Chile

MERGERS AND ACQUISITIONS OF COMPANIES

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THE ACQUISITION OR TAKING OF CONTROL OF COMPANIES

As a general rule, Chilean Commercial Law is governed by the dual principles of autonomy and free will. That is to say, everything is permitted except that which is contrary to the law. This can be contrasted with Chilean Public Law or Public Order Law, under which it is only possible to do that which is permitted by law or regulation.

In the context of corporate acquisitions and takeovers, this means that in general such transactions can be performed freely, based upon private agreement between the parties and without the intervention of governmental or regulatory authorities, *except to the extent that restrictions have been expressly enacted* under applicable legislation. In this respect there is no difference between the treatment extended to Chilean nationals and to overseas investors.

When examining the restrictions governing the acquisition of businesses in Chile, in particular the laws regulating the acquisition of corporations, it should be emphasised that this matter has not been systematically addressed in Chilean legislation. Instead, distinct bodies of legislation have grown up governing the acquisition of businesses in different industry sectors, such as telecommunications, finance, insurance, the ports, the ownership of ships and other similar fields of activity. This type of piecemeal approach to legislation is not unusual and indeed is understood to be relatively commonplace in the legal systems of other countries.

It is important to note that there has recently been enacted and published in Chile one of the most important bodies of legislation to be passed in recent years for the regulation of Public Offerings of Shares (la Ley de Oferta Pública de Acciones). This Law governs open corporations, that is to say, corporations whose shares are traded on Stock Exchanges. It also regulates certain other companies in which the public interest is involved because of the number of shareholders holding shares of the company and we could say about it that it is a Public Order Law in general terms. This Law modifies or impacts upon the following laws:

LAWS GOVERNING THE STOCK MARKET

Public share offerings falling into the following categories must follow the procedure set out in this Law:

- Offers that permit the offeror to take control of a company.
- The offer that must be made by a controlling shareholder, for the purpose of acquiring more than two-thirds of the shares of a company that offers its shares to the public. ➡

- If a person seeks to acquire control of a company that itself controls a company that offers its shares to the public and that represents 75% or more of the consolidated asset value, that person must firstly make an offer to the shareholders of the public company, following the rules of this chapter, to acquire a quantity of shares not less than the percentage shareholding that enables such person to take control.
- Every person who, directly or indirectly, seeks to take control of a corporation that offers its shares to the public, regardless of the manner of acquisition of the shares and including acquisitions by means of direct subscription or through private transactions, must give prior notice to the general public, and must set out the procedure that is to govern the performance of the OPA.
- Failure to perform this procedure will not render the transaction invalid, but such failure will give to shareholders and to third parties affected by or involved in the transaction the right to demand compensation for recoverable losses suffered. In addition, there will be the potential for administrative sanctions to be applied, as set out in the various applicable laws.

Laws governing activities in the banking sector

- In general, acts tending towards the merger, taking of control or acquisition of a significant part of a financial institution require the prior authorization of the Superintendent of Banks and Financial Institutions.
- It is important to emphasize that in the field of corporate mergers and acquisitions, the past 15 to 20 years in Chile have seen a growth in the influence of commercial and contractual practices emanating from the Anglo Saxon jurisdictions, although the Chilean legal system is itself of Continental Roman origin.
- As a result of such influences, procedures such as, for example, due diligence, as well as many of the procedures and conditions to be found in the Shareholders Agreements, are very similar to those that regulate transactions entered into in the Anglo Saxon jurisdictions.

THE MERGER OF COMPANIES

Corporate merger is regulated in Chile under Law No. 18.046 concerning corporations (La Ley de Sociedades Anonimas), as well as by other ancilliary rules and regulations.

Articles 99 and 100 of the Law allow for the merger of two or more companies into one company that takes on all of the rights and obligations of the absorbed company and receives all of the patrimony of the absorbed company. The steps taken to implement a merger are juridical acts regulated by the Private Law, without administrative intervention, except in the case of the merger of Banks, Financial Institutions, Insurance Companies and other such entities.

Two principal classes of merger can be identified under Chilean law, namely merger by creation and merger by absorbtion. Neither class involves the liquidation of the merged or absorbed companies. This means that Chilean law enshrines the principle of confusion of patrimony. Pursuant to this principle, purely by operation of the law, the patrimony of the absorbed company will form part of the patrimony of the absorbing company. Below are some of the legal factors that could be material to any planned merger.

Free competition

In Chile, Decree Law N° 211 of 1973, later recast as Decree N° 511, is applied to safeguard the existence of free and fair competition by economic agents, through the Comisiones Preventivas, Resolutivas y Fiscalía Nacional Económica (the National Economic Preventative, Resolutory and Investigative Commissions). Their purpose is to prevent, investigate, correct and impede any attempts to frustrate the existence of free competition, or any abuse of a dominant market position, even when the activities of such entities do not amount to a crime.

A merger may give rise to this type of conduct, especially when the merger results in horizontal integration that is intended to capture a substantial share of the market. The regulatory role of these organisations is not limited to the giving of warnings. On the contrary, such bodies have coercive powers that can be enforced by means, for example, of penal sanctions against the legal representatives of the infringing corporations. (*Fusion de Empresas German R Pinto.*)

Tax considerations

Many material tax considerations must be borne in mind when planning a merger. These include, for example, opportunities to take advantage of tax losses, tax credits under the value added tax legislation, payment of taxes that could be triggered by the act of merger itself, the value of the merged assets from a tax accounting perspective and so on.

In addition and also from a tax perspective, the shares received by a shareholder as a result of the merger are not treated as the withdrawal of profits and from this tax viewpoint, the transaction does not give rise to negative effects.

Although the laws governing merger tend to concern shareholding corporations, a large part of the relevant doctrine also allows for the merger of other types of legal entity. The implementation of such transactions in usually unproblematic.

From a tax perspective, corporate merger permits

the profits or losses of one company to be offset against those of the other company. (*Fusion de Empresas German R Pinto.*)

THE POSITION IN LATIN AMERICA

Many of the legal systems to be found in Latin American countries share a common origin, namely Roman law roots with a French influence. This has given rise to a large number of similarities in the Civil and Commercial legal frameworks of those countries. Nevertheless, important differences exist, especially in the fields of tax, the promotion of foreign investment, environmental legislation and labour laws. These are all areas that must be considered before a final decision is taken to invest. In addition, it must be remembered that the laws of each country in these various fields operate independently of the laws in operation in other countries of Latin America and there are no direct links between them, making cross-border mergers a virtual impossibility.

In any event, the following principal points will need to be reviewed prior to the making of any investment decision:

Laws and Regulations Governing Foreign Investment:

The foreign investment legislation or bilateral treaties of each country will generally establish mechanisms that must be followed and that will grant particular rights to the investor, especially in relation to the tax rates that are to govern the transaction for particular periods of time, non-discrimination rights, rights of access to the formal currency market for the remitting overseas of capital and profits, and so on.

Tax

If the investor makes the investment directly from its country of origin, a review of the legislation of that country will be required to ascertain whether taxes paid in the country receiving the investment will be taken into account in the investor's home country, in order to avoid double taxation. Consideration should be given to the various treaties in existence between particular countries, aimed at avoiding double taxation. It may be necessary to consider making the investment through the medium of a company incorporated expressly for this purpose, whether that new company is to be incorporated in the country in which the investment is to be made (with the objective of taking advantage of available tax advantages), or alternatively in another jurisdiction.

This is because of problems that can be caused in Latin America by the application of diverse tax legislation and different tax rates, depending upon the country of destination of the investment. Even when double tax treaties are formally in place, it is not unusual for the investor to find itself faced with possible exposure to double-taxation owing to the complexities and bureaucracy of some taxation systems.

Again from a tax perspective and by way of forward planning for any eventual disposal of the investment, it may prove to be appropriate to perform the transaction through the medium of a company which only have the aforementioned purpose.

Companies whose shares are traded on the stock exchange

As a general rule, any foreign investor may freely acquire a company, whether in whole or in part. In many countries in the region, the investor will be required to register a domicile and to obtain from the tax authorities of the relevant country an authorisation for the purpose of levying taxes.

The countries of Latin America do not share a common body of legislation governing the acquisition of companies, whether or not listed on a Stock Exchange.

In Chile and in general elsewhere in Latin America the laws governing the acquisition of companies that do not trade their shares on a Stock Exchange are to be found in the civil and commercial legislation of each country

Turning to companies whose shares are traded on Stock Exchanges, practically all Latin American countries have enacted legislation governing public offers to make acquisitions and laws for the protection of minority shareholders.

In any event, as a general governing principle, there is an obligation to perform a public offer for shares in a company not only in the case of a taking of control, but also when a shareholder acquires a relevant proportion of the company's shares that enables that shareholder, in practice, to decide, in its own discretion, upon the core policies and direction of the company. ➡

Vial y Palma

Vial y Palma was formally founded in 1938, but with members of both families having been dedicated to the practice of law on an uninterrupted basis since the start of the nineteenth century. Agustín Vial S. became a lawyer in 1797, and José Gabriel Palma V. became a lawyer in 1819, opportunity in which they worked together. Vial y Palma has evolved into a full service corporate . The principal areas of specialisation are antitrust, arbitration, banking, bankruptcy, and Insolvency, Business Law, Corporations (open and closed), Debt Recovery, Distributorship, E-commerce, Employment, Environment, Estates, Foreign Investment, Franchise Law, Intellectual Property, Internet, Investment, Joint Ventures, Landlord & Tenant, Litigation, Mergers & Acquisitions and Related Commercial Transactions, Project Finance, Real Estate, Development & Construction, Securities, Shipping, Taxation, Labour, Technology, Telecommunications and Media, Trade Finance, Visas, Shareholders Agreements.

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