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Colombia

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Colombia.

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COLOMBIA
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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

There is no single rule or law that governs mergers and acquisitions but rather a set of rules that will apply depending on the nature of the target company and on the structure to be undertaken for the transaction. Some rules that govern M&A transactions include:

i. Commercial Code, Law 222 of 1995 and Law 1258 of 2008, which are the set of rules that govern an M&A transaction from a corporate legal perspective;
ii. Law 795 of 2003 (the Financial Statute) and Decree 2555 of 2010, which govern the acquisition of financial institutions (including banks, insurance companies, insurance brokers, and broker/dealers, among others);
iii. Law 964 of 2005 and Decree 2555 of 2010, which govern the acquisition of publicly traded companies (including by means of a public tender offer); and
iv. Law 1340 of 2009 and Resolution No. 90523 of 2022 issued by the Superintendency of Industry and Commerce, which govern the merger control regime.

In addition, the main regulatory authorities are the following:

i. Superintendency of Companies (*Superintendencia de Sociedades),* which is the governmental entity that undertakes the surveillance of companies from a corporate and foreign exchange perspective;
ii. Superintendency of Finance (*Superintendencia Financiera)*, which is the governmental entity that undertakes the surveillance of financial entities (including banks, insurance companies, insurance brokers, and broker/dealers among others) and authorizes transactions related to publicly traded companies; and
iii. Superintendency of Industry and Commerce (*Superintendencia de Industria y Comercio)*, which is the governmental entity that undertakes the surveillance related to antitrust matters.

If the target runs a business under special surveillance by the Government (such as healthcare, TMT services, energy, defense, among others) other superintendencies and/or administrative authorities might be involved in the process.

2. What is the current state of the market?

According to Transactional Track Record (TTR), there were 294 reported transactions in 2023 (28 more transactions than those reported during 2022), for an amount of approximately USD 5.132,11 billion (non-confidential transactions), which represents a slightly increase in the number of M&A transactions and almost a 50% decrease in the deal value compared to 2022. The trend of the market was different throughout the year, having a concentration in May, June, August, October, and December 2023 with 156 transactions in such five months (53% of the transactions reported during 2023). This tendency shows a variable trend of closed transactions during 2023.

It is expected that the M&A market in Colombia will continue a slowdown trend during 2024, subject to the terms in which certain key structural reforms (such as the pension, health and labor reforms) are approved by the Congress, and to the final policy to be adopted by the Government in relation with the hydrocarbon exploration.

3. Which market sectors have been particularly active recently?

The sectors in which we have evidenced particularly high M&A activity are internet, software & IT services. According to TTR, 85 of 294 transactions were undertaken in these sectors during 2023, almost 30% of

the deals reported in 2023. In contrast with 2022, the health sector did not evidence high M&A activity during 2023. Other industries with significant activity during last year include business & professional support services and banking and investment.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

Some of the most significant factors influencing M&A transactions in Colombia over the next two years include:

i. Economic recovery and political stability: The pace of economic recovery and the maintenance of political stability will be crucial factors influencing M&A activity. Favorable economic conditions, including GDP growth, low inflation, and stable exchange rates, can encourage deal-making as companies feel more confident about investing and expanding through acquisitions.
ii. Sectoral dynamics: Different sectors in Colombia will experience M&A activity based on their performance and growth prospects. Industries such as technology, renewable energy and infrastructure may see increased activity as companies look to capitalize on emerging opportunities or address evolving consumer demands. Additionally, sectors such as e-commerce and digital services, could attract interest from domestic and international investors.
iii. Government policies and regulations: Regulatory factors will continue to influence M&A activity in Colombia. Changes in government policies, tax laws, and regulations related to foreign investment can impact deal structures and timelines. Additionally, enforcement of antitrust laws and competition regulations will play a role in shaping the M&A landscape. Some relevant topics to be considered are the following:
    a. The terms in which the structural reforms announced by the Government are approved by the Congress during 2023 (mainly the pension, health, and labor reforms).
    b. Decree 46, issued on January 30, 2024, marks a significant change to Colombia's corporate legal framework since the enactment of Law 1258 of 2008. This decree addresses key issues such as conflicts of interest and acts of competition among administrators by introducing a legal definition of such concepts, which were previously vaguely defined. It also outlines individuals who may pose a conflict of interest for administrators when participating in company operations. Moreover, this new regulation sets forth an authorization process by the maximum social body of a company for situations where administrators face conflicts of interest or engage in acts of competition. The Decree also introduces the right of any shareholder, in the interest of the company, to demand accountability from administrators causing harm to the company.
    c. Decree 79, issued on January 30, 2024, sets forth an exception to carrying out a public tender offer (*oferta pública de adquisición*) in the event that the investors are beneficiaries of more than 25% of the voting capital of the company and less than 50% of the same, in two or more listed companies, and intend to acquire shares through an exchange swap contract in order to gain control of the company. Notwithstanding such exception, in these cases, within the month following the completion of the swap contract, the investors must request the authorization to carry a public tender offer directed to the minority shareholders that did not participate in such transaction, which must have at least the same price used in the swap agreement and maintain the other general conditions of the initial transaction.
    d. The impact of Law 2277 of 2022 (tax reform), especially in relation with: (i) the increase of the capital gains tax rate (10 to 15%); (ii) the introduction of a 1.5% stamp tax on public deeds to document the transfer of immovable property; (iii) the increase of the dividends tax rate (from 10% to 20%); (iv) the creation of a minimum tax that guarantees an effective taxation of

15%, which may have an impact on tax neutral reorganizations or contributions in kind; and (v) the potential change of the 20% income tax rate for free trade zones, subject to the implementation of an export-oriented / internationalization plan, which shall be approved by the Government in 2023-2024.

5. What are the key means of effecting the acquisition of a publicly traded company?

Although the number of M&A transactions is significantly higher for private companies than for publicly traded companies, the most common way to undertake an acquisition of a publicly traded company is by means of a public tender offer (*oferta pública de adquisición*). The public tender offer will be required to be directed to all shareholders in the event a person, directly or indirectly, either (i) proposes to become the beneficial owner of 25% or more of the total outstanding voting shares of a publicly traded company or (ii) is already the beneficial owner of 25% or more of the outstanding voting shares of such a company and intends to increase its ownership by more than 5%. The offeror, if conditions and thresholds are met, shall request prior authorization before the Superintendency of Finance (*Superintendencia Financiera*) and, if the transaction implies a market concentration or integration, the antitrust authorization before the Superintendency of Industry and Commerce (*Superintendencia de Industria y Comercio*).

In addition, and in spite of the fact that hostile bids are not common in Colombia (although a couple of hostile acquisitions for three of the main listed companies in Colombia -Sura, Argos, and Nutresa- took place during the last quarter of 2021 and 2022) considering that there is usually a controlling shareholder and that the management of a company does not have a significant role in an acquisition, third parties unrelated to the transaction will be given the opportunity to interfere with a public tender offer and file competing bids.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

Publicly available information will depend on whether the target company is a publicly traded company or a privately held company. In this regard (i) for the first case (publicly traded companies), periodic information required to be revealed (including annual audited financial statements) together with other material information will be available to the public, and (ii) for the second type of companies (privately held companies), basic corporate information will be available to the public (including name of directors and officers, amount of capital, corporate purpose, name of quota holders (if the type of company is a limited liability company) and audited financial statements (depending on certain types of companies).

In addition, in a public tender offer, the offeror will need to disclose specific information related to the transaction, such as the minimum and maximum amount of shares the acquirer is willing to acquire, the price, information on the methodology used to appraise the shares, among others. However, no material information will be required to be disclosed on the target company, other than specific facts of such entity such as the name and principal place of business of the Company. In privately held companies, no disclosure is required.

7. To what level of detail is due diligence customarily undertaken?

Although the level of due diligence may vary depending on several factors, such as if the target company is a privately held company or a publicly traded company, the industry in which the target company operates, the statutory auditor of the target company, sophistication of the management of the target company, among others, due diligence will normally be made in two stages: (i) an initial due diligence, conceived as a “red flags report” that corresponds to a high-level analysis and highlight of the most relevant legal issues, and (ii) a confirmatory due diligence, with a more detailed report and description of the business and main issues of the target company.

Due to the current political and economic situation, and the lessons derived from the Covid-19 pandemic, the scope of the due diligence now usually includes a more detailed analysis of potential risks, the breach of any material agreement due to measures taken by the Government or the financial situation of the target, business continuity, among others.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

Although the key decision-making organs will vary

depending on the type of company, the principal corporate bodies of a target company are:

i. For corporations, a shareholder's general assembly, and a board of directors; the principal power of the shareholders' assembly will be to amend the by-laws of the company (therefore approving a spin-off or merger), to approve the financial statements of the company, and to decide on the main corporate actions of a company. The board of directors will normally approve the entering into material agreements by the company, including the sale of assets of the target company, and in general, undertake the managing of the company; and
ii. For a simplified stock corporation, the corporate organs will be similar to the ones provided for the corporation, but in this type of company the board of directors is optional.

9. What are the duties of the directors and controlling shareholders of a target company?

Under Colombian law, directors are subject to certain fiduciary duties, including acting without conflict of interest, in good faith, with the diligence of a "good businessman" and in the best interests of the target company, including fostering compliance with the law and the by-laws of the target company, granting equitable treatment to all shareholders and taking into consideration their best interests, as well as abstaining from using privileged information.

All shareholders, but especially controlling shareholders, must exercise their voting rights in a non-abusive manner. Under recent caselaw, shareholders could also be potentially subject to a fiduciary duty of loyalty. Both directors and shareholders are liable before the company, other shareholders, and third parties for any illegal and/or non-diligent action.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

There is no approval, consultation, or other special rights granted by the applicable laws to employees or other stakeholders.

11. To what degree is conditionality an accepted market feature on acquisitions?

While, as a general rule, offers for publicly traded companies must be unconditional, it is customary that takeover offers for privately held companies are subject to common conditions, such as minimum acceptance, no occurrence of a material adverse change, correctness of representations and warranties, and obtention of all necessary regulatory or third-party approvals (e.g. authorization from the antitrust authority or other governmental authorities). Other types of conditionality, for instance, "agreeing to agree" on contracts of a transaction, are normally not accepted.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

An acquirer will normally request exclusivity in letters of intent, memorandum of understanding, and other preliminary agreements whereby an "in-principle" figure of the principal commercial terms of the transactions is provided. Exclusivity obligations in Colombia are valid and remedies available in case of a default will comprise monetary damages (penalties and the right to claim additional damages) arising from the contractual breach.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Although not frequent, "breakup fees" have been starting to be more commonly used in deals as a protection of potential acquirers if a transaction does not close for reasons not attributable to the acquirer.

14. Which forms of consideration are most commonly used?

The form of consideration most commonly used is payment in cash. In direct mergers shares of the resulting company are offered to the shareholders of the merged entities. Other forms of consideration are uncommon.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Although it depends on the nature of the company, in privately held companies a "control" situation (having more than 50% more of the shareholding interest, or by

any means controlling the power of decision of the board of directors) is required to be registered before the Chamber of Commerce within 30 business days as of the day the control situation or change in the ownership of the shareholding interest takes place and, therefore, such registry will be publicly available.

A person acquiring or disposing shares in a listed company or in a financial institution (including banks, insurance companies, insurance brokers, and broker/dealers, among others) must notify (i) the issuer or the financial institution, as the case may be, (ii) the Colombian Superintendency of Finance (*Superintendencia Financiera de Colombia*), and (iii) the Colombian Stock Exchange (*Bolsa de Valores de Colombia – BVC*) if the number of shares to be acquired or disposed reaches or exceeds 10% of the capital stock of such company. Such notification shall be accompanied by the corporate and financial documents set forth in the applicable law.

16. At what stage of negotiation is public disclosure required or customary?

Due to the rules related to the disclosure of material information to the market, disclosure of a transaction involving a publicly traded company usually takes place upon the execution of the purchase agreement. On the other hand, if the target is a privately held company, the negotiation phase is normally not publicly disclosed (unless the transaction is structured as an open auction) and rules for the disclosure of the transaction are usually included in the transaction documents.

17. Is there any maximum time period for negotiations or due diligence?

There is no maximum time period for negotiations or due diligence, although it is customary that the period to finalize the due diligence is between 30 and 60 days and the negotiation phase takes around 30 to 45 days. In most cases, negotiations start before the due diligence process is completed.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

In publicly traded companies the acquisition of shares by means of a public tender offer must comply with the following rules regarding the price of the shares:

i. If buyer has acquired shares in the listed company within the 3 previous months to the date on which the tender offer is informed to the Superintendency of Finance (*Superintendencia Financiera de Colombia*), the acquisition price of the shares included in the tender offer shall not be less than the higher price paid by the buyer in such previous acquisition.
ii. If there is a pre-agreement (*pre-acuerdo*) in place between buyer and seller regarding the shares, the purchase price shall not be less than the higher price set forth in such pre-agreement.
iii. In the event of competing offers over a listed company, the purchase price offered in the competing offer cannot be inferior to the purchase price included in the initial tender offer.

There are no specific circumstances where a minimum price may be set for the shares of a privately held company (except in certain transactions structured as open auctions).

19. Is it possible for target companies to provide financial assistance?

Although there is no express rule in Colombia according to which a target company could not provide financial assistance, it is not a common practice nor advisable for companies with minority shareholders due to the risks that such decision may trigger for the management of the company and even for the shareholders. The foregoing considering that the management members and shareholders may be held personally liable for acts that are not in the best interest of the company or that represent a conflict of interest.

Notwithstanding the foregoing, in the acquisition of privately-owned companies by private equity funds, it is becoming common that the target company at closing guarantees the acquisition finance obligations and that a merger between the acquisition vehicle and the target company is completed 6 to 12 months after the completion of the deal.

20. Which governing law is customarily used on acquisitions?

The governing law typically used in acquisitions is Colombian law. In larger multijurisdictional deals or mega-deals, if there is an international element in the transaction (for instance, one of the parties is a foreign entity), New York law is commonly agreed upon. In this case, an international arbitration tribunal to protect the application of New York law in case of a claim is also

frequently included.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

In order to request the previous authorization from the Superintendency of Finance to carry out a public tender offer (*oferta pública de adquisición*), buyer must provide the following documentation: (i) the bid booklet; (ii) the bid announcement project; (iii) the authorizations from the competent bodies of the bidder (as the case may be); (iv) the certificate of incorporation and good standing of the target company; (v) a copy of the filings before other competent authorities, when required; and (vi) a bidder's representation regarding the inexistence of other preliminary agreements different from those included in the bid booklet.

Particularly, the bid booklet shall include detailed information regarding the bidder and the bid, such as: any preliminary agreements between the parties, information regarding the bidder's business and financial situation (including its audited financial statements), among others. In addition, the bid announcement project must contain, among other information: the bidder's identification, the minimum and maximum shares the bidder is willing to acquire, and the form of consideration.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

Transfer of shares in a corporation or a simplified stock corporation is undertaken by means of a letter sent by the transferor to the company informing the legal representative of the transfer and requesting the formalization of the transfer or endorsement of the shares of the company to the transferee, registration of the transferee and the transfer in the shareholders' registry book and cancellation of the former shares and issuance of new share certificates.

In principle, there are no transfer taxes or duties on the transfer of shares. However, the profits on the transfer of shares (purchase price minus cost basis) are considered as income for the seller, which is subject to: (i) the general corporate income tax (35%) if the sold shares have been held for less than two years; or (ii) the capital gains tax at a rate of 15%; provided, that the sold shares have been held for at least two years.

Foreign investors shall register any acquisition or sale of shares in Colombian entities before the Colombian Central Bank.

23. Are hostile acquisitions a common feature?

Hostile takeovers are uncommon considering that the companies usually have controlling shareholders and the limited power of the management of the company. However, it is worth mentioning that a couple of hostile acquisitions for three of the main listed companies in Colombia (Sura, Argos, and Nutresa) took place during the last quarter of 2021 and 2022.

24. What protections do directors of a target company have against a hostile approach?

There is no special protection to directors of a target company in a hostile takeover. Our tender offers regulation includes a duty of neutrality and passivity similar to the one set forth by the EU Takeover Directive. Directors in Colombian listed companies do not hold the right to block a takeover transaction, and as a general rule do not play any active role in a given transaction. Therefore, any defensive measure taken by directors is likely to face the hurdle of said board neutrality rule. The most common defensive measure used in public markets to date is a competing offer.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Yes, please refer to the answers set forth in questions number 4 and 5 related to public tender offers.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Minority shareholders will have, in principle and unless in the case of issuance of special types of shares, the same economic and political rights granted to the majority shareholder, including to inspect the books and records of the company for an ordinary meeting. In addition, for corporations (S.A.) the following decisions are required to be taken with a special majority in accordance with law:

i. The approval of profits distribution for an amount which is less than 50% of those

obtained in the corresponding fiscal year, requires the favorable vote of 78% of the shares present in the meeting. If this majority is not obtained, the shareholders must distribute at least 50% of (i) the net profits or (ii) the outstanding profits after compensating the losses of the corresponding fiscal year. In the event that the legal, statutory, and/or occasional reserves exceed the subscribed capital of the Company in an amount equivalent to 100%, then the above-mentioned distribution percentage shall increase to 70%.

ii. The issuance of shares which are not subject to the right of first refusal, will require the favorable vote of 70% of the shares present or duly represented in the corresponding shareholders meeting.

iii. A mandatory payment of dividends in shares of the corporation requires a special resolution of 80% of the votes cast by shareholders voting on the resolution. Payment in shares will not be mandatory, and will only be made to shareholders that voluntarily accept it, if (i) payment in shares is approved with a majority lower than 80% or (ii) the 80% majority is reached, but the company has a controlling shareholder.

iv. The transformation of the company to a simplified stock corporation, which will require the unanimous consent of the shareholders.

27. Is a mechanism available to compulsorily acquire minority stakes?

Our tender offers regulation does not include a squeeze-out mechanism. Therefore, squeeze-outs are uncommon in Colombia.

Nevertheless, once the company becomes private, it may be registered as a simplified stock corporation, a type of company that allows equivalent mechanisms to the squeeze-out.

Previous to Law 1258 of 2008, forcing a shareholder out of a company was particularly complicated. However, such law included certain provisions to enable buyout of shareholders. Such mechanisms, though, are exclusive for simplified stock corporations and are essentially two: (i) exclusion, and (ii) cash consideration in a merger or spin-off transactions. Through exclusion, a majority of the shareholders can vote a shareholder out of a company, if the exclusion events and procedures are expressly stated in the by-laws. Following the exclusion, the company shall buy out the participation of the excluded shareholder.
The other mechanism that may be explored, allows a majority of shareholders to approve a merger or a spin-off, and to exclude minority shareholders from participating in the resulting entity. Instead of receiving stock, the company can distribute cash to such shareholders as consideration, achieving thus the buyout of such minority shareholders. These two alternatives are available only for simplified stock corporations.

Additionally, Law 1258/2008 instituted a short-form merger applicable to companies owning 90% of the shares of a simplified stock corporation. In this event, the decision of the legal representatives or the board shall suffice to approve a merger. No shareholder vote is needed. The merger can be structured to provide for cash consideration for certain minority shareholders, as previously explained, and therefore achieving the buyout.

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