

Take-privates. Equity swaps and legal standing. Equal treatment of shareholders. The National Court's judgment on the take-private of Masmovil and the strong dissenting opinion

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The take-private bid of Masmovil by a SPV set up by three well-known international private equity sponsors in June 2020 was challenged before the National Court (the NC) by several minority shareholders, mainly, on the grounds that (i) the price offered by the sponsors and sanctioned by the CNMV was well below that resulting from the Spanish Regulation on Public Bids (the Regulation) and (ii) the principle of equal treatment of shareholders had been breached.

The NC dismissed the challenges in December 2023¹ and the claimants appealed before the Supreme Court (SC), which in April 2024 decided to hear the appeals²; a final decision on the matter will probably be rendered in the coming months.

The case is extremely interesting because it deals with two important and quite unprecedented legal issues.

The **first issue** is whether an investor through cash-settled equity swaps has legal standing to challenge a take-over bid. It was first discussed in the wake of Telepizza's delisting in 2019, when both the NC and the SC found that an equity swap does not grant legal standing to the investor for it does not own the underlying shares and hence is a stranger to the contract between the offeror and the offerees resulting from the take-over bid.

The claimants in Telepizza had submitted that legal standing in this type of legal actions³ is governed by the Act on Contentious-Administrative Proceedings (the ACAP), and certainly not by the Act on Securities Markets (the ASM) or the Regulation; and, pursuant to articles 24 of the Constitution (access to justice) and 19.1.a of the ACAP, anyone holding a *legitimate interest* has legal standing to challenge the acts of State bodies or agencies⁴. They further asserted that, according to a well-established case law of both the Constitutional Court and the SC, this principle must be applied *pro actione* and encompasses any interest, direct or indirect, legal or economic.

They argued that the price of a take-over bid only affects the investor (*the long party*), given that the derivative dealer (*the short party*) is completely covered as to

¹<https://www.poderjudicial.es/search/AN/openDocument/57a3393d626fa6a4a0a8778d75e36f0d/20240119>.

²<https://www.poderjudicial.es/search/AN/openCDocument/47c54a4d73e1a196b4fcfa15b1b00d4d9c683090500447b6>. Note that decisions by the SC to hear an appeal are extraordinarily rare, for the SC must find that it entails an "objective *casational* interest for the formation of jurisprudence", a test which is applied with extreme rigor.

³ A challenge of a public takeover bid is a challenge of a decision of a State agency, this is to say the authorization of the bid (including its price) by the CNMV.

⁴ Pursuant to article 19.1.a of the ACAP, any person or legal entity holding a right or a legitimate interest has legal standing.

the fluctuations in the underlying share price; thus, the investor has a clear legitimate interest in the outcome of the bid (its price), while the short party is, in practice, indifferent to it.

However, the SC endorsed the NC decision and found that a cash-settled equity swap does not entitle the investor to challenge a public bid because it is not a shareholder and hence "is not an addressee of the bid" according to the ASM and the Regulation.

In Masmovil the NC also decided that the claimants did not have legal standing by merely referring to the SC judgment on Telepizza, without any further reasoning.

On this occasion one of the NC judges issued a strong dissenting opinion asserting that the plaintiff "clearly had legal standing" for it alone borne the risk attached to the underlying shares. He added that the fact that the rules on transparency require to notify not only shares actually owned but also positions through equity derivatives corroborates this conclusion, all the more because in the case at hand the claimant's position in Masmovil through equity swaps had been notified to the CNMV and disclosed in the bid's prospectus. The dissenting judge concluded that "limiting the access to justice in the case at hand violated article 24 of the Constitution".

The **second issue** dealt with by the NC judgment on Masmovil was whether the price of the bid was correct, the principle of equal treatment of shareholders and the role to be played by the CNMV in that respect.

The NC "briefly" (*obiter*) touched upon the arguments submitted by the plaintiffs and dismissed them, concluding it could not find any "manifest" error or "arbitrariness" in the determination of the price.

The dissenting judge, for his part, was of the opinion that the principle of equal treatment of shareholders had been breached, for only certain shareholders had been given the right to co-invest in Masmovil alongside the PE sponsors (through the SPV they had set up to make the bid).

The dissenting opinion concluded that the price sanctioned by the CNMV "was not fair" and that the right decision would have been to annul the authorisation of the bid by the CNMV and to order the "retroaction" of the file, so that the CNMV could rule on an "objective", "equitable" and "fair" price for all shareholders.