

The information in this article provides an overview of the fundamental legal considerations to be addressed when acquiring or establishing a business in the Colombia. This publication is for general information only and should not be used as a basis for specific action without obtaining legal advice.

Acquiring Business in Colombia

INTRODUCTION

Acquiring a business in Colombia requires addressing several legal and commercial issues. This document provides an overview of some of the legal issues that a foreign investor must consider when entering into an acquisition of a Colombian business.

It should also be noted that, under Colombian law, the following businesses cannot be controlled by foreign investors:

- National security and defense industries; and
- Industries related to the handling of toxic, dangerous or radioactive waste produced outside Colombia;

Investment in other industries may require authorization or are limited. For example, foreign investors can only control 40% of the equity of companies operating public broadcasting television channels. Other industries, such as the oil, mining and financial industries require approvals from the Government prior to the closing of an acquisition.

Acquiring a public company requires additional steps, different from the ones applicable to private transactions. The general considerations that follow apply to private transactions, but we also provide a brief summary of publicly traded companies' acquisition rules.

INITIATING THE TRANSACTION

Investors interested in acquiring an existing private business in Colombia can opt for at least three alternatives:

- Acquiring a controlling interest in the equity of an existing company;
- Acquiring the entire production and/or commercial assets of a company in Colombia;
- Acquiring some of the production and/or commercial assets to a company in Colombia.

Under the first scenario, the buyer acquires all of the assets and liabilities of the company (although the seller can offer indemnity provisions for certain liabilities). The controlling interest can be acquired by either buying out the shareholders or by capitalizing a company by acquiring newly issued shares.

In the second and third cases, the buyer is deemed successor to the seller for certain obligations (such as labor obligations), but not for all of the seller's liabilities.

ACQUISITION VEHICLE

When acquiring control over an existing Colombian company, the buyer can act as a foreign investor and need not to establish a Colombian acquisition vehicle. In this case, the buyer will acquire shares in the already existing Colombian company and the foreign investment will be registered as such before the Central Bank (Banco de la República).

If the acquisition involves buying production lines or selected assets, the buyer will need to establish a local presence as, once the acquisition is completed, it will be deemed to have a permanent business in Colombia. The local vehicle can be either a branch of a foreign company or a locally incorporated company.

THE ACQUISITION PROCESS AND DOCUMENTATION

It is common that before entering negotiations, a confidentiality agreement is executed by the prospective seller (the target) and buyer. Confidentiality agreements in Colombia protect undisclosed information and the secrecy of the transaction itself. The standard terms of confidentiality agreements in the context of acquisition allow for the access to the target's information of interest to the prospective buyer. It may also cover the buyer's information related to the seriousness of the offer.

Once the confidentiality agreement is executed, the buyer conducts a due diligence to examine the target and determine liabilities and the upside of the transaction. The usual issues examined in due diligence are:

- Financial issues;
- Corporate governance;
- Commercial issues, including contracts;
- Labor issues,
- FCPA and compliance issues, including antitrust liabilities; and
- Permits and authorizations, if applicable.

Once the due diligence has been prepared, the parties may execute a letter of intent by which a window of exclusive negotiations is established. Acquisitions may also be structured as competitive bids, in which case, the process is not exclusive in nature.

If buyer and seller reach an agreement, then a Sales Purchase Agreement (SPA) will be drafted. SPAs contain the terms of the transaction, including closing dates, price, form of payment, and declarations from buyer and seller and indemnity clauses, if any. Closing can be conditional on the completion of tasks or securing approvals. The most common closing condition in Colombia is related to antitrust considerations.

ACQUIRING A PUBLIC COMPANY

Takeovers of public companies have to be disclosed in accordance with the requirements established by the Financial Superintendence. As a general rule, when acquiring a publicly traded company, it is necessary to act through the Colombian stock market where the target is listed. However, there are four exceptions to the outlined general rule:

- Reacquisition by the issuer of its own shares;
- Acquiring shares of Colombian company traded in a foreign stock exchange;
- Transactions between companies controlled by the same individual or entity; and
- Acquiring shares of foreign companies registered in Colombia, when the transaction is to be carried out abroad.

Public tender offers are required in two scenarios (unless the shareholders unanimously approve the transaction without requiring a public tender offer):

- i. When an individual or entity, directly or indirectly, is to acquire 10% or more of the outstanding shares or a company; or
- ii. When a shareholder with 10% or more of the shares of a listed company is set to increase its participation in 5% or more.

For purposes of control, any number of transactions made within a 120 day term, involving the same parties with substantially similar terms and conditions are deemed a single transaction.

MERGER REVIEW REGIME

Under the Colombian antitrust laws, any transaction in which a merger or acquisition occurs between companies active in the same economic activity or part of the same value chain, has to be reported to the

Superintendence of Industry and Commerce (hereinafter “SIC”), provided that one of the following thresholds is also met:

- i. The operational income of the companies involved in the transaction, for the tax year preceding the transaction, exceeds 100.000 times the Colombian minimum monthly wage (COL\$68.945.400.000, about US\$20.500.000in 2016); or
- ii. The assets of the companies involved in the transaction were valued, in the tax year preceding the transaction, at above 100.000 times the Colombian minimum monthly wage (COL\$68.945.400.000, about US\$20.500.000in 2016).

For purposes of calculating the thresholds, the Colombian income or assets of the parties involved in the transaction has to be added to any Colombian income or assets of any other company related to the parties involved in the transaction (i.e. controlling or controlled companies), which are also involved in the same economic activity, or are part of the same value chain, of the parties involved in the transaction.

Depending on the market definition to be adopted, a transaction may be subject to a notification or a clearance filing. Notifications are allowed for transactions in which the parties hold a market share below 20% in the relevant market of the transaction. Once the notification is filed the parties can close.

Clearance procedures are conducted through a two prong analysis. SIC can approve, demand remedies or block a transaction. Failure to report a transaction subject to the reporting requirement, or gun jumping, is subject to fines for both companies and individuals. Companies can be fined up to 100.000 times the Colombian minimum monthly wage (COL\$68.945.400.000, about US\$20.500.000), whilst individuals can face fines of up to 2.000 times the Colombian minimum monthly wage (COL\$1.378.908.000, about US\$405.000).

FOREIGN INVESTMENT

In Colombia, direct foreign investment needs to be registered with the Central Bank (Banco de la República). According to the Colombian Exchange Regulations, every income and outcome of foreign currency to and from Colombia is considered a foreign exchange operation.

Foreign exchange operations are classified as: (i) free exchange market operations, and (ii) regulated exchange market operations.

This regulated exchange market is controlled by the Colombian Central Bank. Pursuant to Colombian law there are eight (8) operations which both residents and non-residents have to inform and register before the Central Bank, namely:

- Imports and exports of goods;
- Foreign indebtedness and related financial costs;
- Foreign investments and their corresponding profits;
- Colombian investments abroad and their corresponding profits;
- Financial investments in bonds and assets;
- Guarantees and endorsements;
- Operations involving with derivative-based operations.

The above mentioned operations must be handled through:

- Authorized foreign exchange intermediaries (financial entities), or
- Compensation accounts, registered as such before the Central Bank. If the account is not registered before carrying-on an operation in the exchange market, such registry shall be made within the first month following the date of the operation.

When a company performs an operation in the exchange market, it must fill out an exchange form containing all the operation's data (this form varies depending on the kind of operation). Such form must be submitted before the Central Bank through the exchange market intermediaries or directly to the Central Bank in the case of a compensation account.