication of the result of the bid.

When the securities offered in exchange are not admitted to trading on any of the markets referred to above, a valuation report prepared by an independent expert shall be submitted with an assessment of the value of such securities.

When the securities offered in exchange have yet to be issued by the offeror company, the Royal Decree also establishes certain obligations regarding the convening of the general meeting of shareholders of the offeror and the adoption of resolutions providing for the issuance of securities by the shareholders at such meeting. The most significant of such obligations is for the board of the offeror, at the same meeting where it is resolved to make the takeover bid, to resolve to convene a general meeting of shareholders to decide on the issuance of the securities offered as consideration.

4.5. How and when must the consideration offered be guaranteed?

When the consideration offered consists of cash, the offeror must provide a bank guaranty or documents showing that a cash deposit has been made with a credit institution, securing payment of the cash consideration vis-à-vis the market members or settlement systems and vis-à-vis the acceptors of the bid, and allowing for the use thereof by the clearing and settlement system of the market on which the securities covered by the bid are traded.

When the consideration offered consists of securities that have already been issued, evidence shall be provided that they are available and earmarked towards the result of the bid. Although the Royal Decree does not mention it, submission of a certificate that such securities have been blocked should satisfy such requirement.

When the consideration offered consists of securities to be issued by the offeror company, the new regulations require that the board members thereof act in a manner that is not inconsistent with the decision to make the bid. The Royal Decree does not establish any specific documentary requirement to evidence that such is the case. In the event that the National Securities Market Commission believes that there is an insufficient degree of earnestness in the submission of the bid, it may require that board members provide guarantees securing them against any liabilities they might incur for the damage that might be caused if the issuance of the relevant securities is not carried out in accordance with the terms of such issuance.

Evidence of the guarantee for the consideration offered must be provided to the National Securities Market Commission when filing the request for authorisation of the takeover bid or within not more than seven business days of such date (see 8.3 below).

4.6. Until what time may the price be modified and what are the consequences thereof?

Provided such change is an improvement, the price may be modified at any time prior to the five calendar days preceding the expiration of the period for acceptance of the takeover bid.

The modification of the price must be authorised by the National Securities Market Commission, which may extend the period for acceptance of the bid if it deems it necessary.

The increase in the offered price entails the obligation for the offeror to adjust the bid guarantee (see 4.5 above).

The rule is different if there are competing offers: the consideration may be modified until the submission of the envelopes, and the first offeror may modify the consideration even thereafter under certain circumstances (see 13.5 below).

4.7. May the offeror acquire shares of the offeree company outside the takeover bid during the bid process? What are the consequences of such acquisition?

Yes, although the consequences will not be trivial. The acquisition of shares of the offeree company by the offeror or by persons acting in concert therewith outside the bid during the bid process will have the following consequences:

- (a) When the bid is conditional upon obtaining a minimum number of acceptances (see 6.1 below), the acquisition will entail the removal of that and any other condition.
- (b) When the consideration offered consists in whole or in part of securities, the acquisition will create the obligation to offer an alternative consideration in cash that is at least equivalent to the highest price paid for the securities acquired outside the bid.
- (c) If the consideration in the bid consists solely of cash, the acquisition for a price higher than that offered in the takeover bid shall automatically result in the price offered being raised to equal the highest price paid. In such cases, the amount of the guarantees provided must be increased (see 4.5 above). Such increase shall be made within three business days of the date of the acquisition.

Notice of the acquisition shall be given to the National Securities Market Commission as significant information [*información relevante*] on the date on which it is made. The National Securities Market Commission may reopen the bid and adopt such measures as it deems necessary in connection with the modification of the terms of the bid.

5.1. What is the difference between excluded instances, waivable instances and instances that are not subject to the obligation to make a takeover bid?

Excluded instances are those where, even though the circumstances set forth in the Royal Decree creating the obligation to make a takeover bid are present, the Royal Decree itself automatically exempts the recipient from the obligation to make it.

Waivable instances are those where, while the circumstances triggering the obligation to make a takeover bid are likewise present, the Royal Decree gives the National Securities Market Commission the possibility of expressly waiving such obligation in respect of the recipient at its request and on a case-by-case basis, provided the conditions established in the Royal Decree itself are met. The waiver is a new legal device in Spanish regulations governing takeover bids and, in keeping with the most advanced statutory provisions on the matter, seeks to give the National Securities Market Commission a discretionary margin in the enforcement of the Royal Decree to mitigate the rigidity that our system has suffered from since its inception.

Lastly, instances that are not subject to the obligation to make a takeover bid are those where the requirements triggering the obligation to make a takeover bid established in the Royal Decree are not met. For example, when the holder of 55% of the share capital of a listed company acquires additional shares to reach 100% of such capital.

5.2. In what instances does the new Royal Decree exclude the obligation to submit a takeover bid and what are the main differences from the previous regulations?

Generally speaking, the exceptions provided for in the Royal Decree do not differ materially from those established in Royal Decree 1197/1991.

The exclusions established in the Royal Decree are as follows:

- (a) The exclusion relating to the acquisition of shares of listed companies by Funds for the Insurance of Deposits in Banking Entities [*Fondos de Garantía de Depósitos en Establecimientos Bancarios*], Savings Banks [*Cajas de Ahorro*] or Credit Cooperatives [*Cooperativas de Crédito*], the Investment Guarantee Fund [*Fondo de Garantía de Inversiones*], the Insurance Compensation Consortium [*Consortio de Compensación de Seguros*], and other legally established institutions of a similar nature remains basically unchanged. The exclusion comprises not only the acquisition of securities by such institutions, but also allotments that the aforementioned bodies make, subject to the rules on disclosure and competition of offers. The exclusion also extends to indirect takeovers, provided that the competent authority deems it appropriate (see 3.7 above).
- (b) The exclusion relating to acquisitions or other transactions made pursuant to the Compulsory Purchase Act [*Ley de Expropiación Forzosa*] remains unchanged from the system established in Royal Decree 1197/1991.
- (c) The agreement by all holders of securities of the offeree company to sell or exchange all or part of the securities carrying voting rights in the company or to waive the sale or exchange of their securities under the rules applicable to takeover bids continues to be grounds for exclusion, with the added obligation for the holders of such securities to simultaneously agree to de-list such securities from the official secondary markets where they are admitted.
- (d) The scope of application of the grounds for exclusion relating to the capitalisation of claims in cases of insolvency of the offeree company is expanded, since the new rules do not require that the offeree company be undergoing bankruptcy proceedings, but only that the financial feasibility of the offeree company be in serious and imminent danger. The system established in Royal Decree 1197/1991 has thereby been materially improved by including the “bailout operations” that are common in the legislation of our more advanced environment. It shall fall upon the National Securities Market Commission to resolve whether such exception applies; the system is thus closer to waiver than to exclusion.
- (e) A new reason for exclusion is included relating to the gratuitous acquisition of securities, be it *inter vivos* or *mortis causa*. In *inter vivos* gratuitous transactions, it is required that the recipient not have acquired securities in the 12 months prior to the acquisition and that it should not act in concert with the transferor. Under the previous rules, such gratuitous acquisitions were instances that were not included within the scope of application of takeover bid regulations, since the previous article 1 of Royal Decree 1197/1991 required that acquisitions be made for valuable consideration.
- (f) A new reason for exclusion is provided for, whereby the shareholders of companies affected by a merger who, as a result of such merger, reach a percentage of 30% or more of the share capital carrying voting rights of the resulting listed company, will be exempt from the obligation to make a takeover bid, provided that (i) they did not vote in favour of the merger at the respective general meeting of shareholders, and (ii) it can be shown that the primary purpose of the transaction is not the takeover of the resulting company but an industrial or corporate purpose.

The new Royal Decree thereby establishes a system that is more stringent than that existing under Royal Decree 1197/1991, since this type of merger was not included within the scope of application thereof, in spite of the language of the previous article 1. Only those mergers that entailed indirect takeovers of a third-party listed company (an instance from which the current article 7 derives) were transactions subject to takeover bids.

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- (g) The exclusion relating to concentration transactions through joint control is abolished.
 - (h) Lastly, the acquisition of a percentage equal to or greater than 30% of the voting rights of a listed company through a prior voluntary bid is an instance that is excluded from the obligation to make a mandatory takeover bid, provided the requirements established in article 8.f) of the Royal Decree are met (see 1.7 above).

5.3. In what instances and under what conditions may the National Securities Market Commission waive the obligation to make a takeover bid?

Pursuant to the Royal Decree, the CNMV shall waive the obligation to make a takeover bid if the recipient company reaches or exceeds 30% of the voting rights in the offeree company in the event that another entity holds, individually or collectively with the persons acting in concert therewith, a voting percentage in the offeree company equal to or greater than that held by the party required to make the bid. The waiver for this reason shall also apply in the case of a mandatory takeover bid because of indirect or unexpected acquisition of a controlling interest provided for in article 7 of the Royal Decree (see 3.7 above).

The waiver shall be conditional upon the other entity not reducing its shareholdings below those held by the shareholder that has been the beneficiary of the waiver and upon the latter not appointing more than one-half of the members of the board of the offeree company. If this happens or if the waiver is not obtained, the interested party shall be required to submit a takeover bid unless it transfers, within a period of three months, the number of securities required to reduce the excess of voting rights over the aforementioned percentage and provided that it does not exercise voting rights corresponding to the excess over such percentages in the meantime.

Article 4.2 of the Royal Decree governs the general waiver system applicable to this instance. Under the aforementioned article, the waiver must be requested from the National Securities Market Commission by the interested party, who shall at the same time give notice thereof to the offeree company. The latter shall have a period of three business days within which to file allegations with the National Securities Market Commission. Within 10 business days of the request, the National Securities Market Commission shall give notice of its reasoned decision to the interested party, to the offeree company and shall make it public on its website.

5.4. What other instances of exclusion does the Royal Decree provide for and what are the conditions to be met for the exemption from the obligation to make a takeover bid to apply?

If any of the instances of indirect or unexpected acquisition of a controlling interest provided for in article 7 of the Royal Decree occurs (see 3.7 above), the indirect or unexpected recipient of such controlling interest must make a takeover bid for the entire share capital of the offeree company unless, within three months following the date on which the event triggering the obligation to make a takeover bid is determined to have occurred, it transfers the number of securities required to reduce the excess over 30% of the securities of the offeree company to a third party and does not exercise the political rights corresponding to the excess over such

percentage in the meantime. It shall likewise not be required to make the bid if the National Securities Market Commission grants a waiver as provided in the aforementioned article 4 of the Royal Decree (see 5.3 above).

6.1. To what conditions may the effectiveness of the takeover bid be made subject?

Except as mentioned below in connection with the authorisation of the transaction by the competition authorities (see 6.3 below), as regards this issue, a distinction must be made between mandatory and voluntary bids. The former may not be made subject to any condition.

By contrast, the effectiveness of voluntary bids may be made subject to conditions. Only those conditions (i) that are included in the list of admissible conditions set forth in the Royal Decree and (ii) which allow for verification of compliance or non-compliance upon expiration of the period for acceptance of the bid, will be permitted. By imposing a time limit on conditions (the necessary verifiability of compliance therewith at the end of the period for acceptance of the bid), the Royal Decree seeks to provide certainty for bids subject to conditions.

The Royal Decree includes the following list of permitted conditions:

- (a) The approval of amendments to the articles of association or of structural amendments (such as, for instance, a merger or split-off) or the adoption of other resolutions by the shareholders at a general meeting of shareholders of the offeree company.
- (b) Acceptance of the bid for a certain minimum number of securities of the offeree company.
- (c) Approval of the bid by the shareholders at a general meeting of shareholders of the offeror company.
- (d) Any other condition that the National Securities Market Commission deems admissible under the law.

One of the new provisions introduced by the Royal Decree is that when the bid is made subject to acceptance thereof by a specified number of securities, it is no longer necessary, as was

the case under Royal Decree 1197/1991, that the difference between the maximum number of securities to which the bid is directed and the minimum number of securities upon the acquisition of which the effectiveness of the bid is made contingent to be equal to or greater than 20%. Thus, under the new system, a bid directed to the whole of the share capital of the offeree company may, for instance, be made subject to acceptance thereof by 90% of the share capital (the relevant threshold for squeeze-out purposes (see 14.3 below)).

Another new development in this matter is the possibility for voluntary bids (but not mandatory bids) to be made contingent upon approval thereof by the shareholders at the offeror's general shareholders' meeting. This possibility will facilitate the making of bids by foreign companies, which, in some cases and depending on the amount of the transaction,² may be required by the law of their country to secure the prior authorisation of the shareholders at a general meeting of shareholders. This settles an issue raised by the previous system which, by requiring that the offeror provide a certificate of the resolution to make the bid adopted by the appropriate body when submitting the bid, rendered the possibility of including this type of condition at least doubtful. It should be noted that this issue did not arise where the offeror was a Spanish company since, under Spanish law, the body that is generally competent to approve the making of a takeover bid with a cash consideration is the board of directors, regardless of the amount of the bid.

6.2. May compliance with the conditions be waived? Until what time?

Voluntary bids will be rendered void if, upon expiration of the period for acceptance, the conditions to which they were made subject have not been complied with. Nevertheless, the offeror may waive the condition to which its bid is subject and acquire the securities which have accepted it.

If the condition consists of acceptance of the bid by a given minimum number of securities of the offeree company, such condition may be waived when, at the end of the acceptance period, the National Securities Market Commission advises the offeror of the result of the bid.

In all other cases, waiver by the offeror of compliance with the condition will have to be effected not later than the day prior to the expiration of the acceptance period.

6.3. May the effectiveness of the takeover bid be made subject to approval of the transaction by competition authorities or by other regulatory authorities?

When the takeover bid, whether mandatory or voluntary, entails the existence of an economic concentration transaction, whether in Europe, Spain or in any other jurisdiction, the Royal

2 For example, in the United Kingdom, the Listing Rules of the United Kingdom Listing Authority require that the offeror publish an explanatory circular and secure the approval of the shareholders at its general meeting when the bid exceeds certain thresholds which relate the relative value of the bid to the offeror company.

Decree gives the offeror the possibility (but does not impose the obligation) of making its bid contingent upon securing the authorisation or non-opposition of the appropriate competition authorities. Thus, for instance, the effectiveness of a bid may no longer be made subject only to authorisation of the concentration by Spanish competition authorities, as was the case under the previous system, but also to authorisation thereof by the European Commission or by the appropriate authorities of third countries.

The consequences of including this type of condition in the bid are the following:

- (a) If the competent competition authorities authorise or do not oppose the concentration transaction, the bid shall be fully effective.
- (b) If, before the expiration of the acceptance period, the competent competition authorities declare that the proposed transaction is inadmissible, the offeror shall withdraw the bid.
- (c) If, before the expiration of the acceptance period, the competent competition authorities establish that authorisation is subject to a condition, the offeror may withdraw the bid.
- (d) If no express or implied decision is made by the competent competition authorities before the expiration of the acceptance period, the offeror may withdraw the bid.

When the bid made subject to conditions is mandatory, the following special provisions shall apply:

- (a) As long as no express or implied decision is made by the competent competition authorities, the offeror may not exercise the political rights corresponding to the excess of its shareholdings over the threshold making the bid mandatory (i.e., 30%). This entails an extension of the general period established in article 32.2 of the Royal Decree for mandatory bids not subject to a condition, during which the offeror is barred from exercising the political rights corresponding to the excess of its interest over 30% (which extends only until such time as the National Securities Market Commission authorises the bid).
- (b) If the offeror withdraws the bid because any of the circumstances described in (b), (c) and (d) above are present, it shall, within three months, (i) dispose of the number of securities that is necessary to reduce the percentage of voting rights below the controlling interest (i.e., 30%), or (ii) terminate the shareholders' agreement, other agreement or concert whereunder such interest was reached.

As regards administrative authorisations other than those from competition authorities, the Royal Decree provides that the bids requiring regulatory authorisation (for example, because the offeree company does business in a regulated industry and the offeror acquires an interest which, under applicable law governing such industry, requires authorisation from the competent regulatory authority) may be submitted without such authorisation having been previously secured, but the National Securities Market Commission shall not authorise the bid and the acceptance period will thus not begin, until evidence is provided that the authorisation has been secured. In practice, this entails making the bid mandatorily subject to the administrative authorisation in question being secured, since if such approval is not obtained after the bid is submitted, the National Securities Market Commission will not authorise the bid and the bid will lapse.

The foregoing provisions regarding mandatory bids subject to the authorisation of the competition authorities shall apply, to the extent appropriate, to those mandatory bids that are submitted without the mandatory regulatory authorisation having been secured.

7.1. Is it always necessary to make a takeover bid in order to de-list a company?

Yes, except in the following cases:

- (a) When, following a takeover bid, the offeror requires the minority shareholders of the offeree company to sell their shares under a squeeze-out, or such minority shareholders require the offeror to buy their shares under a sell-out and, in this latter case, the offeror becomes the holder of 100% of the company's share capital (see 14 below).
- (b) When all of the holders of the affected securities unanimously agree upon the de-listing and waive the sale of their securities under the rules applicable to takeover bids.
- (c) When the company is terminated as a result of a corporate transaction whereby the shareholders of the terminated company become shareholders of another listed company (in contrast, if they became, in whole or in part, shareholders of an unlisted company, it would be necessary to make a de-listing offer).
- (d) When a takeover bid has previously been made for the entire capital, so long as (i) the offer document contains the expression of intent to de-list the shares, (ii) it is justified, by means of a valuation report, that the price offered in the prior takeover bid satisfies the requirements of the de-listing offer (see 7.2 below), and (iii) the sale of all of the securities is facilitated by means of a permanent order to purchase such securities, at the same price as that in the prior bid, during at least one month over the six-month period subsequent to the end of the preceding bid.
- (e) When the shareholders acting at a general meeting of shareholders and, if applicable, the bondholders acting at a bondholders' meeting [*asamblea de obligacionistas*] approve a procedure that in the opinion of the CNMV is equivalent to a takeover bid because it ensures the protection of the legitimate interests of the holders of the securities to be de-listed.

7.2. Who must make the de-listing offer? At what price?

The offer may be made by the issuer of the securities to be de-listed or by another person or entity provided that such person or entity obtains the approval of the shareholders acting at a general meeting of shareholders of the issuer.

The price of the bid, which must be fully paid in cash and approved by the shareholders acting at a general meeting of shareholders of the issuer of the securities to be de-listed, shall not be less than the higher of (i) the equitable price (see 4.1 above) and (ii) the price resulting from taking into account, collectively and based on a rationale for the respective relevance thereof, the following valuation methods:

- (a) Underlying book value of the company and, if applicable, of the consolidated group, calculated on the basis of the most recent audited annual accounts and, if obtained on a date subsequent to the date thereof, on the basis of the most recent financial statements.
- (b) Break-up value of the company and, if applicable, of the consolidated group. If the use of this method may result in values significantly lower than those obtained by using the other methods, the calculation thereof shall not be required.
- (c) Average weighted price of the securities over the six-month period immediately prior to the announcement of the de-listing proposal by means of the publication of a significant event [*hecho relevante*], regardless of the number of sessions at which they have been traded.
- (d) Value of the consideration previously offered, in the event that a takeover bid has been made over a period of one year prior to the date of the resolution on the request for de-listing.
- (e) Other valuation methods applicable to the specific case and generally accepted by the international financial community, such as discounted cash flows, company multiples and comparable transactions or others.

The directors of the issuer of the securities to be de-listed must prepare a report containing a rationale for the proposed de-listing and for the price offered on the basis of the aforementioned valuation methods. The report must be made available to the shareholders at the time of convening the general meeting at which a resolution is to be adopted regarding the de-listing, the offer and the price.

7.3. If there is the intent to de-list the company, must such intent be stated in the offer document?

Yes.

8.1. How and when must the decision or obligation to make a takeover bid be announced?

In the case of a voluntary bid, the decision to make a takeover bid must be announced as soon as it is adopted. If the consideration in the bid consists of cash, the offeror must, before making the announcement, make sure that it can afford such consideration in full. It is not clear what degree of certainty the offeror must have for such purposes (for example, in the event that the offeror needs external financing, whether it is sufficient to have reached a preliminary agreement with a bank or syndicate (mandate letter) or whether the offeror needs a firm commitment that it will obtain financing without any conditions (agreement containing a "certain funds" clause)), so the answer to these questions will come from actual practice. If there are other types of consideration, the regulations are more vague and merely provide that the offeror shall have adopted all reasonable measures to guarantee the satisfaction thereof.

Whoever falls within any of the cases that trigger the obligation to make a takeover bid (see 3.1 and 3.7 above) must make public and disseminate such circumstance to the market immediately. The communication must specify, if applicable, whether the person or entity intends to request a waiver (see 5.3 above) and, in the case of indirect or unexpected takeovers (see 3.7 above), whether such person or entity intends to make a takeover bid or to reduce its shareholdings below the threshold that triggers the obligation to submit a bid. If a waiver is denied, the offeror shall make public and disseminate the decision to make the bid.

In all cases, the communication to the market must be made in the same manner as in the case of a "significant event" [*hecho relevante*], and therefore, (i) such communication must be sent to the CNMV at the same time that it is disseminated by any other means and as soon as the event becomes known or the decision is adopted, and (ii) the content of the communication must be true, clear and complete, such that it is not misleading or deceptive. In addition, when the entity is an issuer of securities, it must disseminate the information through its website.

8.2. Must the employees of the companies involved be informed of the decision or obligation to make a takeover bid?

Yes. As soon as a takeover bid has been made public, the boards of the offeree company and the offeror must inform the representatives of their respective employees or, in the absence of such representatives, the employees themselves.

Additionally, after the offer document has been published, both the offeror and the offeree company must deliver it to the representatives of their respective employees or, in the absence of such representatives, to the employees themselves. Moreover, the latter must be able to easily and promptly obtain the offer document and the documents supplemental thereto.

8.3. How and when must a request for authorisation of a takeover bid be submitted? What documents must be attached to the request for authorisation?

A request for authorisation of a takeover bid must be submitted within the following periods:

- (i) in general, during the month following the date on which the decision to make the bid has been made public;
- (ii) when a controlling interest has been acquired or more than one-half of the members of the board of the offeree company have been appointed, during the month following the date on which the obligation to make the bid arises (see 3.1 above); and
- (iii) in cases of indirect or unexpected takeovers, within three months of the date on which the takeover occurs (see 3.7 above).

The request for authorisation must be submitted to the CNMV, be signed by the offeror or a person empowered to bind the offeror, contain the main characteristics of the transaction, and be prepared in accordance with the form, if any, established by the CNMV by means of a Circular.

The written request must be accompanied by (i) documents evidencing the adoption of the resolution or decision to make the takeover bid by the competent person or body, as well as (ii) the offer document, signed on all pages thereof by the person identified as responsible thereunder. In the case of a voluntary bid, it must be stated whether the decision to make the takeover bid is subject to approval by the shareholders at a general meeting of the offeror company and, if applicable, the corresponding documents must be submitted as soon as such approval is obtained (see 6.1 above).

Within a period of seven business days after submission of the written request, the following additional documents must be submitted:

- (a) Documents evidencing the establishment of the guarantee for the consideration offered (see 4.5 above).
- (b) Request for administrative authorisation or verification or, if applicable, documents evidencing such authorisation or verification if required by the transaction.
- (c) Documents evidencing the price of the bid and valuation reports when required.

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- (d) Validation certificates evidencing the blocking of the securities of the offeree company, if required.
 - (e) Form of the announcements to be published and certificate evidencing any other form of publicity or dissemination of the bid that may have been contemplated.
 - (f) If the offeror is a legal entity: (i) certificate providing evidence of its creation and of its current articles of association, and (ii) audit of its financial statements and, if applicable, of those of the group to which it belongs, for at least the fiscal year most recently ended or approved. The first-mentioned document shall not be required if the offeror's shares are admitted to trading on a Spanish official secondary market and, as a result, its articles of association have already been filed with the CNMV. The second-mentioned document shall also not be required if the audit has already been filed with the CNMV or if the company is not required to audit its accounts. If the offeror company does not conduct business or has been created to make the bid, there shall be submitted the audits of the financial statements for the fiscal year most recently ended or approved of its controlling shareholders or partners and, if applicable, of the groups to which they respectively belong, so long as they are legal entities. If the offeror company has published financial statements which are subsequent to the closing of the annual accounts referred to above, such financial statements shall also be submitted, unless they have already been filed with the CNMV.
 - (g) When the consideration consists of securities already issued by a company other than the offeror, there shall also be submitted an audit of the financial statements of the issuer and, if applicable, of the group to which it belongs, for at least the most recent fiscal year, as well as, if applicable, a certificate providing evidence of its creation and of its current articles of association, unless the latter have already been filed with the CNMV.

The CNMV shall review the request for authorisation and the documents filed and, if applicable, shall declare, within a period not greater than seven business days after any remaining documents have been submitted, that the request is admitted for processing.

8.4. What is the required content of the offer document?

The content of the offer document is established in the Annex to the Royal Decree and is provided for in five chapters. The offer document must include also an introduction containing any warnings required by the transaction.

In broad outline, the content of the five chapters is as follows:

- (a) Chapter I: information regarding the persons responsible for the offer document, resolutions relating to the bid and applicable law; basic information regarding the offeree company; information regarding the offeror and its group; description of agreements regarding the bid between the offeror and the shareholders, directors or members of management of the offeree company; information on securities of the offeree company which are held by the offeror; information regarding transactions on securities of the offeree company made by the offeror and persons acting in concert therewith over the 12 months preceding the announcement of the bid; information regarding the activities and economic-financial position of the offeror.
- (b) Chapter II: information regarding the securities to which the bid is directed, the consideration offered, the conditions to which the bid is subject, and the guarantees for and financing of the bid.

- (c) Chapter III: procedure for acceptance and settlement of the bid.
- (d) Chapter IV: information regarding the purpose of the transaction, including strategic plans and intentions concerning the future activities of the target, the employees and managers thereof, the disposition of assets and the dividend policy.
- (e) Chapter V: authorisations and other information, including information regarding the application of the Spanish Competition Act [*Ley de Defensa de la Competencia*], and detailed description of the administrative authorisations or verifications required.

If the consideration consists of securities, the offer document must contain such additional information as is equivalent to the information contained in the prospectus for a public offer of securities, unless there is a registration document or prospectus of the issuer of the securities delivered in exchange that is valid under the provisions of the applicable regulations.

8.5. What is the period within which authorisation of the takeover bid must be granted or denied?

The resolution whereby the authorisation is granted or denied must be adopted by the CNMV within 20 business days of receipt of the request. However, if the supplemental documents are received after such request, or in the event that additional information or documents are required, the aforementioned period shall be calculated from the date on which any such additional documents or information are registered or submitted. It follows that, in practice, the authorisation period will be indefinite, as it has been so far.

8.6. How is the takeover bid made public?

The offeror must disseminate the bid and make it generally known to the public within a maximum period of five business days after the offeror has been given notice of the authorisation by the CNMV.

The bid must be disseminated by publishing an announcement in (i) the Listing Bulletin [*Boletín de Cotización*] of the Stock Exchanges where the securities of the offeree company are admitted to trading and of all of them if they are integrated into the Spanish Automated Quotation System [*Sistema de Interconexión Bursátil Español*] and (ii) at least, in a newspaper of national circulation. The announcement must contain the essential data of the takeover bid which are stated in the offer document and must conform to the form registered as a document supplemental to the offer document. The CNMV may require the republication or enlargement of the announcement at the expense of the offeror.

In addition, the offeror must, from the trading day following the date of publication of the first announcement, make available to interested parties copies of the offer document as well as the above-mentioned supplemental documents. The offer document and the supplemental information shall be deemed made available to the public when they are published by any of the following means, at the election of the offeror:

- (a) In one or more newspapers of national circulation.
- (b) In the form of a printed copy made available to the public, without charge, at the Stock Exchanges or markets on which the securities are admitted to trading, or at the registered

offices of the offeror, of the offeree company or of the entity acting as intermediary and in charge of the settlement of the bid.

- (c) In electronic form on the website of the offeror, the offeree company, or the Stock Exchanges or markets on which the securities are admitted to trading.
- (d) In electronic form on the website of the CNMV.

In those cases in which the offer document is made available by publication in electronic form, the offeror must deliver a printed copy, without charge, to any investor that requests it.

8.7. How and when does the board of directors of the offeree company state its position regarding the bid?

The board of the offeree company must prepare a detailed and reasoned report on the takeover bid, which must contain:

- (i) its comments in favour or against the bid;
- (ii) an express statement regarding whether any agreement exists between the offeree company and the offeror, its directors or shareholders, or between any of these and the members of the board of the offeree company;
- (iii) the opinion of the members of the board of the offeree company regarding the bid, and the intention to accept or reject the bid by those that are direct or indirect holders of the affected securities;
- (iv) the possible repercussions of the bid and the strategic plans of the offeror that are included in the offer document in respect of all of the company's interests, employment and the location of its places of business;
- (v) if a board member is subject to a conflict of interest, such board member must so state and must describe the nature of such conflict;
- (vi) if the members of the board take differing positions in connection with the bid, the opinions of those members who are in a minority;
- (vii) information regarding the securities of the offeror company that are directly or indirectly held by the offeree company or by the persons with whom it acts in concert and the securities of the offeree company that are directly or indirectly held or represented by the members of the board of the offeree company, as well as any securities that such board members may hold in the offeror company; and
- (viii) if the board of the offeree company timely receives a differing opinion from the employees' representatives regarding the repercussions of the bid on employment, such opinion shall be attached to the report of the offeree company.

The report must be made public by the offeree company itself by any of the means contemplated for the announcement of the bid (see 8.6 above) within a maximum period of 10 calendar days after the date of commencement of the period for acceptance of the bid. The report must also be submitted to the CNMV and to the representatives of the employees of the offeree company.

9.1. How must a takeover bid be accepted? What is the period for acceptance and when does it commence?

Statements of acceptance of the bid must be made as provided in the offer document. If there are competing offers (see 13 below), multiple statements of acceptance may be made so long as the order of preference among them is indicated and the statements are submitted to the various competing offerors (article 34 of the RD). Statements of acceptance that are subject to a condition shall be invalid.

The period for acceptance of the bid must be established by the offeror in the offer document, and may not be less than 15 nor greater than 70 calendar days from the trading day immediately following the date of publication of the first announcement of the bid by the offeror following authorisation thereof by the CNMV (see 8.6 above).

The period for acceptance of the bid may be extended in the following cases:

- (a) The offeror may extend the acceptance period so long as the aforementioned maximum length of 70 days is not exceeded. The extension must be announced at least three calendar days prior to the expiration of the original period. Therefore, article 23.2 of the Royal Decree seems to indicate that the amendment of the acceptance period is not subject to the time limit established generally for other amendments of the bid under article 31.1 of the Royal Decree (i.e., at any time prior to the fifth day before the expiration of the acceptance period (see 12.1 below)).
- (b) The acceptance period shall be automatically extended, where applicable, such that at least 15 calendar days elapse between the date of holding of the general meeting at which the issuance of the securities offered as consideration must be approved or at which a decision must be made regarding the conditions to which the bid has been subjected and the last day of the acceptance period.
- (c) The CNMV may extend the acceptance period when a supplement to the offer document

is published and it is so required by the significance of the information contained therein (e.g., as a consequence of the amendment of the terms of the bid (see 12.2 below)).

- (d) In the case of competing offers (see 13 below), the periods for acceptance of prior bids shall automatically be modified such that all offers expire on the same day.
- (e) The CNMV may, by means of a reasoned resolution, approve an extension of the acceptance period in all other cases in which it may be necessary, based upon the success of the bid and the adequate protection of the addressees thereof.

9.2. Are statements of acceptance irrevocable?

No, they are not irrevocable. In contrast with the general rule contained in Royal Decree 1197/1991, article 34 of the Royal Decree provides that statements of acceptance may be revoked at any time before the last day of the period for acceptance of the bid.

9.3. How are takeover bids settled? What is the effective date of the settlement?

Within five business days after the expiration of the acceptance period, the Stock Exchange Management Companies [*Sociedades Receptoras de las Bolsas de Valores*] or, as applicable, the entities acting for the account of the offeror, must inform the CNMV of the total number of securities covered by the statements of acceptance submitted.

Once the CNMV is aware of the number of securities mentioned in the preceding paragraph, it must, within two business days, inform the Stock Exchange Management Companies of the stock exchanges on which the securities are admitted to trading and, if applicable, the *Sociedad de Bolsas*, the offeror and the offeree company of the positive or negative result of the bid. The Stock Exchange Management Companies must publish such result in the issue of the Listing Bulletin corresponding to the trading session at which they receive such information.

Once the result has been published, if the bid has had a positive result, it shall be settled. The settlement procedure varies depending upon the nature of the consideration offered. If the consideration consists of cash, the bid must be settled in accordance with the procedure established by Iberclear, and if it consists of securities, the bid must be settled as provided in the offer document.

When the consideration consists of cash, the trading date shall be the date of the session to which the issue of the Listing Bulletin in which the result of the bid is published corresponds. The transaction must be settled within a period of D+3.

10.1. What kind of preventive measures may a listed company adopt?

From a legal viewpoint, the preventive measures that may be adopted by a listed company in the event of a possible hostile takeover bid are basically of two kinds: measures contemplated in the articles of association and contractual measures.

The principal and most effective preventive measure contemplated in the articles of association that is admissible in Spain is the limitation upon the number of votes that may be cast by a single shareholder or by all shareholders belonging to the same group. The articles of association may also provide for qualified quorums or voting majorities for the approval of certain resolutions (capital increases, issuances of debentures, mergers and split-offs, etc.) which, though they may favour the creation of a blocking minority that hinders the future plans of a possible hostile acquirer, may also affect the day-to-day management of the company by hampering approval by the shareholders at the general meeting of strategic initiatives that may be of interest. Another preventive measure that may be contained in the articles of association is the establishment of special requirements to be appointed director (such as, for example, to have been a shareholder of the company over a minimum period of time prior to the appointment) or to serve in key positions (chairman, chief executive officer) on the board of directors (such as, for example, a particular length of service as director of the company). This measure may hinder access of a hostile acquirer to the company's board of directors, but it is not absolute in nature because it does not apply to the appointment of directors in the exercise of the right of proportional representation or when the articles of association provide that it shall not apply if the appointment is approved by a qualified majority of the shareholders at the general meeting or of members of the board of directors, as the case may be.

Contractual preventive measures may in turn be divided into two groups of measures: those provided for in contracts entered into by the company and those arising from agreements executed by third parties. The former include agreements which contain a change of control clause and which may affect assets (e.g., call options), financing (e.g., early redemption and

interest rate increase provisions), issuances of securities (e.g., accelerated conversion clauses and clauses providing for a downward adjustment in the conversion price of convertible debentures), etc., and which, whether or not originally included for a defensive purpose, may discourage the submission of a takeover bid that has not been agreed upon. As regards the second group, the most significant measures are possible voting commitments and restrictions on the transfer of shares or convertible securities that may be provided for in shareholders' agreements [*pactos parasociales*] executed by the shareholders of the company, which may restrict or prevent the exercise of voting rights in favour of a possible takeover bid at the general meeting of shareholders of the target company or the acceptance itself of the takeover bid by the parties to the shareholders' agreement.

In addition to preventive measures of a legal nature, there are measures or strategies of a financial nature, such as an increase in the company's leverage or the listing of subsidiaries, which may require a heightened financial effort in order to take control of the company, by forcing the offeror to assume a greater debt or to increase the total consideration needed in view of the obligation to offer the acquisition of minority interests in subsidiaries by means of a successive takeover bid (see 3.7.1 above).

10.2. How can an offeror become aware of the preventive measures in place at a listed company?

The articles of association of listed companies, as well as shareholders' agreements [*pactos parasociales*] executed by their shareholders which include a regulation of the exercise of voting rights at general meetings or which restrict or condition the free transfer of shares, may be inspected at the Commercial Registry where the issuer is registered, as well as on the websites that issuers must have in compliance with the duties of information and transparency of issuers. The detailed content thereof is regulated by Circular 1/2004, of 17 March, of the CNMV. Shareholders' agreements are also available on the website of the CNMV.

In addition, the management report prepared annually by listed companies at the time of submission of their annual accounts must contain, since the approval of Act 6/2007 information regarding, *inter alia*, (i) all significant agreements that the company has executed and which become effective, are amended or terminated in the event of a change of control at the company as a consequence of a takeover bid, as well as the effects of such agreements, except when the dissemination thereof is seriously detrimental to the company (which exception shall not apply when the company is obligated by law to make such information public), and (ii) all agreements between the company and persons serving in management positions or employees, which provide for compensation payments when such persons or employees resign or are wrongfully dismissed or if the employment relationship ends as a consequence of a takeover bid.

10.3. May a company's preventive measures be neutralised?

One of the main innovations introduced by Act 6/2007 and by the Royal Decree (after the provisions contained in Directive 2004/25/EC) is the establishment of an optional regime that companies may impose upon themselves in order to neutralise some of their own preventive measures.

Listed companies that have preventive measures in place may decide that one or more of the following neutralisation (breakthrough) measures apply in the event that the company is the target of a takeover bid:

- (a) The ineffectiveness of restrictions upon the free transfer of securities established in shareholders' agreements [*pactos parasociales*] regarding the offeree company during the period for acceptance of the bid.
- (b) The ineffectiveness, at the general meeting of shareholders of the offeree company at which decisions are made on the possible adoption of preventive measures, of restrictions upon voting rights contemplated in the articles of association of the company and in shareholders' agreements relating to such company.
- (c) The ineffectiveness of the restrictions contemplated in the preceding letters when, after a takeover bid, the offeror has reached a percentage equal to or greater than 75% of the capital carrying voting rights.

10.4. How can a company's preventive measures be neutralised?

The decision to apply the neutralisation measures mentioned in section 10.3 above must be adopted at the general meeting of shareholders of the company in compliance with the requirements as to qualified quorum and majorities referred to in article 103 of the Spanish Companies Act. For such purpose, the board of directors of the company must prepare a report containing a detailed description of the restrictions established in the articles of association and in shareholders' agreements [*pactos parasociales*] which are intended to be neutralised, the neutralisation measure or measures that the board seeks to apply, the agreements executed or being negotiated by the company or third parties with potential offerors and of which the company is aware, the reasons why the directors propose the adoption of such neutralisation measures, and the direction of the vote cast by each director on the approval of the report. Such report must be made available to the shareholders from the time the general meeting is convened.

When a company decides to apply neutralisation measures, it must include a provision in its articles of association for adequate compensation for the loss suffered by the holders of the neutralised rights, together with a description of the manner in which such compensation shall be paid and the method used to determine it. Given the lack of specificity of the regulations in this area and the difficulty in determining the method of calculation of the compensation and the identity of the beneficiaries thereof, among other issues, it may be expected that the adoption of neutralisation measures will be hardly popular with Spanish listed companies.

Likewise, the shareholders acting at a general meeting of a listed company that have previously approved the application of neutralisation measures may revoke such decision upon the same terms described above and subject to the same quorum requirements and voting majorities as apply to the approval of such neutralisation measures.

The adoption of neutralisation measures and the revocation thereof must be reported by the company to the CNMV, which shall make such communication public, and to the other supervisory bodies of the Member States in which the company's shares are admitted to trading or in which a request for admission has been submitted. The company must set forth such resolutions in its annual corporate governance report.

10.5. May the neutralisation of preventive measures be excluded in the event of lack of reciprocity?

Listed companies that have opted to apply neutralisation measures to themselves may decide, by means of a resolution adopted within a maximum period of 18 months prior to the takeover bid in question being made public, that such measures do not come into play and that, accordingly, the preventive measures contemplated in their articles of association and shareholders' agreements will be maintained, when such companies are the target of a takeover bid made by an entity or group that has not adopted equivalent neutralisation measures. This exception may be applicable to those cases in which the potential offeror is an EU listed company that has preventive measures in place and has not adopted neutralisation measures, or a subsidiary thereof. However, it does not seem applicable when the offeror company is not a listed company or does not belong to a group the parent company of which is a listed company, because unlisted companies, at least in EU Member States, may not apply neutralisation measures. More doubtful are those cases in which the offeror company is not part of any group but an EU listed company that does not apply neutralisation measures holds a non-controlling interest in it (e.g., the case of a consortium composed of several listed companies, some of which are not protected against bids or which, even if protected, have adopted neutralisation measures, and other companies which, while having preventive measures in place, have not decided to neutralise them); also doubtful are those cases in which the offeror company is or belongs to the group of a non-EU listed company which, while having preventive measures in place, is not subject to any legal provisions on mandatory or optional neutralisation similar to those designed by Directive 2004/25/EC.

The decision to exclude the application of the neutralisation measures approved must be adopted at the general meeting of shareholders of the company in compliance with the requirements as to qualified quorum and majorities referred to in article 103 of the Spanish Companies Act and within a maximum period of 18 months prior to the takeover bid being made public. The board of directors of the company must prepare a report containing a rationale for the resolution to be adopted and setting forth the direction of the vote of each director on the approval of the report. The report must be made available to the shareholders from the time the general meeting is convened.

11.1. Is the board of directors of the offeree company subject to a duty of passivity? What are the exceptions to the duty of passivity?

Both the board of directors of the offeree company and any executive body of the board or any body receiving powers therefrom (executive committee, chief executive officer, general managers, etc.) and the respective members thereof, as well as the companies belonging to the group of which the offeree company is a member, and the persons acting in concert with any of the foregoing, are subject to limitations upon their actions from the time of the public announcement of a takeover bid on the company (see 8.1 above) until the publication of the result of the bid. The purpose of these limitations is to eschew any possible interference with the bid by the offeree company by preventing its shareholders from making a decision thereon.

In this connection, before taking any action that may prevent the success of the bid, such management decision-making bodies of the offeree company must obtain the prior approval of the shareholders acting at a general meeting granted in compliance with the requirements as to qualified quorum and majorities referred to in article 103 of the Spanish Companies Act. With respect to decisions adopted prior to the announcement of the takeover bid which have not yet been carried out in whole or in part, the shareholders acting at the general meeting must approve or confirm any resolution that does not fall within the scope of the ordinary course of business of the offeree company and the execution of which may prevent the success of the bid.

In order to obtain the approval of the shareholders at the meeting, the board of directors of the company must prepare a report containing a detailed description of and the rationale for the actions which require approval or confirmation by the shareholders at a general meeting and setting forth the direction of the vote cast by each director on the approval of the report. Such report must be made available to the shareholders from the time the general meeting is convened. The call to the general meeting of shareholders must clearly state the actions

submitted for approval by the shareholders, who, unless coming together at an ordinary general meeting, may not adopt decisions regarding any matter other than the authorisation or confirmation of the subject action or transaction.

Without prejudice to the generality of the above-mentioned limitation, the approval of the shareholders at a general meeting of the offeree company shall be specifically required before any of the following actions is taken:

- (a) Approve or commence any issuance of securities that may prevent the success of the bid.
- (b) Carry out or promote, directly or indirectly, transactions involving the securities covered by the bid or any other securities, including actions intended to promote the purchase of such securities, when the success of the bid may be prevented thereby.
- (c) Dispose of, encumber or lease real property or other corporate assets when such transactions may prevent the success of the bid.
- (d) Pay extraordinary dividends or make any other distributions that are not consistent with the customary policy for payment of dividends to the shareholders or holders of other securities of the offeree company, unless the corresponding corporate resolutions have been adopted and made public by a competent decision-making body prior to the making of the bid.

The only exception to the foregoing is that the board of directors of the offeree company does not need the approval of the shareholders acting at a general meeting in order to seek other offers that compete with the takeover bid originally submitted, because in so doing, the board not only causes no damage whatsoever to the shareholders of the offeree company but rather diligently complies with the fiduciary duties it owes to such shareholders as regards maximising the value of the company.

11.2. Are there any limitations on the preventive measures that the board of directors of the offeree company may adopt with the approval of the shareholders at a general meeting?

Although the regulations allow the board of directors of the offeree company to adopt any measures that may prevent a takeover bid when such measures have been previously and specifically approved by the shareholders at a general meeting, all initiatives that the board of directors seeks to implement must naturally be fully lawful and legitimate in and of themselves; for example, they cannot go against the corporate interest of the offeree company.

11.3. May the duty of passivity be excluded in the event of lack of reciprocity?

As in the case of neutralisation of preventive measures (see 10.5 above), the shareholders acting at a general meeting of a listed company may choose, by means of successive resolutions adopted with an effective period of 18 months each, to release the board of directors from its duty of passivity if the company is the target of a takeover bid made by an entity that, having its registered office outside Spain, does not impose upon its board the duty

of passivity provided for in the Spanish regulations or an equivalent regime that entails the need to obtain the prior approval of the shareholders at a general meeting before adopting measures that may prevent the success of a bid on the offeror company or on an entity controlled by it.

Although the characterisation of companies in respect of which the duty of passivity may be excluded is similar to that provided for in connection with the exclusion of the neutralisation of preventive measures (such that the comments above also apply to this case), it should be noted that, in contrast with the rules applicable to neutralisation, which do not establish any requirements as to the nationality of the offeror company, in the case of the duty of passivity it is a requirement that the offeror company does not have its registered office in Spain. This is due to the fact that unlike neutralisation measures, which may be adopted individually by each listed company regardless of its nationality, the duty of passivity is imposed generally upon all Spanish listed companies; therefore, such duty may only be excluded when the offeror company is a foreign entity and, in addition, the applicable law of its country of origin does not provide for the duty of passivity as a general duty and the offeror company has also not submitted voluntarily thereto under a resolution adopted by its shareholders at a general meeting. Furthermore, it must be noted that the Royal Decree clarifies the concept of control by making a cross-reference to article 4 of the Securities Market Act, which concept is normally more stringent than the concept of control for purposes of a takeover bid (see 3.1 above).

The decision to release the board of directors of the company from the duty of passivity must be adopted by the shareholders at a general meeting of the offeree company in compliance with the requirements as to qualified quorum and majorities referred to in article 103 of the Spanish Companies Act, within a maximum period of 18 months prior to the takeover bid being made public. For such purpose, the board of directors of the company must prepare a report containing a rationale for the resolution to be adopted and setting forth the direction of the vote of each director on the approval of the report. The report must be made available to the shareholders from the time the general meeting is convened.

12.1. Upon what terms may the offeror revise a bid?

The offeror may freely revise its takeover bid one or more times from the time it is submitted until any time prior to the last five calendar days in the acceptance period, so long as such revision complies with the rule of equal treatment of all addressees in the same circumstances.

The changes may be both objective and subjective in nature, so long as they result in a more favourable treatment of the addressees of the bid, either because, in the case of partial voluntary bids, the original bid is extended to a greater number of securities, or because the consideration offered is increased, or because the conditions, if any, to which the bid is subject are eliminated or lessened. When the consideration is improved by totally or partially replacing cash with shares in the offeror company, the opinion of an independent expert must be submitted to the CNMV confirming that the value of the new consideration proposed is greater than the value of the consideration originally offered.

Moreover, the Royal Decree regulates a practice, already allowed under Royal Decree 1197/1991, which consists of the offeror acting in association or concert with third parties in order to modify its bid (see 13.8 below). In regulating these cases, the Royal Decree has innovated by providing that the offeror and the third parties with whom it acts in association or concert must assume joint and several liability for the revised bid.

If there are other offers on the offeree company, the revision of the characteristics of the bid is subject to the provisions applicable to competing offers (see 13.5 below).

12.2. What is the procedure applicable to the revision of a bid?

The offeror must first adopt the corporate resolutions required to modify its bid. Then it must prepare and submit for approval by the CNMV a supplement to the offer document

containing a description of the changes to the characteristics of the bid and, if applicable, in the identity or shareholding composition of the offeror, with express reference to each of the items of the original offer document affected by the changes and with as much detail as in the description of the revised items.

The CNMV must make a decision within a period not to exceed three business days of receipt of the request for revision of the bid, during which period the course of the acceptance period is suspended. Once the changes have been approved by the CNMV, they must be published by the offeror on the business day immediately following the approval.

In addition, the board of directors of the offeree company must issue a report on the revised bid within five calendar days following the date of publication of the changes.

The CNMV may extend the original period for acceptance of the bid if it deems it necessary for purposes of better analysis of the proposed changes.

Unless an express statement to the contrary is made, it shall be deemed that the addressees of the bid that have accepted it prior to the changes consent to the improved bid.

12.3. May the offeror withdraw a bid?

Although the general rule is that bids are irrevocable from the time of public announcement thereof (see 8.1 above), the Royal Decree contemplates certain instances in which the offeror may withdraw the bid. These instances naturally vary depending upon whether the bid is voluntary or mandatory (see 1.5 above) because of the different nature of the bid in each case, with more restrictions being imposed in the case of mandatory bids due to the need to afford greater protection to the shareholders of the offeree company.

Specifically, the offeror may withdraw a bid, whether voluntary or mandatory, in the following cases:

- (a) When the bid is subject to approval by the competent competition authorities and, before the expiration of the acceptance period, the transaction is prohibited or authorised subject to conditions by such authorities, or no decision is made by such authorities regarding the authorisation of the bid (see 6.3 above).
- (b) When due to exceptional circumstances beyond the control of the offeror, the bid may not be carried out or is manifestly unfeasible, provided that the CNMV authorises the withdrawal.

An offeror that has made a voluntary bid may withdraw it when a competing offer is authorised. In contrast with such power, if the bid is mandatory, the offeror may only withdraw it when, after the procedure applicable to competing offers has ended, an unconditional competing offer that contains better terms than the mandatory bid is maintained.

Finally, and as regards voluntary bids only, the offeror may withdraw the bid when the shareholders acting a general meeting (or the board of directors, if it has been released from the duty of passivity) of the offeree company approve a preventive measure against the bid submitted (see 11.1 above) which, in the opinion of the offeror, prevents it from maintaining its bid, so long as the offeror itself has not had any direct or indirect participation in favour of the adoption of such resolution and the CNMV authorises the withdrawal.

The offeror must immediately report to the CNMV the decision to withdraw the bid, accompanied by an express and detailed statement of the reasons therefore, and the CNMV must make such decision public.

12.4. In what cases does the bid cease to have effect?

Voluntary bids cease to have effect when, at the expiration of the acceptance period, the conditions to which the bid has been subjected have not been fulfilled, unless the offeror waives such fulfilment (see 6.2 above). The waiver may be effected until the day prior to the expiration of the acceptance period, except for the condition consisting of acceptance of the bid by a minimum number of securities, which may be waived when, following the expiration of the period for acceptance of the bid, the CNMV notifies the offeror of the number of shares included in the acceptances received.

13.1. What conditions or minimum requirements must be met by competing offers?

Directive 2004/25/EC, as well as Act 6/2007 which adopts the former as part of Spanish law, limit themselves to a mention of the concept of competing offer, but the definition and material regulation thereof is included in the Royal Decree.

Pursuant to the Royal Decree, competing offers are a type of takeover bid that must comply with the requirements and conditions applicable to any takeover bid, in addition to those specifically laid down in Chapter IX of the Royal Decree.

A takeover bid is defined as a “competing offer” when it affects securities for all or a part of which another takeover bid, the acceptance period of which has not yet expired, has previously been submitted to the CNMV. Article 42 of the Royal Decree elaborates upon these two basic requirements by specifying that a competing offer may be submitted at any time after the submission of the original bid until the fifth calendar day prior to the expiration of the period for acceptance thereof and, in addition, must cover a number of securities that is not less than that in the last preceding offer (which only applies to partial voluntary bids). Note here the distinction between “original bid” (a term used to define the period) and “last preceding offer” (a reference term for purposes of determining the number of securities that an offer must cover in order to be defined as a competing offer). Therefore, if there are several competing offers, the last offer submitted must cover a number of securities that is not less than that in the immediately preceding offer, rather than not less than that in the bid originally submitted.

In addition to the two requirements mentioned above, a competing offer must fulfil the following conditions:

- (a) It must outbid the last preceding offer (again, this is a reference to the immediately preceding offer, not to the original bid), either by raising the price or value of the consideration offered or by extending the offer to a larger number of securities.

- (b) When the submission of a competing offer is mandatory (see 1.5 above), the offer must also comply with the requirements established in the Royal Decree in respect of mandatory takeover bids.

13.2. Until when may a competing offer be submitted?

In principle and as a general rule, a competing offer may be submitted at any time after the submission of the original bid until the fifth calendar day prior to the expiration of the period for acceptance thereof.

Therefore, the deciding element as to the date of commencement of the period for submission of a competing offer is that a bid has previously been submitted (not merely announced) for the same securities, even though the second offeror is unaware of such submission at the time of submitting the second offer (which is, however, a difficult case to imagine, except for a quasi-simultaneous submission by each offeror of its respective request for authorisation to the CNMV). In this case, even if the second offer is submitted other than as a competing offer, the Royal Decree provides that the CNMV shall inform the second offeror of the existence of the first offer and that the second offer shall become subject to the rules applicable to competing offers, the first consequence of which is that the processing thereof is suspended until the first offer is authorised, if applicable.

As regards the date of expiration of this period, the Royal Decree provides that it is the fifth calendar day prior to the expiration of the period for acceptance of the original bid. This provision entails an extension of the period established by the repealed Royal Decree 1197/1991, which was 10 calendar days after the commencement of the period for acceptance of the last preceding offer, provided that not more than 30 calendar days had elapsed since the commencement of the period for acceptance of the original bid. The purpose of the new provision is thus to facilitate the submission of competing offers, which will naturally benefit the shareholders of the offeree company.

What will happen, though, if more than one competing offer is submitted? Will the period extend until the fifth calendar day prior to the period for acceptance of the last offer submitted? The answer to this question is contained in paragraph 1 of article 44 of the Royal Decree, which provides for a consolidation of the periods for acceptance of all offers into only one period (which will foreseeably be the period corresponding to the last offer submitted) and which will be published by the CNMV on its website. Therefore, the deadline to take into account for these purposes is the fifth calendar day prior to the expiration of the new period for acceptance of offers that results from this consolidation of time periods.

Finally, the Royal Decree establishes a significant exception in connection with the deadline of the period for submission of competing offers, which applies to mandatory takeover bids in the event that the fact that triggers the obligation to make a bid (for example, the acquisition of a controlling interest by the second offeror) takes place after the expiration of the period established for the submission of competing offers. In this case, the Royal Decree makes it clear that the CNMV shall extend the periods established in Chapter IX in order for the mandatory bid to be also governed by the provisions of such Chapter applicable to competing offers.

13.3. What is the period within which a competing offer must be authorised or rejected?

Competing offers are processed in the order of their submission, such that a competing offer shall not be processed until the preceding offer has been authorised, if applicable. As no

specific period is provided for in Chapter IX, the period for processing shall be the period established for the processing of takeover bids in general, i.e., 20 business days after receipt of the request for authorisation (see 8.5 above).

13.4. How does the submission of a competing offer affect the timetable for a takeover bid?

The primary effect of the submission of a competing offer on the timetable is the interruption of the period for acceptance not only of the original bid but also of all competing offers previously submitted. The Royal Decree follows a logical approach in seeking that both the original bid and all competing offers subsequently submitted be processed together, such that the shareholders may assess all of the offers as a whole and simultaneously. This is why, as stated in section 13.2 above, the periods for acceptance of all offers are consolidated into a single period, which expires for all of them on the same day.

Unlike the general period for acceptance of takeover bids, which is established by the offeror between a minimum of 15 and a maximum of 70 calendar days, the period for acceptance of competing offers established by the Royal Decree is 30 calendar days from the day following the date of publication of the first announcement of the authorised competing offer. Taking this into account, as well as the consolidation of acceptance periods described above, the consolidated period for acceptance of the original bid and subsequent competing offers expires on the thirtieth calendar day after the day following the date of publication of the first announcement of the last competing offer submitted.

This single acceptance period may be extended, in addition to other cases contemplated in article 23 of the Royal Decree that may be applicable, in the event of improvements in the bids authorised by the CNMV. In this case, the acceptance period shall be extended for 15 calendar days following the publication of the announcements in which the offeror disseminates the new terms of the bids, which phrase must, in our opinion, be read to mean 15 calendar days following the first of such announcements.

In light of the foregoing, it should be noted that, at least in theory, the competing offers process may take an indefinite amount of time to the extent that, within the aforementioned periods, an unlimited number of new competing offerors may add to those already existing.

13.5. What are the effects of a competing offer on prior bids: withdrawal and revision?

The submission of a competing offer has two main effects on the original bid and other competing offers that may have previously been submitted: the possibility of withdrawing and of modifying (rather, improving) the prior offers.

First, the authorisation of a competing offer enables the offerors of prior bids to withdraw them, but the Royal Decree provides for a significant distinction depending upon whether the prior offers are voluntary or mandatory (see 1.5 above). In the case of voluntary prior offers, the offeror may withdraw them as soon as the CNMV authorises the competing offer subsequent thereto, whilst in the case of a mandatory offer, it may not be withdrawn until the end of the procedure applicable to competing offers and provided that an unconditional competing offer that contains better terms than the prior mandatory offer is maintained.

Second, the submission of a competing offer enables prior offerors to modify (improve) the terms of their offers. The Royal Decree provides that the improvement may be effected *“once the competing offers have been authorised”*, rather than point to the time when such offers have merely been announced.

The Royal Decree clearly advances the possibility of improving offers that have already been authorised, thus seeking a maximisation of shareholders’ benefit. This is one of the most significant innovations of the Royal Decree vis-à-vis the rules applicable to competing offers contained in Royal Decree 1197/1991, because until now, an offer could only be improved by means of the sealed envelope system. Thus, on the one hand, the new regulations allow for the terms of a bid to be improved in a continuous and unlimited fashion until the sealed envelopes must be sent, and on the other hand, the offeror is allowed to act in association or concert with third parties in order to improve the terms of the bid, so long as certain requirements are satisfied. More specifically, in the event that the offeror acts in association or concert with third parties in order to improve the bid, both the offeror and such third parties must assume joint and several liability for the revised bid.

A bid may be improved either by increasing the price or value of the consideration offered, or by extending the bid to a larger number of securities, provided, however, that, if the improvement in the consideration entails a change in the nature thereof, the opinion of an independent expert confirming the improvement shall be required.

13.6. May a shareholder that has accepted a prior bid revoke its acceptance in order to accept a competing offer?

Chapter IX does not lay down specific rules regarding the revocability of statements of acceptance that have been submitted. Therefore, the general rules provided by article 34 of the Royal Decree must be deemed applicable. Article 34 provides in paragraph 3 thereof that statements of acceptance may be revoked at any time before the last day of the period for acceptance of the bid (see 9.2 above).

In connection with the acceptance of a takeover bid, an interesting innovation vis-à-vis the old regulations is the possibility introduced by article 34.4 of the Royal Decree of making multiple statements of acceptance when there are competing offers. In these cases, the order of preference must be indicated and the statements must be submitted to the various competing offerors (see 9.1 above). Multiple statements of acceptance will be particularly useful when there are several partial voluntary bids competing against one another, because they will spare the addressee of the bid the need to do complex calculations as to the number of statements of acceptance it must submit in each bid.

13.7. How does the competing offers process end? Does the first offeror have advantages of any kind?

As was the case under the repealed Royal Decree 1197/1991, the competing offers process ends when all the offerors that have not previously withdrawn their offer send a sealed envelope to the CNMV. In the sealed envelope the offerors shall have enclosed either their most recent improvement or their decision not to submit an improvement of the offer. It is important to point out once again that the Royal Decree refers to the *“most recent improvement”*, which

means that prior to the end of the process (through the submission of the sealed envelope), each of the offerors, including the original offeror and all subsequent competing offerors, may have had the chance to submit several successive improvements, provided, however, that it is the most recent one that must be enclosed in the envelope.

The sealed envelope must be submitted to the CNMV on the fifth business day following the expiration of the period for submission of competing offers; this provision entails a substantial extension of the period contemplated in Royal Decree 1197/1991, which provided that the envelopes were to be sent on the fifth business day following the commencement of the period for acceptance of the last possible competing offer (or upon the expiration of the period for submission thereof). In connection with this period, we cannot fail to mention that some of the time periods provided for in the Royal Decree in the area of competing offers are not properly coordinated. Thus, a literal application of article 44.3 of the Royal Decree would mean that, in some cases, the sealed envelope must be submitted after the expiration of the acceptance period, because the period for submission of competing offers ends on the fifth calendar day prior to the expiration of the period for acceptance of the original bid (article 42.1 of the Royal Decree). This does not seem to be the purpose of the provision, so it will be necessary to wait until the CNMV provides an interpretation of the time periods applicable in this area.

The Royal Decree gives some advantages to the first offeror, which is justified by the fact that such first offeror has incurred search costs and risks greater than those incurred by the other offerors. First, after the envelope submission stage has ended, the first offeror may make one last *ex post* improvement, provided that the consideration offered by it in its sealed envelope is not lower by 2% than the highest consideration offered by competing offerors in their envelopes. This prior requirement having been complied with, the original offeror may improve the price of the best offer made in an envelope by at least 1%, or may extend the original bid to a number of securities that is at least 5% larger than that in the best competing offer submitted in an envelope.

Second, the Royal Decree innovates significantly by providing that the offeree company may agree upon break-up fees with the first offeror (see 2.2 above).

13.8. May another offeror join in a prior bid that has already been authorised?

In line with the provisions of Royal Decree 1197/1991, the Royal Decree prohibits those persons that act in concert with the offeror, those belonging to the same group to which the offeror belongs or those which act for the account of the offeror from submitting a competing offer. On the other hand, the Royal Decree provides for an already existing practice by permitting (subject to compliance with specific requirements and conditions) the association or concerted action between an offeror and a third party in order to improve a bid that has already been submitted. In consequence, a third party may join as co-offeror in a bid that has already been authorised, so long as:

- (i) the purpose of the association or concerted action is to improve a bid that has already been authorised;
- (ii) none of the entities participating in the bid has a direct or indirect interest in another offer regarding the same securities;

- (iii) the offeror and the third parties acting in association or concert assume joint and several liability for the bid; and finally,
- (iv) the identity of the offeror group, including third parties acting in association or concert, is reflected in a supplement to the offer document.

14.1. What are sell-out and squeeze-out rights?

The new regulations governing takeover bids (article 60. *quater* of the Securities Market Act, as amended by Act 6/2007 and articles 47 and 48 of the Royal Decree) grant the offeror that has come to hold at least 90% of the voting capital of the offeree company as a consequence of a takeover bid accepted by 90% of the addressees thereof, the right to require the minority shareholders and the holders of the other securities that did not accept the offer to sell to the offeror all of their shares and other securities (squeeze-out). By way of fair reciprocity, under the same conditions, minority shareholders have the right to force the offeror to purchase their securities (sell-out).

These provisions, which are among the most significant innovations brought by the reform of the rules applicable to takeover bids, enable the offeror to become the holder of 100% of the share capital of the offeree company by driving minority shareholders out of the company (squeeze-out). At the same time, they enable the addressees of the bid that at first decide not to accept it but then realize that the success of the bid has left them in a truly minority position to “opt out of the company” by making use of a second chance after the original takeover bid (sell-out).

For the offeror, this right of squeeze-out aimed at the acquisition of all of the shares (and other securities giving the right to the acquisition thereof) of the offeree company is undeniably of great significance. Buying the shares of minority shareholders will enable the offeror to de-list the offeree company without having to follow the complex procedure applicable to de-listing offers (see 7 above). A squeeze-out also facilitates placing the acquisition debt at the level of the acquired company (“debt push down”) by means of a simplified merger or merger by absorption, or the optimisation of the distribution of reserves of the target company. A squeeze-out enables the offeror to fully integrate the company into its group and manage it in its sole interest. It allows the offeror to make decisions regarding the distribution or withholding of profits, the best borrowing policy, or even the very existence of the company or its disappearance through a merger or liquidation, without taking into

account the interests of any minority shareholders (without prejudice, obviously, to strict compliance with the rules providing for the protection of creditors and other stakeholders). The consolidation of all the shares under a single head reduces the expense of convening general meetings of shareholders as well as the expense relating to the shareholders' right to receive information. And above all, it saves the majority shareholder from exposure to the risk of an abusive exercise by certain minority shareholders (known as "free-riders") of the rights held by them (right to receive information, to challenge corporate resolutions or to hold the directors accountable). Such exercise of rights does not pursue the collective benefit of the shareholders, and hence of the company, but rather the individual interest of such minority holders, who endeavour to squeeze the maximum yield out of their interests and obtain an exorbitant price for their shares.

For its part, the right of sell-out serves as a fair counterbalance to the powers accorded to majority shareholders under the right of squeeze-out. The right of sell-out is provided for in contemplation of the risk of abuse by the majority shareholder of the situation of control obtained through the takeover bid, which may lead it to derive private benefits from the company to the detriment of minority shareholders or simply to modify the risk profile of the company by causing it to increase its indebtedness. The right of sell-out is also justified by the inability of minority shareholders to obtain adequate compensation for their shares on the market when the market loses liquidity as a result of the takeover bid. But most importantly, the sell-out constitutes a second chance granted to minority shareholders to sell their shares, such shareholders thus being freed from the pressure of accepting the original bid.

14.2. Who are the addressees and beneficiaries of the rights of sell-out and squeeze-out?

The Securities Market Act and the Royal Decree grant the rights of sell-out and squeeze-out to the offeror and to the holders of the securities to which the original takeover bid was directed. Such holders shall be, in the first place, the shareholders that have decided not to accept the bid and remain at the company as minorities.³ Next come the holders of convertible and exchangeable debentures and of pre-emptive rights, which securities must necessarily have been included in the prior bid, pursuant to article 3 of the Royal Decree. Finally, if the original bid was also directed to the holders of warrants or other securities or instruments, whether issued or to be issued, carrying an option to the acquisition or subscription of shares, such holders shall also be the holders and addressees of the rights of sell-out and squeeze-out.⁴

- 3 Non-voting shares and treasury stock deserve special mention here. Article 3 of the Royal Decree only requires that the takeover bid be directed to non-voting shares that, at the time that authorisation of the bid is requested, have the right to vote; it follows that the rights of sell-out/squeeze-out will only affect non-voting shares that have recovered the voting rights attached thereto (unless, obviously enough, the offeror has decided to extend the bid to the remaining non-voting shares). In contrast, the Royal Decree does not contain any provisions regarding treasury stock, which, in our opinion, may be the subject-matter of the rights of sell-out/squeeze-out if such stock was included in the prior bid.
- 4 As in the case of de-listing offers (article 10.2 of the Royal Decree), the regulations follow a restrictive approach here: if the offeror decided not to include in its bid warrants or other securities aside from shares, convertible debentures and pre-emptive rights, the holders thereof may not exercise the right of sell-out and will remain tied to securities that will only allow for the acquisition of a truly minority interest in a company that will normally have been de-listed.

14.3. What are the requirements for the rights of sell-out and squeeze-out to arise?

The rights of sell-out/squeeze-out are conditional (for both the offeror and the minority shareholders) upon compliance with three requirements. First, the offeror must have made a takeover bid (whether mandatory or voluntary) for 100% of the capital of the offeree company. Therefore, the rights of sell-out/squeeze-out do not arise in the case of partial (voluntary) bids.

Second, the offeror must hold, as a result of the takeover bid, securities representing at least 90% of the capital carrying voting rights. In order to determine such percentage, there must be added up both the shares already held by the offeror before submitting the bid, and the shares acquired under or during the takeover bid itself. Moreover, although the regulations are silent in this respect, we believe that the percentage should also include the securities held by the other persons whose interests must be added to the interest held by the offeror in order to determine its obligation to make the bid: shares held by companies belonging to the group to which the offeror belongs and (though this is more doubtful) shares held by members of their boards and shares held by nominees or by persons acting for the account of or in concert with the offeror (article 5 of the Royal Decree). The reference to capital carrying voting rights means that, in order to calculate the percentage, non-voting shares and treasury stock (whose voting rights will then be suspended) must be deducted or subtracted. Finally, the term "held" [*posesión*] used by the Securities Market Act allows for the inclusion in the calculation not only of shares owned by the offeror but also shares it has received under usufruct or pledge or that have otherwise been assigned thereto so long as the offeror is entitled to exercise the voting rights attaching to such shares.

Third, the Securities Market Act and the Royal Decree require that *"... the bid has been accepted by holders of securities representing at least 90% of the voting rights covered by the bid"*. The right of *squeeze-out* (as well as the right of *sell-out*) is thus conditional not only upon the fact that the offeror is a large majority shareholder and that minority holders lack any real weight in the company, but also upon the success of the prior bid, measured as a percentage of acceptances. The Spanish parliament has therefore opted for the most restrictive among the alternatives offered by Directive 2004/25/EC,⁵ by establishing the acceptances requirement as a second protection afforded to minority holders. This option may well end up damaging the interests of the minority holders the lawmaker intended to protect, by leaving them tied to a truly minority interest (well below 10%) as well as preventing them from exercising the right of sell-out due to the fact that the bid has not reached the required percentage of acceptances.

The third requirement, relating to the minimum percentage of acceptances, discourages the purchase of shares before the takeover bid and, consequently, creates disincentives to mandatory bids (see 1.5 above). An example will help understand the point: an offeror that acquires 60% of the capital of the offeree company before making its bid will need to succeed in having the bid accepted by 90% of the remaining 40% of the capital to which the bid is directed in order to be able to exercise the right of squeeze-out; therefore, in the final analysis, it will need to become the holder of 96% of the voting rights in the offeree company

5 Article 15.2 of Directive 2004/25/EC allowed for the setting of a single holding threshold of 90%, which could be increased to 95%, irrespective of the greater or lesser percentage of acceptance of the prior bid.

(60% + (90% x 40%) = 96%). In contrast, if the offeror does not buy shares of the offeree company before submitting its bid, it may, merely by holding 90% of the capital carrying voting rights, force minority shareholders to sell their shares. In sum, the more shares the offeror acquires prior to its bid, the more it raises the percentage for the exercise of the right of squeeze-out; thus, the threshold stands at 91% in the case of a prior acquisition of 10% of the capital, but goes up to 99% in the case of a prior acquisition of 90%.⁶

14.4. May the offeror condition the bid to reaching a percentage that enables it to exercise its right of squeeze-out?

Mandatory takeover bids (see 1.5 above), may not be subjected to any condition (see 6.1 above). Accordingly, the offeror that has previously acquired the control of the offeree company may not condition a subsequent bid to the acceptance thereof by a number of securities enabling it to exercise the right of squeeze-out (and the offeror may also not condition its bid to reaching 75% of the capital required to integrate the offeree company into its consolidated group for tax purposes).

In contrast, voluntary bids (see 1.5 above) submitted before the acquisition of control of the offeree company, may be subjected to the conditions set out in article 13 of the Royal Decree and, among them, to the “*acceptance of the bid for a certain minimum number of securities of the offeree company.*”.. (see 6.1 above). An offeror that makes a bid before the takeover may therefore condition the bid to reaching 90% of the voting rights or such greater percentage as will enable it to exercise its right of squeeze-out. Thus, the Royal Decree favours offerors that submit their bid without having previously acquired a percentage that is equal to or greater than 30% of the offeree company (or a lower percentage that has enabled the offeror to appoint more than one-half of the directors of the offeree company).

14.5. What consideration must be paid in squeeze-outs and sell-outs?

Squeeze-outs and sell-outs must be carried out at an equitable price, such price being understood as being equal to the consideration paid in the prior takeover bid (irrespective of whether the bid consideration was cash or securities).

6 This consequence must be carefully taken into account when designing the takeover bid and prior purchases. The offeror (e.g., a venture capital fund) may well decide not to buy shares, or to buy a lower percentage of the capital of the offeree company before submitting its bid so that the offeror may, in this way, reduce the threshold required to exercise the right of squeeze-out. The question posed by this strategy is what effect it may have on possible competing offers: in theory, the risk of competing offers may also be excluded without previously acquiring control of the company, by means of the so-called “irrevocables”, namely, contracts in which the reference shareholders of the listed company assume the obligation to accept the bid that the investor undertakes to make at a certain price (see 2.3 above). Indeed, if the reference shareholders are willing to sell their interest in the company to the offeror before the bid, they should also agree to assuming the irrevocable commitment of accepting the bid even if a competing offer is subsequently made at a higher price. However, actual practice will show whether, due to psychological reasons, the aforementioned “irrevocables” will be as effective deterrents of competing offers as the prior takeover of the company, and whether reference shareholders, when faced with the alternative of not selling their shares before the bid, will not reserve the right (subject to variations in each case) to sell their shares to the highest bidder, thus freeing themselves of their commitment if another offer is made at a better price.

The massive acceptance of the prior bid renders any additional safeguards (fairness opinions or the authorisation by the CNMV) unnecessary (as opposed to the rules applicable, for example, to de-listing offers (see 7.2 above)). The rule avoids any speculation on the price for the squeeze-out or sell-out, which might have discouraged the acceptance of the original bid to the point of thwarting any such acceptance or of preventing the squeeze-out or sell-out as such.

14.6. When must the rights of squeeze-out and sell-out be exercised and what procedure must be followed for the implementation thereof?

The rights of squeeze-out and sell-out may be exercised, both by the offeror and by minority shareholders, within three months of the date of expiration of the period for acceptance of the prior takeover bid.

Minority shareholders may exercise their right individually, at any time within the above-mentioned three-month period. They may also choose, acting individually, the consideration they wish to receive when the majority shareholder offers an alternative (it being understood that, in the absence of any such choice, they opt for the cash consideration).

For its part, the offeror must disclose its decision to exercise the right, at once in respect of all minority shareholders, as soon as such decision is made, but in any event within the aforementioned three-month period. Its decision shall be irrevocable (unlike, it seems, the decision of minority shareholders). The only important difference regarding who exercises the right (i.e., the offeror or the minority shareholders) refers to the settlement dates and the expenses of the transaction (see 14.7 below).

As to all other matters, the regulation of the procedure applicable to squeeze-outs and sell-outs is concise and flows from the very text of article 48 of the Royal Decree. The lack of detail in the regulations raises some questions. First, the Royal Decree imposes upon the offeror the obligation to disclose in the offer document for the original takeover bid whether or not it intends to require a squeeze-out (article 48.2 of the RD). However, it is not clear what consequences may derive from a subsequent change of mind of the offeror in this connection (if it decides to exercise its right of squeeze-out even without having disclosed it in the offer document for the original bid or, conversely, if it eventually decides not to exercise such right and thus goes back on the disclosure made in the offer document). Similar questions are posed by the possibility of non-compliance by the offeror with its obligation to notify the CNMV, within three business days after the disclosure of the result of the bid, if the conditions for the exercise of the rights of squeeze-out and sell-out are satisfied (article 48.3 of the RD). This notification is clearly intended to facilitate the exercise of the right of sell-out by minority shareholders; however, in our opinion, the failure to effect such notification should not result in the offeror being precluded from exercising the right, but rather, where applicable, in the enforcement of liability by the CNMV.

14.7. How and when are squeeze-outs and sell-outs settled and who must bear the associated expenses?

If the right is exercised by the offeror, squeeze-outs must be carried out simultaneously in respect of all minority shareholders on such date as the offeror elects within a period of 15

to 20 business days following notice to the CNMV, and the settlement takes place within the same period established in the offer document.

In contrast, if the right of sell-out is exercised by minority shareholders (even after the exercise of the right of squeeze-out by the offeror), the sales must be carried out as the notices from the minority shareholders are received, and they must be settled within the same periods as those established in the offer document, counted from receipt of each request.

The offeror that elects to exercise its right of squeeze-out must provide evidence to the CNMV of the establishment of guarantees securing compliance with its payment obligations, which guarantees are obviously not required when it is the minority shareholders that exercise their right of sell-out.

The difference as to who exercises the right of squeeze-out/sell-out also impacts on expenses: in the case of a squeeze-out (requested by the offeror), all expenses arising from the purchase and sale or exchange and the settlement of the securities are borne by the offeror, whilst in the case of sell-outs (requested by minority shareholders), all expenses are borne by the selling minority shareholders.

14.8. What is the relationship between the rights of squeeze-out/sell-out and de-listing offers?

Squeeze-outs or sell-outs whereby the offeror acquires 100% of the voting rights in the offeree company result in such company being de-listed (unless the offeror has been forced to buy as a consequence of the exercise of the right of sell-out by the minority shareholders and the CNMV grants it a period within which to comply again with the requirements of dissemination and liquidity of the securities). Squeeze-out therefore constitutes a procedure for de-listing the offeree company that is clearly more advantageous than the procedure contemplated in article 34.2 of the Securities Market Act and the regulations thereunder, to the extent that they spare the offeror the need to submit a new takeover bid at a price that is a product of the intervention of the CNMV or to follow the alternative procedure provided for in article 10 of the Royal Decree. In this way, the offeror need not obtain the approval of the de-listing offer by the shareholders at a general meeting of the offeree company, nor does it need to prepare a valuation report (by taking into account the values established in the Royal Decree), or to prepare and obtain the approval of a new offer document or, in general, to go through the complexities of the procedure contemplated in the aforementioned article 10 (see 7 above).

PART TWO

DOCUMENTARY APPENDIX

1. TIMETABLE FOR A VOLUNTARY CASH TAKEOVER BID WITHOUT CONSIDERING COMPETING OFFERS¹

DAY	ACTION / CIRCUMSTANCE	PARTY RESPONSIBLE
D-1 month	Announcement of the decision to make the bid ²	Offeror
D	Submission of the bid ³ ▶ Submission of the request for authorisation. Documents providing evidence of the offeror's corporate resolutions and the offer document, among others, are attached ⁴	Offeror
D+7	Admission for processing of the request for authorisation of the bid ▶ CNMV has 7 days to admit for processing the request for authorisation ⁵	CNMV
D+20	Authorisation of the bid ▶ CNMV has 20 days from the submission of the request for authorisation to authorise the bid ⁶	CNMV
D+21	Public and general dissemination of the bid – Publication of the 1 st announcement ▶ The offeror has 5 days to publish the corresponding announcements in the Listing Bulletins and in a newspaper of national circulation	Offeror
D+22	Commencement of the acceptance period ▶ The period for acceptance of the bid may extend from 15 to 70 calendar days , according to the duration established in the offer document ⁷	N/A

1 **Timetable provided merely for guidance.** Unless otherwise noted, days shall be understood to be **business days**.

2 The takeover bid must be announced as soon as the decision to make the bid is made.

3 The bid must be submitted within the **month** following the date on which the decision to make the bid has been made public. However, it is most probable that in practice, as a general rule, the announcement of a voluntary bid and the submission thereof will occur on the same day or within very few days of each other and that, therefore, the one-month period between both events will be significantly reduced or not used altogether.

4 It is assumed that the offeror submits all supplemental documents together with the request for authorisation.

5 The period is counted from the time of submission of all the documents that must accompany the request for authorisation of the bid (including, *inter alia*, the guarantee for the consideration offered).

6 If the CNMV requests additional information or documents, the 20-day period is counted from the date of registration or submission of the additional documents and information.

7 The acceptance period is counted from the trading day following the date of publication of the first announcement of the bid.

DAY	ACTION / CIRCUMSTANCE	PARTY RESPONSIBLE
D+32	Publication of the report of the directors of the offeree company <ul style="list-style-type: none"> ➤ They have 10 calendar days from the date of commencement of the acceptance period 	Board of directors of the offeree company
5 calendar days before expiration of acceptance period	Expiration of the period for submission of competing offers ⁸	N/A
D+36/91 ⁹	Expiration of the period for acceptance of the bid	N/A
D+41/96	Informing the CNMV of the number of acceptances <ul style="list-style-type: none"> ➤ The Stock Exchange Management Companies or the agent have 5 days to inform the CNMV of the number of acceptances 	Stock Exchange Management Companies/agent
D+43/98	Disclosure of the result of the bid <ul style="list-style-type: none"> ➤ CNMV has 2 days to disclose the result of the bid to the Stock Exchange Management Companies and, if applicable, to the <i>Sociedad de Bolsas</i>, the offeror and the offeree company 	CNMV
D+44/99	Publication of the result of the bid in the issues of the Listing Bulletins corresponding to the prior trading session	Stock Exchange Management Companies
D+46/101	Settlement of the bid	Iberclear

⁸ Competing offers may be submitted at any time after submission of the original bid and until the **fifth calendar day prior** to the expiration of the period for acceptance thereof.

⁹ For purposes of this timetable, the acceptance periods considered have been of **15** and **70 calendar days**, respectively.

2. TIMETABLE FOR A VOLUNTARY CASH TAKEOVER BID TAKING COMPETING OFFERS INTO ACCOUNT¹

DAY	ACTION / CIRCUMSTANCE	PARTY RESPONSIBLE
D-1 month	Announcement of the decision to make the original bid ²	1 st offeror
D	Submission of the original bid ³ ▶ Submission of the request for authorisation. Documents providing evidence of the 1 st offeror's corporate resolutions and the offer document, among others, are attached ⁴	1 st offeror
D+7	Admission for processing of the request for authorisation of the original bid ▶ CNMV has 7 days to admit for processing the request for authorisation ⁵	CNMV
D+20	Authorisation of the original bid ▶ CNMV has 20 days to authorise the original bid ⁶	CNMV
D+21	Public and general dissemination of the original bid- Publication of the 1 st announcement ▶ The 1 st offeror has 5 days to publish the corresponding announcements in the Listing Bulletins and in a newspaper of national circulation	1 st offeror
D+22	Commencement of the period for acceptance of the original bid ▶ The period for acceptance of the original bid may extend from 15 to 70 calendar days , according to the duration established in the offer document ⁷	N/A

1 **Timetable provided merely for guidance.** Unless otherwise noted, days shall be understood to be **business days**.

2 The takeover bid must be announced as soon as the decision to make the bid is made.

3 The bid must be submitted within the **month** following the date on which the decision to make the bid has been made public. However, it is most probable that in practice, as a general rule, the announcement of a voluntary bid and the submission thereof will occur on the same day or within very few days of each other and that, therefore, the one-month period between both events will be significantly reduced or not used altogether.

4 It is assumed that the offeror submits all supplemental documents together with the request for authorisation.

5 The period is counted from the time of submission of all the documents that must accompany the request for authorisation of the bid (including, *inter alia*, the guarantee for the consideration offered).

6 If the CNMV requests additional information or documents, the 20-day period is counted from the date of registration or submission of the additional documents and information.

7 The acceptance period is counted from the trading day following the date of publication of the first announcement of the bid.

DAY	ACTION / CIRCUMSTANCE	PARTY RESPONSIBLE
D+32	Publication of the report of the directors of the offeree company regarding the original bid <ul style="list-style-type: none"> ➤ They have 10 calendar days from the date of commencement of the period for acceptance of the original bid 	Board of directors of the offeree company
D+46 ⁸	Submission of a competing offer <ul style="list-style-type: none"> ➤ Competing offers may be submitted at any time after submission of the original bid and until the fifth calendar day prior to the expiration of the period for acceptance thereof ➤ The submission of a competing offer interrupts the course of the period for acceptance of the original bid 	2 nd offeror
[D+51]	Date of expiration of the acceptance period established in the offer document for the original bid	N/A
D+53	Admission for processing of the request for authorisation of the competing offer <ul style="list-style-type: none"> ➤ CNMV has 7 days to admit for processing the request for authorisation⁹ 	CNMV
D+66	Authorisation of the competing offer <ul style="list-style-type: none"> ➤ CNMV has 20 days to authorise the competing offer¹⁰ 	CNMV
D+67	Public and general dissemination of the competing offer - Publication of the 1 st announcement <ul style="list-style-type: none"> ➤ The 2nd offeror has 5 days to publish the corresponding announcements in the Listing Bulletins and in a newspaper of national circulation 	2 nd offeror
D+68	Commencement of the period for acceptance of the competing offer <ul style="list-style-type: none"> ➤ The period for acceptance of the competing offer is 30 calendar days¹¹ ➤ The period for acceptance of the original bid is automatically modified such that both offers expire on the same day¹² (in our example, D+97) 	N/A

8 Assuming the period for acceptance of the original bid is **30 calendar days**. In the example, the competing offer is submitted on the last day of the period for submission.

9 The period is counted from the time of submission of all the documents that must accompany the request for authorisation of the competing offer (including, *inter alia*, the guarantee for the consideration offered).

10 If the CNMV requests additional information or documents, the 20-day period is counted from the date of registration or submission of the additional documents and information.

11 The acceptance period is counted from the day following the date of publication of the first announcement of the competing offer.

12 The new acceptance period that serves as the same period for all offers shall be published by the CNMV on its website.

DAY	ACTION / CIRCUMSTANCE	PARTY RESPONSIBLE
D+78	Publication of the report of the directors of the offeree company regarding the competing offer ¹³	Board of directors of the offeree company
D+92	Expiration of the period for submission of new competing offers ¹⁴	N/A
D+96	Expiration of the period for the original offeror to withdraw its bid <ul style="list-style-type: none"> ▶ The original offeror may withdraw its bid after the authorisation of the competing offer and before the date of submission of the sealed envelopes 	1 st offeror
D+97	<ul style="list-style-type: none"> • Expiration of the (previously extended) period for acceptance of the original bid and of the period for acceptance of the competing offer • Submission of sealed envelopes with the most recent improvement¹⁵ ▶ The sealed envelopes must be submitted on the fifth business day after expiration of the period for submission of competing offers¹⁶ 	Offerors
D+98	Opening of envelopes and dissemination to the market ¹⁷	CNMV
D+100	Provision of evidence, if applicable, of the establishment of supplemental guarantees in connection with the improvements included in the sealed envelopes	Offerors

- 13 The Royal Decree does not specify whether this report must be published (i) within the general period of **10 calendar days** following the date of commencement of the period for acceptance of the competing offer (which is the alternative contemplated here) or (ii) within **5 calendar days** following the date of publication of the authorisation of the competing offer, as would be the case if the rules governing the changes to this type of offer were applied pursuant to the provisions of article 45.8 of the Royal Decree.
- 14 New competing offers may be submitted at any time after submission of the original bid and until the **fifth calendar day prior** to the expiration of the period for acceptance thereof. It must be borne in mind that if a new competing offer were submitted, the periods would once again be extended, and so forth for each new competing offer.
- 15 From the authorisation of the competing offer until the date of submission of the envelopes, any of the offerors may, in turn, improve the terms of its offer, in which case, the acceptance period will be extended.
- 16 As the Royal Decree uses calendar days to calculate the last day of the period for submission of competing offers and business days to calculate the date of submission of the sealed envelopes, and given that such date is calculated by reference to the aforementioned last day, it will normally occur that, pursuant to a literal application of this provision, the date of submission of the envelopes will fall on a day subsequent to the expiration of the period for acceptance of the offers. In this timetable, we have assumed that this is not the case, because this scenario seems to be the most consistent with the spirit of the provision and with the mechanics of the competing offers system. Accordingly, we have assumed that the date of submission of the sealed envelopes coincides with the last day of the acceptance period.
- 17 The opening of the envelopes shall take place on the same day of submission thereof or on the trading day immediately thereafter.

DAY	ACTION / CIRCUMSTANCE	PARTY RESPONSIBLE
D+101	Authorisation of the new terms included in the sealed envelopes <ul style="list-style-type: none"> ▶ If both offerors make changes, the CNMV must authorise both offers on the same date 	CNMV
D+102	Public and general dissemination of the new terms included in the sealed envelopes - publication of announcements ¹⁸ <ul style="list-style-type: none"> ▶ The duration of the period for acceptance of the offers is extended for 15 calendar days after the publication of the announcements 	Offerors
D+103	Commencement of the extension of 15 calendar days of the period for acceptance of the offers	N/A
D+107	Publication of the report of the directors of the offeree company regarding the new terms <ul style="list-style-type: none"> ▶ They have 5 calendar days from the date of publication of the changes 	Board of directors of the offeree company
D+117	Expiration of the extension of 15 calendar days of the period for acceptance of the offers	N/A
D+122	Informing the CNMV of the number of acceptances <ul style="list-style-type: none"> ▶ The Stock Exchange Management Companies or the agents have 5 days to inform the CNMV of the number of acceptances 	Stock Exchange Management Companies/agents
D+124	Disclosure of the result of the offers <ul style="list-style-type: none"> ▶ CNMV has 2 days to disclose the result of the offers to the Stock Exchange Management Companies and, if applicable, to the <i>Sociedad de Bolsas</i>, the offerors and the offeree company 	CNMV
D+125	Publication of the result of the offers in the issues of the Listing Bulletins corresponding to the prior trading session	Stock Exchange Management Companies
D+127	Settlement of the offers	Iberclear

¹⁸ The dissemination shall be carried out by means of the publication of the corresponding announcements in the Listing Bulletins and in a newspaper of national circulation. If both offerors make changes, the new terms must be disseminated in respect of both offers on the same date. The period within which the new terms are to be disseminated must be established by the CNMV in each case.

3. PROVISIONS RELATIVE TO TAKEOVER BIDS FOR SECURITIES INCLUDED IN ACT 6/2007 OF 12 APRIL, AMENDATORY OF ACT 24/1988 OF 28 JULY, ON THE SECURITIES MARKET, PROVIDING FOR THE REFORM OF THE RULES ON TAKEOVER BIDS AND ON THE TRANSPARENCY OF ISSUERS

[...]

Article 1.

Article 34 of the Securities Market Act [*Ley del Mercado de Valores*] is amended to read as follows:

«Article 34. *De-listing.*

1. The National Securities Market Commission [*Comisión Nacional del Mercado de Valores*] may de-list securities that do not satisfy such requirements as to dissemination, frequency or trading volume as may be established in the regulations, as well as those the issuer of which does not comply with the obligations binding upon it, especially in connection with the submission and publication of information. Such de-listing shall be approved by the National Securities Market Commission upon its own initiative or upon a proposal of the bodies supervising the corresponding official secondary markets. Without prejudice to such preventive measures as may be adopted, approval of such measures shall only take place after a hearing with the issuing company.

2. When a company resolves to de-list its shares from Spanish official markets, it must make a takeover bid covering all of the securities subject to de-listing.

Corporate transactions whereby the shareholders of a listed company may become, in whole or in part, shareholders of an unlisted entity shall be regarded as equivalent to de-listing.

The conditions governing the establishment of the price and other requirements of the takeover bids contemplated in this article shall be set forth in the appropriate regulations.

The National Securities Market Commission may dispense with the obligation to make a takeover bid in those instances in which the protection of the legitimate interests of the holders of shares subject to de-listing, as well as those of all convertible bonds and

other securities carrying subscription rights, is ensured by means of another equivalent procedure.

3. In the event of a takeover bid prior to de-listing, the limit on the acquisition of a company's own shares established in Royal Legislative Decree 1564/1989, of 22 December, approving the Restated Text of the Spanish Companies Act [*Ley de Sociedades Anónimas*], in respect of shares listed on an official secondary market shall be 10 per cent of share capital. In the event that, as a consequence of the takeover bid, the company's own shares exceed such limit, they must be repurchased or transferred within a period of one year.

4. The resolution on de-listing, as well as resolutions relating to the bid and the price offered, must be approved by the shareholders at a General Meeting of Shareholders.

5. A report of the directors containing a detailed rationale for the proposal and the price offered shall be made available to the holders of the affected securities at the time of the call to meeting of the corporate decision-making bodies that must approve the bid.»

[...]

Article 8.

Chapter V of Title IV of the Securities Market Act is amended to read as follows:

«CHAPTER V TAKEOVER BIDS

Article 60. *Mandatory takeover bids.*

1. Whoever obtains control of a listed company must make a takeover bid for all of the shares or other securities that might directly or indirectly give the right to subscription thereto or acquisition thereof, to all holders thereof at an equitable price, whether such control is obtained:

- a) By means of the acquisition of shares or other securities that directly or indirectly give the right to subscribe for or acquire voting shares in such company;
- b) By means of shareholders' agreements [*pactos parasociales*] with other holders of securities; or
- c) As a result of other instances of a similar nature as provided in the regulations.

The obligations set forth in this Chapter shall be understood to bind those companies whose shares are either wholly or partly admitted to trading on a Spanish official secondary market and whose registered office is in Spain.

The obligations set forth in this Chapter shall also apply, upon terms to be established in the regulations, to companies that do not have their registered office in Spain and whose securities are not admitted to trading on a regulated market in the Member State of the European Union in which the company has its registered office, in the following cases:

- a) If the securities of the company are only admitted to trading on a Spanish official secondary market.
- b) If the first admission to trading of the securities on a regulated market has been that of a Spanish official secondary market.

c) If the securities of the company are simultaneously admitted to trading on regulated markets of more than one Member State and on a Spanish official secondary market, and the company so decides by giving notice to such markets and to the competent authorities thereof on the first day that the securities are traded.

d) If, as of 20 May 2006, the securities of the company were already admitted to trading simultaneously on regulated markets of more than one Member State and on a Spanish official secondary market and the National Securities Market Commission has so agreed with the competent authorities of the other markets on which they have been admitted to trading or, in the absence of such agreement, it has so been decided by the company.

In addition, the provisions contained in this Chapter shall apply, upon such terms as will be set forth in the regulations, to companies that have their registered office in Spain and whose securities are not admitted to trading on a Spanish official secondary market.

The price shall be deemed to be equitable when it is at least equal to the highest price paid by the party required to make the takeover bid or the persons acting in concert therewith for the same securities during a period of time prior to the bid to be determined by the regulations and upon such terms as shall be established. However, the National Securities Market Commission may change the price so calculated in such circumstances and pursuant to such standards as shall be established in the regulations. The aforementioned circumstances may include the following, among others: that a higher price has been agreed upon between the purchaser and the seller; that the market prices for the securities in question have been manipulated; that market prices in general, or certain prices in particular, have been affected by exceptional events; that the aim is to promote a restructuring of the company. Such standards may include, among others, the average market price during a particular period, the liquidation value of the company or other commonly-used objective valuation standards.

In the event of a change in price as set forth in the preceding paragraph, the National Securities Market Commission shall publish on its website its decision to the effect that the bid be made at a price other than the equitable price. A reasoned opinion must be provided for such decision.

2. For purposes of this Chapter, it shall be deemed that an individual or legal entity, individually or collectively with the persons acting in concert therewith, has control of a company when such individual or legal entity directly or indirectly reaches a percentage of voting rights equal to or greater than 30 per cent; or when such individual or legal entity has reached a lesser interest and appoints, upon such terms as shall be established in the regulations, a number of directors that, together with those already appointed, if any, represent more than one-half of the members of the company's board of directors.

The National Securities Market Commission will conditionally dispense with the obligation to make the takeover bid established in this article, upon terms to be established in the regulations, when another individual or entity directly or indirectly holds a voting percentage equal to or greater than that held by the party required to make the bid.

3. Whoever breaches the obligation to make a takeover bid may not exercise the political rights attaching to any of the securities of the listed company to which they may be entitled for any reason, without prejudice to the sanctions established in Title VIII of this Act. This prohibition shall also apply to the securities held indirectly by the party required to make the takeover bid and to the securities belonging to parties acting in concert therewith.

For purposes of this sub-section, a party that fails to submit a takeover bid, or submits it outside the maximum period established for such purpose, or submits it with material irregularities, shall be deemed to have breached the obligation to make a takeover bid.

Resolutions adopted by the company's decision-making bodies shall be invalid when, for the constitution of such bodies or the adoption of such resolutions, it is necessary to count securities whose political rights are suspended pursuant to the provisions of this sub-section.

The National Securities Market Commission shall have standing to make any relevant challenges by bringing the corresponding legal actions within a period of one year from becoming aware of the resolution, without prejudice to the standing that may be held by other persons.

The National Securities Market Commission may challenge the resolutions of the Board of Directors of a listed company within a period of one year from becoming aware thereof.

4. When the consideration offered consists of securities to be issued by the company required to make the bid, it shall be deemed that the existing shareholders and the holders of convertible bonds do not have the pre-emptive rights contemplated in article 158 of Royal Legislative Decree 1564/1989 of 22 December, approving the Restated Text of the Spanish Companies Act.

5. The following matters shall be provided for in the regulations:

a) The securities to which the takeover bid must be directed;

b) The rules and periods for calculating the percentage of votes giving control of a company, taking into account direct and indirect shareholdings, as well as agreements, contracts or situations of joint control;

c) The person that will be required to submit the takeover bid in instances of shareholders' agreements and unexpected situations of control [*situaciones de control sobrevenido*] in which there is the obligation to make such bid;

d) The terms on which the bid will be irrevocable or on which it may be subject to a condition or be modified;

e) The required guarantees depending on whether the consideration offered is in cash, issued securities or securities for which issuance has not yet been approved by the offeror entity or company;

f) The nature of administrative control by the National Securities Market Commission and, in general, the procedure for takeover bids;

g) The rules applicable to possible competing offers;

h) The rules on pro-ration;

i) The transactions excluded from these rules;

j) The equitable price, forms of consideration, and exceptions that may apply, if any;

k) The information that must be made public prior to the submission of a takeover bid, once the decision to submit it has been made, within the course and after the completion thereof;

l) The period in which a takeover bid must be submitted after the public announcement thereof;

m) The rules regarding the lapsing of bids;

n) The rules applicable to the publication of the results of bids;

o) The information that must be supplied by the board of directors or management bodies of the offeree company and of the offeror to the representatives of their respective employees or, in the absence thereof, to the employees themselves, as well as the procedure applicable to such obligation, without prejudice to the provisions of labour law, and

p) Other matters for which regulation is deemed necessary.

Article 60. *bis*. *Duties of the board of directors and management bodies.*

1. During the period and upon the terms to be established in the regulations, the board and the management bodies of the offeree company or of the companies belonging to the same group must obtain prior authorization from the shareholders acting at a general meeting of shareholders, pursuant to the provisions of article 103 of the Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989, of 22 December, before taking any action that might prevent the success of a bid (except for a search for other bids), and particularly prior to initiating any issuance of securities that might prevent the offeror from obtaining control of the offeree company.

As regards decisions adopted prior to the commencement of the period established in the preceding paragraph and not yet applied in whole or in part, the shareholders acting at a general meeting of shareholders must approve or confirm, pursuant to the provisions of article 103 of the Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989, of 22 December, all decisions that do not occur in the ordinary course of business of the company where the application thereof might frustrate the success of a bid.

In the event that an offeree company has a dual management system, the provisions of the foregoing paragraphs shall also apply to the supervisory board [*consejo de control*].

The general meeting of shareholders referred to in this sub-section may be called fifteen days prior to the date set for the holding thereof, by means of a notice published in the Official Bulletin of the Commercial Registry [*Boletín Oficial del Registro Mercantil*] and in one of the more widely circulated newspapers in the province and setting forth the date for the meeting upon first call and all the matters to be dealt with thereat.

The Official Bulletin of the Commercial Registry shall publish the call to meeting immediately after receipt thereof.

2. A company may decide not to apply the provisions set forth in the preceding sub-section when it is the target of a takeover bid made by an entity that does not have its registered office in Spain and that is not subject to the above-mentioned or equivalent rules, including the rules required for the adoption of decisions by the shareholders at a general meeting of shareholders, or by an entity directly or indirectly controlled thereby, pursuant to the provisions of article 4 of this Act.

Any decision adopted under the provisions of the preceding paragraph shall require authorization by the shareholders acting at a general meeting of shareholders, pursuant to

the provisions of article 103 of the Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989, of 22 December, which decision must be adopted not more than 18 months prior to the takeover bid being made public.

3. The offeree's board of directors must publish a detailed report regarding the bid upon the terms and within the deadlines to be established in the regulations.

Article 60.ter. *Optional neutralisation measures.*

1. A company may decide to apply the following breakthrough measures:

a) The ineffectiveness of restrictions on the transfer of securities set forth in shareholders' agreements regarding such company during the period for acceptance of the bid.

b) The ineffectiveness, at the general meeting of shareholders at which decisions are made on the possible preventive measures provided for in article 60.bis.1 of this Act, of restrictions on voting rights set forth in the articles of association of the offeree company and in shareholders' agreements relating thereto.

c) The ineffectiveness of the restrictions contemplated under the preceding letters when, after a takeover bid, the offeror has reached a percentage equal to or greater than 75 per cent of the voting capital.

2. The decision to apply this article must be adopted by the shareholders at a general meeting of shareholders of the company, pursuant to the provisions of article 103 of the Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989, of 22 December, and must be reported to the National Securities Market Commission and to the supervising authorities of the Member States in which the company's shares are admitted to trading or in which an application for trading has been submitted. The National Securities Market Commission shall make such communication public upon the terms and within the deadlines to be established in the regulations.

The decision to apply this article may be revoked at any time by the shareholders at a general meeting of shareholders of the company, pursuant to the provisions of article 103 of the Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989, of 22 December. The majority required under this paragraph must be the same as that required under the preceding paragraph.

3. When a company decides to apply the measures described in sub-section 1, it must provide for appropriate compensation to the holders of the rights mentioned therein for the loss of such rights.

4. Companies may cease to apply breakthrough measures in effect under the provisions of the foregoing sub-sections when they are the target of a takeover bid made by an entity or group that has not adopted equivalent equivalent breakthrough measures.

Any measure to be adopted under the provisions of the preceding paragraph shall require authorization by the shareholders at a general meeting of shareholders, pursuant to the provisions of article 103 of the Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989, of 22 December, which measure shall be adopted not more than 18 months prior to the takeover bid being made public.

5. The regulations may provide for other matters the contemplation of which is deemed necessary in order to further develop the provisions of this article.

Article 60. quater. *Squeeze-out and sell-out.*

1. When an offeror holds securities representing at least 90 per cent of the voting capital as a result of a takeover bid for all of the securities pursuant to the provisions of articles 60 and 61 of this Act, and the bid has been accepted by the holders of securities representing at least 90 % of the voting rights other than those already held by the offeror:

a) The offeror may require the other holders of securities to sell such securities to the offeror at an equitable price.

b) The holders of securities of the offeree company may require the offeror to purchase their securities at an equitable price.

2. The regulations shall establish the procedure and the requirements applicable to the squeeze-out and sell-out transactions referred to in the preceding sub-section.

Article 61. *Voluntary takeover bids.*

Voluntary takeover bids for shares or other securities that directly or indirectly give voting rights in a listed company must be directed towards all holders thereof, shall be subject to the same rules of procedure as those applicable to the bids contemplated in this Chapter, and may be made, subject to the conditions to be established in the regulations, for a number of securities less than the totality thereof.

A mandatory takeover bid as provided for in article 60 shall not be required when control has been acquired following a voluntary bid for all of the securities that has been directed towards all of the holders thereof and in compliance with all of the requirements established in this Chapter.»

[...]

Article 12.

Sub-sections m), p) and r) of article 99 of the Securities Market Act are amended and two new sub-sections, *r.bis*) and *r.ter*), are inserted in such article 99, to read as follows:

« **Article 99.** *Very serious violations.*

The following acts or omissions by the individuals and legal entities mentioned in article 95 of this Act constitute very serious violations:

[...]

r) Non-compliance with the obligations established in articles 60 and 61 of this Act and in the regulations made under the provisions of this article. In particular:

– Non-compliance with the obligation to submit a takeover bid; the submission thereof outside the maximum period established for such purpose or with material irregularities that prevent the National Securities Market Commission from considering the bid submitted or from authorizing it; or the making of a takeover bid without the required authorization.

– Failure to publish or to submit to the National Securities Market Commission the information and documentation that must be published or submitted thereto as a consequence of actions requiring the submission of a takeover bid, within the course or after the completion thereof, when the information or documentation in question is relevant or the amount of the bid or the number of affected investors is significant.

– The publication or provision of information or documentation relating to a takeover bid in which data has been omitted or which contains inaccuracies, untruths or misleading information, when the information or documentation in question is relevant or the amount of the bid or the number of affected investors is significant.

r.*bis*) Non-compliance by the board of directors and management bodies with the obligations established in article 60.*bis* of this Act and in the regulations hereunder.

r.*ter*) Non-compliance with the obligations established in articles 34 and 60.*ter* of this Act and in the regulations hereunder.»

Article 13.

Sub-section j) of article 100 of the Securities Market Act is amended, and new sub-sections z), z.*bis*) and z.*ter*) are inserted in such article 100, to read as follows:

« **Article 100.** *Serious violations.*

The following acts or omissions by the individuals and legal entities mentioned in article 95 of this Act constitute serious violations:

[...]

z) Failure to publish or to submit to the National Securities Market Commission the information and documentation that must be published or submitted thereto as a consequence of actions requiring the submission of a takeover bid, within the course or after the completion thereof, when such failure does not constitute a very serious violation under the provisions of letter r) of the preceding article.

z.*bis*) The publication or provision of information or documentation relating to a takeover bid in which data has been omitted or which contains inaccuracies, untruths or misleading information, when this does not constitute a very serious violation under the provisions of letter r) of the preceding article.

z.*ter*) Failure to include in the management report of listed companies the information required in article 116.*bis* of this Act, or the existence of omissions or untrue or deceptive information therein.»

Artículo 14.

A new article 116.*bis* is inserted in the Securities Market Act to read as follows:

«**Article 116.*bis.*** *Additional information to be included in the management report.*

The companies referred to in this Chapter shall include in the management report information about the following:

a) The capital structure, including securities that are not traded in a regulated EU market, stating, if applicable, the different classes of shares and for each class of shares, the rights and obligations conferred and the percentage of the share capital represented;

b) Restrictions to the transferability of securities;

c) Significant direct and indirect stakes in the capital;

d) Restrictions to the right to vote;

e) Shareholder' agreements;

f) Rules applicable to the appointment and replacement of the members of the board of directors and to the amendment of the articles of association;

g) The powers of the members of the board of directors and, in particular, powers to issue or repurchase shares;

h) Any significant agreements made by the company that enter into force, are amended or conclude if there is a change of control of a company upon a takeover bid being made, and its effects, except when its disclosure is particularly harmful for the company. This exception does not apply when the company is obligated to make this information public by operation of law;

i) Agreements between the company and its directors, officers or employees establishing compensations when any of the latter three resign or are unfairly dismissed or if the employment relationship is ended by reason of a takeover bid.

The board of directors shall present a yearly explanatory report at the general meeting of shareholders concerning the items contained in this article.»

Additional provision. *Rules applicable to certain increases in shareholdings in a listed company.*

A party which, upon the entry into force of this Act, holds a percentage of voting rights in a listed company that is equal to or greater than 30 per cent and less than 50 per cent shall be obligated to make a takeover bid in accordance with the provisions of Chapter V of Title IV of Act 24/1988 of 28 July, on the Securities Market, when, after the entry into force of this Act, any of the following circumstances occurs:

a) It acquires, in a single act or in successive acts, shares in such company until increasing its shareholdings by at least 5 per cent over a period of 12 months.

b) It reaches a percentage of voting rights equal to or greater than 50 per cent.

c) It acquires additional shareholdings and appoints a number of directors that, together with those that have already been appointed, if any, represent more than one-half of the members of the board of directors of the company.

The Government may establish the requirements that it deems necessary for the application of this provision, as well as the transactions excluded from these rules.

In any event, the National Securities Market Commission will conditionally dispense, upon the terms to be established in the regulations, with the obligation to make a takeover bid established in sub-section a) when another person or entity directly or indirectly holds a voting percentage equal to or greater than that held by the party required to make the bid.

[...]

Second transitional provision. *Transitional rules applicable to certain takeover bids.*

This Act shall apply to takeover bids in respect of which a request for authorization has been submitted to the National Securities Market Commission and such request has not been granted prior to the entry into force of this Act.

Third transitional provision. *Transitional rules applicable to certain increases in shareholdings in a listed company prior to the entry into force of this Act.*

Whoever has acquired shareholdings in a company prior to the entry into force of this Act and, after such entry into force, appoints a number of directors that, together with those that have already been appointed, if any, represent more than one-half of the members of the board of directors of the company, must make a takeover bid in accordance with the provisions of Chapter V of Title IV of Act 24/1988 of 28 July, on the Securities Market. This provision shall apply when the appointment is made within 24 months following the acquisition of the shareholdings.

[...]

First final provision. *Transposition of European Union law.*

This Law partially transposes Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids and Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market amending Directive 2001/34/EC.

[...]

Third final provision. *Lawmaking capacity.*

The Government may issue any regulations as are necessary to develop execute and enforce the provisions of this Act.

Fourth final provision. *Entry into force.*

This Act shall enter into force four months after its publication in the Official State Bulletin [*Boletín Oficial del Estado*]

4. ROYAL DECREE 1066/2007, OF 27 JULY, ON RULES APPLICABLE TO TAKEOVER BIDS FOR SECURITIES

I

Act 6/2007 of April 12, amendatory of Act 24/1988 of 28 July, on the Securities Market, providing for the reform of the rules on takeover bids and on the transparency of issuers, provides a new text for article 34 and for Chapter V of Title IV of Act 24/1988 of 28 July, on the Securities Market. The purpose of such Act has been twofold: on the one hand, to introduce the amendments required by the transposition of Directive 2004/25/EC of the European Parliament and of the Council, of 21 April 2004, on takeover bids; and on the other hand, to make such amendments to the rules as may be necessary to ensure that takeover bids are carried out within a comprehensive legal framework and with absolute legal certainty.

This royal decree on takeover bids completes the amendments introduced by Act 6/2007 with the aim of thoroughly achieving the two purposes mentioned above. The starting point and the enabling legislation for the issuance of this royal decree are to be found within the framework of the aforementioned sets of provisions.

The significance of the changes introduced in the Act and the consequent significance of the changes included in this royal decree justifies the repeal of Royal Decree 1197/1991, of 26 July, on rules applicable to takeover bids for securities, and the substitution thereof with a new royal decree providing for an exhaustive set of rules governing all of the stages in the making of a takeover bid for shares of a listed company.

II

This royal decree has 50 articles, distributed in eleven chapters, as well as two additional provisions, one transitional provision, one repeal provision and four final provisions.

Chapter I contains the basic provisions regarding the scope of this royal decree. It is thus laid down that this royal decree applies to all takeover bids, whether voluntary or mandatory, for a listed company. Along the same lines as in the Act, provision is made for the instances of cross-border application of this royal decree, with specific rules as to the aspects of the bid that shall be governed by the provisions set forth herein and the issues that shall be governed by the Law of the country where the company has its registered office.

Chapter II contains the rules specifically applicable to mandatory takeover bids when control of a company is obtained, both directly and in unexpected situations of control. If the factual cases that amount to such control occur, a takeover bid must be submitted for all

of the company's capital at an equitable price. However, no such bid shall be mandatory in the instances in which the National Securities Market Commission [*Comisión Nacional del Mercado de Valores*] grants a waiver or in such other instances as are excluded under this royal decree. Also specified are the cases in which the price of the bid may or must be adjusted upwards or downwards.

Chapter III focuses on other cases of takeover bids. Thus, in addition to mandatory bids in cases in which control is obtained, two other instances of mandatory bids are provided for: bids for the de-listing of securities and bids that must be made when a company wishes to reduce capital through the acquisition of its own shares for subsequent redemption thereof. Finally, the possibility of making voluntary bids is also contemplated. These are cases in which a person wishes to acquire large shareholdings by directing a bid to all of the shareholders. These bids may be made for all of the capital or a portion thereof. In general, the rules applicable to these bids are the same as for mandatory bids, with a few exceptions set forth in the relevant articles of this royal decree.

In Chapter IV, this royal decree provides for the consideration and guarantees offered in a bid. The consideration for a company's shares may consist of cash or securities or a combination of both. Provision is made for certain cases in which a cash consideration is to be offered as an alternative, in order to ensure adequate shareholder protection. In order to ensure that the bid is made in earnest, the offeror is also required to provide appropriate guarantees evidencing that it can afford the consideration offered therein.

All of the stages of the procedure that must be followed in a takeover bid are regulated by this royal decree. As provided in Chapter V, the procedure begins with the announcement of the intent (in the case of a voluntary bid) or of the obligation (if not a voluntary bid) to submit a takeover bid. This announcement must be made as soon as it is decided to submit a bid or as soon as the factual cases requiring the submission of a mandatory bid occur.

Once the bid has been announced, a request for authorisation, together with any documents required for review thereof, must be submitted to the National Securities Market Commission, and after such authorisation has been granted, the offeror must adequately disseminate the bid in order to inform the market and, in particular, all of the shareholders of the offeree company. All along this process, the employees of the offeror and of the offeree company must be kept adequately informed.

The offeror must give the shareholders a definite period within which to accept the bid, if they so wish. Before the expiration of this acceptance period, the board of directors of the offeree company must publish a report containing its opinion regarding the bid.

This chapter also sets forth the rules applicable to the authorisations that may be required by administrative agencies other than the National Securities Market Commission.

Chapter VI elaborates on the provisions contained in the Act regarding the mandatory duty of passivity of the board of directors of the offeree company and the optional regime of neutralisation (breakthrough) of other preventive measures against bids. In the first case, provision is made for specific measures that must be approved by the shareholders at a general meeting. In both cases, mandatory safeguards are established for the shareholders to make a decision at the general meeting with full knowledge of the proposals submitted thereto.

Although takeover bids are irrevocable in principle, Chapter VII provides for instances in which voluntary bids may be subject to the fulfilment of certain conditions. In the case of mandatory bids, the possibility of withdrawal of the bid is included when at the end of the entire process applicable to competing offers, there still exists a bid, not subject to conditions,

which betters the mandatory bid, as well as, under certain conditions, when the bid is subject to administrative authorisation in connection with competition matters. There is also a general provision governing the withdrawal of any bid on the grounds of exceptional circumstances preventing the submission thereof.

Furthermore, this royal decree grants the offeror the possibility of improving the bid originally submitted.

In addition to these limitations on the offeror's actions, this royal decree provides for the impact on the bid resulting from the fact that during the bid procedure, the offeror acquires shares of the offeree company outside such procedure. The purpose of these provisions is to give the offeror some room for manoeuvre without the shareholders sustaining any harm as a result.

The final provisions on the takeover bid, contained in Chapter VIII, refer to the acceptance period, the calculation of the acceptances received and the settlement of the bid.

Chapter IX focuses on the procedure applicable to competing offers, i.e., offers on a company that has been the target of another previous offer in respect of which the acceptance period has not yet expired.

In Chapter X, this royal decree provides for the procedure applicable to two novel devices in our law, namely, squeeze-outs and sell-outs, which are defined in the Act.

Finally, there is a brief reference to the rules on supervision, inspection and sanctions applicable in respect of the regulations contained in the royal decree.

This royal decree expressly repeals Royal Decree 1197/1991, of 26 July, on rules applicable to takeover bids for securities, and has been issued under the enabling provisions contained in articles 34, 60, 60 *bis*, 60 *ter* and 60 *quater* of Act 24/1988 of 28 July, on the Securities Market, and in the third final provision of Act 6/2007 of 12 April, amendatory of Act 24/1988 of 28 July, on the Securities Market, providing for the reform of the rules on takeover bids and on transparency.

By virtue thereof, at the proposal of the Minister of Economy and Finance, with the prior approval of the Minister of Public Administrations, in agreement with the Council of State, and following the deliberations of the Council of Ministers at its meeting of 27 July 2007,

I HEREBY PROVIDE AS FOLLOWS:

CHAPTER I

SCOPE

Article 1. *Subjective scope.*

1. The provisions of this royal decree shall apply to all individuals or legal entities that make or must make a takeover bid for shares of a listed company or for other securities carrying the right to the acquisition or subscription thereof.

Those companies whose shares are, in whole or in part, admitted to trading on a Spanish official secondary market and which have their registered office in Spain, shall be deemed to be listed companies. Companies which do not have their registered office in Spain shall be governed by the provisions of sub-sections 2, 3 and 4 below.

This royal decree shall not apply to takeover bids for shares of open-ended investment companies [*sociedades de inversión de capital variable*] or to takeover bids for shares of the central banks of the Member States of the European Union.

2. The rules set forth in sub-section 3 below shall apply to companies which do not have their registered office in Spain and whose shares are not admitted to trading on a regulated market in the Member State of the European Union in which the company has its registered office in any of the following cases:

a) When the company's shares are only admitted to trading on a Spanish official secondary market.

b) When the first admission to trading of the shares on a regulated market has been the admission to trading on a Spanish official secondary market.

c) When the company's shares are simultaneously admitted to trading on regulated markets of more than one Member State and on a Spanish official secondary market and the company so decides by giving notice to such markets and to the competent authorities thereof on the first day that its shares are traded.

d) In the event that as of 20 May 2006, the company's shares were already admitted to trading simultaneously on regulated markets of more than one Member State and on a Spanish official secondary market and the National Securities Market Commission has so agreed with the competent authorities of the other markets on which they were admitted to trading or, in the absence of any such agreement, when it has so been decided by the company.

The National Securities Market Commission shall publish on its website its appointment as competent authority for the authorisation of takeover bids on the companies referred to in letters c) and d) above, on the business day immediately following the notice or the making of the agreement mentioned in such letters.

3. The following rules shall apply to the cases contemplated in the preceding sub-section:

a) The decision regarding the authorisation of the bid shall be the purview of the National Securities Market Commission.

b) All issues in connection with the consideration or price offered in the bid procedure—in particular, the information regarding the offeror's decision to submit a bid, the contents of the offer document and the dissemination of the bid—and all issues in connection with competing offers shall be governed by the provisions of this royal decree.

c) As to the information that must be provided to the employees of the offeree company and as to all Company Law matters—in particular, the percentage of voting rights that gives control and the exceptions to the obligation to make a bid, as well as the circumstances in which the board of directors or the management body of an offeree company may take action that may disrupt the development of the bid—, the applicable rules and the enforcement authority shall be those of the Member State of the European Union in which the offeree company has its registered office.

4. When the offeree company does not have its registered office in Spain or in any other Member State of the European Union and its shares are admitted to trading on a Spanish official secondary market, the provisions of letters a) and b) of sub-section 3 shall apply.

5. If the offeree company has its registered office in Spain but its securities are not admitted to trading on a Spanish official secondary market, the provisions of letter c) of sub-section 3 shall apply.

Article 2. *Objective scope.*

This royal decree shall apply both to mandatory takeover bids, provided for in articles 3, 7, 10 and 12, and to voluntary bids as provided in article 13.

CHAPTER II

TAKEOVER BID WHEN CONTROL IS OBTAINED

Article 3. *Mandatory takeover bid when control is obtained.*

1. Whoever obtains control of a listed company must make a takeover bid for all of the securities, to all holders thereof at an equitable price, whether such control is obtained:

a) By means of the acquisition of shares or other securities that directly or indirectly grant voting rights in such company;

b) By means of shareholders' agreements [*pactos parasociales*] with other holders of securities, as provided in article 5.1.b); or

c) As a result of the instances of indirect or unexpected takeover [*tomas de control indirectas o sobrevenidas*] established in article 7.

2. The bid must be made to:

a) All holders of shares in the listed company, including holders of non-voting shares that, at the time that authorisation of the bid is requested, have the right to vote pursuant to the provisions of applicable law.

b) All holders, if any, of stock subscription rights, as well as holders of bonds that are convertible into and exchangeable for shares.

The bid may or may not be made to all of the holders of warrants or other securities or financial instruments carrying the option to acquire or subscribe for shares, except for those mentioned in letter b) of this sub-section, whether issued or to be issued. If made to them, the takeover bid must be made to all persons holding any such warrants, securities or financial instruments in question.

3. In cases of concerted action, shareholders' agreements or other instances in which, pursuant to article 5, the percentages of voting rights held by several shareholders are deemed to be held by one person, the person who directly or indirectly holds the greatest percentage of voting rights shall be required to make a bid. If the percentages held by two or more shareholders are the same, both or all of them shall be required to make the bid collectively.

4. The bid shall be submitted as soon as possible and within a maximum period of 1 month after control is obtained.

Article 4. *Controlling interest.*

1. For the purposes of this royal decree, it shall be deemed that an individual or legal entity has, individually or collectively with the persons acting in concert therewith, a controlling interest in a company in any of the following cases:

a) When it directly or indirectly reaches a percentage of voting rights equal to or greater than 30 per cent; or

b) When it has directly or indirectly reached a lesser percentage of voting rights and appoints, within 24 months following the date of acquisition of such lesser percentage, as provided in article 6, a number of board members that, together with those already appointed, if any, represent more than one-half of the members of the board of directors of the company.

2. The National Securities Market Commission shall waive the obligation to make a takeover bid as provided in articles 3 and 7 when the percentage mentioned in letter a) of the preceding sub-section is reached in the event that another person or entity holds, individually or collectively with the persons acting in concert therewith, a voting percentage equal to or greater than that held by the party required to make the bid.

However, the waiver shall be conditional upon the person or entity not reducing its shareholdings below those held by the shareholder that has been the beneficiary of the waiver or upon the latter not appointing more than one-half of the members of the board, pursuant to the provisions of article 6. If this happens or if the interested party does not obtain the waiver because the factual requirement mentioned in the preceding paragraph is not satisfied, the interested party shall be required to submit a takeover bid unless it transfers, within a period of 3 months, the number of securities required to reduce the excess of voting rights over the aforementioned percentage or terminates the shareholders' or other agreement or concerted action by virtue of which such percentage was reached and provided that the voting rights corresponding to the excess over such percentages are not exercised in the meantime.

The waiver must be requested by the interested party, who shall at the same time give notice thereof to the offeree company. Once the request for a waiver has been submitted, the offeree company shall have a period of three business days within which to file allegations with the National Securities Market Commission. Within ten business days of the request or of the date of registration of such documents and information as may be required, the National Securities Market Commission shall give notice of its reasoned decision to the interested party and to the offeree company and shall make it public on its website.

3. When a waiver has been granted in accordance with the provisions of the preceding sub-section and the making of a takeover bid becomes mandatory, the equitable price shall be the greatest among the prices calculated pursuant to articles 9 and 10.

Article 5. *Calculation of voting rights.*

The following rules shall be taken into account in order to calculate the percentages of voting rights mentioned in the preceding article:

1. The voting percentages corresponding to the following persons or entities shall be deemed to be held by the same person:

a) Those belonging to the same group [*grupo*], as such term is defined in article 4 of Act 24/1988 of 28 July, on the Securities Market, as well as those held by the members of their boards, unless evidence is provided to the contrary.

b) Those held by other persons acting in their own name but for the account of or in concert with such person. It shall be deemed that such concert exists when two or more persons collaborate under an agreement, be it express or implied, oral or written, in order to obtain control of the offeree company. It shall be presumed that concert exists when the persons in question have entered into an agreement of those mentioned in article 112 of Act 24/1988 of 28 July, on the Securities Market, which is intended to establish a common policy as to the management of the company or aimed at exercising significant influence on the company, as

well as any other agreement that, with the same purpose, regulates the right to vote in the board of directors or in the executive committee of the company.

c) The voting rights that such person may exercise freely and over an extended period under a proxy granted by the owners or holders of the shares, in the absence of specific instructions with respect thereto.

d) The voting rights attaching to shares held by a nominee [*persona interpuesta*], such nominee being understood as a third party whom the person required to make a bid totally or partially covers against the risks inherent in acquisitions or transfers of the shares or the possession thereof.

There shall be deemed included in this sub-section the voting rights attaching to shares that constitute the underlying asset or the subject matter of financial contracts or swaps when such contracts or swaps cover, in whole or in part, against the risks inherent in ownership of the securities and have, as a result, an effect similar to that of holding shares through a nominee.

2. There shall be included both the voting rights stemming from ownership of the shares and those enjoyed under a usufruct or pledge or upon any other title of a contractual nature.

3. The percentage of voting rights shall be calculated based on the totality of the shares carrying voting rights, even if the exercise of such rights has been suspended. Shares that directly or indirectly belong to the offeree company itself in accordance with the information available on the date of calculation of the percentage of voting rights shall be excluded. Non-voting shares shall be calculated only when they carry voting rights pursuant to applicable law.

4. No obligation to make a takeover bid shall result from acquisitions or other transactions entailing a mere redistribution of voting rights when, under the provisions of sub-section 1, they continue to be deemed held by the same person.

No such obligation shall result, either, from the acquisition of securities or other financial instruments giving the right to the subscription, conversion, exchange or acquisition of shares which carry voting rights until such subscription, conversion, exchange or acquisition occurs.

Article 6. *Appointment of board members.*

For the purposes of the obligation set forth in article 3 to make a takeover bid in cases in which control is obtained, it shall be presumed, unless evidence is provided to the contrary, that the holder of the equity interest in question has appointed members of the board of the offeree company in the following cases:

a) When the board member has been appointed by the holder of the equity interest or by a company belonging to the same group as such holder in the exercise of its right of proportional representation.

b) When those appointed are, or have been over the 12 months prior to their appointment, directors, senior managers, employees of, or non-sporadic providers of services to, the holder of the equity interest or companies belonging to the same group as such holder.

c) When the appointment resolution could not have been approved without the affirmative votes cast by the holder of the equity interest or by companies belonging to the same group as such holder, or by the board members previously appointed by such holder.

d) When the person appointed is itself the holder of the equity interest in question or a company belonging to the same group as such holder.

e) When in the corporate documents reflecting the appointment, including the minutes, certifications, notarial instruments or other documents prepared in order to obtain registration, or in the public information of the offeree company or of the holder of the equity interest in question, or in other documents of the offeree company, the holder of the equity interest asserts that the board member has been appointed by such holder, or that he/she represents it or is a proprietary director [*consejero dominical*] in the offeree company by reason of his/her relationship with such holder.

In no event shall a person be deemed to have appointed board members that are classified as independent directors or as proprietary directors representing other shareholders that do not act in concert with the holder of the equity interest, pursuant to the corporate governance rules referred to in article 116 of Act 24/1988 of 28 July, on the Securities Market.

Article 7. *Indirect or unexpected takeovers.*

1. In the event of a merger or takeover of another company or entity, even if not admitted to trading on any market or not registered in Spain, which holds a direct or indirect interest in the share capital of a third-party listed company, the following rules shall apply:

a) A takeover bid must be made when, as a consequence of the merger or takeover, the percentage of voting rights specified in article 4 is directly or indirectly reached in the listed company.

b) The bid must be made within 3 months of the date of the merger or takeover, and the rules on determination of the equitable price set forth in article 9 shall apply thereto.

However, the making of a bid shall not be mandatory when, within the above-mentioned period, transfer is made of the number of securities required to reduce the excess of voting rights over the aforementioned percentages and so long as the political rights corresponding to the excess over such percentages are not exercised in the meantime, or when a waiver is granted by the National Securities Market Commission as provided in article 4.

2. In the event that, by means of a capital reduction in a listed company, a shareholder reaches either of the percentages of voting rights contemplated in article 4, such shareholder shall not be allowed to exercise the political rights corresponding to the excess over such percentages without submitting a takeover bid.

The bid must be made within 3 months of the date of the capital reduction, and the rules on determination of the equitable price set forth in article 9 shall apply thereto.

However, the making of a bid shall not be mandatory when, within 3 months of the date of the capital reduction, transfer is made of the number of shares required to reduce the excess of voting rights over the aforementioned percentages and so long as the political rights corresponding to the excess over such percentages are not exercised in the meantime, or when a waiver is granted by the National Securities Market Commission as provided in article 4.

3. In the event that, as a consequence of the exchange, subscription, conversion or acquisition of the shares of a listed company deriving from the acquisition of the securities or instruments referred to in the second paragraph of article 5.4, a shareholder reaches either of the percentages of voting rights set forth in article 4, such shareholder shall not be allowed to exercise the political rights corresponding to the excess over such percentages without making a takeover bid for the whole of the share capital.

The bid must be made within 3 months of the date of the subscription or conversion, and the rules on determination of the equitable price set forth in article 9 shall apply thereto.

However, the making of a bid shall not be mandatory when, within 3 months of the date of the exchange, subscription, acquisition or conversion of the securities, transfer is made of the number of shares required to reduce the excess of voting rights over the aforementioned percentages and so long as the political rights corresponding to the excess over such percentages are not exercised in the meantime, or when a waiver is granted by the National Securities Market Commission as provided in article 4.

4. In the event that, as a consequence of changes in treasury stock, a shareholder reaches either of the percentages of voting rights set forth in article 4, such shareholder shall not be allowed to exercise the political rights corresponding to the excess over such percentages without making a takeover bid for the whole of the share capital.

The bid must be made within 3 months of the date of notice by the company of the changes in its treasury stock, and the rules on determination of the equitable price set forth in article 9 shall apply thereto.

However, the making of a bid shall not be mandatory when, within 3 months of the date of notice by the company of the changes in its treasury stock, transfer is made, either by the party required to make the bid or by the company itself, of the number of shares required to reduce the excess of voting rights over the aforementioned percentages and so long as the political rights corresponding to the excess over such percentages are not exercised in the meantime, or when a waiver is granted by the National Securities Market Commission as provided in article 4.

5. Financial institutions and any other person or entity that, in compliance with a contract or commitment to underwrite an issuance or a public offer for the sale of securities of a listed company, reach the percentage of voting rights established in article 4 must make a takeover bid for the whole of the share capital and may not exercise in the meantime the political rights corresponding to the excess over such percentages.

The bid must be made within 3 months of the date of the closing of the issuance, and the rules on determination of the equitable price set forth in article 9 shall apply to the bid.

However, the making of a bid shall not be mandatory when, within the above-mentioned period, transfer is made of the number of securities required to reduce the excess of voting rights over the aforementioned percentages and so long as the political rights corresponding to the excess over such percentages are not exercised in the meantime, or when a waiver is granted by the National Securities Market Commission as provided in article 4.

Article 8. *Cases excluded from the obligation to make a takeover bid when control is obtained.*

The making of a takeover bid shall not be mandatory in the following cases:

a) Acquisitions or other transactions made in the discharge of their powers and duties by Funds for the Insurance of Deposits in Banking Entities [*Fondos de Garantía de Depósitos en Establecimientos Bancarios*], Savings Banks [*Cajas de Ahorro*] or Credit Cooperatives [*Cooperativas de Crédito*], the Investment Guarantee Fund [*Fondo de Garantía de Inversiones*], the Insurance Compensation Consortium [*Consortio de Compensación de Seguros*], and other legally established institutions of a similar nature, as well as acquisitions consisting of the allotments that the aforementioned bodies approve, subject to the rules on disclosure and competition of offers laid down in the specific regulations, in the discharge of their powers and duties.

Also excluded shall be the indirect takeovers contemplated in article 7.1 of this royal decree, regardless of the voting percentage that results from the above-mentioned allotments,

when in the opinion of the competent supervisory authority, who shall so notify the National Securities Market Commission, the exclusion is desirable in order to ensure the success and financial feasibility of the restructuring transaction in question in terms of the cost of such indirect takeovers.

The exclusion shall not apply to such subsequent transfers or other transactions as may be made by the allottees under allotments made by the bodies mentioned in the first paragraph of this sub-section.

b) Acquisitions or other transactions made pursuant to the Compulsory Purchase Act [*Ley de Expropiación Forzosa*], and such others as may result from the exercise by the competent authorities of powers governed by public law and contemplated in the legislation in force.

c) When all of the holders of securities of the offeree company unanimously agree to sell or exchange all or a part of the shares or other securities that directly or indirectly give voting rights in the company or waive the sale or exchange of their securities under the rules applicable to takeover bids.

Notwithstanding the foregoing, the above-mentioned holders shall be required to simultaneously agree upon the de-listing of the securities from the official secondary markets on which they are admitted.

d) Acquisitions or other transactions resulting from the conversion or capitalisation of claims into shares of listed companies the financial feasibility of which is subject to a serious and imminent danger, even if the company is not undergoing bankruptcy proceedings, provided that such transactions are intended to ensure the company's financial recovery in the long term.

It shall fall upon the National Securities Market Commission to resolve, within a period not to exceed fifteen days from the submission of the corresponding request by any interested party, that a takeover bid is not required.

e) *Mortis causa* gratuitous acquisitions, as well as *inter vivos* gratuitous acquisitions, provided that, in this latter case, the recipient has not acquired, over the 12 preceding months, shares or other securities that may give the right to the acquisition or subscription thereof and there is no agreement or concert with the transferor.

f) When control has been obtained after a voluntary bid for all of the securities, if either of the following circumstances is present: the bid has been made at an equitable price, pursuant to the provisions of article 9; or the bid has been accepted by holders of securities representing at least 50 per cent of the voting rights to which the bid was directed, for which purpose the voting rights already held by the offeror and those held by shareholders that have reached an agreement with the offeror in connection with the bid shall be excluded from the calculation.

g) In the event of a merger, the shareholders of the offeree companies or entities shall not be required to make a takeover bid when, as a consequence of the merger, they directly or indirectly obtain, in the resulting listed company, the percentage of voting rights set forth in article 4, provided that they did not vote in favour of the merger at the relevant general meeting of shareholders of the offeree company and provided also that it can be shown that the primary purpose of the transaction is not the takeover but an industrial or corporate purpose.

It shall fall upon the National Securities Market Commission to resolve, within a period not to exceed fifteen days from the submission of the corresponding request by the shareholder and following verification that the circumstances mentioned in the preceding paragraph are present, that a takeover bid is not required.

Article 9. *Equitable price.*

1. The takeover bids provided for in this chapter shall be made at a price or for a consideration that is not less than the highest price that the offeror or such persons as may act in concert therewith have paid or agreed upon in respect of the same securities over the 12 months prior to the announcement of the bid.

2. In order to determine the equitable price, there shall be included the full amount of the consideration that the offeror or such persons as may act in concert therewith have paid or agreed to pay in each case. Specifically, the following rules shall apply:

a) If the purchase and sale results from the exercise of a prior call option, the premium, if any, agreed upon for the granting of the option shall be added to the purchase price;

b) If the purchase and sale results from the exercise of a prior put option, the premium, if any, agreed upon for the granting of the option shall be subtracted from the purchase price;

c) In the case of other derivative financial instruments, the price shall be the exercise price plus the premiums paid for the acquisition of the derivative;

d) In the foregoing cases, if the exercise prices are calculated in connection with several transactions, the applicable price shall be the highest price at which the shareholder in question has concluded transactions.

e) When the securities have been acquired by means of an exchange or conversion, the price shall be calculated as the weighted average of the market prices of such securities on the date of acquisition.

f) When the acquisition includes some compensation in addition to the price paid or agreed upon, or when a deferral in payment has been agreed upon, the price of the bid shall not be less than the highest price that results after including the amount of such compensation or of such deferred payment.

3. When the mandatory bid must be made without the offeror or the persons acting in concert therewith having previously acquired the shares of the offeree company over the above-mentioned twelve-month period, the equitable price shall not be less than the price calculated in accordance with the valuation rules contained in article 10.

4. The National Securities Market Commission may modify the price calculated in accordance with the provisions set forth in the preceding sub-sections when any of the following circumstances is present:

a) The listing price of the securities of the offeree company during the reference period has been affected by the payment of dividends, a corporate transaction or any extraordinary event that warrants an objective correction of the equitable price.

b) The listing price of the securities of the offeree company during the reference period shows reasonable signs of manipulation, as a result of which a sanction proceeding has been commenced by the National Securities Market Commission for violation of the provisions of article 83 ter of Act 24/1988 of 28 July, on the Securities Market, without prejudice to the application of any appropriate sanctions and provided that notice of the statement of charges has been served upon the interested party.

c) The equitable price was lower than the trading range for the securities on the date of the acquisition when such price was determined, in which case the bid price shall not be less than the lower price in such range.

d) The equitable price corresponds to an acquisition for a volume that is not significant in relative terms and provided that it was carried out at the listing price, in which case the applicable price shall be the highest price paid or agreed upon under the other acquisitions during the reference period.

e) The acquisitions during the reference period include some compensation in addition to the price paid or agreed upon, in which case the bid price shall not be less than the highest price that results after including the amount of such compensation.

f) The offeree company can be shown to be undergoing serious financial difficulties, in which case the consideration in the bid shall be such as results from applying the valuation rules set forth in article 10.

In all the preceding cases, the National Securities Market Commission may direct the offeror to submit a report on the valuation methods and criteria used to determine the equitable price. Such criteria may include, among others, the average market value over a particular period, the break-up value of the company, the value of the consideration paid by the offeror for the same securities over the twelve months prior to the announcement of the bid, the underlying book value of the company, and other generally accepted objective valuation criteria which, in any event, ensure the protection of shareholders' rights.

The National Securities Market Commission shall publish on its website the decision that the bid be made at a price other than that established in the preceding sub-sections.

5. When the bid is not made within the maximum period specified in article 17, interest shall accrue on the equitable price at the legal interest rate for money until the date on which the bid is finally submitted, without prejudice to the imposition of any applicable sanctions.

CHAPTER III

OTHER CASES OF TAKEOVER BIDS: DE-LISTING, CAPITAL REDUCTION THROUGH THE ACQUISITION OF A COMPANY'S OWN SHARES, AND VOLUNTARY BIDS

Article 10. *De-listing offer.*

1. Pursuant to the provisions of article 34 of Act 24/1988 of 28 July, on the Securities Market, when a company approves the de-listing of its shares from Spanish official secondary markets, it must make a takeover bid as provided in this article, unless a de-listing offer is not required because any of the circumstances contemplated in article 11 is present. Corporate transactions whereby the shareholders of a listed company may totally or partially become shareholders of another unlisted entity or of an entity that does not obtain the admission to trading of its shares within three months of the date of registration of the corresponding corporate transaction with the Commercial Registry [*Registro Mercantil*] shall be treated as a case of de-listing. If the admission to trading has not been obtained upon the expiration of the aforementioned period, a takeover bid must be made pursuant to the provisions of this article.

2. The bid must be made to:

a) All holders of shares in the listed company, including holders of non-voting shares that, at the time that authorisation of the bid is requested, have the right to vote pursuant to the provisions of applicable law.

b) All holders, if any, of stock subscription rights, as well as holders of bonds that are convertible into and exchangeable for shares.

The bid may or may not be made to all of the holders of warrants or other securities or financial instruments carrying the option to acquire or subscribe for shares, except for those mentioned in letter b) of this sub-section, whether issued or to be issued. If made to them, the takeover bid must be made to all persons holding any such warrants, securities or financial instruments in question.

Notwithstanding the foregoing, the bid need not be made to the holders that have voted in favour of the de-listing and that, in addition, block their securities until the expiration of the acceptance period mentioned in article 23. The offer document shall clearly set forth such circumstance as well as the securities that have been blocked and the identity of the holders thereof.

3. The de-listing offer may only be made as a purchase and sale, and the price must consist wholly of cash.

4. The resolution on de-listing and the resolutions on the bid and the price offered must be approved by the shareholders at a General Meeting of Shareholders of the issuer of the securities to be de-listed.

The de-listing offer may be submitted by the issuer itself of the securities to be de-listed or by another person or entity, provided it has the approval of the shareholders acting at a General Meeting of Shareholders of the company subject to de-listing.

If the offer is submitted by the issuer itself of the securities to be de-listed, the securities acquired under the offer must be redeemed or transferred, unless such repurchase or transfer is not required because the requirements established in article 75 of the Restated Text of the Spanish Companies Act [*Ley de Sociedades Anónimas*], approved by Royal Legislative Decree 1564/1989, of 22 December, are satisfied. For such purposes, the limit on the acquisition of a company's own shares shall be 10 per cent of share capital.

De-listing offers shall not require the report of the board of the offeree company contemplated in article 24.

5. The valuation report mentioned in article 34.5 of Act 24/1988 of 28 July, on the Securities Market, shall contain a detailed rationale for the proposal and the price offered based on the results obtained by using the following methods:

a) Underlying book value of the company and, if applicable, of the consolidated group, calculated on the basis of the most recent audited annual accounts and, if obtained on a date subsequent to the date thereof, on the basis of the most recent financial statements.

b) Break-up value of the company and, if applicable, of the consolidated group. If the use of this method may result in values significantly lower than those obtained by using the other methods, the calculation thereof shall not be required, provided, however, that such circumstance shall be set forth in the report.

c) Average weighted price of the securities over the six-month period immediately prior to the announcement of the de-listing proposal by means of the publication of a significant event [*hecho relevante*], regardless of the number of sessions at which they have been traded.

d) Value of the consideration previously offered, in the event that a takeover bid has been made over a period of one year prior to the date of the resolution on the request for de-listing.

e) Other valuation methods applicable to the specific case and generally accepted by the international financial community, such as discounted cash flows, company multiples and comparable transactions or others.

The report shall contain the rationale for the relevance of each of the methods respectively employed in the valuation.

6. The price of the bid, fixed by the issuer of the securities to be de-listed, shall not be less than the higher of the equitable price mentioned in article 9 or the price resulting from taking into account, collectively and based on a rationale for the respective relevance thereof, the methods set forth in sub-section 5.

The offer document shall include the information regarding the rationale for the price and the valuation report as a supplemental document.

7. The securities shall be de-listed when the transaction has been settled, pursuant to the provisions of article 37.

Article 11. *Derogations from the obligation to make a de-listing offer.*

No de-listing offer shall be required in the following cases:

a) When the requirements for carrying out squeeze-outs and sell-outs as set forth in article 47 are satisfied.

b) When all of the holders of the affected securities unanimously agree to the de-listing and waive a sale of their securities under the rules applicable to takeover bids.

c) When the company is terminated as a result of a corporate transaction whereby the shareholders of the terminated company become shareholders of another listed company.

d) When a takeover bid has previously been made for the entire capital of the offeree company with the expression of intent to de-list the shares and, in addition, the price is justified in accordance with the provisions of sub-sections 5 and 6 of article 10 by means of a valuation report, and the sale of all of the securities is facilitated by means of an order to purchase such securities, at the same price as that in the prior bid, during at least one month over the six-month period subsequent to the end of the preceding bid.

e) When the shareholders acting at a General Meeting of Shareholders and, if applicable, the Bondholders acting at a General Meeting of Bondholders [*Asamblea General de Obligacionistas*] of the issuer of the securities to be de-listed approve a procedure that in the opinion of the National Securities Market Commission is, pursuant to the provisions of article 34.2 of Act 24/1988 of 28 July, on the Securities Market, equivalent to a takeover bid because it ensures the protection of the legitimate interests of the holders of the securities to be de-listed.

Article 12. *Takeover bid due to a capital reduction through the acquisition of a company's own shares.*

1. When the capital of a Spanish listed company is reduced through the purchase by it of its own shares for redemption thereof, and without prejudice to the minimum requirements established in article 170 of the Restated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1564/1989, of 22 December, a takeover bid must be made pursuant to the provisions of this royal decree.

If the shares included in the statements of acceptance have exceeded the maximum limit of the bid, the rules on distribution and pro-rata set forth in article 38 shall apply.

2. A takeover bid shall not be required when such purchase is carried out pursuant to the provisions of Regulation (EC) No. 2273/2003 of the Commission, of 22 December 2003, which enforces Directive 2003/6/EC of the European Parliament and of the Council as regards

exemptions for buy-back programmes and the stabilisation of financial instruments, and such purchase does not exceed 10 per cent of the capital of the company carrying voting rights.

Article 13. *Voluntary bids.*

1. Even if they are not mandatory under the provisions of this royal decree, takeover bids may voluntarily be made for the shares of a listed company or for other securities that may directly or indirectly give the right to the subscription or acquisition thereof.

2. Voluntary bids may be subject to the following conditions, so long as the fulfilment or non-fulfilment thereof may be verified at the end of the acceptance period:

a) Approval of amendments to the articles of association or of structural amendments [*modificaciones estructurales*], or adoption of other resolutions by the shareholders at a general meeting of the offeree company.

b) Acceptance of the bid for a certain minimum number of securities of the offeree company.

c) Approval of the bid by the shareholders at a general meeting of the offeror company.

d) Any other condition that the National Securities Market Commission deems admissible under the law.

3. Without prejudice to the specific provisions contained in this article, voluntary bids shall be subject to the same rules set out for mandatory bids in this royal decree.

4. A voluntary bid for less than the total number of securities may be made by a party that, as a result thereof, will not acquire a controlling interest or by a party that already holds a controlling interest and is free to increase its shareholdings in the offeree company without being subject to the obligation to make a mandatory takeover bid.

5. Voluntary bids shall not be required to be made at an equitable price.

6. In the event that during the course of submission of a voluntary bid, such bid becomes mandatory, it shall comply with the provisions applicable to mandatory bids that are laid down in this royal decree. Where necessary, the National Securities Market Commission shall adjust all the time periods applicable thereto in order for the offeror to be able to perform the obligations stemming from the mandatory nature of the bid and in order to ensure the adequate protection of the addressees of the bid.

CHAPTER IV

CONSIDERATION AND GUARANTEES FOR THE BID

Article 14. *Consideration offered.*

1. Takeover bids may be made as a purchase and sale, as a swap or exchange of securities or as both at the same time, and must ensure equality of treatment among the holders of securities that are in the same circumstances.

2. In the following cases, the takeover bid must include, at least as an alternative, a cash consideration or price that is financially equivalent, at a minimum, to the exchange offer:

a) When the offeror or the persons with whom it acts in concert have acquired in cash, over the twelve months prior to the announcement of the bid, securities carrying 5 per cent or more of the voting rights in the offeree company.

b) In the case of a mandatory bid when control is obtained, as provided in Chapter II.

c) In the event of a swap, unless the exchange offer consists of securities admitted to trading on a Spanish official secondary market or on another regulated market of a Member State of the European Union, or of securities to be issued by the offeror company itself, provided that, in this latter case, its capital is totally or partially admitted to trading on any of such markets and the offeror assumes the express commitment to request the admission to trading of the new securities within a maximum period of three months after the publication of the result of the bid. However, a cash consideration or price shall subsequently be included if the offeror company does not approve the issuance of the new securities.

When the securities offered in exchange are not admitted to trading on any of the markets referred to in the preceding paragraph, a report prepared by an independent expert shall be submitted with an assessment of the value of such securities.

3. In the event of a purchase and sale, the cash price for each unitary value shall be expressed in euros.

4. Any proposed swap shall be clear as to the nature, valuation and characteristics of the securities offered in exchange, as well as with regard to the ratios according to which the swap is to be carried out.

The offeror must state the equivalent cash price that results from applying to the exchange ratio the average weighted price of the securities delivered in exchange over the three-month period prior to the prior announcement of the bid. The average weighted price of the securities delivered in exchange shall be determined by the National Securities Market Commission.

5. When the consideration offered consists, in whole or in part, of securities to be issued by the offeror company, the board shall, at the same meeting at which it approves the submission of the bid, resolve to convene a General Meeting of Shareholders at which the shareholders shall make a decision regarding the issuance of the securities offered as consideration.

No such call shall be required when the offeror provides evidence that it has the authorisation of the shareholders at a General Meeting to carry out the issuance of such securities.

The announcement of the call to Meeting, provided for in article 97 of the Restated Text of the Spanish Companies Act approved by Royal Legislative Decree 1564/1989, of 22 December, shall be published prior to the publication of the first of the announcements contemplated in article 22 of this royal decree for the dissemination of the content of the bid or not later than on the date of publication of the first of such announcements. The Meeting must be convened to be held upon first call within a period of one month to forty days after the business day immediately following the publication of the announcements, and not more than 48 hours shall elapse between the first and second call. If the offeror does not have its registered office in Spain, the Meeting shall be convened and held in compliance with the requirements established in the State where it has its registered office.

In any event, the period for acceptance of the bid shall be extended, where applicable, such that 15 calendar days elapse between the business day on which the general meeting at which the issuance is approved is held and the last day of the acceptance period, both days inclusive.

The issuance must be approved for the maximum amount required to comply with the bid submitted and must include the possibility of incomplete subscription.

6. In the instance contemplated in the preceding sub-section, if the offeror company has its registered office in Spain, it shall be deemed that the pre-emptive rights contemplated in article

158 of the Restated Text of the Spanish Companies Act approved by Royal Legislative Decree 1564/1989, of 22 December, do not accrue to existing shareholders or to holders of convertible bonds.

Article 15. *Guarantees for the bid.*

1. The offeror must provide evidence to the National Securities Market Commission of the establishment of guarantees securing compliance with the obligations arising from the bid.

2. When the consideration offered totally or partially consists of cash, the offeror shall comply with the provisions of the preceding sub-section by providing a bond given by a credit institution or documents showing that a cash deposit has been made with a credit institution, securing full payment of the cash consideration vis-à-vis the market members or settlement system and vis-à-vis the acceptors of the bid, and allowing for the use thereof by the clearing and settlement system of the market on which the securities covered by the bid are traded, pursuant to the provisions contained in this regard in the regulations governing clearing and settlement systems.

The National Securities Market Commission may, by means of a Circular, establish the forms in accordance with which the guarantees must be provided.

3. When the consideration offered consists of securities that have already been issued, evidence shall be provided that they are available and earmarked towards the result of the bid.

4. When the consideration offered consists of securities to be issued by the offeror company, the board members thereof shall act in a manner that is not inconsistent with the decision to make the bid. In the event that, after reviewing the particular circumstances of the case, the National Securities Market Commission believes that there is an insufficient degree of earnestness in the submission of the bid, it may require guarantees securing the board members against any liabilities they might incur for the damage that might be caused if the issuance of the relevant securities is not carried out in accordance with the terms of such issuance. Any such guarantees shall be terminated after the capital increase has been approved and, if applicable, after six months have elapsed since the publication of the announcements mentioned in article 22 of this royal decree without any interested party having provided evidence of the existence of court claims in connection with the aforementioned liabilities.

CHAPTER V

ANNOUNCEMENT, SUBMISSION AND AUTHORISATION OF A BID

Article 16. *Announcement of a bid.*

1. In the case of voluntary bids, as soon as the decision to make a takeover bid has been adopted and so long as it has been ensured that any cash consideration can be afforded in full, or following the adoption of all such reasonable measures as may guarantee the satisfaction of any other kind of consideration, the offeror shall make public and disseminate such decision as provided in article 82 of Act 24/1988 of 28 July, on the Securities Market.

2. Whoever falls within any of the cases contemplated in articles 3 and 7 hereof must make public and disseminate such circumstance as provided in article 82 of Act 24/1988 of 28 July, on the Securities Market, including, if applicable, either its intention to request a waiver, or its decision to make a takeover bid, or its intention to reduce its shareholdings below the threshold

that triggers the obligation to submit a bid. If a waiver is denied, the offeror shall make public and disseminate the decision to make the bid in the same manner as provided herein.

3. When the acquisition or transfer of title to or control of the securities covered by the bid requires any administrative authorisation or verification prior to the submission of the bid, any such circumstance shall be disclosed.

4. When a takeover bid on a company has been authorised, no new voluntary takeover bid may be made on the same company, if the period for submission of a competing offer has expired, until the period for acceptance of the previous offers has also expired.

5. The National Securities Market Commission may, by means of a Circular, establish the form in accordance with which the announcements mentioned in this article are to be made.

Article 17. *Submission of a bid.*

1. All individuals or legal entities that are required to make a takeover bid, or that intend to make a takeover bid under the provisions of Chapter III, must request the authorisation of the National Securities Market Commission. For such purpose, a written request for authorisation shall be required, bearing the signature of the offeror or of a person empowered to bind the offeror, containing the main characteristics of the transaction and prepared in accordance with the form, if any, established by means of a Circular by the National Securities Market Commission. The written request shall be accompanied by documents evidencing the adoption of the resolution or decision to make the takeover bid by the competent person or body, as well as by the offer document, signed by the person identified as responsible thereunder, which shall contain the information required for the persons to whom the bid is addressed to be able to make an informed assessment thereof.

The written request shall be entered immediately in the regulated information register provided for in article 92 of Act 24/1988 of 28 July, on the Securities Market.

In the case of a voluntary bid, it shall be stated whether the decision to make the takeover bid is subject to approval by the shareholders at a general meeting of the offeror company and, if applicable, the corresponding documents shall be submitted as soon as such approval is obtained.

All other documents required under the provisions of article 20 may be submitted at the time the request is made or within a period not to exceed 7 business days thereafter.

2. The request for authorisation must be submitted during the month following the date on which the decision to make the bid has been made public pursuant to the provisions of article 16.1. When a controlling interest has been acquired or more than one-half of the members of the board of the offeree company have been appointed, the request for authorisation must be submitted during the month following the date on which the obligation to make the bid arises. In addition, in the cases contemplated in article 7 of this royal decree, the bid must be submitted, if applicable, within three months of the date on which control is acquired.

3. The National Securities Market Commission shall review the request for authorisation and the documents filed and, if applicable, shall declare, within a period not greater than seven business days after the remaining documents mentioned in sub-section 1 have been submitted, that the request is admitted for processing, notice of which shall be given to the interested parties. If the National Securities Market Commission is silent during the aforementioned period, the request shall be deemed admitted for processing.

The National Securities Market Commission shall publish on its website, on the same date that it makes its decision, all admissions for processing, as well as all rejections and the reasons therefor.

4. A request for authorisation shall not be admitted for processing when any of the following circumstances is present and such circumstance is not corrected within the period established in the preceding sub-section:

a) The offer document contains essential errors or does not include the minimum information set forth in Annex I.

b) There are no documents evidencing the establishment of guarantees, or any of the other documents listed in article 20 is missing, or they are submitted with errors or serious defects.

c) The request is patently non-compliant with the provisions of this royal decree.

Article 18. *Content of the offer document.*

1. The offer document, which shall be signed on all pages by a person having sufficient powers as a representative, shall be worded in a manner such that the content thereof may be readily analysed and understood and shall contain the information set forth in the annex to this royal decree.

2. The offer document shall contain any other information that the offeror deems it advisable to include in order for the addressees thereof to be able to make an informed assessment of the bid. The National Securities Market Commission may require the offeror to include in the offer document any additional information it deems necessary and to submit any supplemental documents that it deems appropriate. In addition, the National Securities Market Commission may include in the offer document warnings and considerations that facilitate the analysis and comprehension thereof.

3. The National Securities Market Commission may relieve the offeror of the obligation to include in the offer document any of the information mentioned in this article and in the annex to this royal decree when such information is not available to the offeror, provided that it does not involve facts or circumstances that are essential to make an informed assessment of the bid.

4. The National Securities Market Commission may, by means of a Circular, approve the forms of offer documents that must be submitted in each case.

5. In the event that, after the offer document has been published, any circumstance occurs which requires the inclusion of additional information or data, the offeror may provide it in the form of a supplement under such terms as may be established by the National Securities Market Commission by means of a Circular.

6. In the event that securities issued or to be issued are offered as consideration, the offeror may choose either to include in the offer document information regarding such securities that is equivalent to the information that would be required if a public offer for the sale or subscription of securities were made, pursuant to the provisions of Royal Decree 1310/2005, of 4 November, which partially elaborates upon the provisions of Act 24/1988 of 28 July, on the Securities Market, in connection with the admission of securities to trading on official secondary markets, public offers for the sale or subscription of securities and the prospectus required for such purposes, or else incorporate by reference into the offer document a prospectus that is authorised and current in compliance with the provisions of the aforementioned royal decree.

7. The offer document must be prepared in Spanish, except for the information, if any, therein incorporated by reference as set forth in the preceding sub-section. In such case, the summary of the prospectus incorporated by reference must be translated into Spanish.

8. In addition, the offer document may contain information by reference to one or more documents published prior to or concurrently with the approval of the offer document. Any such documents shall have been approved by the National Securities Market Commission or filed therewith, or approved by or filed with the competent authority of another Member State of the European Union, provided that such State is the State of origin of the issuer of the securities offered as consideration.

Article 19. *Cross-border validity of the offer document.*

1. When a takeover bid is not to be authorised by the National Securities Market Commission, the offer document authorised by the competent authority of another Member State of the European Union shall be valid for a takeover bid for shares of companies whose shares are admitted to trading on an official secondary market in Spain.

2. The National Securities Market Commission may require that supplemental information be included regarding the formalities that must be complied with for acceptance of the bid and regarding receipt of the corresponding consideration, as well as on the tax regime to which the consideration offered shall be subject.

3. The offer document must be translated, at the offeror's choice, into Spanish, into a language of widespread use in the area of international finance, or into a language other than either of the foregoing that is accepted by the National Securities Market Commission. In any event, the National Securities Market Commission may request the offeror to provide a Spanish translation of a summary of the offer document.

Article 20. *Supplemental documentation.*

1. In addition to the offer document, the following documents shall be submitted:

- a) Documents evidencing the guarantee for the bid as provided in article 15.
- b) Request for administrative authorisation or verification or, if applicable, documents evidencing the existence of such authorisation or verification if required by the transaction.
- c) Documents evidencing the price of the bid and valuation reports when required.
- d) Validation certificates [*certificados de legitimación*] evidencing the blocking of the securities of the offeree company, if required.
- e) Specimen form of the announcements to be published as provided in article 22 and certificate evidencing any other form of publicity or dissemination of the bid by any means that may have been contemplated.

2. If the offeror is a legal entity:

- a) Certificate providing evidence of the incorporation of the offeror company and of the current articles of association thereof, issued by the corresponding Commercial Registry in the case of companies which have their registered office in Spain, or in such manner as is legally required in all other cases. When the company's shares are admitted to trading on a Spanish official secondary market, the requirement herein established shall be deemed satisfied if the current articles of association of the company are included in the registration records maintained by the National Securities Market Commission.

b) Audit of the financial statements of the offeror company and, if applicable, of the group to which it belongs, for at least the fiscal year most recently ended or approved, unless such audit has already been filed with the National Securities Market Commission or unless the company is not subject to the requirement of an audit.

If the offeror company does not conduct business or has been incorporated to make the bid, the audits of the financial statements to be submitted shall be those for the fiscal year most recently ended or approved of its controlling shareholders or partners and, if applicable, of the groups to which they respectively belong, so long as they are legal entities.

If the offeror company has published, in any manner, financial statements which are subsequent to the closing of the annual accounts referred to in the preceding paragraphs, such financial statements shall also be submitted, unless they have already been filed with the National Securities Market Commission.

3. When the consideration consists of securities already issued by a company other than the offeror, there shall also be submitted an audit of the financial statements of the issuer and, if applicable, of the group to which it belongs, for at least the most recent fiscal year, as well as the documents set forth in letter a) of sub-section 2, subject to the exceptions established therein in the event that such documents are already included in the registration records of the National Securities Market Commission.

Article 21. Authorisation of the bid.

1. The National Securities Market Commission shall review the offer document submitted as well as the supplemental documents and shall authorise or deny authorisation of the bid. The Commission may direct the offeror to submit such additional information as may be required.

2. The resolution whereby the authorisation is denied shall be reasoned and based upon non-compliance with the provisions of Act 24/1988 of 28 July, on the Securities Market, of this royal decree and other applicable regulations.

3. The resolution whereby the authorisation is granted or denied shall be adopted within twenty business days of receipt of the request.

If the supplemental documents are received after such request as provided in article 17, or in the event that additional information or documents are required, the period mentioned in the preceding paragraph shall be calculated from the date on which any such information or documents are registered.

Pursuant to the provisions of article 16 of Act 24/1988 of 28 July, on the Securities Market, the resolution adopted by the National Securities Market Commission shall end the administrative stage and may be appealed to the Administrative Litigation Courts [*Jurisdicción Contencioso Administrativa*], without prejudice to the filing, if applicable, of an optional motion for reversal [*recurso potestativo de reposición*].

4. The National Securities Market Commission shall give notice of the resolution adopted by it to the offeror, to the offeree company, to the Stock Exchange Management Companies [*Sociedades Rectoras de las Bolsas*] and to the Brokerage House [*Sociedad de Bolsas*], as well as to any other bodies or authorities notice to which may be deemed required, and shall disseminate such resolution by publishing it on its website.

5. When necessary, the National Securities Market Commission may adjust the procedure, time periods and other formal requirements applicable to takeover bids made simultaneously on a Spanish official secondary market and on another market of a non-EU Member State.

Article 22. *Publication of the bid by the offeror.*

1. After the offeror has been given notice of the authorisation, the offeror shall disseminate the bid and make it generally known to the public within a maximum period of five business days. For such purpose, it shall publish the corresponding announcements in the Listing Bulletin [*Boletín de Cotización*] of the Stock Exchanges where the securities subject matter of the bid are admitted to trading and at all of them if they are integrated into the Spanish Automated Quotation System [*Sistema de Interconexión Bursátil Español*] and, at least, in a newspaper of national circulation.

2. The announcements, the republication or enlargement of which may be required by the National Securities Market Commission, shall contain the essential data of the takeover bid which are stated in the offer document, shall conform to the form registered as a document supplemental to the offer document and shall set forth the places where such offer document and other documents are available to interested parties.

3. In all cases, the offeror shall, from the trading day following the date of publication of the first announcement, make available to interested parties copies of the offer document as well as the documents that must be provided together therewith under the provisions of article 20 of this royal decree.

The offer document and other documents that must be provided together therewith shall be deemed made available to the public when they are published by any of the following means at the election of the offeror:

a) In one or more newspapers of national circulation.

b) In the form of a printed copy that shall be made available to the public, without charge, at the Stock Exchanges or markets on which the securities are admitted to trading, or at the registered offices of the offeror, of the offeree company or of the entity acting as intermediary and in charge of settlement of the bid.

c) In electronic form on the website of the offeror, of the offeree company, of the Stock Exchanges or markets on which the securities are admitted to trading.

d) In electronic form on the website of the National Securities Market Commission, in the event that the National Securities Market Commission provides such service for the offer documents it approves.

4. The National Securities Market Commission shall publish on its website, at its own discretion, either all of the offer documents approved over the 12 preceding months, or a list of such offer documents, including, if applicable, a hyperlink to the offer document posted on the website of the offeree company or of the market.

5. In those cases in which the offer document is made available by publication in electronic form, the offeror shall deliver a printed copy, without charge, to any investor that requests it.

Article 23. *Acceptance period.*

1. The period for acceptance of the bid shall be established by the offeror, provided, however, that it shall not be less than fifteen nor greater than seventy calendar days from the trading day immediately following the date of publication of the first of the announcements mentioned in article 22.

2. So long as the maximum length of the period established in the preceding sub-section is not exceeded, the offeror may extend the period originally granted, following notice thereof

to the National Securities Market Commission. The extension shall be announced by the same means by which the offer was published, at least three calendar days prior to the expiration of the original period, with a description of the circumstances giving rise to such extension.

3. The acceptance period shall be automatically extended, where applicable, such that at least 15 calendar days elapse between the date of holding of the general meeting at which the issuance of the securities offered as consideration must be approved or at which a decision must be made regarding the conditions to which the bid has been subjected and the last day of the acceptance period.

4. If a supplement to the offer document is published, the National Securities Market Commission may extend the acceptance period when so required by the significance of the information contained therein.

5. Additionally, the National Securities Market Commission may approve an extension of the acceptance period in all other cases in which it may be necessary. The resolution, which shall be reasoned, shall be based upon the success of the bid and the adequate protection of the addressees thereof.

6. The acceptance period and any extensions thereof, including the reasons for any such extensions, shall always be made public on its website by the National Securities Market Commission.

Article 24. *Report of the board of the offeree company.*

1. The board of the offeree company shall prepare a detailed and reasoned report on the takeover bid, which shall contain its comments in favour or against, and shall expressly state whether any agreement exists between the offeree company and the offeror, its directors or shareholders, or between any of these and the members of the board of the offeree company, as well as the opinion of such board members regarding the bid, and the intention to accept or reject the bid by those who are direct or indirect holders of the affected securities.

The report shall also set forth the possible repercussions of the bid and the strategic plans of the offeror that are included in the offer document in respect of all of the company's interests, employment and the location of its places of business.

If a board member is subject to a conflict of interest, such board member shall so state and shall describe the nature of such conflict.

If the members of the board take differing positions in connection with the bid, the opinions of members who are in a minority shall be included in the report.

The report shall include the securities of the offeror company that are directly or indirectly held by the offeree company or by the persons with whom it acts in concert and the securities of the offeree company that are directly or indirectly held or represented by the members of the board of the offeree company, as well as any securities that such board members may hold in the offeror company.

2. The report of the board of the offeree company shall be made public by the company itself by any of the means contemplated in article 22.1, within a maximum period of ten calendar days after the date of commencement of the period for acceptance of the bid. The report shall also be submitted, within the aforementioned period, to the National Securities Market Commission for it to include it in the file for the takeover bid, and to the representatives of the employees of the offeree company. If the board of the offeree company receives, within

the periods set forth in this article, a differing opinion from the employees' representatives regarding the repercussions on employment, such opinion shall be attached to the report of the offeree company.

Article 25. *Information to be provided to employees.*

1. As soon as a takeover bid has been made public, the board or the management bodies of the offeree company and the offeror shall inform the representatives of their respective employees or, in the absence of such representatives, the employees themselves.

2. After the offer document has been published, the board or the management bodies of the offeree company and the offeror shall deliver it to the representatives of their respective employees or, in the absence of such representatives, to the employees themselves.

3. The representatives of the employees of the offeree company and of the offeror company or, in the absence of such representatives, the employees themselves, must be able to easily and promptly obtain the offer document and the documents supplemental thereto.

4. The provisions of this royal decree shall be without prejudice to the provisions contained in labour laws in connection with information to, consultation with and participation of employees.

Article 26. *Authorisations required by other supervisory bodies and by competition authorities.*

1. When the takeover bid may entail the existence of an economic concentration transaction, whether in Europe, Spain or otherwise, the relevant competition regulations shall apply. Evidence shall be provided to the National Securities Market Commission of the notice given to the competent competition authorities if so required.

The offeror may make its bid conditional upon obtaining the corresponding authorisation of, or upon the lack of opposition from, the competition authorities, such that:

a) If the competent competition authorities do not oppose the concentration transaction before the expiration of the acceptance period, the bid shall be fully effective.

b) If the competent competition authorities declare, before the expiration of the acceptance period, that the proposed transaction is inadmissible, the offeror shall withdraw the bid.

c) If the competent competition authorities establish, before the expiration of the acceptance period, that the authorisation of the bid is subject to a condition, the offeror may withdraw the bid.

d) If no express or implied decision is made by the competent competition authorities before the expiration of the acceptance period, the offeror may withdraw the bid.

In the case of mandatory bids, the offeror may not, for as long as the corresponding decision is pending, exercise the political rights corresponding to the excess of its shareholdings over the threshold that renders mandatory the submission of a bid. In addition, if the offeror withdraws the bid under the provisions of letters b), c) or d), it shall transfer the number of securities required to reduce the percentage of voting rights below the controlling interest within a period of three months, or shall terminate, within the same period, the shareholders' or other agreement or concerted action by virtue of which such interest has been reached.

If the offeror decides not to subject the bid to the condition of obtaining the corresponding authorisation of, or of lack of opposition from, the competition authorities, or if it decides to move forward with the bid in spite of not having obtained a decision from the competition

authorities, the appropriate competition regulations shall apply to such cases. The provisions contained therein in connection with mandatory bids shall also apply.

2. When the takeover bid requires the authorisation of or lack of opposition from any other body, or prior notice of the transaction to another body, the request for authorisation of the bid may be submitted without such authorisation or lack of opposition having been obtained or without such mere notice having been given. However, the National Securities Market Commission shall not authorise the bid until evidence is provided that the authorisation or lack of opposition has been secured or that the notice has been given, unless such periods as are required to deem the authorisation constructively granted by the administrative authorities have elapsed.

In the case of mandatory bids, the offeror may not exercise the political rights corresponding to the excess of its shareholdings over the threshold that renders mandatory the submission of a bid until the corresponding decision has been made. In addition, when the corresponding body denies the authorisation or opposes to the transaction, the offeror shall transfer the number of securities required to reduce the percentage of voting rights below the controlling interest within a period of three months after notice of the decision, or shall terminate, within the same period, the shareholders' or other agreement or concerted action by virtue of which such interest has been reached.

Article 27. *Suspension of political rights.*

1. A party that breaches the obligation to make a takeover bid pursuant to the provisions of article 60.3 of Act 24/1988 of 28 July, on the Securities Market, shall not be allowed to exercise the political rights arising from any of the securities of the listed company the exercise of which such party has upon any title, or from any of the securities indirectly held by such party required to submit a takeover bid, or from the securities held by those acting in concert therewith.

For such purposes, the following shall be deemed political rights arising from the securities: the right to attend and vote at General Meetings; the right to receive information; pre-emptive rights; the right to be a part of the board of directors of the company; the right to challenge corporate resolutions, unless they are contrary to Law, and, in general, all other rights not having an exclusively economic content.

2. Political rights that have been suspended under the provisions of the preceding subsection may only be reacquired by making a takeover bid for all of the securities of the company, with the price being fixed pursuant to the provisions of article 10, or by obtaining the unanimous consent of the other holders of the securities, which consent shall be expressed individually by each of such holders.

3. A mere resale of the securities in respect of which the obligation to make a takeover bid has been breached shall not prevent the imposition of the corresponding administrative sanctions and shall not give right to the exercise of the political rights attaching to the securities held that have not been sold. The transferee of the securities resold may only exercise the political rights attaching thereto if the transferee is not connected to the transferor under any of the relationships mentioned in articles 5 and 6 of this royal decree.

CHAPTER VI

PREVENTIVE MEASURES AGAINST A TAKEOVER BID

Article 28. *Limitations upon the actions of the boards of the offeree company and its group.*

1. From the public announcement of a takeover bid as provided in article 16 until the disclosure of the result of the bid, the boards of the offeree company, any executive body of

such boards or any body receiving powers therefrom, their respective members, as well as the companies belonging to the group of which the offeree company is a member and any other company that might act in concert with any of the foregoing shall obtain the prior approval of the shareholders at a general meeting of shareholders as provided in article 103 of the Restated Text of the Spanish Companies Act approved by Royal Legislative Decree 1564/1989 of 22 December, before taking any action that may prevent the success of the bid, except for the search for other offers, and in particular, before commencing any issuance of securities that may prevent the offeror from acquiring control of the offeree company.

In particular, they shall not:

- a) Approve or commence any issuance of securities that may prevent the success of the bid.
- b) Carry out or promote, directly or indirectly, transactions involving the securities covered by the bid or any other securities, including actions intended to promote the purchase of such securities, when the success of the bid may be prevented thereby.
- c) Dispose of, encumber or lease real property or other corporate assets when such transactions may prevent the success of the bid.
- d) Pay extraordinary dividends or give any other kind of compensation that is not consistent with the customary policy for payment of dividends to the shareholders or holders of other securities of the offeree company, unless the corresponding corporate resolutions have previously been adopted by the competent corporate body and made public.

2. With respect to decisions adopted prior to the commencement of the period set forth in the preceding sub-section which have not yet been carried out in whole or in part, the shareholders acting at the general meeting shall approve or confirm any decision that does not fall within the scope of the company's ordinary course of business and the execution of which may prevent the success of the bid.

3. Exempted from the limitations established in this article shall be:

- a) The search for competing offers. In the event that during this process, access is granted to any kind of non-public information of the offeree company, the equal treatment of all potential offerors shall be ensured as provided in article 46 of this royal decree.
- b) Actions or transactions which, after the announcement of submission of the bid, are expressly approved by the shareholders acting at a General Meeting of Shareholders, pursuant to the provisions of article 103 of the Restated Text of the Spanish Companies Act approved by Royal Legislative Decree 1564/1989, of 22 December.

4. For purposes of the provisions contained in the preceding sub-sections:

- a) The shareholders acting at a general meeting other than an ordinary general meeting shall not decide on any matters other than the authorisation or confirmation of the action or transaction in question.
- b) The directors of the company shall prepare a detailed written report containing a rationale for the actions to be taken which require authorisation or confirmation by the shareholders at a general meeting. Such report shall set forth the direction of the vote cast by each director when votin] on the approval of the report. The report shall be made available to the shareholders from the time the general meeting is convened.

c) The call to meeting shall clearly set forth the actions for which authorisation or confirmation is requested.

d) The call to meeting shall set forth the right accruing to all shareholders to examine the full text of the proposed resolution and the report thereon at the registered office and to request that such documents be delivered or sent to them without charge.

5. Companies shall have the right not to apply the provisions of the preceding sub-sections when they are the target of a takeover bid made by an entity which does not have its registered office in Spain and which is not subject to the same or comparable provisions, including the provisions on rules applicable to the adoption of decisions by the shareholders at a general meeting, or by an entity directly or indirectly controlled by it, pursuant to the provisions of article 4 of Act 24/1988 of 28 July, on the Securities Market.

Any decision adopted under the provisions of the preceding paragraph shall require the approval of the shareholders at a general meeting, as prescribed in article 103 of the Restated Text of the Spanish Companies Act approved by Royal Legislative Decree 1564/1989, of 22 December, which decision shall be adopted within a maximum period of eighteen months prior to the takeover bid being made public.

For such purposes:

a) The directors of the company shall prepare a detailed written report containing the rationale for the resolution to be adopted. Such report shall set forth the direction of the vote cast by each director when voting on the approval of the report. The report shall be made available to the shareholders from the time the general meeting is convened.

b) The call to meeting shall clearly set forth the decision proposed to the shareholders.

c) The call to meeting shall set forth the right accruing to all shareholders to examine the full text of the proposed resolution and the report thereon at the registered office and to request that such documents be delivered or sent to them without charge.

Article 29. *Optional neutralisation (breakthrough) of other preventive measures in the event of a takeover bid.*

1. Pursuant to article 60 *ter.* 2 of Act 24/1988 of 28 July, on the Securities Market, companies shall provide to the National Securities Market Commission, within a maximum period of fifteen business days following the holding of the general meeting as provided in such article, information regarding the decision to apply the following breakthrough measures:

a) The ineffectiveness of restrictions upon the free transfer of securities established in shareholders' agreements regarding such company during the period for acceptance of the bid.

b) The ineffectiveness, at the general meeting of shareholders at which decisions are made on the possible preventive measures provided for in article 60. *bis.*1 of Act 24/1988 of 28 July, on the Securities Market, of restrictions upon voting rights contemplated in the articles of association of the offeree company and in shareholders' agreements relating to such company.

c) The ineffectiveness of the restrictions contemplated in the preceding letters when, after a takeover bid, the offeror has reached a percentage equal to or greater than 75 per cent of the capital carrying voting rights.

The National Securities Market Commission shall immediately publish such information on its website.

2. The decision to apply breakthrough measures shall be adopted at a general meeting of shareholders of the company, as provided in article 103 of the Restated Text of the Spanish Companies Act approved by Royal Legislative Decree 1564/1989 of 22 December.

For such purposes:

a) The directors of the company shall prepare a detailed written report setting forth the rationale for the resolution to be adopted. Such report shall contain, *inter alia*:

(i) A description of the restrictions upon the transfer of securities established in shareholders' agreements which have been reported to the company;

(ii) A description of the restrictions upon voting rights established in the articles of association of the company and in the shareholders' agreements reported to the company;

(iii) A detailed enumeration of the measures they propose for approval at the general meeting among those contemplated in sub-section 1 and the terms upon which the restrictions will become ineffective;

(iv) A statement of the reasons why the directors propose the ineffectiveness of the aforementioned restrictions in the cases in which they make such proposal;

(v) A description of any agreements reached or being negotiated by the company with a potential offeror in respect of the company's shares, or entered into or negotiated by persons other than the company but of which the company has become aware;

(vi) A statement of the direction of the vote cast by each director upon voting on the approval of the report.

b) The directors' report shall be made available to the shareholders from the time the general meeting is convened.

c) The call to meeting shall clearly state the decision proposed to the shareholders.

d) The call to meeting shall set forth the right accruing to all shareholders to examine the full text of the proposed resolution and the report thereon at the registered office and to request that such documents be delivered or sent to them without charge.

3. Without prejudice to the communication as significant information of both the call to the general meeting at which the proposed resolutions referred to in this article shall be put to the vote and the directors' report regarding such proposal and the proposed resolution itself, in the event that the shareholders acting at the general meeting finally approve the ineffectiveness of any of the restrictions mentioned in the preceding sub-section 1, the company shall so make it public and disseminate it as significant information upon the terms established in article 82 of Act 24/1988 of 28 July, on the Securities Market, and shall report it both to the National Securities Market Commission for inclusion in the register contemplated in article 92 of Act 24/1988 of 28 July, on the Securities Market, and to the supervisory bodies of the Member States in which the company's shares are admitted to trading or on which the admission to trading has been requested.

The adoption of the corresponding resolution by the shareholders at the general meeting shall be reflected in the Annual Corporate Governance Report of the Company referred to in article 116 of Act 24/1988 of 28 July, on the Securities Market.

4. When the company decides to apply any of the measures described in sub-section 1, it shall provide for adequate compensation for the loss suffered by the holders of the rights

mentioned therein, which compensation shall be included in the articles of association, together with a description of the manner in which such compensation shall be paid and the method used to determine it.

5. Subject to the same requirements set out in the preceding sub-sections 1 through 3, the shareholders acting at a general meeting of the company may revoke the decision to apply any of the measures for neutralisation (breakthrough) of preventive measures in the event of a takeover bid that the shareholders may have adopted under the provisions of such sub-sections.

In order to revoke the decision to apply the breakthrough measures contemplated in sub-section 1, the same quorum or majority of votes shall be required as for the application of such breakthrough measures.

6. Companies may cease to apply the breakthrough measures they have in effect under the provisions of the preceding sub-sections when they are the target of a takeover bid made by an entity or group that has not adopted comparable breakthrough measures.

Any measure adopted under the provisions of the preceding paragraph shall require the approval of the shareholders at a general meeting, as prescribed in article 103 of the Restated Text of the Spanish Companies Act approved by Royal Legislative Decree 1564/1989 of 22 December, which decision shall be adopted within a maximum period of eighteen months prior to the takeover bid being made public.

For such purposes:

a) The directors of the company shall prepare a detailed written report setting forth the rationale for the resolution to be adopted. Such report shall state the direction of the vote cast by each director upon voting on the approval of the report.

b) The directors' report shall be made available to the shareholders from the time the general meeting is convened.

c) The call to meeting shall clearly state the decision proposed to the shareholders.

d) The call to meeting shall set forth the right accruing to all shareholders to examine the full text of the proposed resolution and the report thereon at the registered office and to request that such documents be delivered or sent to them without charge.

CHAPTER VII

CHANGES TO, WITHDRAWAL OF, AND CESSATION OF EFFECTS OF THE BID

Article 30. *Irrevocability and conditions in the bid.*

1. Takeover bids shall be irrevocable from the time of the public announcement referred to in article 16, and they shall not be modified or withdrawn or cease to have effect other than in the events and in the manner established in this royal decree.

2. Mandatory takeover bids shall not be subject to any condition, except as provided in article 26 of this royal decree. In contrast, voluntary takeover bids may be subject to a condition as provided in articles 13 and 26.

Article 31. *Changes to the characteristics of the bid.*

1. The characteristics of the bid may be revised at any time prior to the last 5 calendar days established for acceptance thereof, so long as such revision results in a more favourable

treatment of the addressees of the bid, either because the original bid is extended to a greater number of securities or because the consideration offered is improved, or because the conditions, if any, to which the bid is subject are eliminated or lessened. The modification shall comply with the rule of equal treatment of all addressees in like circumstances.

If the improvement in the consideration consists of a change in the nature thereof, the opinion of an independent expert so confirming it shall be required, unless the consideration originally offered is a swap or exchange of securities and the new consideration consists of cash in an amount greater than the amount stated in compliance with the provisions of article 14.4 of this royal decree.

2. The offeror may act in association or concert with third parties in order to modify its bid, provided that:

a) The offeror and the third party or parties with whom it acts in association or concert assume joint and several liability for the revised bid.

b) The change in the identity or composition of the offeror and other modifications are reflected in a supplement to the offer document.

3. The decision or resolution on changes to the characteristics of the bid shall be reflected by the offeror in the supplement, which shall contain a detailed description of the changes to the characteristics of the bid, with express reference to each item of the original offer document which is affected thereby and a detailed separate description of the reasons underpinning the changes. The changes shall be described with as much precision and accuracy and to the same extent as the revised items.

4. Any change to the terms of the bid shall be submitted for approval by the National Securities Market Commission, which shall make a decision within a period not to exceed three business days of receipt of the request. During such period, the course of the acceptance period shall be suspended.

The National Securities Market Commission may, if it deems it necessary for purposes of better analysis of the proposed changes, extend the period for acceptance of the bid, which extension the National Securities Market Commission itself shall publish on its website.

5. After the changes have been approved by the National Securities Market Commission, they shall be made public by the offeror on the business day immediately following such approval.

6. The provisions of article 24 shall apply to the changes, provided, however, that the period for issuance of the report of the board of the offeree company shall be 5 calendar days from the date of publication referred to in the preceding sub-section 5. If necessary, the National Securities Market Commission may extend the acceptance period as it deems appropriate.

7. Unless an express statement to the contrary is made, subject to the same requirements established for acceptance of the original bid, it shall be deemed that the addressees of the bid that have accepted it prior to the changes consent to the revised bid.

8. In the case of competing offers, the provisions of Chapter IX of this royal decree shall apply.

Article 32. *Limitations on actions by the offeror.*

1. From the public announcement of a takeover bid referred to in article 16 until the submission of the bid as provided in article 17, the offeror, the members of its board of

directors and of its management bodies, its controlling shareholders, its advisors, the persons with whom it acts in concert and all others who take part in the transaction shall refrain from disseminating or publishing, by any means, any data or information that is not included in the prior announcement of the bid.

2. In the case of mandatory bids, while the bid is pending authorisation by the National Securities Market Commission, the offeror and the persons acting in concert therewith shall not be allowed to exercise the political rights corresponding to the excess of their shareholdings over the threshold that triggers the obligation to submit a bid, nor shall they be allowed to appoint, directly or indirectly, any additional members to the board of the offeree company.

3. Without prejudice to the provisions of the sub-sections below, the offeror may acquire securities of the offeree company at any time. However, if the bid is subject to the condition of obtaining a minimum number of acceptances, the acquisition by the offeror, outside the bid, of securities issued by the offeree company, from the public announcement of the bid referred to in article 16 until the date of publication of the result thereof, shall entail the elimination of the aforementioned condition and of any other condition that may have been established.

4. When the consideration in the bid consists of securities of the offeree company, or of a combination of cash and securities of the offeree company, and the offeror or the persons acting in concert therewith acquire, from the public announcement of the bid referred to in article 16 until the date of publication of the result thereof, securities of the offeree company outside the bid, the offeror shall be required to offer all addressees of the bid, as consideration in the alternative to the consideration originally established, a cash consideration that shall in no event be less than the highest price paid for the securities so acquired. Additionally, this obligation shall apply even though the securities offered as consideration are not securities of the offeree company if the offeror or the persons acting in concert therewith acquire the securities offered as consideration outside the bid from the public announcement of the bid referred to in article 16 until the date of publication of the result thereof. In such cases, the guarantees, if any, that have been provided shall be enhanced to the extent required. Such enhancement shall be effected within three business days of the acquisition.

5. When the consideration in the bid consists exclusively of cash, the acquisition by the offeror or by persons acting in concert therewith of securities covered by the bid at a higher price than the price established in the offer document or in the amendments thereof shall automatically entail the increase of the offered price to the highest price paid. In such cases, the guarantees, if any, that have been provided shall be enhanced to the extent required. Such enhancement shall be effected within three business days of the acquisition.

6. When the offeror or the persons acting in concert therewith acquire the securities covered by the bid, they shall give notice thereof to the National Securities Market Commission on the same day, as well as of the prices paid and agreed upon. This information shall be regarded as significant information. If necessary, the National Securities Market Commission may extend the acceptance period as it deems appropriate and adopt any other measures required as a consequence of the changes to the terms of the bid, including, if applicable, the submission by the offeror of a supplement to the offer document.

7. In no event may the offeror or the persons acting in concert therewith transfer shares of the offeree company until the settlement of the bid. This rule shall likewise apply to the transfer of securities offered under bids in which the consideration consists, totally or partially, of securities.

Article 33. *Withdrawal and cessation of effects of the bid.*

1. After a voluntary bid has been submitted, the offeror may withdraw it only in the following cases:

a) When a competing offer is authorised, as provided in Chapter IX.

b) In the cases contemplated in letters b), c) and d) of sub-section 1 of article 26.

c) When due to exceptional circumstances beyond the control of the offeror, the bid may not be carried out or is manifestly unfeasible, provided that the prior approval of the National Securities Market Commission is obtained.

d) When, pursuant to the provisions of article 28, the shareholders acting at a general meeting of the offeree company adopt a decision or resolution that, in the opinion of the offeror, prevents it from maintaining the bid, so long as the offeror itself has not had any direct or indirect participation in favour of the adoption of such resolution and obtains the prior approval of the National Securities Market Commission. The same rule shall apply to cases in which the actions of the board are not subject to this limitation in accordance with the procedure described in article 28.5.

However, in the case of resolutions among those mentioned in letter d) of article 28.1, the offeror may maintain the bid and adjust the consideration thereunder so long as, in light of the circumstances of the case, the reduction, if any, in the new consideration is not greater than required to preserve the financial equivalence with the former one and the offeror obtains the prior approval of the National Securities Market Commission.

2. In the case of a mandatory bid, the offeror may withdraw it in the following cases:

a) When due to exceptional circumstances beyond the control of the offeror, the bid may not be carried out or is manifestly unfeasible, provided that the prior approval of the National Securities Market Commission is obtained.

b) In the cases contemplated in letters b), c) and d) of sub-section 1 of article 26.

c) When at the end of the procedure applicable to competing offers, an unconditional competing offer that contains better terms than the bid is maintained, pursuant to the provisions of Chapter IX.

3. Voluntary bids shall cease to have effect when they are not accepted by the holders of the minimum number of securities, if any, upon which they have been made conditional, unless the offeror waives the condition by acquiring all of the securities offered.

If other conditions have been established, the bid shall cease to have effect if upon the expiration of the acceptance period the conditions have not been fulfilled, unless the offeror waives fulfilment thereof not later than the day prior to the expiration of such acceptance period. In this latter case, the provisions of article 31.7 shall apply.

4. The decision to withdraw the bid, accompanied by an express and detailed statement of the reasons therefor, shall be immediately reported by the offeror to the National Securities Market Commission. All other reasons whereby the bid is deprived of effect shall likewise be reported.

Such communications shall be made public as provided in article 22, within a maximum period of two business days of receipt thereof by the National Securities Market Commission.

5. After publication of the withdrawal of the bid or of the reason why the bid ceases to have effect, any acceptances submitted shall be ineffectual, and the expenses arising from the acceptance shall be borne by the offeror.

CHAPTER VIII

ACCEPTANCE OF THE BID AND SETTLEMENT OF TRANSACTIONS

Article 34. *Statement of acceptance of the bid.*

1. Statements of acceptance of the bid shall be made as provided in the offer document.
2. Market members participating in the transaction or entities acting for the account of the offeror shall, on a daily basis, notify the respective stock exchange management companies and the offeror of the statements of acceptance received.
3. Statements of acceptance may be revoked at any time before the last day of the period for acceptance of the bid.
4. When there are competing offers, multiple statements of acceptance may be made so long as the order of preference among them is indicated and the statements are submitted to the various competing offerors.
5. Statements of acceptance shall be invalid if they are subject to a condition.

Article 35. *Information regarding the acceptances received.*

1. During the acceptance period, the offeror and the Stock Exchange Management Company [*Sociedad Rectora de la Bolsa de Valores*] of the Stock Exchange on which the affected securities are admitted to trading shall provide to the National Securities Market Commission, when requested thereby, information regarding the number of acceptances submitted and not revoked of which they are aware.
2. During the period mentioned in the preceding sub-section, interested parties may obtain information regarding the number of acceptances submitted and not revoked, either at the registered office of the offeror or at that of the representatives thereof.

Article 36. *Publication of the result of the bid.*

1. Within five business days after the expiration of the acceptance period, the Stock Exchange Management Companies or, as applicable, the entities acting for the account of the offeror, shall inform the National Securities Market Commission of the total number of securities covered by the statements of acceptance submitted.
2. Once the National Securities Market Commission is aware of the total number of acceptances, it shall, within 2 business days, inform the Stock Exchange Management Companies of the Stock Exchanges on which the securities are admitted to trading and, if applicable, the Brokerage House [*Sociedad de Bolsas*], the offeror and the offeree company of the positive or negative result, depending upon whether or not the minimum number of securities specified in the bid has been reached and whether or not the conditions established for the effectiveness thereof have been fulfilled. The Stock Exchange Management Companies shall publish the result, specifying the details thereof, in the issue of the Listing Bulletin corresponding to the trading session at which they receive such information.

Article 37. *Settlement of the bid.*

1. When the consideration consists of cash, takeover bids that have had a positive result shall be settled in accordance with the procedure established for such purpose by the *Sociedad*

de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores, S.A. [Securities Registration, Clearing and Settlement Systems Management Company] (*Iberclear*), and the date of the corresponding trading transaction shall be deemed to be the date of the session to which the issue of the Listing Bulletin in which the result of the bid is published corresponds.

2. When the consideration consists of a swap of securities, the takeover bid shall be settled as provided in the offer document.

3. After the transaction has been settled, the National Securities Market Commission shall authorise, if applicable, the release of the guarantee offered. Partial reductions thereof may be allowed, provided that the pending settlement process is not impaired thereby.

Article 38. *Rules on distribution and pro-ration.*

1. When the total number of securities covered by the statements of acceptance exceeds the maximum limit of the bid, the following rules shall apply to the settlement of the transaction:

1st) Linear distribution.- The distribution shall begin by allotting to each acceptance the same number of securities, which shall be the number that results from dividing 25 per cent of the total of the bid by the number of acceptances.

Acceptances made for a number of securities less than the number referred to in the preceding paragraph shall be satisfied in full.

2nd) Distribution of the excess.- The number of securities that have not been allotted in accordance with the foregoing rule shall be distributed in proportion to the number of securities covered by each acceptance.

2. In the case of takeover bids contemplated in article 12 for which statements of acceptance have exceeded the maximum limit of the bid, the shares offered by each shareholder shall, for the purposes of settling the bid, be reduced in proportion to the number of shares covered by such shareholder's acceptance.

3. Stock Exchange Management Companies shall coordinate their action in order to determine the number of securities to be allotted to each acceptance in those cases in which the rules on distribution and pro-ration set out in the preceding sub-sections must be applied and the securities covered by the bid are admitted to trading on several Stock Exchanges.

4. In any event, the various acceptances made directly or indirectly by the same individual or legal entity shall be deemed as a single acceptance.

Article 39. *Negative result of voluntary bids.*

1. If the bid becomes ineffectual because the minimum number of securities upon which it was made conditional has not been reached or, in general, because the conditions established have not been fulfilled, the entities or persons that have received the acceptances for the account of the offeror shall return the documents evidencing title to the securities that have been delivered to them by the acceptors.

All expenses arising from such return shall be borne by the offeror.

2. The offeror, the companies belonging to its group, the members of the board of the offeror, the senior management thereof and the persons who have made the bid in their own name but for the account of the offeror or in concert therewith shall not make another takeover bid in respect of the same securities, except in accordance with the provisions of Chapter IX

of this royal decree, until six months have passed since the date of publication of the result on which the bid became ineffectual, nor shall they acquire securities or fall within any of the cases that trigger the obligation to submit a takeover bid as provided in this royal decree.

3. The provisions of this article shall not apply in the event of withdrawal of a bid resulting from the circumstances mentioned in sub-section 1 of article 33 of this royal decree.

CHAPTER IX

COMPETING OFFERS

Article 40. *Definition.*

Competing offers shall be deemed to be such takeover bids as affect securities for all or a part of which another takeover bid, the acceptance period of which has not yet expired, has previously been submitted to the National Securities Market Commission, and provided that the requirements set forth in article 42 are met.

Article 41. *Authorisation of a competing offer.*

1. The National Securities Market Commission shall authorise competing offers and the improvements referred to in article 45 so long as they comply with the general provisions of this royal decree and the specific provisions contained in this chapter.

The National Securities Market Commission shall make public its decision through its website.

2. Persons acting in concert with the offeror or belonging to the same group to which the offeror belongs, and persons acting directly or indirectly for the account of the offeror, may not submit a competing offer.

Without prejudice to the foregoing, the offeror may act in association or concert with third parties in order to improve its bid, so long as:

a) No person or entity participates, directly or indirectly, in more than one offer, either as co-offeror, in concert with the original offeror or otherwise.

b) The offeror and the third party or parties with whom it acts in association or concert assume joint and several liability for the revised bid.

c) The change in the identity or composition of the offeror group and other modifications are reflected in a supplement to the offer document.

3. All offers shall be processed in the order of their submission, such that offers that have only been disclosed by means of a prior announcement shall be processed in the order that results from the date of submission thereof.

4. If a competing offer is submitted before the publication of the announcements of a prior bid as provided in article 22, the National Securities Market Commission shall so notify the new offeror, informing such new offeror that its offer shall be subject to the rules applicable to competing offers, and shall suspend the processing thereof until the prior bid is authorised.

After the first bid has been published, the National Securities Market Commission shall give the offeror that made the competing offer a period of 10 calendar days within which to ratify the terms thereof or, if required, to improve them as provided in the following article.

Article 42. *Conditions in a competing offer.*

1. Any competing offer shall comply with the following requirements:

a) It shall be submitted at any time after the submission of the original bid until the fifth calendar day prior to the expiration of the period for acceptance thereof. The acceptance period shall, if applicable, be the period that results from the changes that may have been made under the provisions of article 44.

b) It shall cover a number of securities that is not less than that in the last preceding offer.

c) It shall outbid the last preceding offer, either by raising the price or value of the consideration offered or by extending the offer to a larger number of securities. If the consideration is improved by means of a change in the nature thereof, the opinion of an independent expert so confirming it shall be required, unless the consideration originally offered consists of a swap or exchange of securities and the new consideration consists of cash in an amount greater than the amount stated in compliance with the provisions of article 14.4 of this royal decree.

d) When the submission of a competing offer is mandatory under the provisions of Chapter II of this royal decree, the offer shall also comply with such provisions. If the event that gives rise to the obligation to submit the offer occurs after the expiration of the period established in letter a), the National Securities Market Commission shall extend the periods provided for in this chapter in order to allow for the submission of the mandatory competing offer. Such offer shall be submitted immediately upon the occurrence of the event that gives rise to the submission thereof and, in any event, within five business days thereafter.

2. Insofar as the requirements established in the preceding sub-section are complied with, competing offers may, when the submission thereof is not mandatory, make their effectiveness conditional upon the acceptance of the offer by the holders of a capital percentage greater than that in any preceding offer. They may also be subject to any other condition upon the terms of article 13.2 of this royal decree.

3. Consideration may be in any of the forms provided for in article 14.

4. The first offeror may agree with the offeree company upon the payment of a commission to the former as expenses of preparation of the bid in the event that such bid is not successful because of the submission of other competing offers.

The amount of such commission shall not be greater than 1 per cent of the total amount of the bid, shall be approved by the board of directors, with a favourable report from the financial advisors to the company, and shall be described in the offer document.

Article 43. *Statements of acceptance of competing offers.*

Multiple statements of acceptance may be made as provided in article 34.4.

The procedure for computation of multiple acceptances shall be governed by the following rules:

a) Acceptances shall first be attributed to the offers indicated as the first preference of each acceptor.

b) Acceptances of offers that are withdrawn or cease to have effect upon the grounds established in this royal decree shall be attributed to the following offers in order of preference.

The National Securities Market Commission may, by means of a circular, establish the computation procedure and the manner in which the results thereof shall be made public.

Article 44. *Period for acceptance of competing offers.*

1. The period for acceptance of competing offers shall be thirty calendar days from the day following the date of publication of the first announcement referred to in article 22. The submission of a competing offer shall interrupt the period for acceptance of the prior offer or offers, which period shall automatically be modified to the extent required for the periods for acceptance of all offers to expire on the same day.

The new acceptance period that serves as the same period for all offers shall be published by the National Securities Market Commission on its website.

2. The extensions of the acceptance period contemplated in article 23, except for the extension provided for in sub-section 2 thereof, shall apply to competing offers.

3. The acceptance period and any extensions thereof shall be made public by the National Securities Market Commission.

Article 45. *Withdrawal and modification of competing offers.*

1. The authorisation of a competing offer shall entitle the offerors that have made prior offers to withdraw them. In the case of mandatory bids, the provisions of article 33.2 shall apply. The offer must be withdrawn prior to the date of modification of the terms thereof set forth in sub-section 3, and the withdrawal shall be immediately notified to the National Securities Market Commission and announced by the means established in article 22.

2. Once the competing offers that have been submitted have been authorised and until the time indicated in sub-section 3, any offeror that has not withdrawn its offer may modify the terms thereof, so long as the announcement of a new competing offer has not been previously published.

3. On the fifth business day following the expiration of the period for submission of competing offers as provided in article 42.1 a) above, all offerors that have not withdrawn their offers shall submit to the National Securities Market Commission, in a sealed envelope or in any other manner to the satisfaction of the National Securities Market Commission that ensures the confidentiality of the information, a communication that may contain either their most recent improvement pursuant to article 42 or their decision not to submit it.

If on the date set forth in the preceding paragraph only one offer remains, the offeror shall be released from the obligation to submit the aforementioned communication and may maintain or revise its offer as provided in article 31.

4. The National Securities Market Commission shall open the envelopes on the same day of submission thereof or on the next trading day and shall disclose the terms set forth therein to all the offerors and to the market by publishing them on its website.

5. In the cases of improvement contemplated in sub-sections 2 and 3 of this article, the offeror shall submit to the National Securities Market Commission evidence of the decision adopted, a supplement to the offer document describing the changes to the offer with as much precision and accuracy and to the same extent as the revised items, and a form of the announcements to be published.

Within the following three business days, each offeror shall provide evidence to the National Securities Market Commission of the establishment of the supplemental guarantee corresponding to the modification submitted.

If the improvement does not conform to the requirements of this Royal Decree or the offeror does not submit the documents specified in the preceding paragraphs, the National Securities Market Commission shall deem the improvement not to have been made and shall make such circumstance public.

6. If the original offeror has not withdrawn its bid, it may modify the terms thereof as provided in sub-sections 2 and 3 as long as it complies with the following requirements:

a) The consideration offered in a sealed envelope or by other comparable means must not be 2 per cent lower than the highest consideration offered in the envelopes or by other comparable means.

b) It must better the terms of the competing offer or offers, either by raising the price or value of the consideration offered for the best of them by not less than 1 per cent, or by extending the original bid to a number of securities that is at least 5 per cent larger than that in the best competing offer. However, when the bid is bettered other than by merely raising the price or merely extending the bid to a larger number of securities, a report of an independent expert shall be submitted confirming that the bid betteres the last preceding offer, unless the consideration originally offered is a swap or exchange of securities and the new consideration consists of cash in an amount greater than the amount stated in compliance with the provisions of article 14.4 of this royal decree.

The last-mentioned improvement shall be submitted within a maximum period of five business days of the communication by the National Securities Market Commission established in sub-section 4.

7. After the offeror has been notified of the authorisation, the offeror shall, within the deadline indicated by the National Securities Market Commission, disseminate the new terms of the offer as provided in article 22. If several offerors make modifications, both the authorisation and the dissemination of the new terms shall occur on the same dates.

The period for acceptance of competing offers shall be extended for a period of 15 calendar days after the publication of the announcements mentioned in article 22, and shall automatically be extended until such date to the extent required. The extension shall be announced by the National Securities Market Commission on its website.

8. The obligation of the board of the offeree company to prepare a report as laid down in article 24 shall apply to the offers regulated by this article, but the period for publication of such report of the board of the offeree company shall be five calendar days from the date of publication of the modification.

9. Without prejudice to the provisions of article 43, and absent any express statement to the contrary, which shall be subject to the same requirements originally established for acceptance of each of the offers, it shall be deemed that the addressees of such offers that have accepted them prior to the modification thereof consent to the respective revised offers.

Article 46. *Equal amount of information.*

1. The offeree company shall ensure that all competing offerors have access to the same amount of information.

2. For such purpose, the offeree company shall, when so specifically requested by an existing or potential offeror in good faith, make available thereto the requested information so long as such information has been provided to other existing or potential offerors.

3. The company shall make the delivery of information conditional upon the recipient duly ensuring the confidentiality thereof, upon such information being used for the sole purpose of making a takeover bid and upon the information being necessary to make the bid.

CHAPTER X

SQUEEZE-OUTS AND SELL-OUTS

Article 47. *Conditions applicable to squeeze-outs and sell-outs.*

1. Whoever has made a takeover bid for all of the securities may, once the bid has been settled, require the other holders of shares or other securities covered by the bid to sell them at an equitable price. Likewise, any of the holders may require the offeror to purchase all of its securities at such equitable price.

The above-described rights shall be conditional upon the following two circumstances being present on the date of settlement of the bid:

a) The offeror is a holder of securities representing at least 90 per cent of the voting capital of the offeree company.

b) The prior takeover bid has been accepted by holders of securities representing at least 90 per cent of the voting rights covered by the bid.

2. The consideration in the takeover bid shall be deemed to be an equitable price.

Article 48. *Procedure applicable to squeeze-outs and sell-outs.*

1. The maximum period to require the squeeze-out or sell-out shall be three months after the expiration of the acceptance period.

2. The offer document shall state whether the offeror intends to require a squeeze-out if the conditions set forth in article 47 are met.

3. Within three business days after the publication of the result of the bid, the offeror shall inform the National Securities Market Commission whether the conditions set forth in article 47 are met.

4. As soon as the offeror makes a decision and in any event within the period indicated in sub-section 1, the offeror shall inform the National Securities Market Commission whether or not it shall require a squeeze-out. If it does, it shall set the date of the transaction within a period of 15 to 20 business days after the communication of its decision to the National Securities Market Commission, which the latter shall make public. The offeror's decision shall be irrevocable.

The offeror shall, prior to the date of the transaction, provide evidence to the National Securities Market Commission of the establishment of guarantees ensuring compliance with the obligations arising from the exercise of the right of squeeze-out.

The transaction shall be settled within the same period established in the offer document, to be counted from the date of the transaction.

5. The offeror shall disseminate the characteristics of the squeeze-out and make them generally known to the public by the means contemplated in article 22, within a maximum period of five business days of the date of publication by the National Securities Market Commission.

The holders of securities affected by the squeeze-out shall notify the offeror, through the entities acting as depositaries of their securities and prior to the date of the transaction, of the nature of the consideration that they have chosen, as the case may be. Absent any such notice, it shall be deemed that they opt for the cash consideration, if such alternative is available.

6. The requests for sell-outs received by the offeror shall be settled within the same periods established for the settlement of the bid in the offer document, to be counted from receipt of each request.

7. The entities in charge of the settlement shall be required to effect the transfers of such securities and cash as are necessary to consummate the squeeze-out or sell-out within the periods established in the preceding sub-sections 4 and 6.

8. In the case of a squeeze-out, all expenses arising from the purchase and sale or exchange and the settlement of the securities shall be borne by the offeror.

In the case of a sell-out, all expenses arising from the purchase and sale or exchange and the settlement of the securities shall be borne by the sellers.

9. After evidence of the settlement of the transactions has been provided to the National Securities Market Commission, the guarantee may be reclaimed.

10. The execution of a squeeze-out transaction shall entail the de-listing of the affected securities. Such de-listing shall be effective as from the settlement of the transaction.

If the offeror becomes the holder of all of the securities as a consequence of sell-out transactions, such securities shall also be de-listed as from the settlement of the last transaction, unless the National Securities Market Commission, at the request of the offeror, grants it a period of one month within which to comply again with the requirements of dissemination and liquidity of the subject securities. If such period expires without the said requirements being complied with again, the securities shall automatically be de-listed.

11. The National Securities Market Commission may, by means of a Circular, establish such other requirements as it deems necessary for the application of the procedure described in this article.

CHAPTER XI

RULES ON SUPERVISION, INSPECTION AND SANCTIONS

Article 49. *Supervision, inspection and sanctions.*

The persons or entities that make a takeover bid, the offeree companies, the securities dealer companies [*sociedades de valores*] and securities brokerage houses [*agencias de valores*] or the credit institutions acting on behalf of the offeror, the directors of any of the aforementioned entities and any person that directly or indirectly participates in the takeover bid for the account of or in concert with them, shall be subject to the rules on supervision, inspection and sanctions of Act 24/1988 of 28 July, on the Securities Market.

Article 50. *Duty of abstention.*

Securities dealer companies and securities brokerage houses or credit institutions, as well as notaries public [*fedatarios públicos*], that during the performance of their duties or on account of their functions become aware of a transaction that may violate the regulations applicable to takeover bids shall refrain from participating in them.

First additional provision. *Mandatory bid in the case of certain increases in shareholdings in a listed company.*

Parties which, upon the entry into force of Act 6/2007 of 12 April, amendatory of Act 24/1988 of 28 July, on the Securities Market, providing for the reform of the rules on takeover bids and on the transparency of issuers, hold, directly or indirectly, pursuant to the provisions of article 3.1 of this royal decree, a percentage of voting rights in a listed company that is equal to or greater than 30 per cent and less than 50 per cent, shall be required to make a mandatory takeover bid, subject to the terms, conditions and exceptions set forth in this royal decree for the mandatory takeover bids provided for in Chapter II when, after the entry into force of the above-mentioned Act, any of the following circumstances occurs:

- a) They acquire, in a single act or in successive acts, shares of such company until increasing their shareholdings by at least 5 per cent over a period of twelve months.
- b) They reach a percentage of voting rights equal to or greater than 50 per cent.
- c) They acquire additional shareholdings and appoint, under the provisions of article 6 of this royal decree, over a period of 24 months after the acquisition, a number of directors that, together with those that have already been appointed, if any, represent more than one-half of the members of the board of directors of the company.

Second additional provision. *Publication of calendar of trading days.*

For purposes of the computation of trading days, the National Securities Market Commission shall every year publish on its website the calendar of trading days in effect on official secondary markets.

Sole transitional provision. *Transitional rules applicable to certain takeover bids.*

1. This Royal Decree shall apply to takeover bids in respect of which a request for authorisation has been submitted to the National Securities Market Commission and which have not been authorised prior to the entry into force of Act 6/2007 of 12 April, amendatory of Act 24/1988 of 28 July, on the Securities Market, providing for the reform of the rules on takeover bids and on the transparency of issuers.

2. Without prejudice to the provisions of the preceding sub-section, in the event of submission of offers that are competing offers in respect of bids authorised prior to the entry into force of Act 6/2007 of 12 April, amendatory of Act 24/1988 of 28 July, on the Securities Market, providing for the reform of the rules on takeover bids and on the transparency of issuers, the National Securities Market Commission may, after the submission of the corresponding supplement to the offer document, modify the authorisations granted in order to adjust the preceding offers to the rules in effect that are contained in the aforementioned Act and in this Royal Decree.

Sole repeal provision. *Repeal of regulations.*

Royal Decree 1197/1991, of 26 July, on the rules on takeover bids, as well as all sets of provisions of equal or lower rank that conflict with the provisions of this royal decree, are hereby repealed.

First final provision. *Incorporation of European Union Law.*

The incorporation into Spanish Law of Directive 2004/25/EC of the European Parliament and of the Council, of 21 April 2004, on takeover bids, is completed by means of this royal decree.

Second final provision. *Enabling provisions.*

This royal decree is issued under the enabling provisions set forth in article 149.1.6.^a, 11.^a and 13.^a of the Spanish Constitution.

Third final provision. *Regulation-making authority.*

The Ministry of Economy and Finance and, with the express authorisation thereof, the National Securities Market Commission, are hereby authorised to make such regulations as may be required for the further development and enforcement of, and compliance with, the provisions of this royal decree.

Fourth final provision. *Entry into force.*

This royal decree shall come into force on 13 August 2007.

ANNEX

CONTENT OF THE OFFER DOCUMENT

INDEX AND LIST OF SUPPLEMENTAL DOCUMENTS

Introduction and warnings if required by the transaction

CHAPTER I

Persons responsible for the offer document.

- a) Name and position of the persons responsible for the offer document and, if applicable, of the specific parties for which they assume responsibility.
- b) Statement of the persons responsible ensuring that the data and information contained in the offer document is true, that no misleading data or information is included, and that there are no omissions that may alter the content thereof.

Resolutions, scope and applicable law.

- a) Resolutions and decisions of the offeror for the purposes of making the bid and granting of powers to the persons responsible for the offer document.
- b) Scope of the bid, applicable law and competent authority, with a detailed statement of the applicable regulations under the provisions of article 1 of this royal decree.
- c) Markets in which the bid will be made.
- d) Statement of the domestic laws and regulations that will govern the contracts entered into by and between the offeror and the holders of securities of the offeree company as a consequence of the bid, and indication of the competent courts.

Information regarding the offeree company.

- a) Corporate and trade name. Registered office and address.
- b) Composition of share capital. Other securities that may give the right to the acquisition or subscription of shares. Voting rights attaching to the securities. Markets on which the shares and other listed securities are admitted to trading.
- c) Structure of the board of directors and of the management and supervisory bodies, with a statement of the positions therein and the shares and other securities of the offeree company held by members of such bodies.
- d) Shareholding structure of the offeree company and shareholders' agreements.
- e) Limitations upon the right to vote and restrictions upon access to the board of directors established in the articles of association.
- f) Resolutions regarding the application of breakthrough measures and compensation contemplated by the offeree company.

Information regarding the offeror and its group.

- a) Legal personhood, corporate and trade name, registered office, address, date of incorporation, length of life and corporate purpose. If an individual, name and address.

b) Composition of share capital. Other securities that may give the right to the acquisition or subscription of shares. Voting rights attaching to the securities. Markets, if any, on which the shares and other listed securities are admitted to trading.

c) Structure of the board of directors and of the management and supervisory bodies, with a statement of the positions therein and the shares and other securities of the offeror company held by members of such bodies.

d) Identity of the main shareholders, partners or members of the offeror, with a statement of the securities, voting rights, and persons who exercise control individually or acting in concert. If the offeror is not controlled by any person, an express statement shall be included to such effect.

e) Identity of the individuals or legal entities acting in concert with the offeror and description of the agreements or other relationships giving rise to the concerted action. If no person acts in concert with the offeror, an express statement shall be included to such effect.

f) Limitations upon the right to vote and restrictions upon access to the board of directors established in the articles of association.

g) Resolutions regarding the application of breakthrough or comparable measures and compensation contemplated by the offeror company.

h) Entities belonging to the same group to which the offeror belongs, with a description of the group structure. If none, a statement to that effect.

Agreements regarding the bid and the offeree company.

a) Full description of all agreements or understandings of any kind between the offeror and the shareholders and members of the board of directors and of the management and supervisory bodies of the offeree company, and benefits reserved for such members by the offeror. If none, a statement to that effect.

If the statement contemplated in the preceding paragraph is not in the negative, securities and voting rights in the offeror company held by the members of the board of directors and of the management and supervisory bodies of the offeree company and by the shareholders that are parties to the agreement.

b) Members simultaneously serving on the board of directors and on the management and supervisory bodies of the offeree company and of the offeror company.

c) Shares of the offeror company and other securities that may give the right to the acquisition or subscription thereof directly or indirectly held by the offeree company, with a statement as to the voting rights attaching thereto. If none, a statement to such effect.

Securities of the offeree company held by the offeror.

a) Shares of the offeree company and other securities giving the right to the subscription or acquisition thereof, which are held, directly or indirectly, by the offeror, by its directors, by the directors of the controlled companies belonging to its group, by its controlling shareholders, partners or members, and by other persons acting for the account of or in concert with the offeror, with a statement as to the corresponding voting rights.

b) Treasury stock of the offeree company.

Transactions on securities of the offeree company.

a) Type, date and price of or consideration for the spot or forward transactions carried out by the offeror and the persons acting in concert therewith over the last 12 months preceding the prior announcement of the bid.

With as much detail as indicated above, information shall be provided regarding transactions carried out during the period elapsed from the prior announcement of the bid until the submission thereof and transactions carried out thereafter until the authorisation of the bid.

If an agreement regarding the bid or the offeree company has been executed with the shareholders or directors thereof, the information required in this article shall extend to all persons that are parties to the agreement.

If there are no transactions, an express statement shall be included to such effect.

b) If any agreement has been executed with the offeree company, the treasury stock transactions carried out by the offeree company over the period indicated in letter a) above shall also be stated.

Activities and economic-financial position of the offeror.

a) Information regarding the activities and economic-financial position of the offeror company for the fiscal year most recently ended and audited, including its net worth, revenues, total assets, net financial debt and results of operations, and with express reference to any significant qualifications or statements contained in the audit reports.

If the offeror company forms part of a group, the above-mentioned information shall refer not only to the offeror company but also to the financial statements of the consolidated group.

If the offeror company does not do business or has been incorporated for submission of the bid, the information required herein shall refer to its controlling shareholders, partners or members.

b) The aforementioned information shall also be included for the period subsequent to the closing of the most recent financial accounts to the extent that such information has been made public.

CHAPTER II

Securities to which the bid is directed.

a) Number and description of the securities or types of securities to which the bid is directed and voting rights attaching thereto.

b) Number and description of the securities or types of securities that have been blocked in order to prevent the transfer thereof by any means during the course of the bid, voting rights attaching thereto and identity of the holders thereof.

c) Number and description of the securities or types of securities which the bid effectively covers, after those that have been blocked have been deducted, together with the voting rights attaching thereto, including a statement, if applicable, of the maximum or minimum number or percentage of securities that the offeror undertakes to acquire.

d) Distribution of the securities and the voting rights respectively carried by them among the various offerors, if applicable.

Consideration offered.

a) Consideration offered for each security or type of security and manner in which it will be paid.

If the offeree company has announced a dividend that is to be paid during the course of the period for acceptance of the bid, it shall be stated whether or not the gross amount of such dividend will be deducted from the consideration offered.

b) Rationale for the consideration and valuation method used to determine the equitable price where applicable.

c) When the consideration consists, in whole or in part, of the exchange for other securities, the following shall also be included:

Information regarding the ratios according to which the exchange is to be effected.

Equivalent cash price resulting from applying to the exchange ratio the average weighted price of the securities offered for the three-month period preceding the prior announcement of the bid.

Report of an independent expert in which the cash price of the securities offered in exchange is determined, when the securities are to be issued by the offeror company itself and its capital is not totally or partially admitted to trading on a Spanish official market or on a regulated market of a Member State of the European Union, or when the securities offered are not admitted to trading on such markets.

d) Compensation offered in exchange for the breakthrough measures [sic] that may become ineffective under the provisions of article 29 of this royal decree, specifying the manner in which the consideration will be paid and the method used to determine it.

Conditions to which the bid is subject.

a) Description of the conditions to which the bid is subject or statement in the negative if no conditions have been established.

b) Limitations or restrictions, be they regulatory, imposed by the offeror company itself or by third parties, to which the offeror may be subject in connection with a possible waiver of the aforementioned conditions if they are not fulfilled.

c) Provisions made by the offeror regarding a possible waiver of the conditions and the impact of such waiver on the bid, on the purpose thereof and on the other provisions contained in the offer document.

Guarantees for and financing of the bid.

a) Nature of the guarantees established by the offeror in order to settle the bid, details of the financial institutions with which they have been established and amount thereof.

b) Sources of funds to finance the bid and main characteristics and terms of such financing, including, in the case of third-party financing, the identity of the financial creditors and the provisions made by the offeror for the purposes of financial debt service.

c) Effects of the financing on the offeree company. If the offeror believes that the payment of interest on the financing of the debt, the refinancing thereof or the guarantees therefor will

depend on the business of the offeree company, such circumstance shall be expressly stated and a detailed description of the financing agreements shall be included. Otherwise, a statement in the negative shall be made.

CHAPTER III

Acceptance and settlement procedure.

- a) Period for acceptance of the bid.
- b) Formalities with which the addressees of the bid must comply in order to express their acceptance, as well as the manner in which and the period within which they will receive the consideration.
- c) Expenses of acceptance and settlement of the bid that must be borne by the addressees, or distribution thereof between the offeror and the addressees.
- d) Time periods within which to waive the conditions, if any, to which the effectiveness of the bid is subject.
- e) Appointment of the financial institutions or intermediaries acting for the account of the offeror in the acceptance and settlement procedure.
- f) Formalities with which the holders of the securities must comply in order to request a sell-out of the securities covered by the bid and to elect, if applicable, the type of consideration if the conditions established in article 47 of this royal decree are satisfied.

CHAPTER IV

Purpose of the transaction.

- a) Purpose of the acquisition.
- b) Strategic plans and intentions regarding the future activities and location of the places of business of the offeree company and its group for a minimum 12-month timeframe.
- c) Strategic plans and intentions regarding the preservation of employees' and managers' jobs at the offeree company and its group, including any significant change in working conditions for a minimum 12-month timeframe.
- d) Plans in connection with the use or disposition of assets of the offeree company; changes contemplated in its net financial debt.
- e) Plans in connection with the issuance of securities of any kind by the offeree company and its group.
- f) Corporate restructurings of any kind that have been contemplated.
- g) Dividend policy.
- h) Plans in connection with the structure, composition and operation of the board of directors and of the management and supervisory bodies of the offeree company and its group. Provisions regarding the appointment of members to such bodies by the offeror.
- i) Provisions in connection with maintaining or amending the articles of association of the offeree company or of the entities within its group.

j) Intentions regarding whether the securities of the offeree company will continue to be listed or, if applicable, regarding the de-listing thereof, and commitments to adopt, within 6 months after the settlement of the bid, such measures as may allow for the securities to continue to be listed or to be de-listed depending upon the intentions expressed in this connection.

k) Intention to exercise or not to exercise the right of squeeze-out provided for in article 47 of this royal decree.

l) Intentions in connection with the transfer of securities of the offeree company, indicating whether any agreement with other persons exists in this regard and the securities, if any, of the offeree company held by such persons.

m) To the extent that the offeror company is affected by the bid, the information referred to in the preceding paragraphs of this chapter shall also be included in connection with the offeror company itself and its group.

n) If the offeror is a listed company, the impact of the bid and the financing thereof on its main financial indicators shall be described.

CHAPTER V

Authorisations and other information or documents.

a) Whether or not it is possible for the result of the bid to be subject to the provisions of Act 16/1989 of 17 July, on the Defence of Competition, by Regulation (EC) No. 139/2004 of the Council of the European Communities, or by other competition provisions and, if applicable, actions that the offeror intends or is required to undertake, stating the possible consequences thereof pursuant to the provisions of articles 26 and 33 of this royal decree.

b) Detailed description of the administrative authorisations or verifications, other than the authorisation of the National Securities Market Commission, obtained prior to the submission of the bid.

In the event that, as a consequence of the acquisition or transfer of title to or control of the securities resulting from the bid, the offeror needs an administrative authorisation or verification that is yet to be obtained or requested, such circumstance shall be stated and information shall be included regarding the actions that the offeror intends or is required to undertake and the expected effects in the event of non-compliance or denial.

c) In the case of bids submitted as a swap, the offer document shall contain additional information equivalent to the information to be included in the prospectus provided for in Royal Decree 1310/2005, of 4 November, unless there is a registration document or prospectus of the issuer of the securities delivered in exchange which is valid under the provisions of articles 27, 30 and 31 of such Royal Decree.

d) Places where the offer document and the documents attached thereto may be examined.

5. DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 APRIL 2004 ON TAKEOVER BIDS (Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

Whereas:

(1) In accordance with Article 44(2)(g) of the Treaty, it is necessary to coordinate certain safeguards which, for the protection of the interests of members and others, Member States require of companies governed by the law of a Member State the securities of which are admitted to trading on a regulated market in a Member State, with a view to making such safeguards equivalent throughout the Community.

(2) It is necessary to protect the interests of holders of the securities of companies governed by the law of a Member State when those companies are the subject of takeover bids or of changes of control and at least some of their securities are admitted to trading on a regulated market in a Member State.

(3) It is necessary to create Community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures.

(4) In view of the public-interest purposes served by the central banks of the Member States, it seems inconceivable that they should be the targets of takeover bids. Since, for historical reasons, the securities of some of those central banks are listed on regulated markets in Member States, it is necessary to exclude them explicitly from the scope of this Directive.

1 OJ C 45 E, 25.2.2003, p. 1.

2 OJ C 208, 3.9.2003, p. 55.

3 Opinion of the European Parliament of 16 December 2003 (not yet published in the Official Journal) and Council decision of 30 March 2004.

(5) Each Member State should designate an authority or authorities to supervise those aspects of bids that are governed by this Directive and to ensure that parties to takeover bids comply with the rules made pursuant to this Directive. All those authorities should cooperate with one another.

(6) In order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should accordingly provide for the possibility of exceptions and derogations. However, in applying any rules or exceptions laid down or in granting any derogations, supervisory authorities should respect certain general principles.

(7) Self-regulatory bodies should be able to exercise supervision.

(8) In accordance with general principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority should in appropriate circumstances be susceptible to review by an independent court or tribunal. However, Member States should be left to determine whether rights are to be made available which may be asserted in administrative or judicial proceedings, either in proceedings against a supervisory authority or in proceedings between parties to a bid.

(9) Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company's securities for all of their holdings at an equitable price in accordance with a common definition. Member States should be free to establish further instruments for the protection of the interests of the holders of securities, such as the obligation to make a partial bid where the offeror does not acquire control of the company or the obligation to announce a bid at the same time as control of the company is acquired.

(10) The obligation to make a bid to all the holders of securities should not apply to those controlling holdings already in existence on the date on which the national legislation transposing this Directive enters into force.

(11) The obligation to launch a bid should not apply in the case of the acquisition of securities which do not carry the right to vote at ordinary general meetings of shareholders. Member States should, however, be able to provide that the obligation to make a bid to all the holders of securities relates not only to securities carrying voting rights but also to securities which carry voting rights only in specific circumstances or which do not carry voting rights.

(12) To reduce the scope for insider dealing, an offeror should be required to announce his/her decision to launch a bid as soon as possible and to inform the supervisory authority of the bid.

(13) The holders of securities should be properly informed of the terms of a bid by means of an offer document. Appropriate information should also be given to the representatives of the company's employees or, failing that, to the employees directly.

(14) The time allowed for the acceptance of a bid should be regulated.

(15) To be able to perform their functions satisfactorily, supervisory authorities should at all times be able to require the parties to a bid to provide information concerning themselves and should cooperate and supply information in an efficient and effective manner, without delay, to other authorities supervising capital markets.

(16) In order to prevent operations which could frustrate a bid, the powers of the board of an offeree company to engage in operations of an exceptional nature should be limited, without unduly hindering the offeree company in carrying on its normal business activities.

(17) The board of an offeree company should be required to make public a document setting out its opinion of the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, and specifically on employment.

(18) In order to reinforce the effectiveness of existing provisions concerning the freedom to deal in the securities of companies covered by this Directive and the freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by such companies be transparent and that they be regularly presented in reports to general meetings of shareholders.

(19) Member States should take the necessary measures to afford any offeror the possibility of acquiring majority interests in other companies and of fully exercising control of them. To that end, restrictions on the transfer of securities, restrictions on voting rights, extraordinary appointment rights and multiple voting rights should be removed or suspended during the time allowed for the acceptance of a bid and when the general meeting of shareholders decides on defensive measures, on amendments to the articles of association or on the removal or appointment of board members at the first general meeting of shareholders following closure of the bid. Where the holders of securities have suffered losses as a result of the removal of rights, equitable compensation should be provided for in accordance with the technical arrangements laid down by Member States.

(20) All special rights held by Member States in companies should be viewed in the framework of the free movement of capital and the relevant provisions of the Treaty. Special rights held by Member States in companies which are provided for in private or public national law should be exempted from the 'breakthrough' rule if they are compatible with the Treaty.

(21) Taking into account existing differences in Member States' company law mechanisms and structures, Member States should be allowed not to require companies established within their territories to apply the provisions of this Directive limiting the powers of the board of an offeree company during the time allowed for the acceptance of a bid and those rendering ineffective barriers, provided for in the articles of association or in specific agreements. In that event Member States should at least allow companies established within their territories to make the choice, which must be reversible, to apply those provisions. Without prejudice to international agreements to which the European Community is a party, Member States should be allowed not to require companies which apply those provisions in accordance with the optional arrangements to apply them when they become the subject of offers launched by companies which do not apply the same provisions, as a consequence of the use of those optional arrangements.

(22) Member States should lay down rules to cover the possibility of a bid's lapsing, the offeror's right to revise his/her bid, the possibility of competing bids for a company's securities, the disclosure of the result of a bid, the irrevocability of a bid and the conditions permitted.

(23) The disclosure of information to and the consultation of representatives of the employees of the offeror and the offeree company should be governed by the relevant national provisions, in particular those adopted pursuant to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and

consulting employees⁴, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies⁵, Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European Company with regard to the involvement of employees⁶ and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community — Joint declaration of the European Parliament, the Council and the Commission on employee representation⁷. The employees of the companies concerned, or their representatives, should nevertheless be given an opportunity to state their views on the foreseeable effects of the bid on employment. Without prejudice to the rules of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)⁸, Member States may always apply or introduce national provisions concerning the disclosure of information to and the consultation of representatives of the employees of the offeror before an offer is launched.

(24) Member States should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. Likewise, where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the holders of the remaining securities should be able to require him/her to buy their securities. These squeeze-out and sell-out procedures should apply only under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze-out and sell-out procedures in other circumstances.

(25) Since the objectives of the action envisaged, namely to establish minimum guidelines for the conduct of takeover bids and ensure an adequate level of protection for holders of securities throughout the Community, cannot be sufficiently achieved by the Member States because of the need for transparency and legal certainty in the case of crossborder takeovers and acquisitions of control, and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

(26) The adoption of a Directive is the appropriate procedure for the establishment of a framework consisting of certain common principles and a limited number of general requirements which Member States are to implement through more detailed rules in accordance with their national systems and their cultural contexts.

(27) Member States should, however, provide for sanctions for any infringement of the national measures transposing this Directive.

(28) Technical guidance and implementing measures for the rules laid down in this Directive may from time to time be necessary, to take account of new developments on financial markets. For certain provisions, the Commission should accordingly be empowered

4 OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

5 OJ L 225, 12.8.1998, p. 16.

6 OJ L 294, 10.11.2001, p. 22.

7 OJ L 80, 23.3.2002, p. 29.

8 OJ L 96, 12.4.2003, p. 16.

to adopt implementing measures, provided that these do not modify the essential elements of this Directive and the Commission acts in accordance with the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC⁹. The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁰ and with due regard to the declaration made by the Commission in the European Parliament on 5 February 2002 concerning the implementation of financial services legislation. For the other provisions, it is important to entrust a contact committee with the task of assisting Member States and the supervisory authorities in the implementation of this Directive and of advising the Commission, if necessary, on additions or amendments to this Directive. In so doing, the contact committee may make use of the information which Member States are to provide on the basis of this Directive concerning takeover bids that have taken place on their regulated markets.

(29) The Commission should facilitate movement towards the fair and balanced harmonisation of rules on takeovers in the European Union. To that end, the Commission should be able to submit proposals for the timely revision of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1. *Scope*

1. This Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets (hereinafter referred to as 'rules'), relating to takeover bids for the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market within the meaning of Directive 93/22/EEC¹¹ in one or more Member States (hereinafter referred to as a 'regulated market').

2. This Directive shall not apply to takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent to such repurchase or redemption.

3. This Directive shall not apply to takeover bids for securities issued by the Member States' central banks.

Article 2. *Definitions*

1. For the purposes of this Directive:

9 OJ L 191, 13.7.2001, p. 45. Decision as amended by Decision 2004/8/EC (OJ L 3, 7.1.2004, p. 33).

10 OJ L 184, 17.7.1999, p. 23.

11 Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27). Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(a) ‘takeover bid’ or ‘bid’ shall mean a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law;

(b) ‘offeree company’ shall mean a company, the securities of which are the subject of a bid;

(c) ‘offeror’ shall mean any natural or legal person governed by public or private law making a bid;

(d) ‘persons acting in concert’ shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid;

(e) ‘securities’ shall mean transferable securities carrying voting rights in a company;

(f) ‘parties to the bid’ shall mean the offeror, the members of the offeror’s board if the offeror is a company, the offeree company, holders of securities of the offeree company and the members of the board of the offeree company, and persons acting in concert with such parties;

(g) ‘multiple-vote securities’ shall mean securities included in a distinct and separate class and carrying more than one vote each.

2. For the purposes of paragraph 1(d), persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC¹² shall be deemed to be persons acting in concert with that other person and with each other.

Article 3. *General principles*

1. For the purpose of implementing this Directive, Member States shall ensure that the following principles are complied with:

(a) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;

(b) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company’s places of business;

(c) the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;

(d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;

¹² Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p. 1). Directive as last amended by Directive 2003/71/EC (OJ L 345, 31.12.2003, p. 64).

(e) an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration;

(f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

2. With a view to ensuring compliance with the principles laid down in paragraph 1, Member States:

(a) shall ensure that the minimum requirements set out in this Directive are observed;

(b) may lay down additional conditions and provisions more stringent than those of this Directive for the regulation of bids.

Article 4. *Supervisory authority and applicable law*

1. Member States shall designate the authority or authorities competent to supervise bids for the purposes of the rules which they make or introduce pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of those designations, specifying any divisions of functions that may be made. They shall ensure that those authorities exercise their functions impartially and independently of all parties to a bid.

2. (a) The authority competent to supervise a bid shall be that of the Member State in which the offeree company has its registered office if that company's securities are admitted to trading on a regulated market in that Member State.

(b) If the offeree company's securities are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent to supervise the bid shall be that of the Member State on the regulated market of which the company's securities are admitted to trading.

If the offeree company's securities are admitted to trading on regulated markets in more than one Member State, the authority competent to supervise the bid shall be that of the Member State on the regulated market of which the securities were first admitted to trading.

(c) If the offeree company's securities were first admitted to trading on regulated markets in more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States shall be the authority competent to supervise the bid by notifying those regulated markets and their supervisory authorities on the first day of trading.

If the offeree company's securities have already been admitted to trading on regulated markets in more than one Member State on the date laid down in Article 21(1) and were admitted simultaneously, the supervisory authorities of those Member States shall agree which one of them shall be the authority competent to supervise the bid within four weeks of the date laid down in Article 21(1). Otherwise, the offeree company shall determine which of those authorities shall be the competent authority on the first day of trading following that four-week period.

(d) Member States shall ensure that the decisions referred to in (c) are made public.

(e) In the cases referred to in (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the

information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by their supervisory authorities are bound by professional secrecy. No information covered by professional secrecy may be divulged to any person or authority except under provisions laid down by law.

4. The supervisory authorities of the Member States for the purposes of this Directive and other authorities supervising capital markets, in particular in accordance with Directive 93/22/EEC, Directive 2001/34/EC, Directive 2003/6/EC and Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by paragraph 2(b), (c) and (e). Information thus exchanged shall be covered by the obligation of professional secrecy to which persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant to this Directive.

Provided that the general principles laid down in Article 3(1) are respected, Member States may provide in the rules that they make or introduce pursuant to this Directive for derogations from those rules:

(i) by including such derogations in their national rules, in order to take account of circumstances determined at national level

and/or

(ii) by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in (i) or in other specific circumstances, in which case a reasoned decision must be required.

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the course of bids or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine

the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

Article 5. *Protection of minority shareholders, the mandatory bid and the equitable price*

1. Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.

2. Where control has been acquired following a voluntary bid made in accordance with this Directive to all the holders of securities for all their holdings, the obligation laid down in paragraph 1 to launch a bid shall no longer apply.

3. The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.

Provided that the general principles laid down in Article 3(1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. By way of consideration the offeror may offer securities, cash or a combination of both.

However, where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, it shall include a cash alternative.

In any event, the offeror shall offer a cash consideration at least as an alternative where he/she or persons acting in concert with him/her, over a period beginning at the same time as

the period determined by the Member State in accordance with paragraph 4 and ending when the offer closes for acceptance, has purchased for cash securities carrying 5 % or more of the voting rights in the offeree company.

Member States may provide that a cash consideration must be offered, at least as an alternative, in all cases.

6. In addition to the protection provided for in paragraph 1, Member States may provide for further instruments intended to protect the interests of the holders of securities in so far as those instruments do not hinder the normal course of a bid.

Article 6. *Information concerning bids*

1. Member States shall ensure that a decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority must be informed before such a decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform the representatives of their respective employees or, where there are no such representatives, the employees themselves.

2. Member States shall ensure that an offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any translation required, in any other Member State on the market of which the offeree company's securities are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that Member State. Those authorities may require the inclusion of additional information in the offer document only if such information is specific to the market of a Member State or Member States on which the offeree company's securities are admitted to trading and relates to the formalities to be complied with to accept the bid and to receive the consideration due at the close of the bid as well as to the tax arrangements to which the consideration offered to the holders of the securities will be subject.

3. The offer document referred to in paragraph 2 shall state at least:

- (a) the terms of the bid;
- (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;
- (c) the securities or, where appropriate, the class or classes of securities for which the bid is made;
- (d) the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid;
- (e) the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it;

(f) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;

(g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company;

(h) all the conditions to which the bid is subject;

(i) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;

(j) the time allowed for acceptance of the bid;

(k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities;

(l) information concerning the financing for the bid;

(m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company;

(n) the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts.

4. The Commission shall adopt rules for the application of paragraph 3 in accordance with the procedure referred to in Article 18(2).

5. Member States shall ensure that the parties to a bid are required to provide the supervisory authorities of their Member State at any time on request with all the information in their possession concerning the bid that is necessary for the supervisory authority to discharge its functions.

Article 7. *Time allowed for acceptance*

1. Member States shall provide that the time allowed for the acceptance of a bid may not be less than two weeks nor more than 10 weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of 10 weeks may be extended on condition that the offeror gives at least two weeks' notice of his/her intention of closing the bid.

2. Member States may provide for rules changing the period referred to in paragraph 1 in specific cases. A Member State may authorise a supervisory authority to grant a derogation from the period referred to in paragraph 1 in order to allow the offeree company to call a general meeting of shareholders to consider the bid.

Article 8. *Disclosure*

1. Member States shall ensure that a bid is made public in such a way as to ensure market transparency and integrity for the securities of the offeree company, of the offeror or of any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information.

2. Member States shall provide for the disclosure of all information and documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States on the regulated markets of which the offeree company's securities are admitted to trading and to the representatives of the employees of the offeree company and the offeror or, where there are no such representatives, to the employees themselves.

Article 9. *Obligations of the board of the offeree company*

1. Member States shall ensure that the rules laid down in paragraphs 2 to 5 are complied with.

2. During the period referred to in the second subparagraph, the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company.

Such authorisation shall be mandatory at least from the time the board of the offeree company receives the information referred to in the first sentence of Article 6(1) concerning the bid and until the result of the bid is made public or the bid lapses. Member States may require that such authorisation be obtained at an earlier stage, for example as soon as the board of the offeree company becomes aware that the bid is imminent.

3. As regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the general meeting of shareholders shall approve or confirm any decision which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid.

4. For the purpose of obtaining the prior authorisation, approval or confirmation of the holders of securities referred to in paragraphs 2 and 3, Member States may adopt rules allowing a general meeting of shareholders to be called at short notice, provided that the meeting does not take place within two weeks of notification's being given.

5. The board of the offeree company shall draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(i). The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

6. For the purposes of paragraph 2, where a company has a two-tier board structure 'board' shall mean both the management board and the supervisory board.

Article 10. *Information on companies as referred to in Article 1(1)*

1. Member States shall ensure that companies as referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of those rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby, with the company's cooperation, the financial rights attaching to securities are separated from the holding of securities;

(g) any agreements between shareholders which are known to the company and may result in restrictions on the transfer of securities and/or voting rights within the meaning of Directive 2001/34/EC;

(h) the rules governing the appointment and replacement of board members and the amendment of the articles of association;

(i) the powers of board members, and in particular the power to issue or buy back shares;

(j) any significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bid, and the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company; this exception shall not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements;

(k) any agreements between the company and its board members or employees providing for compensation if they resign or are made redundant without valid reason or if their employment ceases because of a takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report as provided for in Article 46 of Directive 78/660/EEC¹³ and Article 36 of Directive 83/349/EEC¹⁴.

13 Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11). Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

14 Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts (OJ L 193, 18.7.1983, p.1). Directive as last amended by Directive 2003/51/EC.

3. Member States shall ensure, in the case of companies the securities of which are admitted to trading on a regulated market in a Member State, that the board presents an explanatory report to the annual general meeting of shareholders on the matters referred to in paragraph 1.

Article 11. Breakthrough

1. Without prejudice to other rights and obligations provided for in Community law for the companies referred to in Article 1(1), Member States shall ensure that the provisions laid down in paragraphs 2 to 7 apply when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

3. Restrictions on voting rights provided for in the articles of association of the offeree company shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Multiple-vote securities shall carry only one vote each at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

4. Where, following a bid, the offeror holds 75 % or more of the capital carrying voting rights, no restrictions on the transfer of securities or on voting rights referred to in paragraphs 2 and 3 nor any extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company shall apply; multiple-vote securities shall carry only one vote each at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members.

To that end, the offeror shall have the right to convene a general meeting of shareholders at short notice, provided that the meeting does not take place within two weeks of notification.

5. Where rights are removed on the basis of paragraphs 2, 3, or 4 and/or Article 12, equitable compensation shall be provided for any loss suffered by the holders of those rights. The terms for determining such compensation and the arrangements for its payment shall be set by Member States.

6. Paragraphs 3 and 4 shall not apply to securities where the restrictions on voting rights are compensated for by specific pecuniary advantages.

7. This Article shall not apply either where Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the

Treaty, or to special rights provided for in national law which are compatible with the Treaty or to cooperatives.

Article 12. *Optional arrangements*

1. Member States may reserve the right not to require companies as referred to in Article 1(1) which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11.

2. Where Member States make use of the option provided for in paragraph 1, they shall nevertheless grant companies which have their registered offices within their territories the option, which shall be reversible, of applying Article 9(2) and (3) and/or Article 11, without prejudice to Article 11(7).

The decision of the company shall be taken by the general meeting of shareholders, in accordance with the law of the Member State in which the company has its registered office in accordance with the rules applicable to amendment of the articles of association. The decision shall be communicated to the supervisory authority of the Member State in which the company has its registered office and to all the supervisory authorities of Member States in which its securities are admitted to trading on regulated markets or where such admission has been requested.

3. Member States may, under the conditions determined by national law, exempt companies which apply Article 9(2) and (3) and/or Article 11 from applying Article 9(2) and (3) and/or Article 11 if they become the subject of an offer launched by a company which does not apply the same Articles as they do, or by a company controlled, directly or indirectly, by the latter, pursuant to Article 1 of Directive 83/349/EEC.

4. Member States shall ensure that the provisions applicable to the respective companies are disclosed without delay.

5. Any measure applied in accordance with paragraph 3 shall be subject to the authorisation of the general meeting of shareholders of the offeree company, which must be granted no earlier than 18 months before the bid was made public in accordance with Article 6(1).

Article 13. *Other rules applicable to the conduct of bids*

Member States shall also lay down rules which govern the conduct of bids, at least as regards the following:

- (a) the lapsing of bids;
- (b) the revision of bids;
- (c) competing bids;
- (d) the disclosure of the results of bids;
- (e) the irrevocability of bids and the conditions permitted.

Article 14. *Information for and consultation of employees' representatives*

This Directive shall be without prejudice to the rules relating to information and to consultation of representatives of and, if Member States so provide, co-determination with the employees of the offeror and the offeree company governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC, 2001/86/EC and 2002/14/EC.

Article 15. *The right of squeeze-out*

1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 to 5 apply.

2. Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him/her those securities at a fair price. Member States shall introduce that right in one of the following situations:

(a) where the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights in the offeree company,

or

(b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90 % of the offeree company's capital carrying voting rights and 90 % of the voting rights comprised in the bid.

In the case referred to in (a), Member States may set a higher threshold that may not, however, be higher than 95 % of the capital carrying voting rights and 95 % of the voting rights.

3. Member States shall ensure that rules are in force that make it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of securities, Member States may provide that the right of squeeze-out can be exercised only in the class in which the threshold laid down in paragraph 2 has been reached.

4. If the offeror wishes to exercise the right of squeeze-out he/she shall do so within three months of the end of the time allowed for acceptance of the bid referred to in Article 7.

5. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash. Member States may provide that cash shall be offered at least as an alternative.

Following a voluntary bid, in both of the cases referred to in paragraph 2(a) and (b), the consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90 % of the capital carrying voting rights comprised in the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

Article 16. *The right of sell-out*

1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 and 3 apply.

2. Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his/her securities from him/her at a fair price under the same circumstances as provided for in Article 15(2).

3. Article 15(3) to (5) shall apply *mutatis mutandis*.

Article 17. *Sanctions*

Member States shall determine the sanctions to be imposed for infringement of the national measures adopted pursuant to this Directive and shall take all necessary steps to ensure that

they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Member States shall notify the Commission of those measures no later than the date laid down in Article 21(1) and of any subsequent change thereto at the earliest opportunity.

Article 18. *Committee procedure*

1. The Commission shall be assisted by the European Securities Committee established by Decision 2001/528/EC (hereinafter referred to as ‘the Committee’).

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to Article 8 thereof, provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Directive.

The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

3. Without prejudice to the implementing measures already adopted, four years after the entry into force of this Directive, the application of those of its provisions that require the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them before the end of the period referred to above.

Article 19. *Contact committee*

1. A contact committee shall be set up which has as its functions:

(a) to facilitate, without prejudice to Articles 226 and 227 of the Treaty, the harmonised application of this Directive through regular meetings dealing with practical problems arising in connection with its application;

(b) to advise the Commission, if necessary, on additions or amendments to this Directive.

2. It shall not be the function of the contact committee to appraise the merits of decisions taken by the supervisory authorities in individual cases.

Article 20. *Revision*

Five years after the date laid down in Article 21(1), the Commission shall examine this Directive in the light of the experience acquired in applying it and, if necessary, propose its revision. That examination shall include a survey of the control structures and barriers to takeover bids that are not covered by this Directive.

To that end, Member States shall provide the Commission annually with information on the takeover bids which have been launched against companies the securities of which are admitted to trading on their regulated markets. That information shall include the nationalities of the companies involved, the results of the offers and any other information relevant to the understanding of how takeover bids operate in practice.

Article 21. *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 20 May 2006. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law that they adopt in the fields covered by this Directive.

Article 22. *Entry into force*

This Directive shall enter into force on the 20th day after that of its publication in the *Official Journal of the European Union*.

Article 23. *Addressees*

This Directive is addressed to the Member States.

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