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Chile

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Carey y Cía

1 Types of transaction

How may businesses combine?

The most common forms of business combinations are as follows.

Purchases of shares or assets of the target company

Purchases of shares are relatively free of restrictions unless the target company is a public corporation (ie, a company that has its shares registered with the Chilean securities and insurance regulator, the SVS), one of the parties to the transaction participates in a regulated industry or the entity resulting from a business combination raises competition issues.

Merger

Either through the absorption of one company by another or through the creation of a new entity.

Tender offer for the shares of the target company

Unless a legal exemption is available, the only way to take over a public corporation is through a tender offer, the procedures of which are regulated in detail in the Securities Act and SVS regulation, ensuring equal opportunity and fair dealing among all shareholders of the target company.

Contractual joint venture or by incorporation of a legal entity

There are neither specific rules nor a framework regarding joint ventures in Chile, which are governed by contractual law or the relevant legal entity regulation, as the case may be.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations are the Civil and Commercial Codes, the Limited Liability Company Act, the Corporation Act (with its regulation), the Securities Act, the regulations issued by the SVS in the case of public corporations and, under certain circumstances, the Competition and Antitrust Act.

3 Governing law

What law typically governs the transaction agreements?

Chilean law typically governs the transaction agreements.

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?

No stock exchange filings are necessary in connection with business combinations. When the target company participates in a regulated business, such as banks, insurance companies, pension fund administrators (AFP), mass media or casinos, among others, the government authorisations mentioned in question 17 apply.

There are no stamp taxes or other governmental fees payable in connection with completing a business combination.

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?

The kind and level of information that needs to be made public in a business combination depends on the type of structure and entities involved. Generally, transactions between private companies in businesses other than those mentioned in question 17 have no disclosure requirement.

In transactions requiring the approval at the shareholders' meeting of a public corporation, the shareholders, the SVS and the stock exchange where the corporation is listed must receive, at least 15 days before the date of the meeting, notice of the shareholders' meeting with the matters to be submitted for approval. Such notice must also be published in a newspaper at least three times prior to the meeting. Any report prepared for the meeting (eg, valuation reports, directors' opinion and audited financial statements of the companies to be merged) must be available for review by the shareholders at the company's offices and posted on the company's website.

Takeover of a public corporation by means other than a tender offer (explained below) requires the person that, directly or indirectly, intends to take control of the public corporation, to previously disclose such intention to the public in general. For such purposes, a written communication must be sent to the target company, to the companies that control or are controlled by the target, to the SVS and to the stock exchanges on which the target's securities are traded. With the same purpose, a prominent notice must be published in two nationally circulated newspapers and posted on the website of the person with the intention of taking control at least 10 business days prior to the closing of the deal or as soon as negotiations between the parties are formalised (for example, the execution of a memorandum of understanding (MoU)) or confidential information from the target is delivered to the buyer.

The contents of such written communication and notice are determined by the SVS. Once the takeover is completed, the new controlling shareholder must, within two business days of closing the transaction, publish a notice disclosing said event in the same newspapers and send a written communication to the above-mentioned persons.

When the takeover is carried out through a tender offer, the bidder shall:

- publish a prominent note in two nationally circulated newspapers the day before to the commencement of the offer;
- make available to the public (and deliver to the SVS and the stock exchanges) as of the date of the notice of commencement

of the tender offer and during the term of such offer, a prospectus containing all the terms and conditions; and
- publish the results of the tender offer on the third day after the expiration of the term of the offer or extension thereof in the same newspapers in which it published the notice of commencement, describing the total number of shares received, the number of shares that it will acquire, the pro rata factor, if applicable, and the percentage of control it will achieve as a result of the tender offer.

In addition, each board member of the target company shall prepare and issue a written report in which they express their opinion as to the suitability of the tender offer to the shareholders. Such report must indicate the relationship of each director with the controlling person of the issuer and with the offeror and if each such director has an interest in 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?

The Securities Act and regulations enacted thereunder by the SVS provide that any person who, either directly or through other persons or legal entities, owns or acquires 10 per cent or more of the capital of a public corporation and every director and manager of such public corporation (notwithstanding the number of shares they own), shall report his stock ownership to the SVS and to the stock exchanges where such company has listed its shares no later than the day after any purchase or any transfer of shares is made, or any commitment or contract is signed or the entering into any contract or derivative product linked to the value of shares of such company. The SVS must receive such reports through its online system of information delivery, the SEIL.

In addition, the reporting party must inform whether the purchase of shares is a bid to acquire control of the company or will just be a financial investment.

These disclosure requirements are not affected if the company is a party to a business combination.

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?

Directors have a fiduciary duty to the corporation and they have to perform their role in the best interest of all shareholders, and not merely in the interest of those who elected them. In exercising their duties, board members must exercise due care and they are jointly and severally liable for damages caused to the corporation and its shareholders due to their wilful or negligent conduct.

Controlling shareholders owe no fiduciary duties to the corporation or the rest of the shareholders, but the Corporation Act establishes that every shareholder must exercise its rights in the company respecting the rights of both the corporation and the rest of the shareholders. However, controlling shareholders of public corporations may not take advantage of the company's business opportunities unless the board of the company expressly discards the opportunity or a year has passed since the company stopped the development of such opportunity.

8 Approval and appraisal rights

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

Shareholders' approval by the affirmative vote of two-thirds of the issued voting shares is required to dissolve, transform, merge or split up the corporation, issue bonds or debentures that may be converted into shares, sell more than 50 per cent of the corporation's assets (or the control or more than 50 per cent of the assets of a relevant subsidiary of the company) and grant real or personal guarantees to secure third-party obligations (except in the case of subsidiary corporations, in which case the approval of the board of directors shall be sufficient).

The approval by the shareholders at the shareholders' meeting of the matters described above (except for split-up), among other cases, gives dissenting shareholders the right to withdraw from the company. In this case, the company has to purchase the dissenter's shares. The purchase price of the shares depends on whether the shares are listed on a stock exchange and how great their trading volume is. If they are listed and have a significant trading volume, the purchase price will be the average market price during the two months immediately before the shareholders' meeting that triggered the dissent. In all other cases, the purchase price will be the book value.

Likewise, shareholders have withdrawal rights when a person acquires a shareholding equal to or in excess of two-thirds of the issued voting shares of a public corporation by a means other than a tender offer for 100 per cent of the shares or a legal exemption to the mandatory tender offer, and such person does not launch a tender offer for all the remaining shares of the corporation at a price at least equivalent to the price that would have been paid to a dissenting shareholder.

When the controlling shareholder acquires a shareholding in excess of 95 per cent of the issued shares of a public corporation (notwithstanding the means to reach such shareholding), all shareholders shall have the right to withdraw and to have their shares purchased by the corporation within 30 days of the publication in a nationally circulated newspaper of the notice by the controlling shareholder that the requisite shareholding has been reached.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unsolicited (hostile) transactions are extremely rare in Chile because almost all of the public corporations have a controlling shareholder with a stake large enough to block any takeover attempt (either as a tender offer or a proxy campaign).

Further, although defensive tactics are not expressly banned, the tender offer regulation provides that during the offer the target company may not acquire its own shares, approve the creation of subsidiaries, dispose of assets representing more than 5 per cent of its total assets; or increase its indebtedness by more than 10 per cent. The SVS, however, may authorise such transactions provided that they do not adversely affect the normal tender offer process.

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?

Break-up fees and reverse break-up fees are allowed in Chile and parties to a business combination are free to agree in whatever terms to such break-up as long as the amount of the fee is considered reasonable and not disproportionate (considering the opportunity cost and value created by the bidder). However, there is no relevant statutory or judicial guideline to construe what is a reasonable break-up fee.

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?

Generally no, but the SVS may intervene in a business combination involving a public company to oversee that all the requirements and provisions determined by law are fulfilled.

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?

Tender offers and exchange offers are irrevocable, but the bidder may include objective conditions of cancellation in the notice of commencement and the offer prospectus. For example, that a certain minimum of shares are tendered to the bidder or that certain provisions of the by-laws of the target company are amended. However, the tender offer cannot be conditioned to the financing and the prospectus must set forth how the bidder will finance the payment for the shares' purchase price.

In other types of cash acquisitions, there is no restriction (other than the seller's willingness) on including the financing of the purchase price or other terms as conditions precedent to close a business combination.

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?

Having the buyer's financing as a condition precedent for closing is uncommon, and therefore, usually the burden of the financing is on the buyer. Further, including representations and warranties on the financial capacity of the buyer to be able to close is becoming more common. Failure to close by the buyer due to lack of financing is treated like any other breach.

In general, there is no restriction for Chilean companies to give financial assistance in connection with a business combination. However, if at the time of the purchase the financing may be qualified as a related-party transaction for the target company giving the financial assistance, such assistance must be approved by the board on arm's-length conditions similar to those prevailing on the market, and could also need the approval by the affirmative vote of two-thirds of the outstanding voting shares. Should the target company wish to have its assets used to secure the buyer's loan with a third party, a special shareholders' meeting of the target company must approve such guarantee by the affirmative vote of two-thirds of the issued voting shares.

Exceptionally, banks are prohibited from granting loans, directly or indirectly, with the purpose of allowing the debtor to pay the shares issued by such bank.

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?

Since 1 January 2010, a squeeze-out mechanism for public corporations was incorporated in the Corporations Law. Although not yet fully tested, we can anticipate that the cumbersome mechanism provided for in the law may significantly limit its use. To implement the squeeze-out, is necessary that the by-laws of the company include a special provision allowing the squeeze out and such mechanism will be applicable only to the shares acquired by the shareholders after such special by-laws provision was in effect. The squeeze-out is triggered only when the controlling shareholder reaches a shareholding in excess of 95 per cent through a tender offer for 100 per cent of the shares of the company, provided that through such tender offer the controlling shareholder acquired at least 15 per cent of the shares of the company.

If the requisite condition is met, within 15 days following the end of the 30-day term for exercising the right to withdraw from the company explained in question 8, the controlling shareholder shall communicate its decision to squeeze out the minority shareholders by registered mail to each shareholder and shall publish a prominent note in a nationally circulated newspaper and on the company's website. The controlling shareholder shall pay the price of the shares of the shareholders squeezed out 15 days after the communication of the decision to buy out the minority shareholders and within such time, the shares will be registered under the name of the controlling shareholder.

Other than the squeeze-out mechanism explained above or unless shareholders consent to lose their status as shareholders of a corporation, no person shall lose such status as a consequence of an exchange of shares, merger, incorporation of a new entity, transformation or division of such corporation.

Further, shareholders have a legal pre-emptive right to subscribe, in proportion to the shares they hold, any newly issued share, debentures convertible into shares or any other securities that may confer future rights over those shares. This pre-emptive right may be waived and transferred by the shareholders to third parties.

15 Cross-border transactions

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

There is no specific legal or regulatory framework in Chile governing cross-border transactions. However, companies must comply with the law of Chile and the other relevant jurisdiction.

Foreign investment in Chile and the repatriation of an investment and its profits must be carried out through either the legal frameworks of chapter XIV of the Compendium of Foreign Exchange Regulations of the Central Bank of Chile or the Foreign Investment Statute, Decree Law No. 600.

Foreign exchange transactions may be freely carried out by any person. However, certain transactions must be reported to the Central Bank of Chile or carried out in the formal foreign exchange market (the FEM, comprising commercial banks and other authorised entities), or both.

In general terms, a person that purchases or sells foreign currency is not required to report such transaction to the Central Bank of Chile. However, purchases and sales of currency in amounts equal or higher than US$10,000 must be reported to the tax authorities by entities of the FEM.

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?

If the target company is a public corporation, the takeover notice referred to in question 5 is mandatory. Likewise, when the transaction is structured through a tender offer, such offer must be open for no less than 20 and no more than 30 days. The offeror may, however, extend the tender offer once only for a minimum of five and a maximum of 15 days.

17 Sector-specific rules

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

Banks

Prior authorisation by the Chilean banking regulator, the SBIF, will be necessary when more than 10 per cent of the capital shares of a

bank is acquired; a bank acquires shares in another bank; and a bank or group of banks achieve a significant market share as a result of a merger, acquisition of assets, takeover or increase in ownership at another bank.

Insurance companies

Prior authorisation by the SVS will be necessary for the acquisition of a 10 per cent or greater direct share of the capital of an insurance company. The shareholder acquiring such interest must report the identity of its controlling partners to the SVS.

AFPs (pension fund administrators)

Acquisition of 10 per cent or more of the shares of an AFP requires prior authorisation from the Superintendency of AFP.

Mass media

Any relevant event or act in connection with the transformation or change of ownership or control in a media company must be reported to the Antitrust Court within 30 days of its completion. However, in the case of media companies subject to the state-sponsored licensing system, relevant events or acts must be the subject of a previous report prepared by the Antitrust Court assessing their impact on the media market. This report must be issued within 30 days of the filing of the application, otherwise to be deemed as not meriting any objection.

Casinos

Transfer of shares of the corporation operating casinos in Chile requires the prior authorisation by the Superintendencia de Casinos de Juego (the casino regulator).

18 Tax issues

What are the basic tax issues involved in business combinations?

Share transactions must be generally effected at fair market value. The sale of shares is subject to income tax when a gain is obtained. The gain corresponds to any difference between the tax basis of the shares and the actual sales price. The general rule is that the tax basis in the sale of shares is their acquisition price, adjusted for inflation from the month preceding the acquisition to the month preceding the sale. Any amount exceeding the tax basis will be a taxable gain. The effective taxes applicable on the gain differ depending on the circumstances surrounding the sale of the shares. If the shares are sold by a non-habitual trader of the shares to an unrelated entity at least one year after their acquisition, the gain is subject only to a 17 per cent corporate tax. If any of these requirements is not met in a particular sale, the transaction will generally be subject to the same 17 per cent first category tax, plus the 35 per cent additional withholding tax, if the seller is a foreign non-resident or non-domiciled individual or entity (general tax regime). The 17 per cent corporate tax paid is a credit against the additional withholding tax due. If the seller is a local company, only the 17 per cent tax is applied until the local company makes a remittance of profits to its foreign shareholder.

If the seller is a non-resident taxpayer and the buyer is a resident taxpayer, the buyer may be required to withhold part of the purchase price to cover the tax liabilities of the seller arising from the sales transaction.

There are special tax treatments for capital gains realised: on the sale of stock by a foreign institutional investor, on the sale of stock that is actively traded on a stock exchange and on the sale of stock acquired prior to 1984.

Sales of offshore vehicles may be treated as a sale of a local company if the purchaser is a resident taxpayer. Sales of interests in a Chilean limited liability company are subject to special tax rules, both in relation to the applicable tax bases and the tax rate.

There are no transfer or indirect taxes imposed on either the sale of shares or in the sale of interest in a limited liability company.

Gains arising from the sale of assets are subject to the general tax regime. Gains are represented by the positive difference between tax basis and the sale price. The sale of inventory is subject to value added tax. The sale of fixed assets may be subject to value added tax, depending on the time elapsed since its acquisition.

Chile has enacted tax-free reorganisation rules which are mainly targeted at internal group restructuring, but which may sometimes be used in transactions with third parties. Reorganisation rules mainly allow implementing tax-free divisions, mergers and contributions. It is worth mentioning that reorganisation rules do not apply to sales.

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, changes in connection with the ownership, possession or holding of enterprises will not affect the rights and obligations of the employees pursuant to their individual or collective employment contracts. Those contracts will remain in effect and continue with the new employer. Please note that under Chilean labour and social security regulations, 'enterprise' means any organisation of personal, material and immaterial means (resources) ordered under an administration to achieve economic, social, cultural or charitable goals that has a certain legal individuality. Therefore, according to such provision, employment contracts would not terminate because of the transfer of the business (either by sale or merger). On the contrary, the employment contracts of all the employees would automatically continue with the new owner. Indeed, by mere operation of the law, all the employment contracts will continue in full force and effect with the new owner with the same rights and obligations, including seniority, vacation time, unions, and so on.

A business combination is not subject to consultation with, or authorisation from, any labour authority, works council, labour union or other similar body.

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?

Bankruptcy is primarily a procedure for the orderly liquidation and winding-up of the debtor. Its main purpose is to liquidate in a single preceding all assets pertaining to an individual or legal entity, to pay its debts to its creditors and not to protect the debtor.

The most important effects of the bankruptcy declaration are: the preclusion of the debtor's ability to administrate, manage and dispose of its assets; the creditors and their respective rights are determined; and suspension of the creditors' right to initiate or continue separate actions for compulsory collection.

The trustee or any creditor may claim that any sales, transfers and conveyances of the debtor's assets (among other possible transactions) in connection with a business combination executed during the 'suspect period' (up to two years before the debtor's bankruptcy declaration) is fraudulent and shall be declared null and void.

Creditors may agree, with special majorities, on the effective continuation of the debtor's business or on the disposal of the whole or part of the bankrupt estate as an ensemble or economic unit.

Effective continuation of the debtors' business requires the approval of a minimum of two-thirds of the creditors with voting rights. Should the mortgagees and pledgees vote in favour of the effective continuation, their rights to initiate or continue separate foreclosure is thereby suspended, provided of course, that the mortgaged or pledged assets form part of the debtor's business subject to the agreement of effective continuation.

On the other hand, the resolution regarding the disposal of the whole or part of the bankrupt estate as an ensemble or economic unit requires a specific proposition made by the trustee, as well as

the approval of the bankrupt debtor and the majority of the creditors with voting rights. The most important consequence of this agreement is that it suspends the right of mortgagees and pledgees to initiate or continue foreclosure separately from the other creditors, even if they do not give their consent to this agreement, provided the secured assets form part of the economic unit.

21 Anti-corruption and sanctions

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

Since December 2009, legal entities may be sanctioned, under certain circumstances, for specific crimes, including:

- concealing or disguising in any fashion the illegal origin of specific goods, knowing that they stem directly or indirectly from illegal activity (eg, trafficking of narcotic and psychotropic drugs, terrorist conduct, crimes related to securities market), acquires, possesses, holds or uses the goods mentioned above with the intention of securing profits or associates or conspires with the purpose of engaging in any of the acts described above;
- financing of terrorism; and
- bribery of national and foreign public officials.

The legal entities which are found guilty on the crimes indicated above may be subject to the following penalties:

- dissolution or cancellation, as applicable;
- temporary or perpetual prohibition to execute agreements with state agencies;
- total or partial loss of fiscal benefits, or prohibition to receive such benefits for a certain period of time;
- fines; and
- other cumulative penalties such as the publication of an abstract of the judicial conviction in a newspaper of national circulation, confiscation of the proceeds of crime and fines up to the amount equivalent to the investments made by the legal entity (if the crime involves amounts in excess of the relevant entity's income).

Update and trends

The government has announced that during 2011 a new regulation on corporations will be enacted, replacing the current regulation (Reglamento de Sociedades Anonimas) dated 1981, which has not been updated, although the Law on Corporations has been amended several times. The new regulation will include specific rules regarding capital increase and reductions, exercise of shareholders' rights (voting and information), appointment of directors, fiduciary duties and board meetings, withdrawal rights and further guidance for the process of transforming, dividing and merging corporations. This last aspect of the new regulation would be very important, considering that up to now the Law on Corporations has only very limited rules.

Further, certain entities (eg, banks, institutional investors, stock exchanges, foreign exchange houses, casinos, customs agents, auction houses, real estate brokers, notaries public and registrars) are subject to special reporting obligations to the UAF (Unidad de Análisis Financiero or Financial Analysis Unit), the specialist agency to prevent and impede the utilisation of the financial system and other economic sectors for the commission of crimes related to money-laundering. The reporting entities shall report any act, operation or transaction that they detect in the performance of their activities, which, pursuant to the uses and customs of the activity in question, appears unusual or apparently lacking in economic or legal purpose. In addition to the UAF, other authorities related to preventing asset-laundering and financing of terrorism activities include the SBIF, the SVS, the Gambling Commission, the Pension Funds Commission, the Central Bank and the Internal Revenue Service.

Finally, Chile is a part to both the OAS and the UN conventions against corruption.

/Carey
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