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Dominican Republic

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1 Types of transaction

How may businesses combine?

There are several ways for businesses to combine in the Dominican Republic. The most widely used are mergers and business combinations via contributions in kind, as well as share and asset acquisitions.

Mergers

Since the entry into force of Law No. 479-08 on Business Associations and Individual Proprietorships with Individual Liability on 19 June 2009, mergers and corporate break-ups or divisions are now regulated under our company law. Law No. 479-08 repealed and replaced title III of the Code of Commerce and represented a complete revision of Dominican company law, including for the first time regulation on the corporate process involved in mergers and corporate break-ups. Law No. 479-08 was substantially amended by Law No. 31-11, adopted on 9 February 2011 (hereinafter collectively referred to as the Company Law). However, only limited modifications to merger regulation were introduced by Law No. 31-11.

Under the Company Law mergers imply the transfer of all of the assets and liabilities of a company to a new or existing company and the dissolution of the company making such transfer. As a result of the merger, the shareholders of the company transferring such assets will receive in exchange shares in the company receiving such assets. Two types of mergers are recognised:

- merger by consolidation: consists of the formation of a new entity (the resulting company) by the combination of two or more merging companies, which are dissolved; and
- merger by absorption: implies that one of the merging companies, the absorbing company, absorbs the other (the absorbed company). The absorbed company loses its legal personality, transfers all its assets and liabilities to the absorbing company, and is dissolved.

Business combinations via contributions in kind

Other types of business combinations may ensue when one or more companies contributes part or all of its assets in kind to one or more new or existing companies, in exchange for shares. Unlike a merger, where the shareholders of the company transferring the assets directly become shareholders of the resulting or absorbing company, the company contributing the assets in kind would receive the shares in the new or existing company receiving such contribution.

Other business combinations

Businesses may combine generally through other means such as acquisition of shares, acquisition of assets and joint ventures.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations are:

- the Company Law, which sets out the regulations for mergers, corporate break-ups, contributions in kind and share transfers;
- the Mercantile Registry Law No. 3-02, which sets out the obligation to record all corporate minutes and documents relating to these processes at the Chamber of Commerce and Production of the domicile of the merging companies;
- the Tax Code (Law No. 11-92 and its amendments) and Tax Code Regulation; the tax legislation regulates business combinations in the chapters of the Tax Code of the Dominican Republic, Law No. 11-92 of 1 May 1992, and its Regulation No. 135-98 relating to the Reorganisation of Corporations, as well as Decree No. 408-10, adopted on 12 August 2010, on Corporate Reorganisations; and
- the Labour Code (Law No. 16-92 of 29 May 1992), which sets out the joint liability of the transferor and the transferee in relation to employees for the obligations that arise after the assignment of a business or transfer of employees.

In addition, companies in specific industries are subject to additional regulations and statutes.

3 Governing law

What law typically governs the transaction agreements?

In general, transaction agreements are governed by the law chosen by the parties except when the agreement concerns public policy. Civil code provisions are applicable in a supplementary fashion to those issues not specifically agreed upon, and will also be applicable in cases where the Civil Code expressly indicates that its provisions shall prevail. Regarding the mechanics of a business combination, the Company Law would govern the relevant corporate documentation and processes to be executed, except if the structure for the business combination is a sale of assets or another type of contractual agreement that does not impinge on corporate matters.

In the case of mergers the Company Law requires a transaction agreement to be executed. This agreement must contain the plan of what is going to be executed and comply with legal formalities.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Filings

The process to be used for completing the combination would depend on the type of transaction chosen to execute it.

In the case of combinations which fall within the scope of corporate reorganisations as defined by the income tax chapter of the Tax Code of the Dominican Republic, Law No. 11-92 of 1 May 1992, and as further outlined by Decree No. 408-10 on Corporate Reorganisations, the Tax Department's prior approval is required for the reorganisation to be considered non-taxable. This approval is requested by a letter submitted by the companies presenting the merger or reorganisation case, and the terms and conditions of the proposed transaction. After the Tax Department issues its approval, the companies can proceed with the corporate processes required to execute the combination. (For further information regarding Dominican tax law and regulations on corporate reorganisations, see question 18.)

In mergers and contributions in kind, the minutes of the shareholders' meetings that authorise the transactions must be filed at the Mercantile Registry, and in the case of mergers the document setting out the planned execution of the same must also be filed at the Mercantile Registry.

After complying with all corporate steps regarding mergers and contributions in kind, including recording the documents at the Mercantile Registry, the companies must file all the documents related to the business combination with the Tax Department to obtain further approval of the transfer of the assets without fiscal effect and the transfer of the fiscal rights and obligations to the resulting entity (when allowed).

Companies that are absorbed or dissolved as a result of a merger present final tax returns to the Tax Department within 60 days of the general shareholders' meeting, which will decide the final distribution of the company's assets (liquidation).

Regulated entities must obtain approval or a statement of non-objection from the corresponding regulators of their specific industries, for which they are required to file the combination documents with the corresponding authorities.

For companies which offer its securities (stock, bonds, etc) for sale to the general public, traded on the open market, the Company Law expressly provides that the planned execution document for mergers must be filed with the Securities Superintendency in order to obtain approval for the project. Moreover, once the merger is executed, the documents must be filed with the Securities Superintendency.

In the case of acquisition of shares, the relevant contractual and corporate documentation would be filed at the Mercantile Registry and further at the Tax Department, in order to update the company's relevant registries.

Lastly, in the case of joint ventures and asset purchases, in principle the transaction documents do not need to be filed and can remain private, to the extent that they are not required to record the transfer of any ownership rights at public registries. Real estate, intellectual property, vessels and motor vehicles are subject to public registration.

Fees

Recording the corporate documents at the Mercantile Registry entails payment of filing fees, and in the case of modifications to a company's Mercantile Registry certificate, increase of capital of one of the existing companies or incorporation of a new entity, fees must be paid on a scale that varies depending on the resulting capital of the company. In addition, if the authorised capital of one of the companies is increased, taxes on an increase of capital must be paid at a rate of 1 per cent calculated on the increase made.

Depending on the type of assets transferred, additional filings must be made at the corresponding registries in order to transfer the property rights over such assets.

Finally, depending on the structure adopted for securing the combination, this could entail payment of certain taxes, as explained in more detail in question 18, and some minor stamp taxes.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that needs to be made public in a business combination depends on the type of structure used.

All relevant information regarding the transaction must be made available to the shareholders and the statutory auditor when required; this would include the proposed transaction agreement in the case of mergers, financial terms of the offer and the reports of the board or managers, and that of the combination statutory auditor as to the suitability of the transaction.

In general, for mergers and contributions in kind the minutes of the shareholders' meetings which authorise the transaction and other relevant corporate documents such as the board and statutory auditor reports must be filed with the Mercantile Registry. Once filed, they become public documents. These documents must contain the detail of the assets being transferred and their value, as well as the method for determining the same.

Moreover, in mergers an excerpt of the document setting out the execution of the transaction must be filed at the Mercantile Registry and published in a newspaper of national circulation within 30 days of the execution of the same.

In the case of bondholders, if their approval is not sought, the company must offer to reimburse the bondholders by making such offers through two publications made in 10-day intervals in newspapers of national circulation.

For companies which offer its securities for sale to the general public, traded on the open market, the Company Law expressly provides that the document setting out the execution of the mergers must be filed with the Securities Superintendency in order to obtain approval of the project. Once the merger is executed, the documents must be filed with the Securities Superintendency. In addition to such publicity requirements, the information related to the transaction must be included in the said company's updated prospectus.

In the case of joint ventures, asset purchases and share purchases, the by-laws of the companies would determine whether shareholder approval would be required. The terms of the transaction document can remain private, unless a substantial amount of the company's assets is being transferred and as such, in case it is a corporation (*sociedad anónima*), approval by the shareholders would be required as would be the filing of the corporate documents that contain the shareholders' authorisation of the transaction. Furthermore, in the case of share transfer, the same would be recorded at the Mercantile Registry and Tax Department in order to update the company's file.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The Company Law establishes that when a particular shareholder becomes the owner of shares that represent more than 10 per cent of the voting rights in the company, it must inform the company, by means of a bailiff act, within 15 days from the acquisition of the shares, of the amount of shares it owns and of the voting rights represented by them. This provision is not applicable to limited liability companies (*sociedades de responsabilidad limitada*).

Companies that have made public offerings must inform the regulators of significant changes in the shareholder composition, which entail change in control; similar provisions apply to most regulated entities.

There are no express provisions regarding business combinations as to shareholding disclosure requirements.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors of the company owe basic fiduciary duties to the company's shareholders, including duty of care (diligence of a good businessman), duty of loyalty and duty of confidentiality, which are relevant to any business combination transaction.

The duties of the directors in mergers are to make available to the shareholders a report containing a summary of the proposed transaction and all relevant documents. The directors may be subject to fines if they do not make available to the shareholders the document setting out the execution of the transaction within the term stipulated by the Company Law. They may also be subject to fines and penal sanctions if they do not submit to the Securities Superintendency the documents required by law in the case of companies that make public offerings.

With mergers the companies involved must appoint a statutory auditor who must evaluate all aspects of the proposed transaction and issue its conclusions on the methods for carrying out the combination and the evaluation of the same. The statutory auditor will be liable for the recommendations presented to the shareholders.

The Company Law does not establish any duties owed by the controlling shareholders in the case of business combinations.

8 Approval and appraisal rights

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

Mergers, contributions in kind and sale of all or a substantial amount of the company's assets must be approved by the shareholders of the companies involved by a supermajority, equivalent to that required for amendments to company by-laws. The by-laws set forth the relevant quorum and majorities in order to adopt these shareholder resolutions. However, the Company Law establishes that this decision must be resolved in a general extraordinary shareholders' meeting and sets forth minimum quorum and majorities, as follows:

Stock companies

The relevant quorum is the presence of shareholders that represent at least half of the outstanding stock. The relevant majority is attained by approval of at least two-thirds of the shares represented in the meeting.

Limited liability companies

The approval of at least a majority of the outstanding shares will be required.

Should the merger or break-up seek to increase the obligations of the shareholders towards the companies involved in any way, the unanimous consent of the shareholders must be obtained.

There are no appraisal rights in connection to business combinations.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

There are no provisions related to unsolicited or hostile transactions. However, we must point out that, although allowed by the regulators, at the time of writing, no public offerings of equity have been made in the local securities market.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There is no regulation with respect to break-up and reverse break-up fees. Under contract law, however, there is freedom to contract whatever terms the parties may decide in the Dominican Republic; hence break-up and reverse break-up fees would be allowed.

There are no specific limitations on a company's ability to protect deals from third-party bidders. However, as a general principle of law, though stock companies may institute limitations on stock transfers, such as pre-emption rights and rights of first refusal, the same may not hinder a shareholder's right to transfer its stock in an absolute fashion, as the free transfer of stock is of the essence in a stock company.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than in specific industries in which business combinations are regulated, government agencies may not influence or restrict the completion of business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The law does not regulate conditions to a tender offer or exchange offer. Given that there is freedom to contract whatever terms the parties may decide, tender offers, exchange offers or other forms of business combinations may be subject to any conditions agreed on by the parties, including obtaining financing in cases of cash acquisitions, provided the said conditions do not contravene the laws of public policy.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Obtaining financing may be established as a precondition to closing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In business combinations, there is no regulation that provides for the possibility of compulsory minority stockholders' squeeze-out. Each shareholder must consent to the sale of their shares so they may not be squeezed out. For cases of mergers the approval at the shareholders' meeting is required, and, although dissenting shareholders will be bound by the resolution passed in said meeting, they will continue to have participation in the resulting entity, proportional to their participation in the absorbed entity, and thus may not be squeezed out unless they agree to it.

Notwithstanding the foregoing, there is no limitation to the parties agreeing to drag-along provisions, etc, in a shareholders' agreement or other type of agreement.

15 Cross-border transactions

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

There are no specific laws and regulations established for cross-border transactions. However, all companies operating locally must comply with the applicable Dominican law, depending on the structure chosen for the business combination.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are no relevant waiting periods for completing combinations.

Required notifications for companies which offer their securities for sale to the general public traded on the open market are referred to above.

Please note that a creditor has the right to file a claim of opposition to a merger or corporate break-up at court, via an expedited procedure, within 30 days of the date that the excerpt of the merger or corporate break-up execution document has been published in a national newspaper. If the court orders either reimbursement of the creditor's credit or the granting of guarantees, and this is not complied with by the company, the merger or corporate break-up would not be enforceable in relation to said creditor. However, the opposition filing does not suspend or prohibit the merger or corporate break-up from continuing to take effect.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in specific industries, such as local financial intermediation entities (Law No. 183-02), companies making public offerings (Company Law and Law No. 19-00), electricity concessionaires (Law No. 125-01), pension fund administrators (Law No. 87-01), health risks administrators (Law No. 87-01), insurance companies (Law No. 146-02) and telecommunications companies (Law No. 153-98), in undertaking business combination transactions would be subject to the requirements established by the corresponding regulators for entities of each of the aforementioned industries, and to the provisions of the applicable laws and regulations for each of these sectors.

18 Tax issues

What are the basic tax issues involved in business combinations?

The Income Tax Chapter of the Tax Code of the Dominican Republic, Law No. 11-92 of 1 May 1992, establishes that generally when companies are reorganised, the results that may arise as a consequence of the reorganisation will not be affected by the taxes established in the Code and its regulations, and that the fiscal obligations and rights corresponding to the subjects who reorganise will be allowed to be transferred to the continuing entities. The provisions mentioned above are subject to compliance with applicable regulations and obtaining prior approval from the Tax Department. However, we must point out that accumulated losses from the combining entities may not be transferred so as to be used against future tax liability of the absorbing or resulting entity.

Therefore, if the business combination qualifies as a reorganisation under fiscal regulations, it would be non-taxable. The cases which fall within the scope of corporate reorganisations, as defined in the income tax chapter of the Tax Code of the Dominican Republic, Law No. 11-92 of 1 May 1992, and hence may benefited from neutral tax treatment, are defined by Decree No. 408-10 on Corporate Reorganisations. Under such norms reorganisations are understood to be:

- the merger of a pre-existing businesses into a third one, or by absorption of one of them;
- the spin-off or division of one enterprise into others that shall jointly continue the operations of the first; or
- the sale and transfer of one entity to another which, despite being legally independent, constitute an economic group.

In order for such reorganisations to be afforded neutral tax treatment, the tax authorities must confirm that they meet the following criteria:

- that there is similarity, connection or complementarity of the economic activities carried out by the entities involved in the reorganisation;
- that the reorganisation process is carried out for valid economic reasons or with the purpose of rationalising the activities of the entities participating in the reorganisation and not for the sole purpose of obtaining tax advantages;
- that the last tax returns presented by such entities to the Tax Department reveal operations.

The last criterion is required, in the case of mergers resulting in the formation of a new entity, only for the pre-existing entities.

If these provisions are met, and authorisation from the tax authorities is sought and obtained, the possible fiscal effects of the reorganisation are neutralised, and the transfer of fiscal rights and obligations from the former companies to the resulting company is allowed.

This tax treatment is subject to the prior approval of the Tax Department, which is requested by a letter submitted by the companies presenting their merger or reorganisation case, and the terms and conditions of the proposed transaction.

After the Tax Department issues its approval, the companies can proceed with the corporate processes required to execute the combination. However, as per Decree No. 408-10, this approval is considered to be subject to the compliance of the participating entities to the conditions set forth in the approval. If, after this approval is issued, these conditions are not met, the Tax Department may consider the transaction to be taxable, and collect any and all relevant applicable taxes.

The companies that will cease operations due to the corporate reorganisation must inform the Tax Department of this situation at least 30 days before the proposed date for closing. Therefore, the request for prior approval of the reorganisation shall also be subject to this term.

According to the Tax Code, the companies that are dissolved shall present final tax returns to the Tax Department within 60 days of the general shareholders' meetings that decide on the accounts of the final liquidation, that is, the final distribution of the dissolved companies' assets and liabilities. Norm 05-2009 issued by the Tax Department establishes that the tax on assets paid by the dissolved company in the case of a reorganisation, such as a business combination, may be transferred as a credit to the resulting entity for the fiscal year in which the reorganisation took place.

However, please note that if a business combination is not structured as a company reorganisation, and approved by the Tax Department as such, income tax, including capital gains tax, and other taxes would be applicable.

Also, depending on the structure of the business combination, several taxes could be payable:

- capital gains: in cases of asset acquisitions and contributions in kind as well as in acquisitions of shares, possible fiscal effects (income tax) of capital gains would be payable in the amount of a 25 per cent tax over capital gains. In addition, if the seller is an individual and the buyer is a legal person, then the buyer must withhold and pay to the Tax Department on the seller's behalf taxes amounting to 2 per cent of the purchase price of the shares;

Update and trends

As a consequence of the credit crisis, economic activity in the Dominican Republic slowed down, and there was a decrease in the number of mergers and acquisitions taking place, especially during the period from late 2008 to mid-2010. Notwithstanding the foregoing, since mid-2010 we have seen a noticeable increase in M&A activity, with several acquisition transactions occurring in the market. The current trend in this arena in the Dominican Republic is acquisitions, and we expect an overall increase of M&A activity.

In relation to the regulatory regime in the Dominican Republic, in the recent past mergers and corporate break-ups were only mentioned in passing in certain fiscal guidelines and regulations. Law No. 479-08 enacted on 11 December 2008 (the Company Law) included for the first time regulation on the corporate process and mechanics involved in mergers and corporate break-ups. This statute also increased shareholders' rights, especially minority shareholders' rights, as well as creditors' rights and protection. Currently there are no proposals to change the regulatory or statutory framework governing business combinations.

- real estate transfer tax: 3 per cent over the price or the appraised value by the Tax Department, whichever is greater. This tax would not be applicable in contributions in kind of real estate to a local company;
- vehicle transfer tax: 1 per cent over the price or the appraised value by the Tax Department, whichever is greater; and
- value-added tax: 16 per cent over the value of inventories of raw materials and finished products.

Also, in all cases, if the combination entails an increase in capital, capital tax at a rate of 1 per cent over the increased capital must be paid.

19 Labour and employee benefits

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

Law No. 16-92 of 29 May 1992 (the Labour Code) regulates labour liabilities in transactions that involve the transfer of a business or assignment of employees to a new entity, in order to protect employees' rights. In this vein, the transferor and the transferee are jointly liable for all liabilities derived from the labour contracts from the date of transfer, as well as all rights and obligations resulting from the labour contracts that correspond to the assigned business or the assigned employee, including those that have been subject to lawsuit and are pending judgment or foreclosure. The transferee or resulting company in a business combination, as the new employer, must preserve and maintain all the individual terms of employment of the transferred employees.

The business combination shall be notified to the employees, their union (if any), and the Department of Labour within 72 hours following its execution.

An alternative to the above is to agree that the transferor terminates the existing labour agreements prior to the transfer of business. This dismissal entails the payment of severance and any acquired rights in favour of employees upon termination.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Once bankruptcy procedures have been initiated, a company may no longer be the target of a business combination.

21 Anti-corruption and sanctions

What are the anti-corruption and economic sanctions considerations in connection with business combinations?

No specific anti-corruption sanctions are established in connection with business combinations.

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