New Rules for Public Offers of Acquisition (OPA)

By Hernán Carassai.

Last December 27, 2018, the Argentine Securities and Exchange Commission (CNV, in Spanish), by means of General Resolution No. 779/2018, issued the rules for the new legal regime applicable to public offers of acquisition (OPA, in Spanish) created by the amendment introduced to Capital Markets Law No. 26,831 (LMC, in Spanish) by Productive Financing Law No. 27,440 (LFP, in Spanish).

The rules define certain aspects the determination of which had been expressly delegated by the LFP to the aforementioned authority, and provide other specifications that will be essential for these offers from now on.

In this article, I would like to concentrate in how certain matters related to OPAs due to takeovers have been regulated.

Opportunity. Section 87 of LMC, in its former text, established that anyone who directly or indirectly intended to reach control of a company the shares of which were admitted to the public offer regime, should **previously** promote an OPA, within the term established in said regulation.

The amended Section 87 of the Law establishes that the obligation to bring the OPA starts after a person has effectively **reached** a controlling interest in a company with said characteristics. It is worth recalling that the OPA should be promoted **after having reached the controlling interest and not before**, as a means to achieve it.

This amendment clears the uncertainties created by the previous regulation of OPAs that established that, notwithstanding the legal rules, in certain cases of "indirect or upcoming" change of control, the OPA could or should be formulated after such change[1] . The wording was not clear. In my opinion, when dealing with "indirect or upcoming" changes of control, the rule only referred to changes of control in a listed company controlled by a company object of a merger or that had changed its parent company. It was related to cases in which the change of control was more "indirect" that "upcoming". The rule did not expressly regulate the direct change of control in the listed company as a result of a merger.

The reference to the acquisition of a controlling interest in an "indirect or upcoming manner" still applies in the new rule, and seems to continue referring to cases in which a listed company changes its indirect parent company. As we shall see later, now, the rules of the CNV expressly regulate the cases of direct change of control due to a merger in companies admitted to the regime.

In any case, as from the effective date of the LFP, any OPA due to a change of control should be promoted (except in the cases expressly excluded) after reaching the controlling interest and not before, and the offer should be submitted to the CNV as soon as possible and no later than one (1) month after the "acquisition of the controlling interest". More specifically, the rule says that such term is counted "as from the moment the person **reaches** the controlling interest".

Price. Another very important change introduced by the LFP as regards OPAs due to a change of control is related to the determination of the "equitable price" (PE, in Spanish) that should be offered to minority shareholders by the one who had reached the effective control of a listed company.

Before the amendment, the LMC admitted that such price may result -for all hypothesis of mandatory OPA- from the analysis of different criteria, fixing a floor, determined by the average listing price of the stock during the immediately preceding month.

Now, the LMC amended by the LFP, distinguishes between the PE of the OPA due to a takeover and the rest of mandatory OPAs.

[1] These cases were regulated under the subtype of direct or upcoming acquisitions. Under this subtype, the Rules of the CNV governed the case of the merger or acquisition of a company -which could even not be admitted to the public offering regime,- that had a direct or indirect interest in the capital stock of a third company, the shares of which were admitted to negotiation, and established that if the merger or takeover was of a "mere securities holder company" or of a company "in which the securities of the affected company" constituted an essential part of the assets the acquisition of which was the determinant reason for the transaction, the OPA should be **previously** formulated when, as a consequence of the merger or takeover, a substantial interest was going to be reached in the "affected company," resulting in the acquisition of a controlling interest; **for the purposes of subsequently establishing whether it was a merger with, or the takeover of, a company different than those previously mentioned, the OPA should be promoted later, within the term of one hundred and eighty (180) calendar days after the date of registration of the merger or takeover, as the case may be.**

In the first case, the rule is objective. The controlling party should offer the minority shareholders to purchase their shares **at the highest** of: **(i)** the highest price that the offeror would have paid or agreed for the shares subject to the offer during the twelve (12) months prior to "the commencement date of the period during which the OPA must be executed" (the "Highest Price"); and **(ii)** the average price of the shares subject to the offer during the semester immediately prior to the date of the announcement of the transaction by which the change in the controlling interest is agreed upon (the "Average Quoted Price")[2].

The law establishes that in order to determine the Highest Price, the acquisitions of a "nonsignificant participation in relative terms" shall not be taken into account, provided they have been made at a quoted price, in which case it shall be the highest price paid by the remaining acquisitions during the reference period. The regulation of the CNV understands that the "volume is nonsignificant in relative terms" when the total of transactions performed by the offeror represents 5% or less of the total negotiation volume of the relevant class of stock during the trading session.

As regards the calculation of the term of twelve (12) months prior to the "date of commencement of the period during which (the offeror) should bring the OPA", the rule establishes that such term is counted from the date of payment or the date of the agreement that allowed reaching the controlling interest to three hundred sixty-five (365) calendar days prior to such date.

The law is not clear because it mentions as starting point for the calculation of the term the "date of commencement of the period during which the offer should be made," but it actually does not establish such a period but a term for the "submission of the offer" to the CNV (one month from the formalization of the controlling interest).

Therefore, the regulation establishes that the twelve (12) months -strictly speaking, the 365 calendar days- are counted backwards from the date of payment of the price or from the agreement that allowed reaching the controlling interest. It is worth mentioning that the regulation mentions the date of the agreement and not of the date of the takeover, therefore the term should be counted as from such date, independently of the moment in which control is acquired.

On the other hand, the law establishes that the Average Quoted Price does not apply when the percentage of shares listed represents at least 25% of the capital stock of the issuer and the liquidity conditions provided by the CNV are met in turn, the CNV understands that a class of stock meets such conditions when: (A) the total admitted shares less those that belong to the controlling company reach or exceed 25% of the authorized capital stock of the issuer; and (b) the effective average daily negotiated value of the class during the semester prior to the communication of the transaction whereby the change of control is agreed is equal to or higher than the amount of Pesos equivalent to USD 800,000.

If such liquidity conditions are not complied with, it should be taken into account that for the determination of the Average Quoted Price, the simple average resulting from the quotient between the sum of closure prices in the trade sessions in which there was a negotiation of the class, and the number of trade sessions with effective negotiation in the semester prior to the date of the announcement of the transaction whereby the change of control is agreed, should be considered.

In addition, the regulation establishes that the series of prices used should be "homogeneous", particularly when they were affected by the payment of dividends, any corporate transaction or any extraordinary event that "allow an objective correction of the price". The rule does not say anything else. It seems to indicate that if a series of prices could not be reasonably considered as "homogeneous", it should be out of the analysis for the purposes of the calculation.

As regards the calculation of the "semester immediately prior to the date of the announcement of the transaction," this term should be calculated from the day before the date on which the offeror is obliged to make the publication of the announcement of the transaction whereby the change of control is agreed, to one hundred and eighty (180) calendar days before it. The offeror shall be obliged to make such publication immediately (after reaching control) and in a prominent manner. This communication should inform the Highest Price and the Average Quoted Price.

[2] In case of the remaining mandatory OPAs (basically, the OPA due to voluntary withdrawal from the regime and the OPA after the listed company is subject to almost total control:), apart from the aforementioned provisions, the offeror shall, as the case may be, contemplate other criteria such as the equity value of the shares, the value of the company calculated according to criteria of discounted cash flows and/or indicators applicable to comparable companies or businesses, or the liquidation value of the company; fixing, however, as floor, the greatest of the Highest Price and the Average Quoted Price, unless the mandatory OPA is formulated notwithstanding the offeror has not previously acquired control, in which case the PE could not be lower than the Average Quoted Price, and in such case the price adjustment rules shall be applicable to the relevant cases.

Currency. Another very important aspect is the one related to the currency in which the PE should be denominated. The regulation issued by the CNV establishes that when the PE is fixed in a currency different than the Argentine Peso, it shall be converted to Pesos at the official selling exchange rate published by Banco de la Nación Argentina as of the day before the date of liquidation.

Moreover, when the PE should be fixed at the Highest Price (because it is greater than the Average Quoted Price) and it is denominated in a currency other than the Argentine Peso, the liquidation and payment should be made in such currency or, in the alternative, in Pesos, in the resulting amount after converting it into Pesos at the official selling exchange rate published by Banco de la Nación Argentina as of the day before the liquidation.

It is hard to think, in the first case, that the offeror may choose to establish the PE in any currency other than the Peso. However, in the second case, it is very probable that the Highest Price had been fixed in a foreign currency.

This provision tries to protect the minority shareholder from the depreciation resulting from the devaluation of the Peso between the date on which the offeror paid or agreed the Highest Price and the date on which the OPA is liquidated. It is unlikely that the offeror may agree the Highest Price in Pesos, given the exchange rate fluctuations existent in our country; the offeror would probably try to shorten as much as possible the period of time comprised between the time on which it pays or agrees the Highest Price and the date of liquidation of the OPA[3].

Adjustments to the PE. The regulation establishes that the Highest Price includes any other additional consideration paid or agreed. If the "final price" is increased due to subsequent adjustments, the PE should be recalculated and adjusted in case it results in a higher amount. And, if the adjustment is made after the period of the offer, the difference should be paid to those who accepted the offer within ten (10) calendar days counted as from the payment of the increase.

Therefore, the offeror should continue making payments to the minority shareholders (those who, for such purposes, should keep their contracting accounts) in case the Highest Price is subsequently adjusted after the OPA is liquidated.

Exceptions in case of merger. The new rule provides for events where, despite of the occurrence of a change of control, the promotion of the OPA aimed at minority shareholders is not necessary. The merger is among the exception events.

Firstly, it excludes (from the obligation to promote the OPA) those shareholders of the "affected companies or entities" when, as a result of the merger, "they reach in the company admitted to the regime", directly or indirectly, the controlling interest, provided they have not voted in favor of the merger in the relevant shareholders' meeting; then, it considers that the promotion of an OPA is not applicable "in case of direct takeover due to a merger between companies entitled to go public".

Evidence should be submitted to the CNV about the compliance of the transaction with these requirements within fifteen (15) calendar days "after the occurrence of the determinant fact of the obligation," and the Authority should issue a report accepting or rejecting the petition within fifteen (15) calendar days counted as from the date on which all documents are gathered. In case of rejection, the rules and terms for the formulation of the OPA shall be applicable.

Then, it would seem that if the merger is of two companies allowed to go public, the shareholders that become the controllers of the surviving company shall have no obligation to promote an OPA while, in other cases of merger (such as, for example, between a company the shares of which are admitted to the regime and a company the shares of which are not, or between a company that offers its shares to the public and another company that only offers negotiable instruments), the exception shall be admitted provided the shareholders of the "affected companies" had not voted in favor of the merger.

[3] For the purposes hereof, we assume that the Highest Price is higher than the Average Quoted Price. Considering scenarios such as the year 2018, during which the Peso suffered a devaluation of approximately 100% in relation to the US Dollar, the further the date of the agreement from the date of liquidation of the OPA, the higher the price per share in Pesos that the offeror should offer to the minority shareholders shall be (as regards the price paid to the counterparty of the agreement).

This last solution seems to come from the Spanish law. There, the legal regime of public offers of acquisition of securities[4] exempts the shareholders of the affected companies from the obligation to formulate an OPA when, as a result of a merger, they reach in the resulting listed company, directly or indirectly, a controlling interest provided they had not voted in favor of the merger in the relevant shareholder's meeting. The foreign regime incorporates a second requirement, i.e. to probe that the main purpose of the transaction is not to take control but to reach an industrial or business goal[5].

Our legal regime on the matter has come and gone with this topic. Transparency Decree No. 677/2001 expressly excluded these events from the regime of the mandatory OPA due to change of control. Then, on the opposite, the LMC, in its Section 87, included a paragraph whereby it expressly established that the obligation to promote the OPA included those cases in which the change of control was the result of a corporate reorganization, a merger or spin-off. Finally, such paragraph was eliminated by the restatement of said Section by the last amendment introduced by the LFP.

In another opportunity we shall analyze whether there are reasons worthy of consideration based on the principles that inspire our current legal framework of the capital market that may justify these exceptions.

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[4] Established by Royal Decree No. 1066/2007 (consolidated test as of October 1, 2014)

[5] The Spanish Securities and Exchange Commission ("CNMV") has been restrictive at the time of granting the exemption. According to Julio Lujambio, Corporate partner of Pérez-Llorca, the criteria of the CNMV has been to respect the exceptional nature of the exemption in order to avoid the opening of an alternative road (for the takeover) by means of a corporate transaction controlled by the controlling shareholders of the companies involved in the transaction. The CNMV has not agreed to a variety of cases submitted to its consideration, whether because it did not appreciate a sufficiently solid industrial or business goal or because the commitments that the majority shareholder was willing to undertake were not sufficient to nuance, mitigate and, in to some extent, undo the change of control that would have occurred by virtue of the merger.