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Panama

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M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

Panama's economy is experiencing a period of unprecedented growth, fuelled largely by a spike in foreign direct investment (FDI) entering the country. Investors and foreign businesses have continued to seek out Panama as a FDI destination, driving the investment rate to around 30%, significantly higher than the region's 22.7% average. This influx of foreign capital has fed into the economy, generating a growth rate of approximately 7.5% for 2010, and 9.5% approximate growth for 2011, which would make it the fastest growing economy in the region. Two important mega-infrastructure projects, the US$5.25 billion Panama Canal expansion (as at 1 March 2012, US$1 was about EUR0.74) and the construction of a metropolitan transportation system, have both been key contributors to this growth. In addition, whereas other Latin American countries went through recessions during the financial crisis of the past few years, Panama was one of the few countries to maintain positive growth rates.

One of the major factors allowing Panama to maintain its growth levels is the prevalence of M&A activity. Many major multinational corporations, including Procter & Gamble, Halliburton, AES, Hewlett-Packard, Maersk and Hyundai, have established regional offices or headquarters in Panama, taking advantage of the tax, immigration and employment incentives granted to potential investors. The economy's largest sectors have seen the majority of this foreign investment M&A activity:

- The banking sector, one of Panama's strongest sectors, saw the sale of the commercial, retail and private banking operations of BNP Paribas' Panama branch to the Bank of Nova Scotia, Panama branch, and the reorganisation and purchase of Stanford Bank, the first banking reorganisation to be carried out in Panama. The second quarter of 2011 also saw the buy-out of the majority stake in Stanford Bank.

  The Panama Stock Exchange (*Bolsa de Valores de Panamá*) (PSE), and Latin Clear (*Central Latinoamericana de Valores*) went through a strategic reorganisation. The two exchanges became indirect wholly owned subsidiaries of Latinex Holdings, a newly created corporation whose shares were registered with the Panama National Securities Commission and listed on the PSE. The reorganisation was implemented through a complex array of transactions including reverse mergers, terminating the public listing and registration of both entities, and public registration of Latinex Holdings shares. The PSE and Latin Clear are, respectively, the only licensed stock exchange and clearance and depositary agency in the country.

  The most significant banking groups and broker-dealers in Panama are participants in the PSE and in Latin Clear. As of 31 December 2009, the balance of all assets under custody by Latin Clear was US$4.6 billion and as of 31 March 2010, the total amount of principal debt securities listed on the PSE was approximately US$2.8 billion. This was the first time that a reorganisation of this magnitude and complexity, involving the most important players of the Panama securities market, had been attempted in Panama.

- In the aviation sector, LAN Airlines acquired 98.9% of Aerovías de Integración Regional (AIRES), Colombia's second largest airline. In industrial services, Empresas Hopsa sold a majority interest in Mortero Seco Panama, a pre-mixed dry mortar plant, to local and regional investors.

- In the ports sector, Oiltanking Colon SA, a privately owned independent oil storage company, acquired a 100% stake in Colon Port Terminal (CPT) and Colon Oil and Services (COASSA). Both companies are engaged in the storage terminal business and will be managed and operated by Oiltanking Gmbh. Oiltanking Colon SA is a wholly owned subsidiary of Oiltanking Gmbh, the second largest independent tank storage provider for petroleum products, chemicals and gases worldwide. Oiltanking Gmbh is a subsidiary of Marquard & Bahls, a leading privately owned German petroleum company.

- In the food and beverage industry, the two principal dairy players were sold to foreign investors. Sociedad de Alimentos de Primera (Bonlac), a leading player in fresh dairy products and fruit based beverages, was acquired by Colombia's Grupo Casa Luker. In 2011 Grupo Casa Luker also acquired the operations of the Café Duran Group, including those of Esteban Duran Amat, Torrefactora Coclé, Bianchi Vending Panamá, and Cafetales, the largest market player in coffee processing and distribution in Panama. The acquisition of Bonlac and Café Durán Group were the third and fourth acquisitions in Panama by Grupo Casa Luker.

  The second dairy player sold to foreign investors was Grupo Industrias Lácteas, mainly Industrias Lácteas (a leading company with a more than 50-year tradition in the Panamanian dairy and juice-based beverage categories). Also sold were Conservas Panameñas Selectas, Plásticos Modernos and Elisia, to The Coca-Cola Company and Coca-Cola FEMSA, the largest public bottler of Coca-Cola products in the world in terms of sales volume.

- In the pharmaceutical industry, Interbank Group, acting through a subsidiary in Panama, acquired Inkafarma, a Peruvian chain of pharmacies, with nearly 400 retail stores in the country and 30% of the market share, through a series of Inkafarma companies located in multiple jurisdictions.
- In the automotive industry, Chile's Grupo Gildemeister acquired a majority stake in the Grupo Los Tres Holding Corporation and its automobile distribution business throughout Central America, through the acquisition of Grupo Los Tres Holding Corporation and its numerous operating and off-shore subsidiaries throughout Central America.

In recent years, M&A deals in Panama have had many drivers. Certain deals have been instigated by the need to consolidate in a very competitive environment, others have been undertaken to control costs and exploit synergies, or have been fuelled by the global economy and the need to develop new international markets and expand market share. Some of the largest transactions in Central America have included a Panamanian target, either an operating company or a holding company registered in Panama with operations in the region.

2. What are the main means of obtaining control of a public company?

The main means for obtaining control of a public company are through a public offer or a legal merger. Most combinations usually involve a two-step process that begins with a tender offer (either for shares, cash or a combination of both) followed by an actual merger.

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

Hostile bids are uncommon, however they are allowed so long as the bid conforms to the requirements set forth by the securities regulator.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

The relevant Panamanian laws and regulations governing business combinations include:

- Law No. 32 of 1927 (Corporations Law).
- Law No. 4 of 2009 (Limited Liability Company Law).
- 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 share-for-share mergers) and Law No. 18 of 2006, which created a special capital gains regime may also apply. In the case of publicly traded companies, Decree Law No. 1 of 1998 and its regulations (Securities Law) govern tender offers, proxy statements and rules of disclosure, among other matters.

The Superintendency of Capital Markets (SCM) is the regulatory body that enforces the Securities Law (*see box, The regulatory authority*).

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

A bidder generally makes a due diligence review of publicly available information on the target. This includes a review of the corporate structure of the target, including the articles of incorporation (articles) and bye-laws (in the public record) which set forth, among other things the company's:

- Corporate purposes.
- Share capital.
- Rights of the various classes of shares.
- Limitations on the transferability of shares.

Bidders also try to obtain copies of regulatory paperwork such as commercial licences, permits, concession contracts, any regulatory reporting, and a history of sanctions and fines with regulatory authorities. Any public material agreements are reviewed. Litigation, environmental, intellectual property, and real property searches are also carried out.

Hostile bid

Due diligence enquiries for a hostile bid are similar to those for a recommended bid.

Public domain

A public company will have filed an offering document with the SCM which includes an in depth description of its business and assets as well as management's discussion and analysis of its operations and financial statements. Public companies must file annual and quarterly reports (which include audited annual financial statements and unaudited quarterly statements, respectively) with the securities regulator and must also notify investors of any material event.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

There are no specific rules on maintaining secrecy until the bid is made, other than the general secrecy obligations which fall under duties of loyalty and care for directors and executives of the company.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

A memorandum of understanding or undertaking from key shareholders can be obtained, however, the existence and terms of the memorandum must be disclosed. The tender offer documents must expressly state that the bidder has not made nor agreed to make any payments, retributions, donations or give any other type of consideration, for any reason, in favour of any of the target's shareholders.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply?

An offer is subject to the public tender offer rules under the securities laws if a bidder offers to purchase either:

- More than 25% of the shares of a public company.
- Any number of shares which, as a result of the purchase, would result in the bidder owning more than 50% of the issued and outstanding shares of the public company.

If the offer does not fall into either of these two scenarios, the bidder can build a stake in the target without restrictions or timetables. At the time the public tender offer is announced, the bidder must disclose its direct and indirect shareholding (beneficial ownership) in the target, as well as any shares held by its directors, officers, executives, and its controlling parent, with an indication of those shares acquired in the previous 180 days, stating the following:

- The date of purchase.
- Price.
- Quantity.
- Percentage the shares represent of the total issued and outstanding shares of the shares' class.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

In a public tender offer, the Securities Law requires that the target's board of directors issue a detailed report with its opinion regarding the offer, and that it make reference to the existence of any agreements between the bidder, the target or its directors, officers or executives, which arose as a result of the tender offer. If there is a competing offer, the board of the target must also issue a detailed report with its opinion regarding the competing offer, disclosing whether there are any agreements between the competing bidder, the target or its directors, officers or executives, which arose as a result of the competing offer.

Since the issuance of an opinion by the board of directors is mandatory, it is not common to have a formal agreement between the bidder and target for the board to issue a recommendation. A board can agree not to solicit or recommend other offers as long as it discloses this agreement in its report.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

It is not common to agree to pay a break fee if the bid is not successful. Tender offers can be conditional on the obtaining of a certain minimum percentage of shares accepting the offer.

Committed funding

11. Is committed funding required before announcing an offer?

Committed funding is required before announcing the offer. The securities laws require that the bidder deposit a guarantee of payment, either in the form of cash, a bank guarantee or a bond, to cover 100% of the tender offer. If the bidder obtains financing for payment of the tender offer, it must file a copy of the financing documentation with the tender offer documents.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

The bidder must publish notices containing the terms of the tender offer with two national newspapers, for two days, before announcing the tender offer. In addition, the bidder must notify the SCM, the PSE and the local depository and clearinghouse Latin Clear, on or before the date of announcing the public tender offer. The notice must be accompanied by, among other things:

- A copy of the prospectus.
- A copy of the guarantee of payment for 100% of the tender offer.
- Copies of the notices filed with the newspapers.
- Copies of all transaction documents (including any applicable financing documents).
- Corporate authorisations.
- The bidders' financial statements for the previous three fiscal years.
- The most recent interim financial statements.

The period for acceptance of the tender offer can be no less than 30 days.

Any competing bids must be for no less than the number of shares which are the object of the original tender offer. Competing bids must be notified to the SCM before the expiration of the period for acceptance of the original tender offer, and the period for acceptance of the competing bid cannot exceed 30 days. The announcing of a competing bid automatically extends the acceptance period of the original tender offer for an additional 30 days. If a competing bid is announced, the original bidder may present a writ with observations or challenges to the competing bid.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

A takeover offer must be made to all the shareholders with the same terms and conditions, and the bidder must pay the same purchase price to all shareholders that accept the offer. A takeover offer can be subject to the satisfaction of conditions or pre-conditions, as long as they are disclosed in the tender offer documentation. Tender offers are usually conditional on the obtaining of a minimum number of acceptances. If a bidder offers to purchase more than 25% of the shares of a public company, or offers to purchase any number of shares which would result in the bidder owning more than 50% of the issued and outstanding shares of the public company, the offer must be subject to the public tender offer rules under the Securities Law. If the tender offer will result in the bidder owning more than 75% of the issued and outstanding shares of the public company, the offer must be made for all shares of the target that are not owned by the bidder.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

The Securities Law specifies the documents which the target's shareholders receive on a tender offer, regardless of whether the bid is recommended or hostile. The bidder must file with the SCM, the PSE and Latin Clear, the following:

- A prospectus which contains the terms of the tender offer.
- Copies of the organisational documents and a good standing certificate of the bidder.
- Documentation which evidences the creation of a guaranteee to secure payment of 100% of the shares which are the object of the tender offer.
- Copies of the notices that will be published (or that were published) with the newspapers.
- Copies of the principal transaction documents of the tender offer.
- The bidder's corporate authorisations for the tender offer.
- Audited financial statements of the bidder, for the previous three fiscal years as well as unaudited financial statements of the bidder for the previous fiscal quarter.

The target's board of directors must issue a detailed report with its opinion regarding the offer, which must make reference to the existence of any agreements between the bidder and the target (or their directors, officers or executives) which arose as a result of the tender offer.

If there is a competing offer, the competing bidder must file all documents listed above. The bidder in the original tender offer can file a writ with observations or challenges to the competing bid with the SCM. The target's board of directors must also issue a detailed report with its opinion regarding the competing offer, which must make reference to the existence of any agreements between the bidder and the target (or their directors, officers or executives) that arose as a result of the tender offer.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are no requirements for a target's board to inform or consult its employees.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

If the tender offer will result in the bidder owning more than 75% of the issued and outstanding shares of the public company, the offer must be made for all shares of the target which are not owned by the bidder.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

In a public takeover the bidder commonly offers cash consideration, a payment in shares of the bidder or a combination of the two.

18. Are there any regulations that provide for a minimum level of consideration?

There are no regulations that require a minimum level of consideration.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no further restrictions on the consideration that can be offered.

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

A bidder cannot compulsorily purchase minority shareholders' shares.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

There are no restrictions on launching a new offer. However, if in the new bid the bidder offers to purchase more than 25% of the shares of the target, or offers to purchase any number of shares which, as a result of the purchase, would result in the bidder owning more than 50% of the target's issued and outstanding shares, the new offer must also be subject to the public tender offer rules under the Securities Law.

De-listing

22. What action is required to de-list a company?

The company must request de-listing from the PSE. The request must include the following documentation:

- Corporate authorisations for de-listing.
- Certification from the legal representative of the company stating that:
  - all obligations of the company to investors in the securities which are being de-listed have been fulfilled; and
  - the securities have been redeemed, are no longer issued and outstanding, and are not listed on a stock exchange other than the PSE.
- Copies of a notice published in a national newspaper for three consecutive days, announcing the de-listing.
- Payment of a nominal de-listing fee.

Once the de-listing with the PSE is completed, the company must request de-registration of the securities with the SCM. The request must include the following documentation:

- Corporate authorisations for the de-listing.
- A good standing certificate of the company.
- Copies of a notice published in the newspaper for three consecutive days, announcing the de-registration.
- Certification from the legal representative of the company stating that:
  - all obligations of the company to investors in the securities which are being de-listed have been fulfilled; and
  - the securities have been redeemed, are no longer issued and outstanding, and are not listed on any stock exchange.
- Certification from the PSE stating that the securities are no longer listed.
- Filing of a form with information on the securities being de-registered.
- Payment of a nominal de-listing fee.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

The target's board of directors may convene a meeting of the shareholders (before or after the bid), to explain the terms of the hostile bid and recommend rejection of the offer by the shareholders. The target's board of directors may lobby the shareholders to reject the tender offer, and when it issues its detailed report with the opinion regarding the offer, it may also recommend that it be rejected.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

The sale of shares that are registered with the SCM and listed on the PSE is not subject to capital gains taxes in Panama, except in the event of a tender offer, in which case the sale is subject to a 5% capital gains tax on the purchase price.

Panama-source income gains realised by sellers in a share purchase are subject to a 10% capital gains tax. The capital gain is the difference between the selling price allocated to Panamanian sources and the tax basis of the shares owned by the selling shareholder. Buyers must withhold 5% of the total purchase price allocated to Panamanian sources (as an advance of the capital gains tax) and directly pay this amount to the tax authorities within ten days of the transfer of the shares.

The buyers, as well as the target company whose shares are being acquired, are jointly and severally liable with the buyer for the payment of the 5% advance capital gains withholding. If the 10% capital gains tax on the realised capital gain is less than the 5% advance withholding, sellers can request a tax credit for the difference. Alternatively, sellers can choose to treat the 5% advance capital gains withholding as the final and definitive capital gains tax payable in connection with the sale of the shares. In practice, most sellers pay the 5% purchase price capital gains withholding, as it is difficult to request and use the tax credit in the same year that the transaction took place.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

There is no mandatory merger control approval process and the process is entirely voluntary. However, with the new anti-trust and competition regime established by Law 45 of 2007 (Competition Law), economic concentrations created by the mergers of conglomerates within the Panamanian market have come under increasing, albeit still limited, scrutiny by regulators. The Competition Law prohibits economic concentrations whose effects may unreasonably restrict or harm free competition. An economic concentration is defined as the merger, acquisition of control, or any other act under which corporations, associations, shares, trusts, establishments or any other kind of assets are combined, and which occurs between suppliers or potential suppliers, customers or potential customers, and other competing or potentially competing economic agents. The law applies to any acts or practices that may unreasonably restrict or harm free competition, and whose effects take place in Panama, regardless of where those acts have been carried out or perfected.

The Competition Law expressly provides that the following business combinations will not be deemed prohibited economic concentrations:

- Joint ventures formed for a definite period of time to carry out a particular project, which is also contemplated in other jurisdictions.
- Economic concentrations among competitors that do not have harmful effects on competition and the market.
- Economic concentrations involving an economic agent that is insolvent, if certain conditions are met, which is broadly equivalent to the failing company exemption in other jurisdictions.

THE REGULATORY AUTHORITY

Superintendency of Capital Markets

W *www.conaval.gob.pa*

Main area of responsibility. The Superintendency of Capital Markets is the securities regulator in Panama.

Economic concentrations with restrictive effects on competition may obtain clearance from the competition authority if the restrictive effects of the concentrations are outweighed by their contribution to obtaining further efficiencies, such as:

- Improvements in the commercialisation and production systems.
- Fostering technical and economic progress.
- Improvements in the competitiveness of the industry.
- Contributions to consumer interests.

If advance verification for the economic concentration is sought and approved, the economic concentration cannot be subsequently challenged. If no advance verification is sought, and after the completion of the transaction the competition authority considers the economic concentration to unreasonably restrict or harm free competition, the competition authority can file a lawsuit with a specialised superior court seeking that conditions be imposed on the parties to ensure competitiveness in the marketplace, or seeking a partial or complete divestiture of the concentration, (or both), within three years following the effective date of the transaction.

Since a merger approval is optional, it may be obtained at any time in the process, and it can also be a condition of the tender offer.

Governmental agencies in Panama 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, and so on.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are no general restrictions on the foreign ownership of shares. Some specific sectors such as telecommunications and other public utilities restrict ownership by foreign governments.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on the repatriation of profits abroad.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

There are no further restrictions or disclosure requirements after the announcement of the offer.

REFORM

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are no current proposals for reform.

CONTRIBUTOR DETAILS

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Qualified. Texas, US, 2006; Panama, 2009

Areas of practice. M&A; securities.

Recent transactions

- FASA's sale of Nissan and Infiniti dealerships to Excel Automotriz.
- Acquisition of Café Durán by Casa Luker.
- Hopsa and Schuff joint venture for steel engineering division.
- Acquisition of Grupo Industrias Lácteas by Coca-Cola and Coca-Cola FEMSA.
- Acquisition of majority interest in Grupo Los Tres and Central American subsidiaries.
- Sale of Bonlac to Casa Luker.
- Reorganisation and sale of Stanford Bank (Panama).
- Empresas HOPSA sale of majority interest in Mortero Seco Panama.
- Grupo Mundial Tenedora strategic alliance with Mapfre America.