GETTING THE DEAL THROUGH

Mergers & Acquisitions

in 58 jurisdictions worldwide

2009

Contributing editor: Casey Cogut

Published by Getting The Deal Through in association with:

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10th anniversary edition

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Mergers & Acquisitions 2009
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1476-8127

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law
Business
Research

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Panama

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1 Form

How may businesses combine?

In Panama, business combinations are usually structured as stock or asset purchases, tender offers or mergers, but other techniques are also used, such as the capitalisation of stock of two operating companies to a holding company especially incorporated for that purpose and the joint participation in the holding company.

In the case of publicly traded companies, combinations usually take place through a two-step process that starts with a tender offer (either for stock or cash or a combination of both) followed by an actual merger. Several recent bank mergers have followed this form.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The relevant Panamanian laws and regulations governing business combinations include Law 32 of 1927 (the Corporations Law), Law 4 of 2009 (the Limited Liability Company Law) and the Commercial Code, which is supplemented by the Civil Code. As combinations generally cause taxable events, the Tax Code and its regulations (especially Executive-Decree 18 of 1994 which establishes a special regime regarding stock-for-stock mergers) and Law No. 18 of 2006 which created a special capital gains regime are also relevant.

In the case of publicly traded companies, Decree-Law 1 of 1998 and its regulations (the Securities Law) govern tender offers, proxy statements and rules of disclosure, among other matters.

3 Governing law

What law typically governs the transaction agreements?

Domestic business combinations are typically governed by Panama law.

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?

Most if not all business combinations require some kind of filing with a governmental entity depending on the industry involved or the type of transaction.

Share acquisitions of privately held companies do not require filing with any governmental entity. Asset acquisitions that include real estate require filings with the Public Registry Office, which engender notarial and registration fees that vary depending mainly on the value of the real estate. In the case of share and asset acquisitions (as well as mergers), stamp taxes are necessary (at the rate of US$1 per US$1,000 of the face value of the transaction).

Tender offers must be filed with the National Securities Commission (NSC) (which requires the payment of a US$10,000 filing fee). The target company and the stock exchange in which the target securities are traded must also be promptly notified.

In the case of mergers, the agreement must be filed with the Public Registry Office (which requires a recordation fee that varies pursuant to a progressive table based on the authorised capital of the surviving or resulting entity) and the General Revenue Department of the Ministry of Finance and Treasury must be notified of the merger within 30 days.

Although not required, business combinations may apply for a favourable opinion from the Authority of Consumer Protection and Defence of Competition under the Antitrust Law, which would exempt the combination from challenges under said law. No fee is payable for that petition.

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 Securities Law requires public companies to disclose all material (that is, information that would likely be of value to an investor), non-public facts or information that could have a material effect on the market price of its securities registered with the NSC. Since most business combinations meet that standard, public companies must disclose to the public the nature of the transaction and its main terms and conditions.

The basic terms and conditions (price, terms of payment, holdbacks and material conditions) as well as the reasons, strategies or purposes of the combination should be included in disclosure statements made by public companies involved in business combinations.

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 Law does not establish especial disclosure requirements for large shareholders and the NSC has not yet adopted regulations establishing such rules of disclosure. Note, however, that public companies are obliged to disclose the names of controlling shareholders at the time of their initial registration and must update that information at least quarterly.

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?

The board of directors of a Panama corporation is responsible for managing its affairs. Its members (as well as the corporation's officers) must carry out their responsibilities in good faith and with the diligence that a person ordinarily employs in its own business. In the case of business combinations, the duty of the directors generally is to look after the interests of the company and its shareholders as a whole, bearing in mind the objective of maximising shareholder value.

Panama law does not impose similar duties on controlling shareholders.

8 Approval and appraisal rights

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

Unless otherwise provided in the articles of incorporation, the boards of directors and the majority of the shareholders of the merging corporations must approve their merger. Shareholders do not have appraisal or similar rights in business combinations.

9 Hostile transactions

What are the special considerations for unsolicited (hostile) transactions?

Hostile or competitive bids are expressly permitted in tender offers. Such competitive bids must comply with certain special provisions of the Securities Law and its regulations, including the filing of an offering memorandum.

There is no statutory obligation imposed on the board of directors or the officers of a Panama corporation to evaluate or transmit to its shareholders hostile bids for a business combination. In general, the Board of Directors and officers must exercise the duty of care mentioned in question 7.

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?

As there is no legal statute that prohibits or limits the use of break-up fees or other mechanisms to prevent third party bids and based on general principles of freedom of contract, the parties to a business combination may agree and be bound by break-up fees designed to frustrate additional bidders. Additionally, commercial trusts have been utilised to insure that all shareholders commit a limited time frame to a particular business combination, thus frustrating third-party bidders.

11 Government influence

Other than through relevant competition (antitrust) 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?

Under the Securities Law, the NSC may suspend tender offers that include false statements or omit material facts that under the law must be disclosed so that the statements made are not misleading in light of the circumstances.

In general, governmental agencies do not influence business combinations, unless their approval is expressly required, as in the case of mandatory approvals in regulated industries, such as banks, insurance companies, etc. Reasons of national security should not influence or restrict the completion of business combinations.

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?

In Panama, parties to a contract are at liberty to agree to such terms and conditions, as deemed to be in their best interests, provided that such terms or conditions are not contrary to the law, morals or public policy. Particularly, in cash acquisitions, the availability of sufficient financing may be a condition.

Tender offers may be revocable or irrevocable and must be made to all holders of shares, under the same terms and conditions, and must provide a term of at least 30 days for acceptance. Any shareholder may revoke its acceptance at any time before the expiration of the offer. Once a tender offer is launched, offerors are prohibited from acquiring shares in the target in a manner other than as provided in its terms.

13 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?

Squeeze-out procedures are not contemplated under Panama law. However, the most familiar squeeze-out may be accomplished by way of the dissolution of the corporation and the subsequent acquisition by the majority shareholders of the assets of the corporation, while minority shareholders receive cash as a distribution in liquidation. Majority shareholders may also use other more sophisticated techniques, such as reverse stock splits. Under the Corporations Law, the articles of incorporation of Panama corporations may include provisions that in effect permit the squeeze-out of minority shareholders. Even if such provisions are not included in the articles of incorporation, such result may be achieved through, for example, the addition of a clause providing that no fractional shares will be issued after a reverse stock split and establishing a monetary payment for such shares.

In the case of tender offers for the acquisition of public companies followed by a merger to squeeze out minorities, it is possible to offer greater consideration in the tender offer than in the merger. In these cases, offerors must bear in mind the disclosure obligations provided in the Securities Law (see question 5) as liability may arise for violations thereof.

Update and trends

Presently, there are no proposals that change any of the laws and regulations governing business combinations.

Law No. 18 of 2006, which created the special capital gains regime discussed in question 16, is yet to be regulated. At present Law No. 18 would affect all direct or indirect transfers of shares of companies generating Panamanian taxable or with real estate located in Panama, without regard to allocation rules, namely the application of the Panama withholding tax in proportion to the Panama share of the transaction. In the case of acquisitions of holding companies with subsidiaries operating in various jurisdictions, including Panama, the lack of allocation rules has required careful structuring and separation of the Panama-taxable entities from the other entities subject to the acquisition or business combination. It is expected that the regulations of Law No. 18, when adopted, will incorporate sensible allocation rules.

The credit crisis has not affected the Panama market with the same intensity as other jurisdictions. However, in the vibrant real estate market there has been a slow down and some projects that were in the pipeline have been cancelled or postponed.

14 Cross-border transactions

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

Panamanian legislation is, in general, territorial in its application. There are no special statutes in effect that establish additional requirements for cross-border transactions.

15 Waiting or notification periods

Other than competition laws, what are the relevant waiting or notification periods for completing business combinations? Are companies in specific industries subject to additional regulations and statutes?

A business combination that involves a tender offer must include a statutory minimum waiting period of 30 days before the acceptance is effective (see question 12).

In transactions that involve the acquisition of all or substantially all the assets of a commercial establishment, a three-day public notice must be made before payment of the purchase price is effected to enable the creditors to claim against the purchase price or to question the adequacy of the purchase price in anticipation of seller having the right to receive payment free of claims from creditors.

In transactions that involve the direct or indirect acquisition or change in control of banking institutions or banking economic groups the Superintendence of Banks of Panama must be notified in advance and presented with an executive summary of the proposed transaction. The preliminary favourable opinion of the Superintendent must be secured prior to publicly announcing the offer.

16 Tax issues

What are the basic tax issues involved in business combinations?

Taxation of business combinations varies depending on their structure. Usually, transaction structures are driven by a need to make them tax-free for the sellers and without adverse tax consequences for the buyers. As Panama follows a territorial system of taxation, non-Panama-source income (that is, income and capital gains realised in connection with a trade, business or asset transaction outside Panama) is not taxed in Panama.

Asset acquisitions are taxable to the seller, although, in the case of assets, the acquirer should be concerned that the payment of applicable taxes is current. Most relevant for the determination of the tax liability in said transactions is the tax basis of the assets acquired. Share acquisitions are likewise taxable to the seller, but the acquirer is required by law to withhold 5 per cent of the purchase price as an advance against the capital gains tax payable by the transferor. Failure to withhold would make the acquirer and the target company jointly and severally liable for the payment of the tax.

In the case of public companies, tender offers are not taxable to the sellers or the buyer. Tender offers outside of a stock exchange would be taxed to the seller and a withholding obligation will be imposed on the purchaser as indicated in the preceding paragraph.

Stock-for-stock mergers that comply with certain conditions and filing requirements are tax free. Other types of mergers generate tax liability for the companies and perhaps its shareholders.

17 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic law governing employer-employees is the Labour Code. Also relevant is the Social Security Law, which establishes

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contributory retirement and pension funds, among others. In general, the law protects employees of entities involved in a business combination as employees' rights remain unaffected thereby.

18 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?

The Commercial Code only deals with bankruptcy liquidation, other forms of bankruptcy reorganisations are not contemplated. A business combination with a target company that is in bankruptcy or receivership may expose the assets of acquiring company to the creditors of the bankrupt and thus must be carefully negotiated and agreed with the bankruptcy curator and the bankruptcy judge.

Banking institutions intervened by the Superintendence of Banks may be reorganised as determined by the superintendant, who has ample powers to order the sale, merger or consolidation of the bank.

 ISSN 1476-8127