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The Legal 500 Country Comparative Guides

Peru

MERGERS & ACQUISITIONS

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

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

For private M&A transactions, the key legislation is the Peruvian Corporate Act (Ley General de Sociedades) and the Peruvian Civil Code. For public M&A transaction, in addition to the previously mentioned laws, the Capital Markets Act (Ley de Mercado de Valores), the Tender Offer Regulation (Reglamento sobre Oferta Pública de Adquisición y de Compra de Valores por Exclusión) and other relevant rules and regulations issued by the Superintendence of Capital Markets (SMV in its Spanish acronym) are applicable.

Public M&As are supervised by the SMV and the Lima Stock Exchange whereas Private M&A are not supervised by any regulatory body; provided that, certain companies that hold certain assets or permits might require authorizations from other governmental bodies. In example, companies holding a PPP concession in toll roads will require a prior authorization from the competent regulatory body (Ositran) and the governmental grantor of the concession.

On June 2021, the Merger Control Act – Law N° 31112 (Ley de Control Previo de Concentraciones Empresariales) and its regulation entered into force. The merger control procedure is overseen by INDECOPI – The Peruvian competition agency – and notification from parties is applicable when:

i. A change of control occurs due to (a) mergers and consolidations; (b) acquisition of shares and relevant operative assets (tangible and intangible); and (c) joint ventures (incorporated or unincorporated) and other partnership agreements (including public private partnerships), and
ii. When the following thresholds are achieved: the sales or book value of assets from the last tax period of all involved parties in the transaction is, jointly, equal or higher than approximately US$ 153.7 million and, the turnovers or book value of assets from the last tax period of at least two of the parties involved in the transaction, individually, equal or higher than US$ 23.1 million each.

Additionally, the Regulation of the Merger Control Act establishes the following:

- There is ex officio procedure if INDECOPI considers a transaction, that although did not surpass the thresholds, may originate anticompetitive effects in the Peruvian market. INDECOPI will have a 12 month-period since the transaction is closed to review it and consider if it requires an authorization. INDECOPI may approve the transaction or mandate to the parties to implement permanent or temporary remedies. Nonetheless, the parties may begin a voluntary procedure to receive clearance from INDECOPI. However, under this scenario, the parties will have to obtain the authorization of INDECOPI to close the transaction.
- A fast-track procedure is applicable when (i) the parties and their economic groups do not perform commercial activities in the same market as the target company or asset's market (either market of the product or service or geographical market) in Peru or when it does not participate in any stage of the production or supply chain in Peru; or, (ii) a transaction where the buyer passes from joint control to exclusive control.
- INDECOPI may review Public-Private Partnerships (PPP) agreement during any stage of the procurement.

One of the main issues being discussed is when an international buyer acquires control of a Peruvian company to enter the Peruvian market for the first time, also known as "first landing." At first glance, such transactions may not require clearance from INDECOPI, as the international buyer may not meet the aforementioned thresholds due to their inactivity in the Peruvian territory in the prior fiscal year of the M&A transaction. However, it is advisable to conduct an antitrust analysis to determine if the buyer or any other company in their economic group has sold goods or provided services to a Peruvian individual or entity, even if done through a Peruvian intermediary. It is also important to review if they own tangible or intangible assets in Peruvian territory and if they hold shares or equity securities in a Peruvian company as a minority shareholder, investor, or financial partner. In summary, first landing, in and of itself, is not exempt from antitrust clearance regulations. Therefore, it is recommended to conduct an in-depth analysis to confirm whether or not the M&A transaction with an international buyer requires clearance from INDECOPI.

2. What is the current state of the market?

Even though Peru has faced political and social turmoil in since the end of 2022, the market is still active; however, not at the same levels as before pandemic. According to TTR, there were 109 M&A transactions in 2022, a 16% decrease in comparison with 2021.

Internet, retail and technological Peruvian companies and assets have been active, however M&A in the natural resources industries such as mining, energy and agriculture have drastically reduced which was once a very attractive industry in the country.

Among the international players, US remains as the top foreign investor in Peruvian M&A, followed by Spain, Chile, Canada, Mexico and the UK. Chinese players are especially active in the energy and natural resources sector.

3. Which market sectors have been particularly active recently?

As mentioned above, retail, internet and the technology sector have been very attractive lately and have had a considerable increase. Professional services and financial industry have also been an attractive and active market sector recently. The mining industry had few transactions on 2022, but the transaction values in this industry were very high, being on of the most important transactions the acquisition of 43.65% equity interest in Minera Yanacocha by Newmont Mining from Buenaventura.

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

i. The Peruvian Control Merger Act: this law continuous to be a significant factor in M&A activity. Until March 2023, there have been around 13 transactions approved by INDECOPI, and none have been rejected yet. M&A Peruvian players, including INDECOPI, are still in a learning and adapting to this new law.
ii. Peruvian Political Climate: Although Peru's political and social turmoil is easing, it will clearly affect the M&A activities in the country for some time, especially regarding to foreign investors who will be more cautious before starting an M&A process.
iii. World Economy: Recent global economic developments will impact some industries with M&A activity, where, for example, strategic investors may be interested to consolidate their market position or enter into new markets.

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

If a person or group of persons will, directly or indirectly, take control of publicly traded company (control being considered if such person(s) acquires an interest over shares with voting rights or any other equity instrument above 25%, 50% or 60% of the total voting shares in the company or enters into a contract which grants such person to obtain a controlling stake or appoint the majority of members of the board of directors), then the acquisition will trigger the obligation to launch a mandatory tender offer (Oferta Pública de Adquisición – OPA).

The mandatory tender offer is a protection that enables minority shareholders to be included in a change of control transaction.

The mandatory tender offer can be launched as part of the change of control transaction of subsequently within a 4 month period following the change of control transaction.

In that regards, in the first scenario, if the person will be acquiring (i) an interest below the abovementioned thresholds; (ii) any other equity instrument which are not shares with voting rights or any other instrument or contract that could give such person control of the publicly traded company, then the acquisition will be performed in the stock market through a stock trader.

In the second scenario, the purchaser may also enter into an agreement with the controlling shareholder to acquire its shares directly. Once the shares of the controlling shareholders are acquired by the purchaser, the purchaser must launch a mandatory offer (OPA Posterior) to the remaining shareholders for a number of shares resulting from a formula set in the Tender Offer Regulation.

With respect to the price of the tender offer, the price would be the one set by the purchaser except for the second scenario of the subsequent tender offer, where the price per share must be equivalent to the price set by an independent appraisal entity, following the pricing methodologies set in the Tender Offer Regulation (which include, Comparables Approach, Discounted Cash Flow, Precedent Transactions, Asset Based Value, Book Value Approach).

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?

The Companies' Registry and other Governmental Agencies have general information on a target company (i.e. certain representatives, registered capital stock, litigation, etc.). However, that information is not necessarily updated or complete, so it is customary for the purchaser only to request and pay for information which have not been deliver during the due diligence process or would want to have certainty of the information received.

Information that only the target company may disclose as it is consider private information under Peruvian law is:

- Identity of the shareholders and their current equity interest (unless it is a public company)
- Financial statements (unless it is a public company)
- Arbitration procedures
- Private contracts (e.g. financial agreements and debt instruments, service agreements, joint ventures, employment contracts, etc.)
- Tax returns and tax investigations by the Peruvian tax authorities.
- Administrative sanctions
- Some licenses and permits issued by the Peruvian local municipalities authorizing the use of property for business purposes.

Notwithstanding above, the following information from public companies is publicly disclosed:

- Identity of the shareholders and their current equity interest if the hold, at least, 5% of the total capital stock of the target company
- Financial statements, including annual, quarterly and mid-term financial statements
- Relevant information disclosed by the target company in accordance with Relevant Matters and Reserved Information Regulation (Resolución de Superintendencia N° 0005-2014, Relgamento de Hechos de Importancia e Información Reservada).
- Dividends policy
- Corporate governance policy.
- Economic group information.
- Financial information.
- Sanctions imposed by the SMV.

The sellers or the target company cannot be obliged to disclosed all their information but the purchaser, during the negotiation of the share purchase agreement, may include (i) detailed representations regarding the target company; and, (ii) sand-bagging provisions.

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

Due Diligence is performed customarily in all M&A transaction. However, the depth of such Due Diligence will depend on the purchaser needs. Anyway, our advice is to always perform an in depth Due Diligence. Executive Due Diligence is regularly composed by (i) corporate law; (ii) tax law; (iii) labor law and employment; (iv) contracts; (v) finance, and (vi) main regulatory issues. A complete Due Diligence is composed by all legal practice areas, depending on the target company industry sector.

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

Although the sellers may decide on their own to sell their shares, customarily a Shareholders' Meeting approved the transaction through a resolution. Especially if the shareholders have pre-emption rights over the transferred shares. In the resolution, the shareholders will waive their pre-emption rights in favor of the purchaser.

In the case of public companies, the Tender Offer Regulation requires the Board of Directors to issue and opinion in connection with the advantages and disadvantages of the tender offer within the 7 Lima Stock Exchange's business days following its day of launch.

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

Directors:

- Act within their powers
- Act on the benefit and the best interest of the company
- Exercise independent judgment
- Exercise reasonable care, skill and diligence
- Avoid conflict of interest
- Duty of loyalty
- Duty of case

Controlling shareholders must respect the minority shareholders rights and act within the scope of the Peruvian law.

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

Employees or other stakeholders would only have specific approval, consultation or any other right if there is written contract with the Target Company with a change of control provision (which, for the case of employees, is very an uncommon provision to have). However, in case of breach of this provision, the consequences are that the contract is terminated (in the case of financing agreements, the corresponding facility can be accelerated and any collateral securing the contract can be foreclosed) by default and the Target Company must indemnify the other party. Customarily, the Target Company give notice to such parties (especially to financial entities) and generally they waive their rights to the change of control provision or conditioned it to certain matters prior to grant such waive.

As mentioned before, in the case of certain companies that hold certain assets or permits might require authorizations from other governmental bodies. In example, companies holding a PPP concession in toll roads will require a prior authorization from the competent regulatory body (Ositran) and the governmental grantor of the concession.

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

Conditionality is generally accepted if the sellers must perform an act prior to closing e.g. cancel an encumbrance over relevant assets or amend any internal procedure in the Target Company. Currently, it is a contractual matter agreed by the parties. Additionally, if the Merger Control Act is applicable, the transaction will be conditioned to the approval by INDECOPI before closing.

In the specific case of public companies -moreover, addressing specifically tender offers- Tender Offer Regulation allows that a tender offer is conditioned to certain terms and conditions (e.g. a minimum floor of shares is acquired through the tender offer).

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

In a non-competitive process, it is customary that the acquirer requests a deal exclusivity provision to the sellers of the Target Company in the non-binding offer letter and the sellers and/or the sellers of the Target Company grant such exclusivity. The deal exclusivity is commonly granted between 60 and 90 days, but it can be renewed for an additional period, prior negotiation between the parties.

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

Once the exclusivity is secure it is common to obtain break-up fees in case one of the parties opt out of the transaction without reasonable cause.

Also, in the Share Purchase Agreement (SPA), acquirers most frequently deal protection and cost coverage mechanisms are escrow accounts, confidentiality, non-compete and non-solicitation clauses and indemnification clauses.

14. Which forms of consideration are most commonly used?

Cash consideration is the most commonly used. But other forms of considerations such as share exchange or asset consideration have been used in M&A transactions in Peru.

In the case of mining deals, it is common for part of the consideration to be paid with mining royalties obtained from the revenues of the sale of extracted minerals by the target company after closing. This royalty typically ranges between 1% to 3% of the revenues and is paid to the seller on a regular basis, usually monthly or quarterly.

The SPA must include a valuation method to calculate the mining royalties to be paid in order to cover the outstanding amount of the purchase price of the shares. This valuation can be based on various factors such as the expected lifespan of the mine project, the quality and quantity of the mineral deposits, and the current market price of the extracted mineral. Generally, the value of a mining royalty can be estimated by projecting the future revenue stream from the mine and discounting it back to its present value using an appropriate discount rate.

It is important to note that the value of a mining royalty can vary over time depending on changes in market conditions and the performance of the mine. Therefore, it is crucial for the SPA to regulate this event and provide a mechanism for adjusting the payment of mining royalties in case of significant changes in the value of the mine.

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

For private companies, there is no mandatory obligation to publicly disclosed ownership levels. For public companies, all information regarding the shareholders that hold at least 5% of the capital stock of the target company is public. Disclosure obligations reach the ultimate beneficial owner.

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

For private M&A transactions, it will only be publicly disclosed if the parties agree to disclose it and once the transaction is closed or when the SPA is executed (if the signing date and the closing date are deferred). In transaction that may bring media attention, parties may decide only to partially disclose the M&A transaction.

For public M&A transactions, the negotiation must be reported to the SMV but it can be reported as a reserved matter and the SMV will not publicly disclose the negotiation. Once the binding offer is accepted by the shareholders, the transaction becomes publicly disclosed.

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

No. The maximum time period is negotiated between the parties. Regularly it will be the same time as the exclusivity period mentioned in section 12 above. Parties may continue to negotiate once the exclusivity period terminates but it will be under the purchaser’s risk.

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

No, parties are free to set the shares’ price. But it must be taken into consideration that the Peruvian tax authorities may object and may start an inspection if the share price is below market value.

However, only in the case of a posteriori takeover bids, the minimum price to be offered for the listed securities has to be determined by a valuation entity and must be formulated within 4 months from the date on which the tender offer is launched or within 5 days from the issuance of the valuation report, whichever occurs first. Likewise, in this scenario, the tender offer must be performed in accordance with the formula established in Annex 1 of the Peruvian Tender Offer Regulations.

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

No. According to the Peruvian Corporations Act financial assistance by the Target Company is prohibited, including granting security interests by the Target Company to the buyer or any of its affiliates. Private equity transactions have been performed in Peru by using complex corporate and tax structures that will not be categorized as financial assistance.

20. Which governing law is customarily used on acquisitions?

Peruvian law is the customarily used on acquisitions in Peru. But foreign law may be used in some transaction where foreign parties are involved, but the parties must consider that in case of conflict of law, Peruvian law will prevail.

New York law is the customarily used in Peru for acquisition at an international level.

21. What public-facing documentation

must a buyer produce in connection with the acquisition of a listed company?

- The prospectus.
- The notice to be publish by the SMV, the Lima Stock Exchange, in the Peruvian Gazzette and in a newspaper.
- The corporate authorizations.
- The offeror's guarantee equivalent to the total consideration.

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

For private M&A transaction, parties must enter into a share purchase agreement (SPA) to document the transfer of shares. The Target Company will register such transfer in the Shares' Ledger (which is held under custody by the Company's CEO). There are no share transfer taxes or stamp duty, but the sellers will have to declare such transfer in their tax return filed to the Peruvian tax authority – SUNAT. The tax rate will depend if the sellers are individuals or corporations and if the transfer is conducted through the Lima Stock Exchange or not.

For public M&A transaction, transaction documentation will depend if the takeover is (i) a prior (OPA previa); or, (ii) posteriori (OPA posterior). Notwithstanding, the prospectus and the offeror's guarantee are essential documentation in both type of public takeovers. There is not share transfer tax or stamp duty in public takeovers. Shares are registered electronic by an agency named CAVALI.

23. Are hostile acquisitions a common feature?

No. There have been very few hostile acquisitions in the last 20 years. However, there has been hostile acquisitions in foreign jurisdictions which have affected directly in their Peruvian subsidiaries.

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

As hostile takeovers are not common, there has been little or no experience on protective measures. However, certain bylaws and directors' agreements contain provisions such as poison pills or "sale of crown jewels" that can be activated upon a hostile takeover.

Additionally, directors and executive officers may have golden parachute clauses in their employment agreements that entitle them to severance payments if they are terminated from their positions due to a change in control of the company. Under Peruvian law, there are no specific regulations or guidelines from competent governmental authorities regarding the inclusion of golden parachute clauses in Peru. However, Peruvian Labor Courts have recognized golden parachute clauses in employment agreements, including those between companies and executives.

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

In public M&A transactions, the buyer will be obliged to make an offer to the minority shareholders in a posteriori public takeover (OPA posterior). In this case, the buyer and the majority shareholders may enter into an agreement out-of-the-counter. Once the shares from the majority shareholders are acquired, the buyer has 4 months to make an offer to the minority shareholders. The valuation of the minority shareholders' shares will be performed by an appraiser appointed by the SMV and the number of shares to be acquired by the buyer are calculated by a formula set in the Tender Offer Regulation.

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

Minority shareholders have the right to: (i) attend Shareholders' Meetings and vote; (ii) receive payment of dividends; (iii) the shareholders holding a least 20% of the voting shares may request to convene a Shareholders' Meeting. In the case of publicly-traded companies (Sociedad Anónima Abierta – S.A.A.), the threshold is 5%; (iv) request information on the target company; (v) the shareholders holding a least 10% of the voting shares may request to audit the target company's financial statements; and (v) shareholders may separate from the company in case they vote against a share capital decrease, merger or consolidation, spin-off, transformation of type of company or redomiciliation.

In accordance with Article 181 of the Peruvian Corporate Act, derivative actions for liabilities are judicial or arbitration actions, which allows shareholders representing at least one-third of the company's share capital to sue the managers (directors or managers) for damages caused to the company, provided that the claim is in favor of the company and not under the particular interest of the shareholders, and that they have not approved the resolution that caused the damage to the company.

On the other hand, the Peruvian Corporate Act also provides for individual liability actions against the company's managers for damages caused to shareholders or third parties. These actions are taken in cases of non-compliance with the duties and obligations that correspond to the managers and can be filed by any affected person, not necessarily a shareholder.

Nonetheless, a shareholder holding at least 60% of the voting shares will have absolute control of the company unless the company's bylaws or a Shareholders' Agreement between the majority shareholder and the minority shareholders establishes higher voting thresholds.

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

Besides OPA Posterior already explained, minority stakes can only be compulsorily acquired if there is a drag-along right for the majority shareholder agreed between the shareholders in a Shareholders' Agreement.

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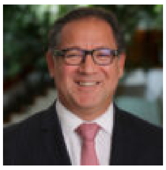

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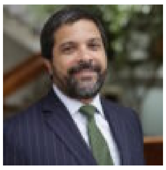

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