

Argentina

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MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year?)

M&A activity has increased in Argentina over the last three years. This is largely because Argentina has almost completed its recovery from the 2001/02 crisis and its gross national product has increased during the last three years by about 8% to 10% each year. However, there are still some sectors that have not seen great improvements in their profitability, mainly due to governmental intervention (in particular, gas, utilities and oil).

The public M&A market varies significantly every year as the Argentine exchange market represents a small portion of the Argentine economy, and does not necessarily accurately reflect the trend in the M&A sector. For example, general M&A activity increased in 2006 from 2005, although there was a decrease in both the number and value of public M&A transactions.

The main public M&A deals in 2006 were:

- On 1 August 2006, Materis Paints España SL agreed to purchase BIARSA shares in Colorín IMSSA, which represent 87.86% of the issued shares of Colorín. The total price paid was around US\$10.32 million (about EUR7.82 million).
- On 28 April 2006, PDVSA Argentina SA (a subsidiary of PDV SA, a Venezuelan oil company) acquired 46.10% of Petrolera del Conosur SA from ANCSOL SAFI (a subsidiary of ANCAP, an Uruguayan oil company) for US\$15 million (about EUR11.4 million).

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

The main means of obtaining control of a public company are by:

- Private agreement between the bidder and the target's controlling shareholder. The agreement triggers an obligation to make a mandatory public takeover bid (*oferta pública de adquisición obligatoria*) (OPAO), unless the target is not subject to the OPAO regime (see *Question 13*) (Public companies must decide before making a request to become

a public company whether they wish to be subject to the regime and modify their bye-laws accordingly. Companies that are already listed must make this decision at the first general meeting held after 12 months of implementing the regime).

- The bidder announcing a public takeover bid (*oferta pública de adquisición*) (OPA) to acquire the target's shares.
- A merger between companies.

A private agreement is the most common means of obtaining control of a public company in Argentina. The two other alternatives are rarely used.

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are allowed but are not common, as most listed companies are controlled by a family or economic group and due to the small size of the Argentine exchange market.

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

Public takeovers and mergers are mainly regulated by:

- The National Securities Commission (*Comisión Nacional de Valores*) (CNV) (see *box, The regulatory authority*). Takeovers are regulated by Chapter XXVII of the CNV regulations governing tender and exchange offers (CNV Regulations) and mergers are regulated by Chapter IX of the CNV Regulations.
- The Public Offering Securities Act (*Ley de Oferta Pública de Títulos Valores, Law No. 17.811*).
- The Companies Act (*Ley de Sociedades Comerciales, Laws No. 19,550 and 22,903*). Public mergers must comply with section 82 to 87 of the Companies Act. The Companies Act does not regulate takeovers.
- In the case of mergers, sections 77 and 109 to 113 of the Income Tax Act (*Ley de Impuestos a las Ganancias, Law No. 20,628 and later modifications*), and the Tax Board Resolution 2245, if the merger is to be structured as a tax free reorganisation.

- The Anti-Trust Act (*Ley de Defensa de la Competencia, Law No. 25,156*), which, in some cases, requires a filing for clearance of the transaction (see *Question 25*).

In addition, the following industries are subject to specific regulations:

- Banking.
- Utilities.
- Insurance.
- Communications.

PRE-BID

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

Before contacting the target, a bidder carries out preliminary due diligence enquiries by reviewing publicly available information about the target (see *below, Public domain*). After the bidder has contacted the target and the parties have signed a confidentiality agreement or letter of intent, the target generally makes non-public information available for the bidder to review.

A bidder's legal due diligence usually focuses on:

- Contingent liabilities (for example, from pending litigation or environmental liabilities).
- The target's material contracts and whether the proposed acquisition may have an effect on them.
- Employee-related liabilities.
- Anti-trust and other regulatory issues.

A bidder also conducts business, financial, tax and accounting due diligence on the target.

Hostile bid

In a hostile bid, the bidder must rely on information about the target that is publicly available (see *below, Public domain*).

Public domain

There are several sources for obtaining information about a listed company. The main source is the CNV website (see *box, The regulatory authority*), which contains the following information:

- The company's bye-laws.
- Annual and quarterly financial statements.

- The annual board of directors' report (*memoria*), which:
 - states the most important information about the company during a fiscal year, including its operations and commercial objectives; and
 - discusses the company's financial situation.
- Minutes of all shareholders' meetings and the most relevant board meetings.
- Reports or minutes of the auditing committee's meetings.
- Minutes of the syndics' meeting (syndics are a supervisory body in charge of the private control of a company).
- A list of the board members, managers and other officers.
- Auditors' affidavits.
- Stock credit ratings.
- Significant economic events.
- Any previous prospectuses.

Information on a listed company can also be obtained from reports of commercial and trade news sources, and public records relating to intellectual property, real estate and litigation.

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

Information about a bid must be kept confidential until it is announced to the market. The CNV Regulations prohibit the use of reserved or privileged information until proper disclosure is made.

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?

It is common for the bidders to obtain a commitment from key shareholders to sell their shares in a public takeover bid. These agreements are usually structured in a way that allows the bidder to acquire only the key shareholders' interest in the target without acquiring the minority shareholders' interest. The agreements must be disclosed, outlining the nature and principal terms and conditions.

8. If the bidder decides to build a stake in the target before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there any circumstances in which shareholdings of associates could be aggregated for these purposes?

Any individual or entity that acquires enough shares of a listed company to grant him at least 5% of the votes in an ordinary

shareholders' meeting must notify the CNV of the transactions by which the threshold was reached (*CNV Regulations*). When calculating the participation, all direct and indirect ownership must be included (that is, shareholdings of associated companies that belong to the same economic group).

Any individual or entity that intends to acquire a substantial participation in the target (at least 35% of shares of a listed company that grant him at least 5% of the votes in an ordinary shareholders' meeting) must launch an OPA if the intended participation will grant him control of target (*CNV Regulations*).

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?

On mergers, there must be a formal agreement between the bidder and target which outlines the main aspects of the merger, including the:

- Proposed exchange ratio.
- Balance sheet of both companies.
- Consolidation of both balance sheets.
- Way the target's business will be managed until the merger is completed.

On acquisitions, the target's board is not required to participate in the negotiation or execution of sale documents, unless an OPA was made, in which case it must issue the mandatory opinions under the CNV Regulations (*see Question 14*).

10. Is it common on a recommended bid for the target to agree a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.

The use of a break fee is not common.

11. Is committed funding required before announcing an offer?

Before making the offer, the bidder must prove to the CNV that it can comply with the offer. If the consideration offered is cash, it must have a guarantee issued by a financial institution in Argentina that is sufficient to cover the offer made. If the consideration is securities, then the bidder must prove that the securities will be available if the offer is accepted (*sections 30 to 32, Chapter XXVII, CNV Regulations*).

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements) and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

A public offer for both recommended and hostile bids includes the following main steps:

- The offer and prospectus is presented to the CNV and clearance of the offer is sought. The CNV has 15 days to request amendments or clarifications from the bidder.
- The offer is announced.
- The offer period ends (this is between 20 to 30 days after the offer).

The timetable is not altered if a competing bid is submitted.

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? 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)?

An offer can be made subject to the satisfactions of one or more pre-conditions. The most common conditions are:

- Acquiring a minimum or maximum amount of shares.
- That there is no material adverse effect on the target.
- That any regulatory approval required for the offer is obtained.

Where the target is voluntarily subject to the OPAO regime, the bidder must make a bid for certain mandatory minimum percentages of shares:

- If the bidder seeks to reach a participation that is equal to or more than 35% of the corporate capital with voting rights and/or votes of the target, it must make an offer for the number of shares that will enable it to acquire at least 50% of the target's shares with voting rights.
- If the bidder holds participation and/or voting rights in the target that are equal to or more than 35% but lower than 51%, and expects to increase its shares in the company by at least a 6% within 12 months, it must make an offer for an amount that represents at least a 10% of the target's shares with voting rights.
- If the bidder seeks to reach a participation equal to or more than the 51% of the corporate capital with voting rights and/or the votes of the target, it should make an offer for the number of shares that will allow it to acquire 100% of the target's shares with voting rights.

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

The target's shareholders receive the following documents on a recommended and hostile bid:

- A prospectus, which contains extensive information on the bid and the bidder. If the offer consideration includes listed securities, the prospectus must also include information about those securities.
- The target's board's report on the offer, which:
 - outlines the offer;
 - states the advantages and disadvantages of accepting the offer;
 - states whether there is any agreement between the bidder and the target or any of the board members;
 - includes an opinion of the price offered and recommends whether to accept or reject the offer. If the board required an independent third party's opinion, the opinion must be attached. If not, it must state that the board has not considered the opinion necessary.
- The documents in relation to the guarantee (see *Question 11*).

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

The target's board is not required to inform or consult its employees about the offer.

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

If the target is voluntarily subject to the OPAO regime, then the bidder must extend the offer to acquire the minority shareholders' shares. The amount offered by the bidder depends on the percentage of shares that the bidder intends to acquire (see *Question 13*).

In addition, if a company or economic group acquires almost total ownership control (*control casi total*) of a listed company, then any minority shareholder can request the controlling shareholder to make an offer to acquire all minority shareholders' participation in the target. An almost total ownership control is reached when an individual or company acquires, directly or indirectly, at least 95% of the listed company's capital (see *Question 20*).

CONSIDERATION

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

The consideration most commonly offered on a public takeover is cash, although securities or a combination of cash and securities can also be offered.

18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

A minimum level of consideration is provided for in the following situations (*sections 20 and 21, Chapter XXVII, CNV Regulations*):

- If the bidder acquired the target's shares within 90 days before the offer was announced, the bidder must offer a consideration that is at least equal to the higher amount paid for the shares.
- If the bidder agreed to acquire shares from the controlling shareholder or other shareholders that can participate in the offer, then the consideration must be at least equal to the price established in the agreements.

The CNV may allow different considerations to different shareholders for the offer in the following cases:

- If the controlling shareholders grant an indemnity or guarantee in relation to a certain risk or a different payment is included in the target's balance sheet (the difference cannot be more than 20%).
- When the target has more than one type of shares, the consideration for each type of share can be different but an independent evaluation entity must evaluate and justify the consideration offered.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

There are no restrictions on the form of consideration that a foreign bidder can offer to shareholders.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

Sections 25(b) to 30 of the Public Offering Transparency Regimen (*Régimen de Transparencia de la Oferta Pública*) (*Decree 677/01*) regulate the compulsory purchase of any remaining minority shareholders' shares.

The bidder's board can make the compulsory purchase within six months from the date it is under almost total ownership control (see *Question 16*) by issuing a unilateral declaration of acquisition. The declaration must include the price that the bidder will pay for each share. The bidder must notify the CNV that the target is under almost total ownership control within ten days of reaching such control.

In addition, the minority shareholders, at the date on which the target is under almost total ownership control, may request that their shares be purchased by the controlling shareholder (bidder). If the controlling shareholder decides to make an offer, it can either:

- Announce an OPA.
- Issue a declaration of acquisition.

The bidder may make an exchange offer if it is a public company. The minority shareholder can assume that the bidder has acquired its shares if the bidder does not respond within 60 days of the minority shareholders' request.

The price payable must be fair, which can be established by using one of the following criteria (there is no rule as to which criterion to use; the one that establishes the fairest price should be used):

- The net equity value of the shares.
- The value of the company, which is based on discounted flow of funds (this is a method of evaluating a company by taking into account the present value of the future cash generated by the target) and/or by using other valuation methods that apply to companies or businesses similar to the target.
- The target's liquidation value.
- The average value of the shares in the relevant stock exchange market for the six months before the agreement to de-list the target.
- The consideration offered on the launch of an OPA during the year before the decision to de-list the target was made.
- The value of issued shares during the year before the decision to de-list target was made.

If the bidder is a public company it may offer an exchange of shares.

Compulsory purchase procedure

The bidder must notify the target of the declaration of acquisition and file a request to de-list the target with the CNV and the corresponding stock exchange within five days of the issue of the declaration.

The declaration, the price to acquire the shares and the other conditions must be published in the *Official Gazette*, in a national newspaper and in the *Stock Exchange Gazette* for three days.

Within five business days of the CNV's approval, the bidder must deposit the full amount of the offer in a special account opened for the acquisition. On an exchange offer, the shares or securities offered must be deposited in the account of a CNV authorised entity. The deposit must include a list of the minority shareholders, including their personal data.

After the declaration is published, the CNV's approval is registered before the Public Register of Commerce and the deposit for the consideration is paid, the declaration must be documented by a notarial deed. The notarial deed must include the following information:

- The declaration of the bidder that it intends to acquire all the minority shareholders' shares and a reference to the board meeting in which it was decided to issue the declaration.
- The price per share.
- Information on the consideration, including the date, name of the financial institution and account number.
- Information on all the publications made.
- The registration data of the target with the Public Register of Commerce.
- The CNV's approval and the reference for the target to be de-listed.

The notarial deed must be registered with the Public Register of Commerce and filed with the CNV and the stock exchanges where the target listed its shares.

The notarial deed is the instrument by which the bidder acquires all the shares of the target's minority shareholders.

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 or buying shares in the target if a bidder fails to obtain control of the target.

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

The following procedure must be followed if a public company decides to be de-listed:

- The board must call an extraordinary shareholders' meeting to approve the de-listing of the company and must issue a report that fully explains the advantages of de-listing. The report must be filed with the CNV and a securities exchange (such as the Buenos Aires Stock Exchange (BCBA)) and copies provided to any shareholder wishing to obtain a copy.
- The extraordinary shareholders' meeting approves the de-listing of the company.

- The company or its controlling shareholder must launch an OPA to acquire all minority shareholders' shares. The notices must indicate if the offer to acquire the shares is not granted to those voting in favour of the de-listing.
- The decision to de-list must be published for three days.
- Authorisations from CNV and BCBA are requested to implement the de-listing (these entities will not grant authorisation if the target has pending investigations).
- Notifications to exiting shareholders stating the conditions for collecting the price of their shares in the target.

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 is not legally required to intervene in a bid for the target's shares, other than the requirements set out in the CNV Regulations in relation to providing an opinion on the advantages and disadvantages of accepting the offer (*see Question 14*). The target's board therefore has limited capacity to prevent or defend the company or shareholders from a hostile bid.

Even when there are no legal restrictions on implementing defence mechanisms (such as poison pills or white knights), they are not usually used in Argentina, as most listed companies are controlled by a family or economic group.

Defence mechanisms must be approved by a shareholders' meeting.

TAX

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

Argentine income tax is not payable on the sale of a listed company's shares by a foreign company or individual.

However, BCBA fees and/or other fees (for example, broker-dealer) must be paid.

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 (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

Public takeovers and mergers (economic concentrations) are subject to notification under the anti-trust laws if specific conditions are met (particularly relating to the business volume of companies), unless an exemption applies (for example, the acquisition

THE REGULATORY AUTHORITY

Comisión Nacional de Valores (CNV)

Head. Eduardo Hecker (Chairman)

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1002 Buenos Aires
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Main area of responsibility. The CNV is responsible for:

- Administering and enforcing federal securities laws.
- Regulating stock exchanges and brokers/dealers.

Contact for queries. See contact details above.

Obtaining information. Additional information can be obtained from the CNV's website (*see above*).

of a sole company by a sole foreign company having no other assets or interests in companies in Argentina).

The anti-trust authorities must be notified no later than seven days after the bid is publicly announced.

In addition to the anti-trust rules, public takeovers or mergers in industries such as banking, utilities, insurance and communications may be subject to approval by regulatory agencies.

All economic concentrations submitted to clearance are only effective between parties and third parties once authorisation is granted.

26. Are there restrictions on 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 foreign ownership of shares except in specific sectors (for example, aviation and the media).

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

Access to the Sole Free Exchange Currency Market (*Mercado Unico y Libre de Cambios*) is granted to all payments of profits and dividends if they correspond to profits or dividends based on annual audited balance sheets.

Non-Argentine residents can transfer foreign currency abroad for any payment received in Argentina corresponding to, among other things, the:

- Sale of their direct investments in the non-financial private sector.
- Final liquidation of the direct investments in the non-financial private sector.
- Sale of shares of Argentine companies.

However, the Argentine Central Bank's authorisation is required when the transactions are above US\$2 million (about EUR1.5 million) per month, or US\$500,000 (about EUR378,997) in the case of sale of shares of Argentine companies.

Also, in some cases, the investment cannot be liquidated until 365 days after the funds enter Argentina.

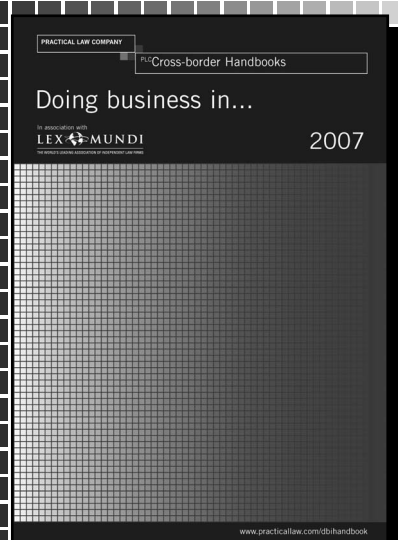
28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

There are no specific disclosure requirements or restrictions on persons who deal in securities of the parties to the bid, other than the general obligations provided in CNV Regulations which prohibit the use of reserved or privileged information until proper disclosure is made (see Question 6).

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

The current administration is not considering any changes to takeover regulation in Argentina.



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