1. Legislation

Transposition of Takeover Bids Directive Delayed

1.1. Transposition of Directive 2004/25/EC of the European Parliament and of the Council, of 21 April 2004, on takeover bids was one of the expected developments in Spanish Company Law for the first half of 2006 – as it should have been completed no later than the 20th of May –. However, the Spanish Government has not yet publicized any drafts aimed at fulfilling its obligations regarding the abovementioned transposition – probably due to the current contests in the Spanish takeover arena – and no immediate developments are foreseeable.

The press has reported that the transposition of Directive 2004/25/EC will be delayed for some months. Reportedly, the amendment of the current Spanish takeover regulation (Royal Decree 1197/1991, of 26 July 1991) is currently under preparation by the Ministry of Economy and will be sent to the Parliament before year-end. To date, no draft amendment has been made public and, therefore, the extent and terms of the reform of the takeover regulation are still unclear.

Reporting Rules for Issuers of Listed Securities Strengthened

1.2. In another case of late transposition, the Government has recently adapted the Spanish Company Law to Directive 2003/51/EC of the European Parliament and of the Council, of 18 June 2003, amending previous Directives on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings – which had to be transposed by Member States no later than the 1st of January 2005 –.

The Spanish Parliament has passed Law 7/2006, of 24 April, amending the 1989 Spanish Public Company Act (1989 SCA) and setting up new reporting rules for issuers whose securities are admitted to trading on EU regulated markets. In virtue of these reinforced requirements, companies listing their securities on a regulated Member State will no longer be entitled to report their financial statements in abridged form.

With this reform, Spanish companies whose securities are admitted to trading on a regulated market of any Member State shall be subject to reporting standards that contribute to enhance

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the comparability of their financial statements with those prepared by other issuers of securities traded on EU regulated markets.

2. Developments on corporate governance

Unified Corporate Governance Code Approved

2.1 Last 19th of May, a group of experts ascribed to the Spanish Securities and Exchange Commission (Comisión Nacional del Mercado de Valores, or CNMV) approved the Unified Corporate Governance Code (UCGC), which brings together previous CNMV’s corporate governance guidelines – i.e. the so called Olivencia and Aldama Reports⁵ – and adopts some European Commission and international recommendations⁶.

The UCGC includes also some complementary recommendations to the government (which is invited to adopt several corporate law reforms), the CNMV, and financial institutions regarding several aspects of their activities that may influence the effectiveness of a good corporate governance for Spanish listed companies.

A first draft of the UCGC had been made publicly available last January 18th and subject to public consultation until February 28th. During the consultation, the draft UCGC faced significant opposition from both listed companies and the private sector. In fact, more than 80 written observations were submitted to the CNMV – in a rather new dynamic of (soft) law-making in Spain – and significant media coverage reported the rather unsatisfactory reception of the CNMV’s proposal.

(i) Withdrawn proposals

The final version of the UCGC expressly acknowledges the validity of private sector comments and withdraws some of the more controversial draft recommendations, such as

a) promoting the delisting of subsidiaries and affiliates of listed holding companies,

b) requiring major shareholders to hold more than 50% of the capital in order to appoint more than 50% of the members of the board of directors,

c) limiting independent directors’ term in office to 12 years – although rotation of independent directors after 12 years of service is still recommended –,

d) preventing independent directors from keeping non-significant holdings in the companies in which boards they sit – i.e. holdings below 5% of the capital –, or requiring the preparation of a separate executive pay report – which will now be included in more general financial statements or in the corporate governance report itself –.

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⁵ Both reports are available at http://www.cnmv.es/index.htm, although the Olivencia Report only in Spanish. The Corporate Governance Code is also available in Spanish (although an English version will probably be available soon).

In order to abort the criticism regarding the mandatory nature of most of UCGC recommendations, the text of the Code has been extensively rewritten, eliminating most of the elements or references that lead to the impression that they constituted legal rules instead of soft-law recommendations.

(ii) Controversial reforms

On the other hand, the CNMV has maintained some of the recommendations that were strongly fought against by listed companies and private sector experts, offering additional explanations and criteria for their interpretation. Most noteworthy, the UCGC

a) includes a very demanding definition of “independent director” – in line with Annex II of the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board –,
b) recommends the suppression of anti-takeover provisions in listed companies’ corporate charters – somehow anticipating the transposition of Directive 2004/25/EC on takeovers in this very point –,
c) recommends the number of executive directors to be set at the lowest possible level and that independent directors account at least for one third of the board seats,
d) includes a recommendation on diversity that shall promote the appointment of a larger proportion of women for director posts,
e) recommends that the board of directors meet and expressly adopt a decision on whether a director involved in a criminal process – a formal judicial imputation is required – shall resign and, if so, take the appropriate steps to elevate a proposal to the shareholders’ meeting, and
f) recommends the setting up of whistleblowing mechanisms under the supervision of the Audit Committee.

(iii) Vacatio legis and further developments

Given the importance of the abovementioned developments made by the UCGC in the Spanish corporate governance arena, Spanish listed companies are given some time to adjust to the new recommendations. Indeed, they will have to comply or explain the UCGC in relation with their activity in 2007 for the first time – i.e. in the corporate governance report to be issued during the first half of 2008 –.

Finally, due to the fact that the UCGC contains additional recommendations to the Spanish Government for the adoption of stricter legislative rules in some areas of corporate governance, further developments are expected during this vacatio legis, such as:

a) a rationalization of listed companies’ disclosure obligations;
b) an extension of the term during which members of the Audit Committee can hold their positions (currently limited to 4 years);
c) enhanced mechanisms of coordination of minority shareholders in protection of social interest – specially using IT solutions –;
d) a modernisation of technical provisions regulating the preparation of lists of shareholders and the issuance of certificates of assistance to shareholder meetings;
e) a refurbishment of the mechanisms of opposition to shareholders’ agreements, seeking to avoid their abuse or improper use against corporation’s interest, and
f) a strengthening of the regime of directors’ liability for breach of their loyalty and other fiduciary duties.