Private Equity

Contributing editor
Bill Curbow

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GETTING THE DEAL THROUGH

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Private Equity 2017

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Chile

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Carey

1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Companies involved in private equity transactions are predominantly private companies (public companies are less involved in this kind of transaction). Transactions usually take the form of stock purchases (either the acquisition of a controlling stake or a minority interest in a business), asset purchases or capitalisation of companies. The specifics of a transaction may vary depending on whether it is a venture capital (VC) deal or a standard private equity transaction.

VC is particularly active in Chile given the active role in the market of the Chilean Economic Development Agency (CORFO). CORFO's financing programmes provide funds of up to four times the amount of equity of the VC fund benefiting from the programme. In VC deals, funding to start-up companies provided by investment funds usually takes the form of capital increases or debt financing in amounts of up to US$4 million. The VC investor often acquires a minority participation in the target, and therefore, the documents include provisions specifically protecting the investor's interest given his or her minority position.

The private equity market in Chile, although less active than the VC industry, is steadily growing. Normally, private equity deals seen in the region involve investments of around US$15 to 20 million. However, private equity transactions involving foreign investors can reach amounts equal to or higher than US$100 million. Currently, new local and foreign players are entering into the Chilean private equity industry.

As mentioned in question 2, going-private transactions and leveraged buyouts are rare in Chile.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

In Chile, public corporations are subject to specific and more stringent corporate governance rules than closely held corporations.

Some specific corporate governance rules applicable to public corporations are as follows:

- the board of directors must be comprised of a minimum of five directors (and, in some exceptional cases, seven);
- the board of directors must hold meetings on a monthly basis;
- the position of manager is incompatible with that of chairperson or director of the board, auditor, or accountant of the same corporation;
- public corporations meeting market capitalisation and ownership dispersion requirements established by the Corporations Law (Law No. 18,046) must appoint at least one independent director and organise a board committee; and
- specific rules regarding related-party transactions.

Going-private transactions are rare in Chile, mainly because of the difficulties of meeting the legal requirements and the lack of an effective mechanism to squeeze-out minority shareholders. In general terms, in order to deregister a public corporation from the Securities Registry of the Chilean Securities and Insurance Commission (SVS) and from the stock exchange (ie, to go private), the public corporation has to evidence to the SVS that there are less than 500 shareholders or, when there are less than 500 shareholders but more than 100 shareholders, shareholders (excluding those with more than 10 per cent shareholding) together hold less than 10 per cent or more of its subscribed capital. Additionally, the public corporation has to evidence to the SVS that it has met the mentioned requirements for a period of at least six months. If the requirements are met, the decision to delist must be approved by two-thirds of the voting shares of the public corporation at a special shareholders' meeting summoned for that purpose.

There are not many public corporations in Chile compared with other jurisdictions (eg, the US, Brazil, etc) and, because of the aforementioned requirements, most of them are not eligible to terminate the registration of its shares before the SVS and the stock exchange. In order to solve this, Chilean law provides for a squeeze-out mechanism, which is difficult to implement successfully. To use this squeeze-out mechanism the law provides the following main requirements:

- the by-laws of the public corporation must contemplate a squeeze-out special provision (and such squeeze-out mechanism shall only be applicable to shares acquired after the inclusion of the aforementioned provision in the public corporation's by-laws); and
- the controlling shareholder can exercise the squeeze-out provision only if he or she has reached a 95 per cent share of the company through a tender offer for 100 per cent of the company, in which he or she acquired at least a 15 per cent share of the company.

With regard to leveraged buyouts, they are not common in Chilean investment culture and there is not a specific market for them.

Finally, in relation to VC transactions, VC funds benefiting from CORFO's financing programmes are required to actively participate in the management of each of its targets. Such active participation is embodied in shareholders' agreements prescribing rights related to the appointment of board members and supermajorities, among other provisions.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

In Chile, the decision to sell shares from a company lies with the shareholders and not with the board of directors, whose role is more limited for these purposes than in common law jurisdictions.

As a general rule, board members of public corporations have fiduciary duties towards the company and may not exclusively defend the interests of the shareholders who elected them.

Any person attempting to take control of a public corporation must launch a tender offer open to any and all of the company's shareholders.

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In such case, each of the company's directors must issue a written report expressing his or her opinion about the convenience of the tender offer and indicating whether or not he or she has an interest in the transaction. Additionally, the director must indicate whether or not he or she has a relationship with the offeror or with the company's current controlling shareholder. For more information about tender offers see question 14.

Public corporations' directors, liquidators, officers, administrators and executives must inform the securities regulator and stock exchanges where the company's securities are listed, about any acquisition or disposition of the company's shares or the execution of contracts in which the price depends on variations of the company's share price.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

Disclosure requirements for private equity transactions under Chilean securities regulation, when applicable, are no different from disclosure requirements applicable to other M&A transactions.

There are no disclosure requirements linked to private equity transactions performed by private funds and private companies. However, considering that both public funds' management companies and public corporations are subject to the surveillance of the SVS and must disclose material information to the SVS and the public in general, private equity transactions involving public investment funds or public corporations may trigger disclosure requirements.

Material information is defined as information that a person of good judgment would consider important for his or her investment decisions.

Going-private transactions, despite the fact that they are rare in Chile, may need the launching of a tender offer or the exercise of a squeeze-out mechanism (see question 2). Tender offers trigger several disclosure obligations (eg, the publication of a notice of commencement, a summary prospectus, a notice of results, etc). Regarding squeeze-out provisions, the decision to squeeze-out minority shareholders triggers disclosure requirements too (particularly, the publication of a prominent note in a newspaper and on the public corporation's website).

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

Timing considerations on private equity transactions depend on different factors. A typical private equity transaction normally takes from two to six months, starting from the execution of a term sheet, memorandum of understanding or letter of intent, including a due diligence and negotiation process and ending with a final closing. However, in specific industries the time frame may change depending on the requirements for approval from the authorities. For instance, regulated sectors (eg, utilities, banking, pension funds, insurance, etc), may take longer because of the need to obtain a clearance from the applicable authority. Also, in concentrated markets the approval of the antitrust authority is required.

For going-private transactions, even though they are rare in Chile, it is necessary to distinguish between public corporations that meet the requirements established by law to become private (in which case it is only necessary to get the extraordinary shareholders' meeting approval for the deregistration and delisting, which should be relatively quick) and public corporations that do not meet the mentioned requirements. In the latter case, assuming that all of the going-private requirements are finally achieved and the squeeze-out mechanism is successfully executed (which is highly improbable), the whole process might take no less than 100 days.

6 Dissenting shareholders' rights

What rights do shareholders have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

As stated in question 2, to deregister and delist a public corporation from the securities registry and the stock exchange, apart from the requirements related to the number of shareholders and ownership dispersion, it is necessary to get the approval of at least two-thirds of the company's voting shares at a special shareholders' meeting. Minority dissenting shareholders have a withdrawal right in case deregistration and delisting is approved.

If a public corporation does not meet the number of shareholders and ownership requirements established by law to become private, tender offers and squeeze-out mechanisms may apply. Regarding the execution of squeeze-out mechanisms (see question 2), the controlling shareholder needs to have previously reached a larger than 95 per cent participation in the company through a tender offer for 100 per cent of the company (in which he or she must have acquired at least 15 per cent of the company). Minority shareholders have the right to withdraw from the company every time a shareholder acquires more than 95 per cent of a public corporation (notwithstanding the means to reach such participation).

Finally, minority shareholders have a withdrawal right in case a shareholder or a group of shareholders with a joint action agreement acquire at least two-thirds of the voting shares of a public corporation and do not issue a tender offer for the remaining shares at a price at least equal to the price the company would have paid to the minority shareholders in case they exercise their withdrawal right. Exceptions to this right are if the mentioned shareholding was acquired through a tender offer for 100 per cent of the shares or if the mentioned shareholding was acquired through any exemption prescribed by law to mandatory tender offers. For more information about tender offers, see question 14.

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

Purchase agreements for private equity transactions are very similar to purchase agreements for traditional M&A transactions. Provisions usually include representations and warranties, conditions precedent to closing, affirmative and negative covenants, post-closing price adjustments, events of default, indemnification provisions, non-compete and non-solicitation clauses, etc. Arbitration is the preferred dispute resolution mechanism.

The VC industry is particularly active in the country, but this is still a new trend as compared to other industries that are more mature. Therefore, there are no models of standardised agreements for the Chilean VC ecosystem. As a consequence, most deals are tailored depending on the parties, and transaction costs may be higher than in other more sophisticated markets. Purchase agreements and shareholders' agreements in VC transactions usually include anti-dilution clauses, vesting provisions, clauses protecting the investors (even more aggressively than in other jurisdictions) covering the appointment and removal of management, veto rights for relevant decisions, non-compete clauses for the founders, etc. Additionally, because of the existence of financing programmes established by CORFO for VC investment funds, VC purchase agreements usually include conditions precedent related to the nature of such programmes.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity buyer should discuss management participation following the completion of a going-private transaction?

As mentioned, going-private transactions in Chile are rare. Regarding management compensation, many of the businesses that are targets for PE or VC funds are family owned or managed by the founders. Therefore, the retention plans of the key management are generally an important part of the negotiation of deals. However, the market is not as developed so as to have standard plans incentives for management, and as a result, they are negotiated on a case-by-case basis.

A common structure, especially in VC deals, is to issue common shares to be offered at a discount to the managers or founders that reach certain predetermined goals.

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9 Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

Regarding the tax status of a target, tax losses can be carried forward and used to absorb taxable profits generated by the target in the future. Accordingly, the target's tax losses should be something to consider in the transactions' price. The target's tax losses can be used in the future regardless of a change of control in it, provided that some requirements established by the Income Tax Law are met.

Interest and financial expenses from loans for the acquisition of equity rights, shares, bonds and securities in general are deductible as an expense according to the Income Tax Law, provided that the following general requirements for expense deduction are met:

- the expense should not have been previously deducted as a cost;
- it should be necessary to generate taxable income;
- the expense should be paid or accrued during the same year in which it is deducted;
- the expense should be accredited to the Chilean Internal Revenue Service by sufficient documentation; and
- the expense should be related to the business activity levied with income tax.

With regard to executive compensation and, specifically, to stock option plans, according to Chilean tax law, from 2017 onwards, in general, the granting, transferring and exercising of stock options will be levied with income taxes, as well as the capital gains derived from the disposal of shares acquired as a consequence of exercising the stock options, as follows:

(i) upon granting the option: the taxable benefit is equal to the difference between the value of the stock option (calculated taking into account the documents where the stock options are granted and the company's underlying assets, among other circumstances) and any premium paid by the employee for the granting of the stock option;
(ii) upon assigning the option: the taxable benefit is equal to the difference between the assignment's value of the stock option and the value of the stock option (calculated in the form described in (i));
(iii) upon exercising the option: the taxable benefit is equal to the difference between the par value or market value of the acquired shares and the value of the stock option (calculated in the form described in (i)); and
(iv) upon disposal of the shares, on the capital gain produced.

In (i), (ii) and (iii), the employee will be subject to second category tax, which is a progressive tax that operates on a per-bracket basis, ranging from zero to 35 per cent from 2017 onwards.

In (iv), the capital gain will be considered as an ordinary income subject to the general tax regime (a 25.5 per cent corporate tax plus final taxes, ranging from zero to 35 per cent, the former being creditable for the payment of the latter).

Finally, from 2017, the tax treatment for capital gains on disposal of shares and equity rights is, in general terms, the same as for capital gains on disposal of other assets (both are subject to the general taxation regime). However, there are specific exemptions for capital gains on disposal of shares, such as for some public corporation's shares.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Financing structures used for private equity transactions are, in general terms, fairly similar to financing structures used for M&A transactions in Chile. Financing is normally obtained at the acquirer's level and loans are usually guaranteed by way of mortgages or pledges over the acquirer's real estate or moveable assets, respectively. Pledges over the target's shares are commonly used. Other security alternatives include a floating charge over the target's assets or a guarantee given to the creditor by the target company.

However, it might be difficult for the debtor to structure a guarantee from the target, over the target's shares or over the target's assets before acquiring a shareholding in such target. In that sense, there might be no guarantee securing the debt in the period between the disbursement of the funds by the creditor and the closing of the transaction (and as a consequence financial closing normally is concurrent with the closing of the transaction).

Eventually, if financing for the acquisition of the target was obtained by a special purpose vehicle (SPV), debt can be transferred to the target company by means of a merger between the SPV and the target company.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements? What other documents typically set out the financing arrangements?

Debt financing in Chile is typically structured by the following documents:

- a loan agreement regulating the relationship between the creditor and the debtor and their rights and obligations. This agreement usually includes representations and warranties, covenants, events of default and use of funds provisions, among other clauses;
- a promissory note in which the debtor promises to pay the loan's unpaid interest and principal to the creditor on a certain date. The advantage of executing promissory notes is related to debt collection procedures (debts documented through promissory notes may be enforced pursuant to a summary proceeding that is shorter than the ordinary procedure applicable to undocumented debts); and
- a guarantee, usually a pledge over the target's shares, to secure the debtor's payment.

Equity financing in Chile is typically structured by the following acts and documents:

- a capital increase in the target company;
- a share subscription agreement executed between the target company and the investor, which can include conditions precedent, representations and warranties, covenants and stand still provisions, among other clauses; and
- a shareholders' agreement normally regulating corporate governance issues (designation of board members, supermajorities, deadlock provisions, etc), restrictions on share transfers and encumbrances of shares, information rights for shareholders, etc.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

As mentioned in question 2, leveraged buyouts are uncommon in Chile. However, fraudulent conveyance is regulated in Chilean law by providing revocatory actions to creditors permitting them to challenge certain acts and agreements that occurred before the insolvency or bankruptcy (eg, prepayments, gratuitous dispositions, acts or agreements executed in bad faith and causing harm to the debtor's creditors, etc). As a consequence, fraudulently transferred property can be recovered to the debtor's estate.

These revocatory actions are particularly important in asset deals, where the investor acquires only assets either directly or after its transfer to a new SPV, and therefore paying the price for the assets to the shareholders and not to the company that was the previous owner. Such deals may be challenged by the creditors if the company that previously owned the assets becomes bankrupt or insolvent.

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Update and trends

An amendment to the Chilean Antitrust Law (Decree with Force of Law No. 211) was passed in August 2016. The amendment established a new mandatory control for concentration operations. According to the new merger control procedure, concentration transactions (which respond to a broad concept including mergers, acquisition of shares, rights and assets, associations, etc) between companies with sales exceeding the thresholds established by the FNE, must be informed to the FNE and the FNE or the Antitrust Court must approve them before the operation's closing. Approval might be subject to the fulfilment of antitrust measures by the parties.

Additionally, any operation in which a party acquires, directly or indirectly, more than a 10 per cent participation in a competing company must be notified to the FNE. This obligation only applies if both companies have, individually, annual sales exceeding 2.6 billion Chilean pesos.

Other amendments introduced to the Antitrust Law include the following:
- new criminal consequences for the crime of collusion;
- higher fines for anticompetitive activities;
- compensation of damages produced by anticompetitive activities through class actions; and
- limitations on interlocking for competing companies' executives and board members.

Some of the amendments will enter into force in May 2017.

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms? Are there any statutory or other legal protections for minority shareholders?

Key provisions in shareholders' agreements protecting minority shareholders' rights include the following:
- restrictions on share transfer and encumbrances on shares (such as rights of first refusal, rights of first offer, tag-along and drag-along provisions, including minimum price for the transfer);
- corporate governance provisions (such as the right of minority shareholders to appoint directly one or more members of the board of directors, or the establishment of qualified majorities for certain board decisions or shareholders' meetings matters);
- audit rights for minority shareholders or the right to access company information; and
- regulation of related-parties transactions, or transactions in which board members have an interest (requiring exclusive approval by non-interested directors on an arm's-length basis).

Additionally, shareholders' agreements in VC typically include anti-dilution provisions and preferred rights in the case of liquidity events.

Some of the most important legal protections for minority shareholders are as follows:
- shareholders have preemptive rights in case of capital increases. These preemptive rights apply either to the issuance of shares or the issuance of securities convertible into shares;
- with the exception of the squeeze-out mechanism explained in question 2, shareholders cannot be forced to sell their shares or lose their status as shareholders of a company;
- board members have a general duty of care towards the company and all of its shareholders' interests. Accordingly, they may not exclusively represent the interest of the shareholders involved in their appointment; and
- certain shareholders' meeting matters must be approved with qualified majorities. In this regard, the general rule for decision-making is a majority of the voting shares. However, other matters require the approval of two-thirds of the outstanding voting shares (such as mergers, spin-offs, sale of certain assets, dissolution, etc).

These protections normally apply both to corporations' and stock corporations' shareholders. However, the by-laws of a company may exclude some of them (particularly in the case of stock corporations, which permit a great deal of flexibility to the shareholders to regulate their relationships).

There are additional protections in the case of public corporations (such as stricter requirements for related-parties transactions, the imposing of tender offer procedures for takeover transactions and, in some cases, the appointment of an independent director and the creation of a director's committee).

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

In general terms, there are no restrictions or requirements related to the acquisition of control of a private company. However, there are some specific restrictions or requirements that may apply for specific industries or in connection with antitrust matters, as explained below.

On the contrary, unless an exception is provided by law, control of public corporations must be acquired through a tender offer procedure. In general terms, tender offers are offers launched by a shareholder or a third party in order to acquire a certain number of shares of a public corporation at a certain price and during a specific term.

Exceptions provided by law to mandatory tender offers are as follows:
- acquisitions of shares issued by a public corporation as a result of a capital increase;
- acquisitions of shares from the company's controlling shareholder, as long as those shares have a minimum trading activity (as defined by the SVS), the price is paid in cash and the price is not substantially higher than the share's market price;
- acquisitions that are a consequence of a merger with the public corporation;
- acquisitions by inheritance; and
- acquisitions resulting from forced sales (ie, sales instructed by a court).

There may be additional requirements for acquisitions of controlling stakes, either of public or private companies, in the case the target company participates in a regulated industry, such as banking, pension funds, insurance, utilities or casino industries.

Additionally, as of May 2017, concentration operations between economic agents whose sales exceed the thresholds established by the National Economic Prosecutor (FNE) will be subject to a mandatory merger control process (see Updates and trends).

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity buyer?

There are no legal limitations on the ability of private equity firms to sell their stakes in portfolio companies. Regarding IPOs, 'going public' considerations are usually dealt with in shareholders' agreements of private equity and VC investors. The number of IPOs in Chile has declined over the last five years, and therefore, an IPO, as an effective exit alternative for private equity investments in Chile is limited.

With respect to post-closing matters in private equity transactions, they are usually addressed in the same way as in ordinary M&A transactions (stock purchase agreements generally include representations and warranties clauses, escrow provisions and price adjustment obligations).

Considering that investment funds normally have a limited duration, if the transaction does not include an escrow (or the amount in escrow is not enough compared to the amount of the fund's liabilities), enforcing price adjustment obligations may be difficult once the seller fund has been dissolved and liquidated.

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16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

As stated in question 2, private companies becoming public need to adapt their corporate governance to the requirements established for public corporations (eg, the board of directors must be composed of at least five directors and hold meetings on a monthly basis; managers must not be board members, auditors or accountants of the company; eventually, the company will have to appoint an independent director and organise a directors' committee, etc). Additionally, other provisions and shareholders' rights may survive, although sometimes with reduced enforceability (eg, restrictions on share transfers or encumbrances cannot be included in public corporations' by-laws, but they may remain in shareholders' agreements. In such cases, share transfers or encumbrances in violation of the shareholders' agreement will not be considered void, but will be considered as a breach of contract and trigger damage compensation obligations).

There are no legal or regulatory lock-up restrictions following an IPO. Nevertheless, it is common to enter into lock-up agreements to ensure that some of the company's shareholders (normally those who hold a controlling stake) will not sell their shares in the company during a fixed time (normally 90 to 180 days).

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

The main industries that have been the focus of private equity investments are infrastructure, mining and energy (particularly renewable energy). As for VC investments, IT and the healthcare industry (mainly biotechnology) have probably been the most significant targets.

Investments and transactions in regulated sectors, such as banking, insurance and pension fund industries must usually fulfil additional regulatory requirements. For example, authorisation from the Chilean banking regulator is needed before exceeding a 10 per cent shareholding in a Chilean bank or before any acquisition of a Chilean bank's participation exceeds 10 per cent; in the insurance sector, any shareholder exceeding a 10 per cent participation must accredit to the relevant regulator the fulfilment of certain requirements related to a minimum capital and the identity of its controlling shareholders, among other things.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

There are two relevant tax issues related to cross-border private equity transactions: indirect transfer rules (ITR) and thin capitalisation rules (TCR).

According to ITR, non-residents selling equity rights (eg, shares, convertible equity or property rights in general) in foreign entities that directly or indirectly hold interest in Chilean assets (eg, Chilean entities' equity; Chilean branches or Chilean permanent establishments; or real or personal property located in Chile) may be subject to taxation for the capital gain derived from the transfer of their rights in the offshore entity.

Normally, these capital gains are subject to taxation if the offshore entity is located in a tax haven jurisdiction, or if the participation in the offshore company being sold and the value of the Chilean underlying assets indirectly owned by the non-resident seller exceed the thresholds established by the Chilean Income Tax Law (Law Decree No. 824).

During 2017, these capital gains will be levied either by 'Regime A' taxation (25 per cent corporate tax rate with a full tax imputation as credit against 35 per cent final taxes) or 'Regime B' taxation (25.5 per cent corporate tax rate with a 65 per cent tax credit against 35 per cent final taxes, but with the possibility of deferring payment of final taxes until distribution of profits to individuals or non-residents).There are ITR tax exemptions related to operations performed within the context of corporate reorganisations.

TCR applies to payments made by local debtors to foreign related parties, subject to a reduced withholding tax rate. These TCRs only apply when the local borrower is heavily indebted (which, pursuant to the Chilean Income Tax Law, is when the local debtor's debt to equity proportion exceeds a 3:1 ratio). According to TCR, such payments will be levied with a 35 per cent tax borne by the local debtor instead of the reduced withholding tax rate that would apply otherwise.

The Chilean Income Tax Law includes, within the concept of related-party debt, indebtedness granted by entities located in tax haven jurisdictions; indebtedness secured with guarantees provided by related third parties; and indebtedness granted to the local debtor by an entity of its same business group, among other things.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

Club deals in private equity are not common in Chile. However, in VC it is common to find groups of VC funds investing in the same target, either in the same investment round, or successively in consecutive rounds. Special considerations that should be borne in mind regarding club deals are related to the regulation of rights, obligations and potential conflicts of interest between the private equity firms participating in

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those deals (eg, different duration of the funds and, therefore, different investment horizons among them).

A practical alternative to structure a group deal may be the formation of a consortium between the parties, either through the execution of a joint venture agreement or the incorporation of an SPV. SPVs allow investment partners to share risks, invest a larger amount of money (normally private equity funds have limitations on their operations derived from their investment diversification policies) and, eventually, join forces with a strategic partner providing knowledge, contacts or expertise to the consortium.

The execution of a shareholders' agreement between the parties (in case there is no joint venture agreement between them, or the existing joint venture agreement does not address these issues), regulating corporate governance matters, restrictions on transferability of shares and, somehow, aligning the parties' interests is highly advisable.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

Apart from merger control mandatory proceedings (see Update and trends), uncertainties of closing can come from the securing of finance by the buyer, the eventual need for third parties' consent (eg, creditors, suppliers, customers, etc) and, in the case of public corporations, the results of a tender offer or squeeze-out proceedings. Also, in VC deals, if the VC funds uses one of the financing programmes of CORFO (see question 1), the closing will be subject to obtaining CORFO approval of the investment.

These uncertainties are usually resolved by means of conditions precedent prior to closing, termination rights in the case conditions precedent are not fulfilled, and penalty clauses. However, penalty clauses tend to apply only to clear cases of breach of contract.

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