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Contributing editor
Alan M Klein

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GETTING THE DEAL THROUGH

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Colombia

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1 Types of transaction

How may businesses combine?

Business combinations may be structured in many different ways in Colombia. A business combination will take place whenever there is a merger; a consolidation; a direct or indirect control acquisition over any given company or, in general, any kind of legal or economic concentration; or any market integration executing any agreement that results in a market concentration. The most commonly used business combinations, among others, are:

- share purchases;
- asset purchases;
- mergers, that is, absorption of a given company by another company or amalgamation of companies, always with stock considerations (except in simplified corporations in which the consideration can be in cash, stock or stake in any other company or any other asset);
- purchases of going concerns (commercial establishments);
- public tender offers (OPA);
- incorporation of a joint company by competitors;
- acquisition of control (consolidation);
- spin-off of a division that is thereafter merged into another company; and
- joint venture or collaboration agreements (different from the incorporation of a joint company by competitors), provided that they: eliminate a competitor from the market indefinitely or for a long term, changing the structure of the relevant market; unify a line of business or a market and not just specific activities made on a daily basis; and that it has full function in the market or has the potential to develop in an autonomous way in the market. If such agreements are made for a defined short or medium term, and either actual or potential competition is maintained between competitors, the joint venture will not be subject to business combinations regulation but to the restrictive agreements and dominance provisions of antitrust regulation which are reviewed under an ex-post analysis by the Superintendency of Industry and Trade.

A business combination can be of the following two types:

- horizontal integration: whenever it takes place between companies that perform the same or similar economic activities (such as whenever it occurs between competitors); and
- vertical integration: whenever it takes place between companies that participate in the same economic process but in different stages of the value chain (such as whenever it occurs between a manufacturer and its suppliers of raw materials or its distributors).

Irrespective of the legal form of the transaction, a business combination is considered to take place whenever there is a horizontal transaction between competitors and competition ceases in a market on which before the transaction competition existed, and after the transaction competitors are considered as a single market agent; and whenever there is a vertical transaction among agents in different levels of the production, distribution or commercialisation chain and after the transaction competitors are considered as a single market agent and competitors are foreclosed by limiting their access to sources of supply or to customers.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Colombia has issued the following regulations governing business combinations:

- the Code of Commerce and Law 222 of 1995, which regulates share purchases, asset purchases, mergers, spin-offs and purchases of going concerns in general;
- the Organic Statute for the Financial System and its amendments, which governs the different business combinations of financial institutions, for example, banks, financial corporations, etc;
- the Regulations of the Finance Superintendency, in particular Decree 2,555 of 2010 with all of its amendments, governs the business combinations of public listed companies, such as OPA; and
- Law 155 of 1959, Decree 1,302 of 1964, Decree 2,153 of 1992, Law 1,340 of 2009 and the regulations of the Superintendency of Industry and Trade, in particular the Unified Circular and Resolution 10,930 of 2015 and the guidelines for merger review, regulate antitrust clearance proceedings.

Moreover, the Superintendencies of Companies and of Finance have specific circulars that regulate the procedures to obtain their authorisation in order to amend the by-laws of companies subject to its supervision or control in the case of mergers, spin-offs, changes of type of company, capital reductions, etc.

Privatisation processes of government companies are governed by Law 226 of 1995.

In addition, the Finance Superintendency has specific antitrust procedures for business combinations among financial institutions, and Aerocivil regulates certain specific types of business combinations in the air transportation industry, such as code-sharing agreements, joint operations, use of charter aircraft and exchange and blocking of slots.

For simplified corporations, created by Law 1,258 of 2008, there is a special merger procedure whenever a merger takes place between a parent company that has a shareholding interest of more than 90 per cent and its subsidiary. In this case the merger may be approved by the officers of the company or by the board of directors. Furthermore, the regulation of simplified corporations allows for consideration to the shareholders in the case of a merger to be made in cash, stock or stake in any other company or any other asset.

3 Governing law

What law typically governs the transaction agreements?

In addition to the laws and regulations described in question 2, as a general principle, all transactions carried out in Colombia between Colombian companies must be governed by Colombian law. Nevertheless, whenever foreign companies participate in transaction agreements, the governing law may be agreed among the parties if Colombia is not the place of performance of the agreement's obligations; however, regulatory issues regarding financial institutions, telecommunications, television, agriculture, energy and air transportation, as well as securities and antitrust laws, when applicable, will govern specific matters of transaction agreements.

In that sense, it is important to point out that in some industries there are specific regulations setting limits to concentrations or vertical integrations, such as energy and gas, health providers and financial institutions.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

In general, a request for clearance for the business combination must be filed with the Superintendency of Industry and Trade for an ex-ante analysis for antitrust purposes whenever there is a business combination under which at least one of the following thresholds are met:

Subjective thresholds

- The relevant companies pursue the same economic activity (horizontal transactions), or;
- the relevant companies are part of the same value chain (vertical transactions). Vertical transactions in each market are analysed separately to determine whether the transaction is reportable.

Objective thresholds

- The combined annual operational income is equivalent to the amount established from time to time by the Superintendency of Industry and Trade (for 2016, 100,000 times the minimum legal monthly wages – 68.9 billion Colombian pesos – or more); or
- the total combined assets of the relevant companies is equivalent to the amount established from time to time by the Superintendency of Industry and Commerce (for 2016, 100,000 times the minimum legal monthly wage – 68.9 billion Colombian pesos – or more).

If none of the above-mentioned subjective and objective thresholds are met, the business combination does not require any type of clearance procedure with the Superintendency of Industry and Trade.

However, if the business combination meets at least one of the subjective and one of the objective thresholds but the combined market share held by the parties involved is less than 20 per cent of the relevant market, the business combination only needs to be notified in advance to the Superintendency of Industry and Trade. Under current regulations, once the notification is filed the parties may close. However, if the market definition or the market shares informed by the parties are proven incorrect, the Superintendency may require the parties to conduct a full pre-evaluation filing if closing has not occurred or it will begin a proceeding to sanction the parties if the transaction has already closed.

If the business combination meets the thresholds and equals or exceeds 20 per cent of the relevant market, the procedure for antitrust clearance is subject to the following rules:

- pre-evaluation filing (phase 1): the parties interested in obtaining antitrust clearance must file a summary of the business combination and a pre-evaluation filing with the Superintendency of Industry and Trade;
- review of the pre-evaluation filing: the Superintendency has 30 business days to determine whether the business combination is approved without further information requirements or whether a full review must be carried out; or
- full evaluation filing: if the Superintendency decides that a full (phase 2) review must continue, the interested parties must file all the information required for its complete study. After the complete filing is made, the Superintendency of Industry and Trade has three months to decide if it approves, rejects or imposes conditions for its clearance. If the Superintendency fails to issue a decision within three months as of the date when information required for the phase 2 analysis, the transaction is deemed as authorised.

Pursuant to Law 1,340 of 2009, the Superintendency of Industry and Trade is the only government antitrust authority responsible for issuing antitrust clearance when applicable, with the exceptions of business combinations among financial entities under the supervision of the Finance Superintendency and in certain business combinations in the air transport industry. Regarding combinations of financial entities, the Finance Superintendency will decide on the antitrust clearance, but in any case it will first require a non-binding preliminary opinion from the Superintendency of Industry and Trade. In the air transport industry, Aerocivil has authority to approve business combinations, whenever they consist of code-sharing agreements, joint operations, use of charter aircraft or exchange and blocking of slots. If the business combination has the structure of a merger or a spin-off, the legal procedure for amending the by-laws of the interested companies will be authorised by the Superintendencies of Companies or of Finance, as applicable. For non-financial companies, by-law amendments for mergers and spin-offs shall only be previously authorised by the Companies Superintendency for companies subject to its supervision or control, whenever the companies involved fall within any of the categories expressly listed in External Circular 001 of 2007 (prior authorisation regime), issued by said Superintendency. If no authorisation is required, certain documents have to be submitted to the Superintendency of Companies, including a special report addressed to the creditors (automatic authorisation regime) pursuant to External Circular 220-007 of 2008 of the referred authority.

In the case of takeovers or bids for listed companies, a bid must be filed with the Finance Superintendency for the acquisition of 25 per cent of the outstanding shares with voting rights of the listed company, and if a beneficial owner holds at least 25 per cent it will also be required to file a bid if it intends to increase its interest in more than 5 per cent of the outstanding shares with voting rights. In any case, the minimum bid allowed is for 5 per cent of the outstanding shares with voting rights of a listed company.

Furthermore, a filing before the Finance Superintendency must also be made for the approval of share purchases of 10 per cent or when a shareholder with a 10 per cent interest acquires any number of additional shares of a financial, insurance or stockbroker institution.

The above-mentioned filings would only entail governmental fees when the antitrust clearance is subject to conditions set forth by the Superintendency of Industry and Trade. In this respect, Law 1,340 and Resolutions 66,916 of 2009 and 72,896 of 2010 of the Superintendency of Industry and Trade set forth the requirement of a 'follow-up fee' for the agency to periodically review the fulfilment of the conditions imposed for a business combination.

Furthermore, depending on the type of legal operation, business combinations may incur one or more of the following: notary fees of 0.3 per cent, registration tax at the Chamber of Commerce of 0.7 per cent and registration tax of 1.5 per cent in the real estate registry.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

If the business combination is a merger, spin-off or sale of a going concern an advertisement including the particulars of the companies and the amount of their assets and liabilities must be published in a national newspaper and a written notice must be sent to the creditors of the companies involved. Merger and spin-offs of companies under the general authorisation regime shall prepare, and post at the companies' domicile, a special report addressed to the creditors disclosing the following information:

- financial statements of the companies;
- appraisal of their assets;
- status and amount of existing pledges or encumbrances over assets;
- judicial proceedings actually pending against the companies and the amounts of their respective provisions;
- description of the assets and liabilities to be transferred; and
- description of the methodology used to appraise the companies and the synergies that will result from the merger or spin-off.

Under applicable Securities Regulation, listed companies are generally required to inform the market through the Finance Superintendency of all material information in a truthfully, clearly and in good time. Any events related to the merger or acquisition of a company must be reported. Disclosure duties entail all material information that would have been reviewed by a prudent and diligent expert to decide whether to buy, sell or keep certain securities related to the proposed business combination.

As mentioned above, business combinations that entail a market integration, in which the companies hold less than 20 per cent of the relevant market, need only be notified in advance to the Superintendency of Industry and Trade, and the following information will have to be provided:

- the parties of the business combination;
- the structure of the transaction;

- the definition of the relevant market (product and geographical markets) or the affected markets and the criteria used for such definition;
- the competitors in the relevant market;
- the market share in the relevant markets of the parties of the business combination and its competitors, and the methodology and sources used for such calculation. The complete calculations or studies used should be filed before the Superintendency of Industry and Trade;
- the indication of the specific legal provisions that set forth maximum market shares in the relevant market or that restrict a party involved in the transaction; and
- the certificates of incorporation, good standing and incumbency of the company and the corresponding powers of attorney, in case the filing is made through attorneys in fact.

In the case of business combinations entailing a market integration of 20 per cent or more of the relevant market, a request for clearance of the business combination must be filed before the Superintendency of Industry and Trade for antitrust purposes with a pre-evaluation filing (phase 1), that needs to include very detailed information regarding:

- the structure of the business combination and the intervening parties;
- the relevant market (product and geographical markets); and
- the competitors, distributors and retailers of the relevant market.

If the Superintendency decides that a full (phase 2) review must be made, then the following additional and detailed information has to be filed:

- the structure of the relevant market;
- the existing barriers to entry to the market; and
- the raw materials or inputs required for the production.

During the beginning of the antitrust pre-evaluation filing (phase 1) notification of the business combination will be published on the Superintendency's website and the Superintendency may also order it to be published in a nationwide or regional newspaper to allow third parties to intervene in the proceedings. A redacted version of the decision from the Superintendency (clearing, clearing with conditions or blocking the operation) will also be published on its website. However, the parties of the business combination may request to the Superintendency to waive the publication requirement based on reasons of public order and evidence of risks arising out of the publication. The Superintendency may either accept or reject the request to avoid the publication of the transaction.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In all mergers and spin-offs, all of the shareholders have an inspection right to review the basis of the operation, such as the merger agreement, the spin-off project, the appraisal of the companies and the financial statements. Individuals or a group of individuals representing one beneficial owner who intends to acquire 25 per cent or more of any given listed company are required to make a public disclosure of their intent through a public offer (known as an OPA). Likewise, a beneficial owner that holds 25 per cent or more of a listed company is required to make a public disclosure of the intent to acquire 5 per cent or more of such company through an OPA. During the six months following the disclosure of an OPA, any stockholder may solicit the offeror to provide information pertaining to the proposal and request the offeror to acquire their stock.

In the event of an OPA, documentation must be filed with the Finance Superintendency as follows:

- the offering memorandum;
- draft of the OPA advertisement;
- board of directors resolution authorising the interested party to submit the OPA;
- certificate of incorporation and good standing issued within the past three months;
- copy of the clearance required from any other Superintendency (for example, the Superintendency of Industry and Trade), if applicable;
- representation made under oath by the interested party stating that there are no other pre-agreements different from those disclosed in the offering memorandum; and
- any other documents or additional information requested by the Finance Superintendency to verify that the purposes of the law are satisfied. A copy of the disclosed pre-agreements should be filed, along with the other OPA documents.

Special rules apply to concurrent offers and exchange offers.
In the event that 100 per cent of the stockholders have previously agreed in writing to sell or buy, the OPA mandatory procedures would not be applicable.

Regarding concurrent offers, see question 9 about unsolicited transactions.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

According to the Code of Commerce, directors and managers have the legal representation of the company, with the limitations and powers established in the by-laws. Their duty is to act with loyalty, good faith and due diligence.

As a general rule, only mergers, spin-offs, capital reductions, changes in the type of legal entity and the approval of financial statements required for initial public offerings must be approved at the shareholders' meeting; however, the by-laws may contemplate their approval for other types of business combinations such as asset sales or purchases, entering into joint venture agreement, etc.

Further, directors or managers shall guarantee that shareholders have the right to inspect the company's records before a shareholders' meeting in order to approve the above-mentioned business combinations or whenever financial statements of the company must be approved. Also, the agenda of shareholders' meetings where a merger, spin-off or changes in the type of legal entity shall be approved must include specific consideration of the withdrawal right to which dissident or absent shareholders are entitled if the transaction lessens their economic rights or implies higher liability for such shareholders. In these cases, the board of directors shall take into account the best interests of the company when making its recommendation.

The directors and managers must protect the rights of the minority shareholders whenever a shareholders' meeting decision may unjustly affect their rights. The same duty is imposed on the controlling shareholders. Corporate decisions, which may be considered as an abusive exercise of the majority or minority rights, can be voided by the Companies Superintendency. Exercising the shareholders' rights with the intent of harming the company or another shareholder may also be declared as an illegal act by the Companies Superintendency. Parties harmed by the conducts of other shareholders are allowed to file claims before the Companies Superintendency to seek compensation for any damages they suffered.

Whenever a business combination involves a merger, a spin-off or a purchase of going concerns, a public advertisement including their particulars shall be published. In addition, a special communication will be sent individually to each creditor in the case of mergers and spin-offs. The purpose of this information is to allow creditors to request additional guarantees for their credits if deemed necessary.

Controlling shareholders have the duty to register either the situation of control or the entrepreneurial group before the corresponding chamber of commerce within 30 days after control is acquired. A situation of control arises when, among other cases, the controlling shareholder: holds more than 50 per cent of the share capital of the controlled company; holds voting right for the majority of the votes required to take a decision in a shareholders' assembly or board of partners or to appoint the majority of members of a board of directors; or is allowed to exercise a dominant influence in the decisions of the directors or managers of a company owing to a contract or another legal obligation.

An entrepreneurial group comes about when, in addition to the situation of control, there is a sole direction and purpose between the controlling shareholder and the controlled company.

The following obligations arise under a situation of control:

- controlling shareholders will consolidate financial statements between the controlling company and the controlled companies if they are all domiciled in Colombia. If the controlling company is not domiciled in Colombia, the controlled company domiciled in Colombia with the highest equity will consolidate the financial statements with all other controlled companies domiciled in the country. Such consolidated

financial statements will be approved by the corresponding shareholder assemblies or board of partners and if required submitted to the appropriate Superintendency and to the tax authority (DIAN);
- controlled companies shall not hold shares or quotas in the controlling companies. Any such transactions will be considered legally ineffective;
- the corresponding superintendency may verify the transactions made by the controlling shareholder and the controlled company which could be considered unreal or made in terms different to arm's-length principles, and against the interest of other shareholders of the controlled company or of third parties. The superintendency may impose fines or order the suspension of such transactions;
- a controlled company may only pay stock dividends to the shareholders that expressly accept it;
- reorganisation or judicial liquidation proceedings may be initiated for all or some of the controlled companies;
- under reorganisation proceedings the reorganisation agreements shall be approved by external creditors, which excludes creditors that are part of the same situation of control or entrepreneurial group; and
- controlling shareholders may be held ancillary liable for the liabilities of the controlled company, if the reorganisation or judicial liquidation proceedings of the controlled company are brought about by acts made by the controlling shareholder on its own benefit or for the benefit of any of its affiliate companies and against the interest of the controlled company.

For entrepreneurial groups, in addition to the obligations mentioned above for situations of control, a special report with regard to the intensity of the economic relations between the companies pertaining to such group shall be prepared by the directors and managers of the controlling and controlled companies and submitted for approval by the corresponding shareholders assemblies or board of partners.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

As a general rule, only mergers, spin-offs, capital reductions and changes in the type of the corporate structure and the financial statements required for initial public offers must be approved at a shareholders' meeting. In these cases, the general principle is that the quorum and majorities are the following:
- quorum: two or more shareholders jointly accounting for over 50 per cent of the company's shares must be present or represented at the shareholders' meeting in order to validly undertake any discussion pertaining to the company's affairs. Except for listed companies, the by-laws may establish a higher quorum for the approval of such decisions; and
- majority: shareholders may approve a business combination when the majority of the votes at the meeting are affirmative.

Nevertheless, the by-laws or shareholders' agreements may require the shareholders' approval for other types of business combinations.

In the case of a merger, spin-off or change of type of corporate structure of the company that entails a higher liability for the shareholders or implies that it lessens their economic rights (for example, the share participation of the shareholder in the company is reduced, the market value of the share is reduced or the nominal value of the share is reduced, provided that there is a capital reduction, or the negotiability of the shares is limited or decreased), the dissident or absent shareholders are entitled to a withdrawal right. The shares of the withdrawing shareholder shall be offered to the remaining shareholders at pro rata of their share participation. If the shares are not entirely acquired, the company will acquire them as long as there are liquid profits or a special reserve has been created for such purpose. The prices of the shares shall be agreed between the parties, and if no agreement is reached, it shall be subject to expert appraisal. In the event of mergers or spin-offs the shareholders must approve the appraisal of the companies involved.

In the event of mergers of financial institutions, minority shareholders who hold no less than 5 per cent of the outstanding shares of one of the intervening companies may request an independent appraisal of the companies involved, which shall be mandatory for the companies involved, unless at least 85 per cent of the outstanding shareholders of each intervening company vote against it. In this last case, the shareholders who did not approve the majorities' appraisal of the shares shall be entitled to a withdrawal right and their shares shall be paid at the price set forth in the independent appraisal from a capital reduction or reacquisition of the company's own shares, under the terms and conditions set forth by the Financial Superintendency. Whenever the combination involves a capital contribution in kind, the appraisal of the contribution shall be approved at the shareholders' meeting.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile takeovers are not common since Colombian companies, even listed companies, have highly concentrated share participations by one or a few beneficial owners.

Despite this, there can be unsolicited transactions in listed companies, which are governed by the provisions of the OPA rules. During an OPA proceeding, it is legally possible for other interested parties to compete by submitting a new OPA, in which case such a competing OPA must comply with the same requirements as to the original OPA. Pursuant to Decree 2,555 of 2010, the following are the requirements that should be met by a competing OPA:
- the offeror of a competing OPA cannot be the same beneficiary as the original OPA;
- the first advertisement of the competing OPA should be published at least two days before the expiration date of the acceptance period of the original OPA;
- the competing OPA cannot be for a lesser amount or lesser price than the original OPA;
- the competing OPA must be better than the original OPA. It is understood as a better offer if the price is at least 5 per cent higher or if the amount of stock to be acquired is at least 5 per cent higher or, if the price or the amount of stock is equal to that in the original OPA, if the minimum amount of shares to be accepted to trigger the OPA is less than the minimum amount in the original OPA;
- if the original OPA contemplates consideration in securities, then the competing OPA may offer cash and securities; likewise, if the original OPA contemplates consideration in cash, then the competing OPA can only offer consideration in cash;
- if the original OPA contemplates upfront payment, then the competitor has to offer the same form of payment; on the other hand, if the original OPA contemplates payment in instalments, then the competing OPA has to present the payment under the same terms or better;
- once the first advertisement of the competing offer is published, any acceptance already made to the original OPA will be automatically made to the competing offer; and
- in any case, the interested party may at any time improve the conditions of the original OPA, following the same procedure for competing offers.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Under public policy principles, no actions against the securities market's transparency are allowed. Thus, any attempt to frustrate additional bidders must be undertaken in accordance with concurrent OPAs.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In general, governmental agencies cannot intervene in, influence or restrict the completion of a business combination.

The Companies or Finance Superintendencies, as applicable, may restrict a merger or a spin-off whenever the applicable procedures are not abided by, and creditors or minority shareholders rights are affected.

Under securities regulations, the Finance Superintendency may influence or restrict the completion of a business combination whenever market transparency may be affected. Furthermore, the Finance Superintendency may block mergers among financial institutions if such a transaction affects the public interest or the financial system's stability.

Under the bankruptcy statute, the Companies Superintendency shall approve certain transactions that may involve business combinations.

Pursuant to antitrust law, the Superintendency of Industry and Commerce may block or impose behavioural or structural conditions on any business combination if it may create a monopoly, foster an eventual abuse of a dominant position, foreclose markets, affect competition, or allow cartelisation in the specific market of the combining companies.

Foreign investment in Colombia is allowed in all sectors of the economy with the exception of the following: activities related to defence and national security; processing and disposal of toxic, hazardous or radioactive waste not originated in the country; private security and surveillance (which in some specific cases such as private security companies can only be provided by legal entities whose equity holders are Colombian individuals, and in others such as valuables transportation foreign individuals or companies can also be equity holders); and, legal entities operating open television services (for which foreign investment cannot exceed 40 per cent of the company's capital stock). In case a business combination violates such prohibition the transaction could be considered null and void.

In certain telecommunication markets, in which the use of the electromagnetic spectrum is licensed by the state, combination may require divestment of licences if, by virtue of the transaction, the thresholds of the maximum licensed spectrum are exceeded.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

OPAs shall be addressed to all the shareholders of the same class of shares of the target company in equal conditions. The only condition for the acceptance of the OPA that can be imposed is that the acceptance is made for 'all or none of the shares', in which case the acceptance of the OPA is made only if all of the shares from the offeree are acquired by the offeror.

Acquisitions through an OPA may be paid in cash, in foreign currency (subject to Colombian foreign exchange regulations) or with securities.

In cash acquisitions, the availability of financing would not be allowed as a condition to a cash offer. Furthermore, before presenting the OPA, the interested party shall constitute collateral, as additional security for performing its obligations under the OPA. If the consideration is in cash, then the collateral may be a cash deposit in a Colombian or a foreign bank, a standby letter of credit, a performance or blanket bond issued by an insurance company, treasury bonds issued or guaranteed by the Republic of Colombia or the assignment of rights in collective investment fund. The beneficiary of the collateral shall be the stock exchange.

Pursuant to Decree 2,555 of 2010, when the consideration for the acquisition (through an OPA) consists of securities, they must be free of any liens or limitations of ownership and must be pledged as collateral for satisfaction of the payment. Further, in these cases in which the payment of the acquisition is to be made with securities, at least 30 per cent of the shares to be acquired through the OPA must be offered to be paid in cash.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Financing, whenever applicable to these types of transactions, is in most cases a contractual issue. Hence, financing is not generally dealt with in the transaction documents as such. As a general rule, financing comes from third parties such as banks and would, most of the time, come down to the negotiation and execution of a credit agreement. When a credit agreement is executed by the purchaser of assets or shares, the purchaser may agree to lien the assets of the target company or the assets acquired, or to pledge the shares.

The financing of the acquisition of shares of Colombian companies may be made either by foreign financial institutions or by Colombian financial institutions pursuant to Colombian exchange regulations. If the financing is made by Colombian financial institution for the acquisition of shares of the same financial institution or of a third financial institution, it can only be made provided that the shares are offered in an initial public offer or in a privatisation process and that the financing is made over other securities which hold a value of at least 125 per cent of the financed amount.

Taking into account that financing is generally regulated by contract, the obligations that may be agreed by the seller to assist the buyer's financing must also be included as contractual matters. As a general practice, parties agree that the seller must collaborate with the buyer to obtain the financing by supplying the information of the target company or of the assets that may be required by the financial entity.

Finally, Law 1,676 of 2013 and Decree 400 of 2014 have set forth a legal framework for moveable guarantees, which provide higher access to financing and may be used for financing business combinations. These regulations create a simple and non-expensive registry for moveable guarantees; provide publicity that makes a guarantee effective against third parties; allows for guarantees to be granted under different priorities (first, second, etc) to different creditors; and, for direct payment to the creditor with the guaranteed asset (which previously was prohibited in Colombia at the time of granting the guarantee due to the prohibition of recission clauses) or simplified enforcement proceedings of the moveable guarantee by a notary public, a Chamber of Commerce or a judicial instance.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Simplified corporations regulated by Law 1,258 of 2008 may include events for the exclusion of shareholders in the by-laws. In such events, reimbursement of their investment must follow the general rules set forth in Law 222 of 1995 for the withdrawal right.

Colombian law does not contemplate specific squeeze-out procedures. However, pursuant to Law 222 of 1995, in business combinations structured by means of a merger, transformation or spin-off, dissident and absent shareholders may withdraw from the company, provided that the transaction entails a higher liability for the shareholders or implies that it lessens their economic rights. The shares of the withdrawing shareholders will be offered to the remaining shareholders at pro rata of their share participation, if the shares are not fully acquired, the company shall acquire them as long as there are liquid profits or a special reserve created for such purpose. The price of the shares shall be agreed between the parties, and if no agreement is reached it will be set forth by an expert.

The same procedures are applicable whenever, as a result of a business combination, a listed company is delisted from the stock exchange.

Minority shareholders may be diluted by means of capital contributions approved by the controlling shareholders. A capital reduction in order to reimburse the corresponding capital to the minority shareholders can also be made, which would require the approval of the Superintendency of Companies, provided that the company has no outstanding liabilities, or that once the reduction is made the assets double the liabilities of the company, or that the creditors of the company accept it expressly in written form. If the external liabilities correspond to labour obligations authorisation from the Ministry of Labour is also required.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions have the same benefits and may be structured with the same flexibility as local business combinations. The Foreign Investment and Exchange Regulations provide the respective legal framework. Foreign investors in general are allowed to enter into transactions in Colombia by investing in all industries, except for activities related to defence and national security; processing and disposal of toxic, hazardous or radioactive waste not originated in the country; and private security and surveillance (which in some specific cases such as private security companies can only be provided by legal entities whose equity holders are Colombian individuals, and in others such as valuables transportation foreign individuals or companies can also be equity holders); and legal entities operating open television services (for which foreign investment cannot exceed 40 per cent of the company's capital stock). Certain regulatory conditions or approvals may apply, for example, for foreign investment in financial institutions.

Foreign investors must register their investments with the central bank after the transaction takes place. The purpose of this registration is to obtain the proper exchange rights for their investment, such as drawing rights abroad over net profits and capital reimbursements.

External financing to Colombian companies or individuals may now be obtained not only from foreign financial institutions but also from foreign companies. Nevertheless, foreign indebtedness must be reported to the central bank before or at the same time of disbursement.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In addition to the waiting period for obtaining antitrust clearance, under merger, spin-off and changes in the type of the corporate structure, shareholders shall be convened to a meeting with at least 15 business days' notice in order to inspect the documents in order to approve the transaction.

Approval of the amendment of the by-laws due to the merger or spin-off after the approval by the shareholders' meeting is subject to an authorisation by the applicable Superintendency (Finance or Companies).

Bondholders will be convened to a meeting with at least eight business days' notice so as to consider the merger.

A notification period of 30 business days to creditors is mandatory.

The whole merger or spin-off process may take between three and six months. If no authorisation is required by the applicable superintendency, a special report addressed to the creditors and shareholders shall be prepared and posted at the company's domicile (General Authorisation Regime) for 30 business days as of the date on which the merger advertisement is published in a newspaper.

In the event of going concern transfers, a two-month notification period for creditors is necessary to terminate the joint and several liability of the transferor with the transferee.

In OPAs a minimum period of 10 business days and a maximum of 30 business days should be granted to stockholders for the acceptance of the OPA.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The following industries are subject to additional regulations:

- financial, insurance and banking: Decrees 633 of 1993 and 2,555 of 2010 and the regulations from the Treasury Ministry and the Finance Superintendency;
- television industry: Laws 14 of 1991, 182 of 1995, 335 of 1996, 680 of 2001 and 1,507 of 2012 and the regulations of the National Television Agency, Communications Regulation Authority and the Spectrum National Agency;
- aviation industry: the Commerce Code and Colombian Aeronautical Regulations;
- health services: Laws 100 of 1993, 1,122 of 2007 and 1,438 of 2011 and the regulations from the Ministry of Health and Social Protection;
- agricultural industry: Laws 101 of 1993 and 811 of 2003 and the regulations from the Agriculture Ministry;
- public utilities services: Laws 142 of 1994, 143 of 1994 (electricity) and 689 of 2001 and the regulations from Public Utilities Superintendency; and
- telecommunications: (other than the television industry): Law 1,341 of 2009 and the regulations from the Information and Communication Technologies Ministry and the Communications Regulation Commission.

Companies holding governmental concessions or licences must follow the necessary proceedings for amending said concessions or licences if as a result of a business combination the holder of the concessions or licence changes.

18 Tax issues

What are the basic tax issues involved in business combinations?

Depending on the structure of the business combination as well as the nature of the parties involved there are different tax consequences.

Income tax

Income tax is levied over the gains in share, asset and going concern transfers. These gains would be equivalent to the difference between the fiscal cost of the shares or assets and the transfer price. For tax purposes, the transfer price between unrelated parties cannot differ by more than 25 per cent from the market value (in the case of shares of non-listed companies, the commercial value corresponds to the intrinsic value of the shares). The tax is partially exempted in the event of the transfer of shares listed on the stock exchange whenever the amount of shares transferred does not exceed 10 per cent of the company's outstanding shares.

If the shares were held for more than two years, capital gains tax over its profits will be of 10 per cent. If the shares were held for less than two years, then the profits are charged with income tax at the rate of 25 per cent. If the seller is located or domiciled in Chile, Spain, Canada, Mexico, Switzerland, South Korea, India, Portugal and countries of the Andean Community of Nations (Equator, Peru and Bolivia), by applying double taxation treaties, lower rates may apply. In any case, if the seller is an entity domiciled abroad, it would be required to file an income tax return and pay the corresponding tax for the transfer of the shares or assets, if any, within one month from the date in which the transfer takes place. This filing is mandatory regardless of the capital gain or loss arising from the transfer. When deciding whether to establish a special purpose vehicle (SPV) in Colombia to pursue a business combination, the rules regarding thin capitalisation have to be taken into account because, for income tax purposes, interest payments may only be deducted for a value up to three times the SPV equity.

Income tax for equity

A recent tax reform (Law 1,607 of 2012), created the income tax for equity, which is levied over the gains or the income earned at a rate of 9 per cent for the fiscal year.

Income tax for equity surcharge

Law 1,739 of 2014 created a surcharge to the income tax for equity applicable to the period 2015–2018, which is levied on income over 800 million Colombian pesos at the following rates: 6 per cent for fiscal year 2016, 8 per cent for fiscal year 2017 and 9 per cent for fiscal year 2018.

Net wealth tax

Law 1739 of 2014 created a new net wealth tax to be levied against liquid assets valued above 1 billion Colombian pesos. This tax will be applicable for the tax years 2015, 2016 and 2017. For the purposes of determining the taxable liquid assets corporate inventories and assets are included but shares are excluded. The applicable rates are as follows: 0.15 per cent in 2016 and 0.05 per cent in 2017.

Value added tax

The sale of immaterial goods (such as shares) and the sale of fixed assets trigger VAT. In general, the sale of inventory is subject to VAT at a rate of 16 per cent.

Industry and trade tax

Municipalities have the autonomy to set rates between 0.2 per cent and 1.4 per cent. The most common rate is 1 per cent for inventory purchases.

Taxes in the event of mergers or spin-offs

Pursuant to Law 1,607 of 2012 only under specific conditions are mergers and spin-offs considered tax exempted regarding income tax or VAT. First, Law 1,607 of 2012 made a distinction between 'acquisitive' mergers and spin-offs (carried out among unrelated parties) and 'reorganisational' mergers and spin-offs (carried out among related parties). Second, when a reorganisation process takes place between two foreign entities with assets located in Colombia, this operation will be taxable in Colombia regarding those Colombian assets if they exceed more than 20 per cent of the total worldwide assets. On the contrary, if the assets in Colombia are less than 20 per cent, then the reorganisation of those assets in Colombia would be tax free.

Update and trends

In February 2016, Colombia enacted an update to the Anticorruption Statute, adopting OECD recommendations regarding prosecution of transnational bribery. The new law also conferred new powers to the Companies Superintendency to prosecute and sanction, through an administrative proceeding, acts of bribery and corruption at the national and transnational level. A consequence of the newly enacted law will likely be that due diligence reports conducted in the context of M&A transactions will need to address in more detail risks arising of the violation of anticorruption laws both in Colombia and abroad.

New rules governing the prevention of money laundering and the financing of terrorism have also been implemented. The new requirements establish that companies subject to the surveillance of the Companies Superintendency, with income exceeding 160,000 times the Colombian minimum monthly wage (110 billion pesos in 2016), have to implement a compliance programme (known as SARLAFT). Hence, compliance with the SARLAFT rules has to be considered an important section of any due diligence conducted in the context of an M&A transaction.

The ad hoc commission to prepare an overhaul of the Tax Code and tax regulations made several recommendations that are expected to be presented to Congress for discussion and enactment later this year. Among the key recommendations made by the commission, which may affect M&A activity, is the suggestion that a new tax over corporate profits be created.

Although the Colombian antitrust regime, including the merger review rules, was updated in 2009, the Government has introduced a bill of law before Congress to introduce several changes. Of interest to M&A activity is the proposal to eliminate the merger review subjective thresholds (discussed in question 4), so that any transaction meeting the objective thresholds would have to be reported to the SIC. The bill of law has met opposition in Congress and may not be enacted.

The Colombian government has also been pursuing admission into the OECD in the past couple of years, and the recommendations of peer reviews, sponsored by the OECD, have been adopted or are in the process of being adopted. This development may entice investors and may increase M&A activity in upcoming years.

Besides the aforementioned statutory and regulatory proposed changes, no other major legislative or regulatory activity that may affect business combinations is expected.

From a perspective of credit availability, past constraints due to the 2007 global financial crisis had an impact on M&A transactions in Colombia. However, over the past couple of years M&A activity has steadily risen as Colombia has remained an attractive destination for international investors and its macroeconomic indicators remained strong.

The following is a comparative chart with the requirements needed in each type of operation in order for it to be considered tax-free:

Acquisitive mergers and spin-offs (unrelated parties)	Reorganisational mergers and spin-offs (related parties)
No income tax if shareholders holding at least 75 per cent of the outstanding shares before the merger or spin-off keep the same proportion in the holdings after the merger or spin-off	No income tax if shareholders holding at least 85 per cent of the outstanding shares before the merger or spin-off keep the same proportion they after the merger or spin-off
Shareholders must receive at least 90 per cent of value in shares as payment for the operation	Shareholders must receive at least 99 per cent of value in shares as payment for the operation
If shareholders holding at least 75 per cent of the outstanding shares sell their shares within two years after the merger or spin-off, they must increase their income tax payment by 30 per cent	If shareholders holding at least 75 per cent of the outstanding shares sell their shares within two years after the merger or spin-off, they must increase their income tax payment by 30 per cent

Transfer pricing rules

Transfer pricing rules (TP rules) were introduced in Colombia by Law 788 of 2002, amended by Law 863 of 2003 and have been enforceable from fiscal year 2004 onwards.

TP rules apply to income taxpayers that enter into transactions with an economic affiliate party domiciled abroad (cross-border and inter-company transactions). These rules will only affect the income tax calculation regarding ordinary and extraordinary income, expenses and deductions.

Asset purchase agreements are subject to the TP rules if they imply cross-border and inter-company transactions and affect income tax in Colombia. In such cases the transaction price will be fixed on an arm's-length basis. Consequently, a transfer pricing analysis will be prepared. In addition, the filing of an information return is mandatory on a yearly basis.

Finally, it is assumed that transactions made between Colombian residents and tax haven residents are considered as transactions performed between related parties and thus subject to TP rules. Decrees 1966 and 2095 of 2014 list the countries considered in Colombia as tax havens. Panama, Barbados, the United Arab Emirates and Monaco are countries temporally excluded from the tax havens list, since negotiations are been undertaken to exchange tax information with the tax authorities of such countries.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

According to the Labour Code, once a share purchase takes place, the employees may continue as employees of the resulting company. In the case of a merger, spin-off and purchase of going concerns there is a mechanism called the employer's substitution by means of which the former employer may be substituted by the new employer (transfer of undertaking). Employees may claim their rights and benefits from the former or new employer, which are jointly and severally liable to the employees until the moment of the employer's substitution is completed, and thereafter, the new employer shall bear the labour liabilities. Nevertheless, among employers of the companies involved, as a general rule, the former employer is only responsible for the labour obligations prior to the employer's substitution, and the new employer only is responsible for the labour obligations after the employer's substitution, unless the employers agree in different terms in writing.

The rights and obligations arising from the individual labour contracts are not affected. In addition, the principle of 'the same pay for the same work' regarding the employees of the resulting company, should be applied.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Pursuant to Law 1,116 of 2006, if the target company is undergoing restructuring proceedings, no sale of assets, going concerns, spin-offs or mergers are allowed without the previous authorisation from the relevant superintendency.

Once the restructuring agreement is in force, it shall be reviewed to ascertain whether there are limitations to carrying out business combinations. Special consideration must be given in the case of a merger, as the resulting company will be responsible for all the obligations under the agreement with the target's creditors.

Furthermore, the restructuring committee will also have powers over the resulting company, and the shareholders, managers and directors will be subject to the codes of conduct adopted with the restructuring agreement.

During restructuring proceedings in case of a merger or a spin-off the following rights are suspended: withdrawal rights of the shareholders; special provisions for bondholders; and the rights of the creditors for requesting better guarantees. In addition, in the case of sale of a going concern the creditors may not oppose to the sale.

In the event that the target company has been declared in dissolution, a merger may only take place within 18 months from the date of dissolution, and the absorbing or resulting company shall have the same corporate purpose as the absorbed company. Furthermore, a new company may be incorporated in order to purchase the assets of the company under dissolution and continue with the same business.

If the business is under mandatory liquidation, no special considerations should be accounted for in the sale of assets, provided that the deal is made on an arm's-length basis.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Law 1,474 of 2011 enacted the anti-corruption statute that contains several provisions sanctioning corrupt practices. This statute created the criminal offence of 'private corruption' that sanctions any person that bribes a director, employee or adviser of a company, in order to favour itself or a third party, against the interest of the company, with four to eight years of prison and a fine of 10 to 1,000 minimum legal monthly wages. In addition, the director, employee or adviser who accepts the bribe will be sanctioned with the same penalty and fine. In the case of the conduct representing economic damage to the company, the crime may be punished with prison terms of between six and 10 years.

Furthermore, pursuant to the anti-corruption statute, the criminal offence of 'disloyal management' for the director, shareholder, employee or adviser of a company that for its own benefit or benefit of a third party, abuses its duties, and commits fraud in order to dispose of the assets of the company or to create obligations for the company, shall be sanctioned with four to eight years in prison and a fine of 10 to 1,000 minimum legal monthly wages.

The use by employees, advisers, directors or managers of a company's privileged non-public information known because of their office or duties, in order to profit from it, either for themselves or for third parties, shall be sanctioned with one to three years' imprisonment and a fine of five to 50 minimum legal monthly wages. The same penalty would be applicable to any person that due to its profession or office, obtains profit for itself or for third parties, by using privileged information for the negotiation of securities, if such information is not publicly known.

In addition, the Anticorruption Statute provides an absolute prohibition on former public officials managing private interests. Therefore, it is forbidden for public officials, for up to two years after leaving public office, to directly or indirectly provide advice or represent the interests of companies regarding matters related to the public entity to which the former public official rendered its services, or that were subject to inspection, surveillance, control or regulation by the public entity to which the former public official rendered its services. This prohibition is indefinite with respect to particular matters that were decided by the former public official.

In early 2016, Colombia enacted Law 1778 of 2016 by which the OECD standards against bribery and corruption were adopted. Under this new law, bribery (including transnational bribery) and corrupt acts can be punishable not only as a criminal offense, but also through an administrative proceeding conducted by the Companies Superintendency. The new sanctions provide for fines to companies involved in local and transnational acts of corruption of up to 200,000 times the minimum monthly wage (in 2016, 137 billion pesos), and can even lead to the suspension or the cancellation of the corporate chart.

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