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Global Legal Group

A close-up, black and white photograph of a heavy metal chain with large, interlocking links. The chain is draped across the top of the page, with the links catching the light and creating highlights and shadows. The background is dark, making the metallic texture of the chain stand out.

The International Comparative Legal Guide To Mergers & Acquisitions 2010

A practical cross-border insight
into mergers & acquisitions

A faint, dark silhouette of a man in a business suit, standing with his hands in his pockets. The silhouette is positioned on the left side of the page, behind the main text. It is a simple, dark outline against the lighter background of the page.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The following regulate M&A in Colombia:

- The Colombian Code of Commerce and the Colombian Civil Code.
- Law 1340 of 2009 in antitrust matters.
- Resolution 400 of 1995 on acquisitions of publicly traded companies.

1.2 Are there different rules for different types of public company?

Private companies have no special regulation.

Resolution 400 of 1995 issued by the Superintendency of Securities (today, SFC), establishes a mandatory tender offer procedure to acquire 25% beneficial ownership in a public company. Such procedure, also applies to increases of more than 5% over the 25% threshold.

1.3 Are there special rules for foreign buyers?

There are restrictions for foreign investments in certain sector of the economy: National defence; toxic waste management; and television broadcast (maximum of 40% of foreign investment). Private security companies may only have Colombian shareholders.

1.4 Are there any special sector-related rules?

Yes. The Superintendency of Finance (“SFC”) must approve any purchase of 10% or more of a financial entity.

1.5 What are the principal sources of liability?

- the theory of *evicción*, which holds liable a seller for defects in title; and
- the theory of hidden defects (*vicios ocultos*), which holds a seller liable for defects in the target that existed prior to the transaction that the seller knew or should have known existed. Since Colombian law has a very general formulation of these theories, parties to Colombian M&A generally establish specific reps & warranties in the purchase agreement.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The alternative means of acquisition are:

- Purchase or subscription of shares (capitalisation).
- Purchase of assets.
- Purchase of a commercial establishment. Its sale is made as an economic unit (bulk transfer). The sale of a commercial establishment, as opposed to a sale of assets implies the statutory assumption by the seller of liabilities for a certain period of time.
- Merger or Spinoff. Some less common examples include:
 - Assignment of political and economic rights or usufruct of shares.
 - Joint Ventures.

2.2 What advisers do the parties need?

Legal and accounting advisers are generally required. In some cases technical advisers may be desirable.

2.3 How long does it take?

It depends on the nature of the target, the acquisition technique used, the complexity of negotiations and whether governmental approvals are required.

A governmental approval that will affect any acquisition, independent of the acquisition technique or nature of the target, is the antitrust approval by the Superintendency of Industry and Commerce (“SIC”). It takes between three to six months. It applies to any consolidation without regard to the acquisition technique used and applies if the companies perform the same economic activities or participate in the same value chain as long as:

- (i) the companies had revenues during the fiscal year prior to the transaction exceeding a certain amount established from time to time by SIC; or
- (ii) the assets of the companies, at the end of the fiscal year prior to the transaction, exceeded a certain amount, established from time to time by SIC.

In those cases they must obtain a non-objection from SIC.

Notwithstanding the above, if the companies (jointly considered) have a market share of less than 20% of the relevant market, the transaction is deemed authorised and the transaction will only have to be notified to SIC.

In the case of financial entities the SFC must approve the transaction from an antitrust standpoint as well.

SIC has the power to grant an unconditioned approval or to condition the purchase to certain behavioural conditions (e.g., freeze in prices for certain periods of time, allowing competitors to access suppliers, etc.) or structural conditions (e.g., divestitures).

The timeline of a transaction will vary depending on the nature of the target as follows:

- If the target is a publicly listed company, the purchase of more than 25% will have to take place through an OPA previously approved by the Colombian SFC. Such procedure can take one to two months.
- If the target is a government owned entity, the purchase of shares of said entity will have to follow the procedure set forth under Law 226 of 1995. Thus, the shares of the entity will have to be offered first and at a preferential price to the *sector solidario* (e.g., pension funds, employees and former employees of the target, cooperative entities, etc.) for a period of at least two months. Afterwards, such shares may be offered to the public in general. It is customary to impose experience requirements to the bidders since the targets are generally public utilities that require a strategic operator.
- If the target is a financial entity, a purchase of more than 10% of the shares of said entity will require the prior approval of the SFC, who will look into the competence, experience and moral stature of the purchasers. This procedure can take two to four months. Recent experiences have shown that the SFC is especially zealous in approving the participation of private equity funds in financial entities.

The timeline of a transaction will vary depending on the acquisition technique as follows:

- If the transaction is a purchase of shares of a private company, the by-laws of the company customarily require sorting out a right of first refusal procedure. This procedure generally takes between one month and 45 days. There are also preemptive rights contemplated if the acquisition technique is the subscription of shares. As opposed to ROFR, preemptive rights apply to both private and public companies and take between one to two months.
- If the transaction is a merger or a spinoff, it will require (i) especially audited financials, (ii) approval by the general shareholders meeting of the parties involved, (iii) approval by the applicable superintendency that supervises the activities of the party or parties involved (generally the Superintendency of Corporations (“*Supersociedades*”)), and (iv) if one of the parties is an issuer of debt securities (e.g., bonds), approval by the bondholders assembly. These procedures can take three to six months. Additionally, mergers and spinoffs grant appraisal rights (*derecho de retiro*) to minorities, which do not interrupt the deal but require either: (i) the non-appraising shareholders to purchase the shares of the appraising shareholders; or (ii) the company repurchasing the shares or reimbursing the capital contributions of the appraising shareholders.

2.4 What are the main hurdles?

Please see question 2.3 above.

2.5 How much flexibility is there over deal terms and price?

Generally, parties are able to freely determine the terms and price of the deal.

However, please note the following:

For tax purposes, tax authorities will presume that the price of the asset is at least 75% of its commercial value (Article 90 of the Tax

Code). Hence, although parties may agree on a lower price, the seller will have to take into account the referred presumption for its tax filings.

In the event of an OPA, the purchase price of the shares of the target can be established by the potential buyer, subject to the following conditions: (i) the price shall not be lower than the highest price of acquisitions made by that potential buyer within the previous three months; and (ii) in the event of a pre-agreed transaction with certain shareholders, the price of the shares cannot be less than such pre-agreed price. When the bidder is offering securities as consideration, at least 30% of the price has to be paid in cash (see below).

2.6 What differences are there between offering cash and other consideration?

In a sale of a private company paid with stock as consideration there are no differences.

However, in the purchase of a publicly listed company, the potential buyer may only offer securities as consideration if:

- it is not launching a competing OPA;
- it is not paying a “reverse” squeeze-out OPA (the minority shareholders holding at least 1% of a listed company that is beneficially owned in more than 90% by a same beneficial owner, may request such beneficial owner to launch a tender offer addressed to the minority shareholders at a price established by a third party);
- such securities are listed in the Colombian Stock Exchange or in another international stock exchange market, recognised by the SFC; and
- the securities are stocks, convertibles, warrants, sovereign debt securities or multilateral debt instruments.

Additionally, when the bidder is offering securities as consideration, at least 30% of the price of the tender offer has to be paid in cash.

2.7 Do the same terms have to be offered to all shareholders?

In the sale of a private company, no.

In publicly listed companies OPA regulations mandate that the tender offer set forth the same conditions to all shareholders.

2.8 Are there any limits on agreeing terms with employees?

None, except the case where non-compete covenants are imposed to employees. Such provisions are considered to be invalid by local courts.

2.9 What documentation is needed?

The required documents vary depending on the type of transaction: purchase or subscription of shares (private documents are required); limited liability corporations (public deeds for the transfer of quotas are required); purchase of assets (private documents are required). Also, if the operation implies transfer of real estate public deeds are also required); purchase of a commercial establishment (documents duly legalised before a Notary Public are required); and merger and spinoff (public deeds are required).

2.10 Are there any special disclosure requirements?

Companies registered before the *Registro Nacional de Valores y*

Emisores - RNVE are obligated to update such registry with any information that is relevant to the market and to disclose all such information that may affect the assessment by an investor of its decision to invest in a given security (*Información Relevante*). This obligation is made extensive to the controlling shareholder. Hence, the sale of control by the controlling shareholder has to be disclosed immediately upon its occurrence. - In a merger, spinoff or sale of a Commercial Establishment, the companies must provide public notice and inform creditors of the transaction.

2.11 What are the key costs?

The key costs are: (i) the parties' legal and financial advisors; (ii) registry tax expenses; and (iii) costs related to granting of public deeds when required. In transactions involving publicly listed companies, OPA fees have to be paid to the stock exchange and the posting of the guarantee will also have a significant cost.

2.12 What consents are needed?

Please see question 2.3 above.

In addition, third party consents may be required for particular agreements executed by the company, in case change of control clauses exist or such agreements are *intuito personae*.

2.13 What levels of approval or acceptance are needed?

As a general rule, the majority of the outstanding shares of a company are required to undertake a capitalisation, a merger or a spinoff.

The sale of shares by a controlling shareholder does not require any approval by the other shareholders of the target.

A sale of assets generally does not require shareholder approval except in certain types of companies (SAS).

2.14 When does cash consideration need to be available?

In a private transaction it does not need to be available.

In the case of OPAs over publicly listed companies, at least 30% of the price must be payable in cash.

3 Friendly or Hostile

3.1 Is there a choice?

There is a choice in theory; however, the concentration in the Colombian market makes hostile takeovers unlikely.

As shareholdings begin to disperse, hostile takeovers may start occurring more frequently through hostile tender offers (OPAs).

Certain hostile mechanisms have been used to dilute minorities through over-capitalisation of a company or through executions of shareholder agreements to obtain supermajorities that would cause the dilution of a certain shareholder.

3.2 How relevant is the target board?

It is generally not relevant. The Board of Directors does not recommend or assess the transaction. It is an exclusive decision of each of the selling shareholders.

3.3 Does the choice affect process?

Yes. If the bidder opts for a hostile approach in an OPA, it will have very little access to information, no protections from hidden defects and it will have to be very expeditious in the execution of the transaction.

4 Information

4.1 What information is available to a buyer?

The information available to a buyer in the case of publicly listed companies is: (i) relevant information (*Información Relevante*) published by the company; (ii) the Prospectus; and (iii) fiscal year and quarterly financials.

For private Companies, the company's basic information included in the mercantile registry and the year end financials published by the Chamber of Commerce of the domicile of the company. Some companies may have published their year-end report through the Internet.

4.2 Is negotiation confidential and is access restricted?

The law does not specifically provide for confidentiality. However it is customary that the parties enter into a confidentiality agreement.

Nonetheless, please bear in mind, that if the company is publicly listed, it has the obligation to disclose relevant information (*Información Relevante*). Such obligation extends to its controlling shareholder. Although ongoing negotiations do not necessarily fall within the specific facts that must be disclosed, current regulations require that disclosure of such negotiations be made to the SFC. The SFC will keep the information confidential unless it determines that certain disclosure is required whenever the behaviour of the market is unreasonable in light of the information available (see Articles 1.1.2.18, 1.1.2.19 and 1.1.2.20 of Resolution 400 as amended).

4.3 What will become public?

In a merger or spinoff the companies interested in a merger/spinoff must provide a public notice through a newspaper. Such notice must contain the main legal and financial aspects of the transaction including an explanation of the valuation method used to determine the exchange ratio. In addition, the merger prospectus has to be available to shareholders for at least 15 business days prior to the approval of the merger (see Circular Article 11 of Law 222).

Also, the creditors of the merged/spun-off companies have to be informed of the proposed transaction by means of a public notice.

Finally, a merger or a spinoff is recorded in a public deed.

Publicly listed companies are subject to enhanced disclosure requirements both as to the negotiations (see question 4.2) as well as to the terms of the deal. The offering memorandum in a friendly OPA has to include a copy of the agreement between the buyer and the seller. Such OM is publicly available.

4.4 What if the information is wrong or changes?

The Company may be held liable and subject to penalties if the provided information is incorrect. Also, in the case of a merger or spinoff, an invalidation of the operation could occur or the competent authorities could deny the authorisation.

If the company is publicly listed, any information in respect of the company will be subject to the anti-fraud provisions of Colombian securities laws.

Any update in the information, depending on the situation may also have to be informed to the competent authorities.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

There are no restrictions in private transactions of private companies.

In the purchase of a public company, shares can be bought outside the offer process but: (i) such purchases may not exceed 25% of the beneficial ownership over the company; and (ii) the price paid in the tender offer may not be lower than the price paid in transactions outside the offer process during the prior three months.

5.2 What are the disclosure triggers?

Securities regulations obligate an issuer of shares to report any change in ownership in excess of 5% of the outstanding shares of the issuer. There are no specific stakebuilding obligations on the part of the purchaser.

5.3 What are the limitations and implications?

The limitation in stakebuilding through the open market is 25% of beneficial ownership. In order to acquire more than 25%, such person will have to launch a mandatory OPA. Additionally, any beneficial owner of more than 25% of the shares of a publicly listed company will have to launch an OPA to increase its beneficial ownership in 5% or more. The implication is invalidation of the transaction.

6 Deal Protection

6.1 Are break fees available?

For private corporations it is possible to provide for break up fees.

In public companies it is possible to establish a break up fee, in order to compensate for the termination of the acquisition process. In Colombia, the break up fee must be assumed by the selling shareholders directly and it is not possible to cause the target to pay the fees.

6.2 Can the target agree not to shop the company or its assets?

The selling controlling shareholder may agree not to shop its shares and generally agrees to cause the company not to shop its assets. However, the controlling shareholder may not cause the directors to act against their fiduciary duties.

During an OPA the target may not execute activities that are outside its ordinary course (e.g., issue shares; sell or dispose more than 5% of its assets; etc.).

6.3 Can the target agree to issue shares or sell assets?

See question 6.2.

6.4 What commitments are available to tie up a deal?

Parties can tie up a private or public deal with break up fees (with the restrictions already mentioned) and exclusivity.

7 Bidder Protection

7.1 What deal conditions are permitted?

Confidentiality and exclusivity are generally available for purchases of shares, assets or commercial establishments. Additionally, a break up fee can also be agreed as mentioned.

In sales of shares of a publicly listed company, exclusivity is only available to negotiate with the selling shareholder but the closing of the transaction will take place through an OPA, allowing a competitor to formulate a competitive bid.

In the context of a merger or spinoff confidentiality is not available since it is a very publicised procedure.

7.2 What control does the bidder have over the target during the process?

Purchase agreements generally contain a conduct of business covenant that applies post-signing and pre-closing, to impede the target from undertaking actions outside its ordinary course of business.

See question 6.2.

7.3 When does control pass to the bidder?

It depends on the acquisition technique:

- A sale of stock, assets or commercial establishment is enforceable between the parties upon the signing of the agreement, or the occurrence of all conditions if the purchase has been conditioned.
- In a merger or spinoff, both of them are only perfected upon the execution of the public deed through which they are formalised.

7.4 How can the bidder get 100% control?

In a purchase of shares the bidder may only get 100% control by purchasing all of the outstanding stock of the company in a consented manner. There are no squeeze out provisions that a bidder could use.

8 Target Defences

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

Due to the high concentration in shareholdings in the Colombian market (most companies are owned in more than 50% by one beneficial owner), it is not customary for the BoD to receive the offer.

The offer is generally directed to the controlling shareholder. The controlling shareholder does not hold a duty to disclose the offer to the other shareholders. Private companies with ROFRs in their by-laws will require a disclosure of the offer to sort out the procedure prior to consummating the acquisition.

8.2 What can the target do to resist change of control?

A controlled target will always be able to resist control if its controlling shareholder is not willing to consent to a sale.

If a controlling shareholder decides to sell, there are no statutory protections for minorities to resist a change in control. The by-laws may contain some protections (e.g., supermajorities, ROFR).

The law does provide that in the event of a merger or spinoff, minorities have appraisal rights in respect of their shares.

In the case of a publicly traded company, the shareholders of the target could promote a competing offer by white knight.

8.3 Is it a fair fight?

No. There is no open market for corporate control in Colombia. Companies are privately negotiated by its controlling shareholders.

In the case of publicly traded companies, a competing bidder could launch a competing bid and compete in the tender offer launched.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The major influences are:

- a comprehensive due diligence of the target due to the scarcity of public information;
- an agreement that clearly allocates liability for hidden defects between the parties;
- good relationships with regulatory agencies in charge of approving the acquisition;

- a fair treatment of minorities; and
- in the case of a publicly traded company, an expeditious execution of the deal is necessary to avoid competing offers.

9.2 What happens if it fails?

No evident consequences arise from a process that fails.

Even in publicly traded companies, the Colombian stock market still has difficulty factoring a failed acquisition into the price of the stock.

10 Updates

10.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in M&A Law in Colombia.

During 2009 the Colombian M&A market was characterised by:

- Regional transactions (for instance, the Avianca/Taca deal).
- local players purchasing assets from multinational companies that could use the cash (Gas Natural selling its EPSA unit to local players).
- Government owned entities being put up for sale.
- Block trades in which local institutional investors are taking a minority stake in important Colombian corporations.

From a legal standpoint the SFC started being stricter in the application of disclosure requirements in M&A transactions.

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