
THE MERGERS & ACQUISITIONS REVIEW

EIGHTH EDITION

EDITOR
MARK ZERDIN

LAW BUSINESS RESEARCH

THE MERGERS & ACQUISITIONS REVIEW

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THE MERGERS & ACQUISITIONS REVIEW

Eighth Edition

Editor
MARK ZERDIN

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EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be

filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin

Slaughter and May

London

August 2014

Chapter 27

GUATEMALA

Jorge Luis Arenales de la Roca and Luis Pedro Del Valle¹

I OVERVIEW OF M&A ACTIVITY

The Guatemalan market continues to be very active in terms of mergers and acquisitions.

A large number of acquisitions took place in 2013 in several industries, including pharmaceuticals, power generation and oil and gas, among others.

So far, the government has maintained its ‘hands-off’ approach towards M&A. As outlined later in this chapter, Guatemala does not have a competition law or a supervisory body that must approve mergers or acquisitions beforehand or *ex post*. Serious discussions are ongoing in both academic and political spheres about approving a competition law, in light of the obligations acquired by Guatemala under the EU–Central America Association Agreement.

Nevertheless, those mergers and acquisitions that take place in the context of banking and insurance companies are regulated and a process must be followed beforehand at the Superintendency of Banks of Guatemala.

Furthermore, we have not seen an impact on the rhythm of mergers and acquisitions in Guatemala for 2013 due to the new income tax law, but such a change in the tax regime did not have the intended effect, which was to increase tax revenue collection in Guatemala. In addition, certain provisions of the new income tax law have been declared unconstitutional by the Guatemalan Constitutional Court in recent rulings, such as certain administrative fines or procedures, although they did not have a direct impact on the M&A market. However, it might be the case that these regulations affect foreign investments, as one of the reforms deals precisely with the imposition of a tax on dividends (which did not exist before).

¹ Jorge Luis Arenales de la Roca and Luis Pedro Del Valle are partners at Arias & Muñoz.

Despite the above, the Guatemalan government has attempted to mitigate any negative effects that the tax reforms may produce and has been very active in promoting Guatemala as a destination for foreign investment and a country for doing business. The Guatemalan investment agency (Invest in Guatemala) and PRONACOM (national competitiveness programme) have done a remarkable job in putting Guatemala in the international spotlight for investments.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Guatemala Commerce Code, Decree No. 2-70 and amendments provides the legal framework for mergers of business companies, and together with the Guatemalan Civil Code, Decree No. 106 and amendments provides the legal framework for acquisitions.

The Commerce Code provides the general rules for mergers, transfers of shares, stock purchase agreements and purchases and sales of commercial enterprises, and the Civil Code provides the general rules for acquisition of assets and other conditions and agreements related to acquisitions. Guatemala does not have an updated legal framework of business companies; nevertheless, the current Commerce Code and Civil Code provide general parameters which are compatible with modern M&A activity and allow modern structures to function in Guatemala.

Also, Guatemala does not have specific regulations on takeovers and does not have any public companies, even though Guatemala has the legal framework for listing public companies. The applicable law in this context is the Securities and Commodities Market Law, which, together with the resolutions issued by the Securities and Commodities Market Registry, contain the regulations applicable to this market.

In the context of acquisitions, it is important to understand what would constitute public and private offering of securities in accordance with the Law.

The offer will be public if any of the following elements are present:

- a* an invitation is made by an issuer openly to the general public to engage in securities trading or negotiation;
- b* the invitation described in (a) is made by an issuer through a third party, via a regulated exchange, or using any other mass media; or
- c* the systematic dealing of securities by means other than the ones mentioned in (a) and (b) above.

Under the Law, public offerings of securities, contracts and commodities must be registered in the Securities and Commodities Market Registry and in the regulated exchange where they are traded.

Concerning private offerings, recent changes to the Law added a definition of what constitutes a private offering. These changes state that a private offering of securities, contracts and commodities exists in any of the following cases:

- a* when the offering is made exclusively to the current partners or shareholders of the issuer in connection with shares that had not been previously registered for public offer;

- b* when the offering is made without the intervention of third parties or the use of mass media directed at individuals or corporations considered by law as ‘institutional investors’. The term refers to persons or entities that, because of the professional or institutional activities in which they engage, the line of business in which they are involved or their corporate purpose, can be considered to be institutional investors. However, the term has no legal definition. The Law does stipulate that entities regulated by the Superintendency of Banks of Guatemala, the Guatemalan Social Security Institute, public and private pension funds, and collective investment vehicles or entities should all be considered institutional investors;
- c* when the offers are made to specific persons (whether individuals or legal entities); such offers not exceeding a maximum of 35 per year, as a total sum of all series regarding securities representative of debt obligations; or
- d* when the offers are made to specific persons (whether individuals or legal entities); such offers not exceeding a maximum of 35 per year, in total, for all series of shares, and that such persons are not currently shareholders of the issuer.

If the offerings described in (c) and (d) above are made to more than 35 persons (individual or legal entities alike), as described, such offerings are automatically considered to be public offerings and will have to fulfil all registration formalities.

In the case of a merger between companies, it is important to note that, above all, the merger is a corporate operation. Thus, to the extent that such character prevails, there should not be any issues from the perspective of the Law.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Currently, there are no bills or official initiatives to change or modernise Guatemala’s corporate law or implement a takeover law.

The only change in respect of certain aspects of corporate law is the new tax regime that has been in force since 1 January 2013, which introduced modern terms such as ‘related party transactions’ and how they should be arm’s-length priced. In addition, a 5 per cent income tax was introduced on the payment of dividends at the source via a withholding. Nevertheless, the new income tax law was amended in late 2013 and the entry into force of the related party transactions and the consequences thereof was delayed to 1 January 2015.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Recently, Guatemala has witnessed direct investment from several companies in South American countries in almost all significant sectors, including energy, infrastructure, oil and gas, finance and banking. It is important to note that European companies have divested their investments, creating opportunities for new investors in the country. Also, Guatemala expects to receive direct investment from Europe due to the recently signed and ratified EU–Central America Association Agreement. The

commercial aspects of this agreement have been in force since 1 December 2013. The remainder of the agreement will enter into force on 1 December 2016.

Over the last decade, Colombia has been the biggest Latin American investor in Guatemala. The United States, however, remains the main investor in Guatemala.

Guatemala has invested in other Central American countries and, in some cases, Europe and Asia, and some companies have successfully invested directly in the Dominican Republic and Mexico.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Guatemala is strategically located and appears to satisfy the demands of any logistical activity. Thus, one would expect transportation and logistics to be a hot industry. Although this has not been the case up to this point, it may become a hot industry as an important project is under scrutiny: a dry channel that will connect the ports located in the Pacific and Atlantic oceans. If this project is initiated, it will certainly increase interest in the industry. However, the project has been suspended and it is not clear when it will be reactivated.

Besides the above, recent transactions in the M&A market in Guatemala have affected the banking and insurance, pharmaceutical and energy sectors. The last five years have seen significant acquisitions of local banks by foreign key players, such as the acquisition by Bancolombia of a 40 per cent interest in Banco Agro Mercantil, SA, as well as the recent acquisition of Banco Reformador, SA by BAC Credomatic (part of the Aval Group). Both Bancolombia and the Aval Group are Colombian groups and would qualify under what are known today as the ‘multilatinas’. Additionally, in 2012 Grupo Ficohsa (Honduran capital) acquired Banco Americano, SA, a then private banking-oriented bank, with the hope of turning it into a retail bank with an important presence in the credit card sector.

In other relevant transactions, in 2010 Grupo EPM (again, a Colombian group) acquired control of Empresa Eléctrica de Guatemala, SA, the electric energy distributor authorised for three of the most important departments in Guatemala: Guatemala (the department), Escuintla and Sacatepéquez. These departments are not only the most populous but are among the most industrially developed.

In addition, 2012 saw the acquisition of Teco Energy’s operations in Guatemala. The deal included both of Teco’s plants in Guatemala: Alborada and San José. This transaction, together with the one described above, seems most representative of the energy market. However, two other transactions are also relevant in this market: one being the acquisition by an investment fund of the two other electric energy distributors (DEOCSA and DEORSA), which service the rest of the 22 departments, and the other being the acquisition, also by an investment fund, of a 50 per cent stake in a hydroelectric power plant located on the outskirts of Guatemala City.

The insurance market, with new regulations enacted in late 2010, saw the inception of foreign insurers such as Spanish giant MAPFRE Seguros and other key players. In some cases, this inception occurred in the form of an acquisition of a local insurance company.

Based on the above, it is evident that Guatemala has been active in terms of M&A transactions with Colombian companies positioning themselves as the biggest investors in Guatemala from Latin America.

Furthermore, 2013 saw the acquisition by MultiInversiones Group of a 40 per cent stake in Telefónica's operations in Guatemala. Likewise, other acquisitions have taken place in the last months, in which Colombian groups have been involved as acquirers.

The first months of 2014 saw the acquisition of Mayaniquel, SA – a nickel extraction project operating in Alta Verapaz and Izabal – by Cunico Resources from Anfield Nickel Corp.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

One important issue which is worth noting when addressing this subject is that, despite the global effect of the financial crisis, Guatemala has been stable from a macroeconomic perspective and, thus, its economy was able to cope with the crisis. Nonetheless, given that Guatemala depends heavily on foreign investment, and its export industry has strong ties with countries that were affected by the crisis, the crisis was still felt in the form of a reduction of foreign investment and local exporters having to turn to other business allies for their products.

Despite being able to take pride in its macroeconomic stability, the Guatemalan economy is small compared with other economies and the size of local banks is proportional to that of the economy. This entails that transactions such as those described in Section V are not locally financed, as the local banks would not have the capacity to finance such deals alone. Nevertheless, some Guatemalan local banks have participated in syndicated loans with other foreign global banks, either acting as lead arrangers or administrative or collateral agents.

Therefore, it can be said that Guatemalan banks have had a certain degree of participation in M&A deals like those described in this article. However, their involvement has not been alone, but in conjunction with other global banks.

From a local perspective, the banking system has changed shape over the previous decade. In 2000 there were over 30 banks; a figure which now has been reduced to 18 (as a result of mergers and some banks being suspended and having their rights, assets and obligations acquired by other banks). In addition, the banking regulations have been brought up to date with global standards.

Interest rates on loans have fluctuated little in recent years. For instance, the rate for loans expressed in US dollars has fluctuated between 6 per cent and 8.5 per cent, depending, naturally, on the risk level and loan security.

Concerning private equity, foreign funds have been active in Guatemala in recent years, and have implemented mezzanine structures whereby their investment is both via funds and equity simultaneously. In addition, recent years have witnessed the birth of local private funds which have been active in important transactions, especially in the power generation industry.

VII EMPLOYMENT LAW

Employment law in Guatemala has not been subject to significant changes. The main applicable provision is the Labour Code, which was enacted in 1961, and focuses on protecting employees and providing them with several minimum rights which cannot be waived. That same focus is still maintained today. Furthermore, as part of the employment law compendium, reference must be made to the social security provisions as well as other related provisions, such as the laws regulating the Technical Training Institute and the Recreational Institute of the Workers.

In any case, the employment law – comprised of the above mentioned laws – does not regulate M&A, nor has it been subject to developments concerning aspects of M&A. For instance, the applicable laws do not contain any regulations dealing with change of control of an employer. However, concepts such as ‘golden parachutes’ have become more familiar and, in some cases, even implemented in this jurisdiction.

Despite the above, employment law has acquired a significant importance in the context of M&A transactions, especially for potential buyers, as they have learned from the due diligence process that, as a general rule, the status quo afforded to employees may not be diminished under any circumstance.

VIII TAX LAW

In the context of tax law, it is important to mention that a new income tax law came into force as of 1 January 2013 in order to bring income tax law up to date. This income tax law introduced modern concepts that did not previously exist in Guatemala, such as the regulation concerning transfer prices – a regulation whose effects have been suspended until 1 January 2015. Likewise, a new regulation concerning this income tax law was enacted.

From the perspective of M&A, it is worth noting that the new income tax law contained certain provisions that aimed to tax the capital gains resulting from the transfer of shares issued by entities that are resident in the country. However, amendments effected in late 2013 circumscribed the scope of capital gains to those generated within the national territory.

Another issue relevant to acquisitions is the fact that the new income tax law has suppressed the 0 per cent tax rate applicable to the appraisal of real estate. According to the new law, any increase in the value of real estate is considered a taxable gain (usually at a rate of 10 per cent). The aforementioned suspended regulation and the approach of the new income tax law have had a direct effect on acquisitions.

According to the new law, the payment and distribution of dividends is subject to a 5 per cent income tax, which must be withheld at the source of payment. This was not the case under the previous income tax law, as the principle was that if the entity distributing the dividends had already paid income tax, said dividends were exempt.

IX COMPETITION LAW

Guatemala does not currently have a specific competition law, and as mentioned before it is the only country in Central America not to have one. It does, however, have the obligation to approve a competition law in light of the EU–Central America Association Agreement. Given that this agreement is now in force, Guatemala has a three-year period in which to enact a competition law, which will most likely have a bearing on M&A transactions, as is generally the case with legislation of this sort.

However, this field has been fairly active in recent years and a number of laws now contain provisions dealing with this matter.

i General Electricity Law

Enacted in 1996, the General Electricity Law contains provisions which show a latent concern as to the competition in this particular market. In that sense, the Electric Energy National Commission, which is a technical body of the Ministry of Energy and Mines, was bestowed, *inter alia*, with powers to ensure that the awarded entities and licensees comply with their obligations derived from this law, and to protect consumers' rights and prevent practices posing a threat to free competition, as well as abusive and discriminatory practices. As such, this commission was entrusted with the powers to make sure that this market works under competitive standards.

ii Hydrocarbons Commercialisation Law

Enacted in 1997, the Hydrocarbons Commercialisation Law had several purposes, including the creation of a free and competitive market in terms of petroleum and petroleum-derived products, to the benefit of consumers and the national economy. In this context, the Law created the following infringements in order to maintain a competitive market: discriminatory cap; coercive prices; concerted prices and discriminatory rebate.

iii General Telecommunications Law

When Central America entered into the free trade agreement with the United States in 2006, a law for the implementation of said agreement was implemented in Guatemala. Known as the 'Amendments for the Implementation of the Free Trade Agreement between Dominican Republic–Central America–United States', it contained several provisions, some of them dealing with the General Telecommunications Law. In that particular context, the section of this law dealing with free competition was amended and a new paragraph was added, by which all commercial network operators shall refrain from engaging in anti-competitive practices.

As noted before, there is no legislation that aims to regulate or strengthen competition in each and every market of the Guatemalan economy, but there are provisions contained in specific industry laws that attempt to set the competition standard for that particular industry.

There are several competition bills in Congress, but none of them has been pushed forward and it does not seem that any of them will become law in the near future. However, the Guatemalan Congress recently ratified the association agreement between Central America and the European Union. This agreement contains certain

provisions whereby it seeks to 'level [the] playing field for European operators by calling upon national governments to ban all types of anti-competitive practices including restrictive agreements, cartels and abuse of dominance.'² Therefore, it seems possible that either the competition bills currently in Congress will be reactivated or new bills will be introduced. In any case, there is likely to be movement in this field in the near future.

X OUTLOOK

As mentioned above, if the dry channel project is implemented transportation and logistics could become a hot industry in terms of foreign investment. However, the project has lost its initial appeal as it has been halted because of an internal review of the process.

In accordance with the current trend, we anticipate that more transactions will take place in the power generation industry, both in the form of new investments and also in the form of M&A. The pharmaceutical industry may also witness other transactions of this type.

In the banking and insurance industry, it seems possible that other M&A transactions will take place. As regards new actors, another insurance giant has recently obtained approval to operate in Guatemala.

Concerning other key issues, it is important to note that, currently, M&A transactions that occur in the banking and insurance sector are subject to prior approval from the Superintendency of Banks. Nevertheless, there is no competition law or similar law under which any sort of M&A is subject to prior approval from the government. There are certain bills in Congress which have been up for discussion for several years.

If it was the case that a competition law was enacted and introduced governmental approvals prior to the completion of a merger or acquisition, this alone may generate a certain degree of uncertainty as to how the approval process will be handled.

Another issue that may bring dynamism to the Guatemalan market in terms of mergers and acquisitions is the fact that the current government has coordinated important efforts in promoting Guatemala as a destination for investment. In that context, several events have taken place, the most important being the investment summit held in Guatemala City in late May 2013.

2 See www.sice.oas.org/TPD/CACM_EU/Negotiations/Highlights_EU_CA_e.pdf. Last visited 8 July 2013.

Appendix 1

ABOUT THE AUTHORS

JORGE LUIS ARENALES DE LA ROCA

Arias & Muñoz

Jorge Luis Arenales heads the corporate, energy and telecommunications departments in the Guatemala office of Arias & Muñoz. He specialises in advising corporations on mergers and acquisitions and corporate and commercial matters. He has ample experience in regulated industries such as energy, oil, gas, telecommunications and project finance.

He holds an LLM with honours from the Northwestern University School of Law (Chicago) and a Certificate in Business Administration from Instituto de Empresa (Madrid). He attended the Program of Negotiation for Lawyers (PIL) at Harvard Law School in Cambridge, Massachusetts. He has a JD degree from Universidad Francisco Marroquín, Guatemala (1998) and he is authorised as a practicing attorney and notary public by the Supreme Court of Justice of Guatemala.

LUIS PEDRO DEL VALLE

Arias & Muñoz

Luis Pedro's has ample experience regarding corporative advice in general, including drafting of typical and non-typical agreements, as well as complex corporate transactions. Mr Del Valle has experience concerning finance and stock market transactions. He also possesses experience and knowledge in the fields of telecommunications and information technology law.

Luis Pedro obtained his law degree from the Universidad Francisco Marroquin in Guatemala, where he also obtained his degree as attorney and notary public. He is a candidate for an LLM in Information Technology Law at Stockholm University in Sweden.

ARIAS & MUÑOZ

Diagonal 6, 10-01 Zona 10
Centro Gerencial Las Margaritas
Torre 2, Oficina 402 B
Guatemala City
Guatemala
Tel: +502 2382 7700
Fax: +502 2382 7743
www.ariaslaw.com