Dominican Republic

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Section 1:REGULATORY FRAMEWORK

1.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?

First of all, we have to mention the Dominican Constitution and Civil Code, which set down the principle of contractual autonomy-of-will, under which legally formed conventions enjoy the binding force of law for the parties involved, provided they do not contravene public order or any special provision of law. As consequence of the autonomy-of-will, in M&A deals parties are allowed to choose the law that will govern their agreement. The general practice for local shares and assets deals is that local law will rule agreements. However, some investors feel more comfortable if a foreign law governs their agreements. New York Law is a favourite for cross-border transactions.

In addition, the Dominican Companies Law 479-08 and the Tax Code (and its supplementary regulations) establish the general rules that govern corporate transactions, mergers and all sorts of business combinations in the Dominican Republic (DR).

For regulated industries, such as telecommunications, energy, banking and insurance, special laws apply. In such industries, the corresponding regulator intervenes to supervise compliance with law and, generally, its prior authorisation is required to complete any M&A deal. The tax authorities may also intervene to grant transfer tax exemptions, for corporate consolidations and reorganisations.

In general, most of the M&A activity in the DR is private. To date, there has been no public company in the DR. Even though the Dominican legal framework for public capital markets has undergone significant advances in the past few years, the market is still incipient. It must be noted though, that Law 479-08 as well as the DR Securities Law and regulations provide that the issuance of securities, as well as the transformation, merger, dissolution and liquidation of public corporations must be made under the supervision of the securities regulator.

1.2 How, and by what measures, are takeover regulations (or equivalent) enforced?

We have no specific takeover regulations in the DR. In fact, hostile takeovers are very rare in our country. The main scenarios where a private takeover may take place in the Dominican Republic are when a company goes through crises related to financial distress or impasses within governing bodies. This could trigger contractual provisions that would give place to the forced exit of one of the shareholders, either by the realisation of collateral or execution of forced sale clauses, (for example, shut approach). This may also be the case that minority shareholders make use of complex corporate engineering and opportunistic strategies, through the implementation of tactics relating to quorums and minorities rules to gain control over the company, to the detriment of other shareholders. Mainly, the bylaws, shareholder agreements, and the Companies Law rule the corporate governance of a company. Our regulation does include certain legal rights that protect shareholders' interests (especially minority shareholders), including information rights, preemptive rights, as well as remedies and legal actions that can be enforced against the administrators and shareholders to plea their compliance and protect its interest in the company.. Shareholders may also execute shareholder agreements, in which they usually set out certain rights and obligations to reinforce and supplement the corporate governance regulated by the bylaws, and where they include provisions for dispute resolution, deadlock remedies, restrictions on transferring shares, security interest over shares treatment, as well as dispositions regulating the ownership and voting rights, such as put-options, preemptive, and drag- and tag-along rights.

Section 2: STRUCTURAL CONSIDERATIONS

2.1 What are the basic structures for friendly and hostile acquisitions?

In the DR, hostile takeovers are not likely to happen. Even though there has been a legal framework for public companies since 2000 (Law 19-00 and other regulations), there has not been any public offering of a Dominican company to date. For this reason, most acquisitions are friendly. Shareholders and boards of directors are usually the same people or closely connected. Under this scenario, if the shareholders accept the offer to sell the company, the board of directors will cooperate with the bidder.

Corporate acquisitions can be structured as an asset purchase, where the seller sells operating assets of the target company to the purchaser, or as an equity purchase in which the purchaser purchases equity interests in a target company from one or more selling shareholders.

2.2 What determines the choice of structure, including in the case of a cross-border deal?

The choice of structure by the parties will be based on different variables. However, the main recommendation to isolate liabilities for a new purchaser is to execute the acquisition as an asset deal. Buying operating assets of the target company will limit the scope of pre-closing liability to labour and tax contingencies. However, additional expenses due to the completion of formalities to transfer some of the acquired assets (registered assets) should be considered as an additional cost of the transaction (transfer taxes).

Generally, an equity acquisition is considered when the target company is the owner of assets (tangible or intangible), or benefits from a tax exemption regime that could not be easily assigned or transferred. Under this type of structure, the purchaser will be liable for all contingencies of the target company while the statute of limitation of such contingencies has not elapsed.

2.3 How quickly can a bidder complete an acquisition? How long is the deal open to competing bids?

The timeframe for completion of an acquisition by a bidder may be affected by conditions as agreed by the parties in the preliminary agreement, and also by the structure chosen by the parties to execute the acquisition.

For example, if an authorisation or regulatory approval is required before closing, or if the approval of a credit facility or any other approval or waiver from a third party is needed, closing would be extended to a reasonable period of time depending on the complexity of the condition to be completed before closing.

Usually, parties execute a preliminary agreement at a very early stage of the negotiations, such as a memorandum of understanding (MOU) or a letter of intent (LOI). This type of agreement generally includes an exclusivity provision regarding the transaction. None of the parties, during the existence of such agreement, would be able to negotiate the same or similar condition with third parties. Consequently, the deal would not be open to other competing bids.

2.4 Are there restrictions on the price offered or its form (cash or shares)?
There are no restrictions on the price offered, or its form in a corporate acquisition in the DR. However it is recommended from a tax point of view that the price paid by the purchaser is reasonable (market value) to avoid possible claims from the Tax Administration. In cases of related party transactions, the market price becomes a more important issue to consider from a tax point of view.

Payment in shares is also possible. In such cases, the purchaser should be aware that, according to the Dominican Corporate Law, a company should have at least two shareholders.

2.5 What ownership and other conditions determine whether the bidder makes the acquisition and can satisfactorily squeeze out or otherwise eliminate minority shareholders?
Generally, by-laws provide for a drag-along right in favour of majority shareholders. Minority shareholders will be forced to sell to the purchaser their shares in the target company. However, in such cases, when a majority shareholder exercises the drag-along right, the purchaser should extend to the minority shareholders the conditions of the offer made to the majority shareholders. Likewise, the minority shareholders, as compensation for this drag-along right in favour of the majority shareholders, should benefit from a tag-along right. According to this right, they would tag to an offer received by a majority shareholder under the same conditions of the offer received.

2.6 Do minority shareholders enjoy protections against the payment of control premiums, other preferential pricing for select shareholders, and partial acquisitions, such as mandatory offer requirements, ownership disclosure obligations and a best price/all holders rule?
Considering that these pratices or strategies, such as control premium and other preferential pricing for select shareholders and partial acquisitions, are used or applied to publicly traded companies, and the Dominican Republic has not developed a stock market, shareholders do not have these protections.

2.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?
Presenting an offer subject to the fulfillment of conditions is generally acceptable. In most cases, the purchaser subjects the transaction to the fulfilment of certain conditions, that will depend on the nature of the transaction. The absence of material adverse changes in the business, as well as the confirmation of certain representations considered by the purchaser are common conditions to find in an offer.

Every transaction is different, but it is common in corporate acquisitions for the seller to request a deposit or down payment when parties are aware that closing will not occur immediately, due to due-diligence processes or other conditions to be fulfilled as regulatory approval or third party consent. The payment of a deposit provides more incentive for parties to close the transaction.

2.8 How do buyers and sellers seek to maximise value through their price and other deal strategies?
The purchaser maximises value by minimising post-closing liabilities. After completing a due-diligence process in order to determine the level of risk of the potential acquisition, the purchaser will request, in addition to contractual indemnities to be included in the purchase agreement, guaranties for potential contingencies related to the assets and to the target company. These guaranties may be provided in cash or in nature by the seller during the time period agreed by the parties. In this sense, the seller will maximise value by reducing its exposure to the maximum after closing, due to contingencies related to the selling of the target company. The seller will limit its liability and will try to obtain a payment of the purchase price, absent any kind of withholdings or adjustments.

Section 3: TAX CONSIDERATIONS

3.1 What are the basic tax considerations and tradeoffs?
According to the Dominican Tax Code (article 11k), the buyer will be jointly liable with the seller for any capital gain generated by the seller due to the transfer of the target company (shares or operating assets as the case may be). For this reason, it is a priority for the purchaser that the seller pays the corresponding capital gain taxes. In most cases, the purchaser and seller design and execute the most cost-efficient fiscal structure to complete the acquisition. Parties discuss tax issues at a very early stage of the negotiations. In all cases, where an income's source is considered to be Dominican, such income is subject to income tax. Article 289 paragraph I of the Tax Code provides that in all cases where a non-Dominican entity is the owner of assets located or economically used in the DR, incomes generated by this foreign company resulting from the direct or indirect selling of such assets (including of equity interest by shareholders) will be considered of Dominican source for the purpose of payment of any capital gain tax.

When the chosen structure to perform the acquisition is an asset deal, the payment of transfer taxes is also required to formalise the transfer of registered properties in favour of the purchaser. Only registered assets require such payment. Real estate and motor vehicles transfers will require the payment of a transfer tax, at three percent over the value of the property and two percent over the value of vehicle (law 495-06).Taxes to be paid will depend on the transfer price.

In addition to transfer tax, there is VAT (article 335 of the Tax Code) that should be paid by the purchaser over movable assets, such as equipment and machinery.

In the DR, the statute of limitation for tax contingencies is three to five years, depending on if a tax return has been filed or not. In case of filling, the statute of limitation will be three years, and in other cases there is an extension to five years.

When purchaser acquires equity in the target company, General Rule 07-2011 provides that the purchaser should withhold one percent of the purchase price to be paid to the seller, and pay such tax to the Tax Administration. This payment is considered an advance payment of the potential capital gain to be generated from the transaction. In such cases, where the seller has the documentation that proves that a capital gain will not be generated, it might request the authorities the corresponding waiver from the withholding of such tax.

3.2 Are there special considerations in cross-border deals?
No there are not. All considerations included above will apply to cross-border deals.

Section 4: ANTI-TAKEOVER DEFENCES

4.1 What are the most important forms of anti-takeover defences, including antitrust, national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?
See section 1.2.

4.2 How do targets use anti-takeover defences?
See section 1.2.

4.3 How do bidders overcome anti-takeover defences?
See section 1.2.

4.4 Are there many examples of successful hostile acquisitions?
See section 1.2.

Section 5: DEAL PROTECTIONS

5.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile interloper?
Generally, parties execute pre-agreements (LOIs or MOUs) by means of which parties agree not to negotiate in similar terms with third parties (exclusivity clauses).

5.2 To what extent are deal protections limited, for example by restrictions on impediments to bidding competition, break fees or lock up agreements?
There are no limitations in deal protections, so parties may agree on any contractual provisions. For example, the buyer is generally required to pay an immobilisation fee, which impedes the seller from negotiating with other bidders while the pre-agreement is in effect.

Section 6: ANTITRUST REVIEW

6.1 What are the notification thresholds in your jurisdiction?
There are no specific notification requirements under Dominican law. However, any person with a legitimate interest and reasonable grounds may make a reasoned request to the Executive Board of the National Commission for Antitrust to initiate investigations based on the principles and rules of law. Additionally, the Executive Board can act *ex officio* when there exist sufficient grounds of breach of antitrust regulations.

6.2 When will transactions falling below those thresholds be investigated?
The Executive Board should investigate all complaints either presented by third parties or *ex officio*. All processes will be public. Nevertheless, the Executive Board, upon request of one of the parties, may put up a reservation of confidentiality on all or part of the probative trade secrets.

6.3 Is a notification filing mandatory or voluntary?
Notification filings are voluntary.

6.4 What are the deadlines for filing, and what are the penalties for not filing?
There are neither deadlines nor penalties for not filing.

6.5 How long are the review periods?
The Executive Board should complete the review within 30 days of the declaration of initiating the investigation. All evidential elements should be collected in accordance with the provisions of the Dominican Penal Procedure Code.

6.6 At what level does your authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?
As stated above, the Executive Board should act *ex officio* when there are sufficient grounds of breach of antitrust regulations.

Section 7: ANTI-CORRUPTION REGIMES

7.1 What is the applicable anti-corruption legislation in your jurisdiction?
The Dominican anti-corruption legislation consists of several acts, decrees and norms, including: Law 200-04 for the free access of public information; Law 10-04 that establishes the Audit Chamber of the Dominican Republic; decree 324-07, which created the National Pursuit of Administrative Corruption; decree 310-05, establishing the Operating Rules of the National Commission on the Ethics and Anti-Corruption; decree 101-05 creating the Commission on Public Ethics and Anti-Corruption; decree 39-03, which creates Social Audit Committees; and, decree 149-98 that creates the Committees on Public Ethics.

7.2 What are the potential sanctions and how stringently have they been enforced?
Offenders of anti-corruption legislation are guilty of contempt, and as such, punishable by imprisonment and pecuniary sanctions. Additionally, offenders will be disqualified from public office for up to five years.

According to Transparency International, the DR has one of the highest perceived levels of public corruption. In practice, actions related to corruption claims are initiated, but remedies are not always provided.

Section 8: OTHER MATTERS

8.1 Are there any other material issues in place in your jurisdiction that might affect a transaction?
In every acquisition deal in the DR, the buyer should carefully consider the status of ownership, the tax situation, as well as compliance with Dominican labour and environmental regulations of the target company.

Therefore, we strongly advise the performance of a legal due diligence, which should include a detailed investigation to determine whether there are liabilities affecting the company or its assets or any existing contravention or infringement of regulatory, corporate, tax, labour, or environmental regulations and policies. To protect the buyer from this sort of liability, we recommend establishing contractual post-closing guarantees.

In addition, if the deal involves a regulated company, it is important to verify compliance of applicable special regulations. In these cases, a previous consent from the regulator is generally required. Therefore, the execution of an LOI or a preliminary agreement is advisable to establish essential representations and warrants, as well as conditions necessary for closing.

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