
CHAMBERS GLOBAL PRACTICE GUIDES

Corporate M&A 2024

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Peru: Law & Practice and Trends and Developments

Mauricio Olaya and Diego Muñiz

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados



PERU

Law and Practice

Contributed by:

Mauricio Olaya and Diego Muñiz

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados



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Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados is a full-service law firm that provides cutting edge legal assistance. Muñiz is the largest law firm in Peru housing an impressive 330+ lawyers working in a broad range of practice areas. With a nationwide network of 13 offices, the firm ensures depth and sophisticated advice oriented to approach legal problems thoroughly and based on business objectives.

Muñiz has extensive experience assisting clients in business transactions both cross-border and locally. The firm does notable work in M&A, banking, capital markets, project development and project finance. With more than 35 practice areas, including tax, labour, environment, anti-trust, intellectual property, litigation and arbitration, mining, and oil & gas, Muñiz handles matters comprehensively.

Authors



Mauricio Olaya is principal partner of Muñiz and head of the corporate and M&A practice. He has handled an impressive number of the major M&A deals closed in Peru. In addition to his

extensive experience in corporate transactions, Mauricio is also a well-known promoter of issues linked to compliance, corporate governance, triple impact business, B Corps and ESG indicators. He graduated with honours from Pontifical Catholic University of Peru Law School. Mauricio is a member of the board of directors of several companies in Peru and is currently ranked Band 1 in Corporate/M&A by Chambers and Partners Global and Latin America.



Diego Muñiz is a senior associate at Muñiz. He concentrates his practice on M&A and corporate matters. Diego has vast and outstanding experience in both local and

cross-border deals, having been involved in various relevant and major M&A transactions in Peru. Diego graduated with honours from Pontifical Catholic University of Peru Law School and holds an LLM from Columbia Law School. He is currently recognised by Chambers and Partners Global and Latin America as Associate to Watch and is a regular contributor to World Bank's Doing Business publication regarding corporate and financial matters.

Contributed by: Mauricio Olaya and Diego Muñiz,
Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados

Calle Las Begonias 475
San Isidro
Lima
Peru

Tel: +51 1 611 7000
Email: molaya@munizlaw.com
Web: www.munizlaw.com



ESTUDIO
MUÑIZ

MUÑIZ
OLAYA
MELÉNDEZ
CASTRO
ONO
& HERRERA
Abogados

1. Trends

1.1 M&A Market

Peru has experienced unparalleled activity in the M&A market compared to 12 months ago. A steady increase of transactions started in the last quarter of 2022 mainly driven by market-beneficial prices, a more centre-oriented government compared to the left-wing ones in Chile and Colombia, and a perception of an economically stable and strong country.

There was a growth of 25% in the number of transactions during 2023 compared to 2022. Also, the total aggregate value saw a significant boost of 166.69% when contrasted with 2022. With a total of 140 M&A transactions, 2023 nearly approached pre-pandemic figures. Given this fact, the effects of COVID-19 on the Peruvian M&A market have currently ceased. It is expected that the pipeline of deals will continue growing during 2024, reinforced by the construction of the mega port of Chancay and the election of Lima once again as host of the Pan American Games.

1.2 Key Trends

Key trends over the last 12 months regarding M&A transactions include an increase of approximately 471% in the total aggregate amount for private equity deals, which were focused mainly on the power generation and electric utilities sector, as well as in software and IT services. There are also good expectations for prices of minerals and metals, as Peru is one of the leading countries in the production of certain minerals, including copper, silver and zinc. Overall, international corporations and investors continue to demonstrate keen interest in the Peruvian market, either seeking to solidify or broaden their foothold in the region or aiming to boost their profits.

1.3 Key Industries

The year 2023 marked a significant recovery in sectors like banking and financial services, mining, technology, infrastructure, logistics and energy. With 28 transactions related to banking and financial services, in 2023 Peru experienced a 225% increase in deals related to this sector compared to 2022, something unprecedented in the Peruvian M&A market. Figures surrounding the mining industry are also a big surprise, with

11 transactions and an upturn of 22% if equated to deals in the same sector during 2022.

The industries that were heavily impacted by the COVID-19 pandemic in Peru were retail, hospitality, food-service, tourism, transportation, and leisure and entertainment. These sectors have been in a slowdown since the beginning of the pandemic. Although 2023 showed a little recovery, experts foresee a slow upturn to pre-pandemic figures. Notwithstanding, the mentioned sectors have also adapted the operation of their businesses to a new normality, and this in turn has led them to better understand the assessment of risks and contingencies.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The most common structures used to acquire a company or business in Peru are:

- equity acquisitions (ie, purchase of stock by means of a stock purchase agreement or through a mandatory tender offer); and
- asset acquisitions (ie, purchase of assets or businesses belonging to the target company).

Applicable practice standards, timing, legal paperwork, rules, and regulations differ when it comes to acquiring a Peruvian publicly traded company or a privately owned one.

In the case of an M&A transaction involving a Peruvian publicly traded company as a target, the acquisition is normally executed by launching a mandatory tender offer, either as an ex-ante tender offer or as an ex-post (subsequent) tender offer over the target stock. It is worth mentioning that in general, almost all Peruvian companies that have their shares listed in the

Lima Stock Exchange are controlled by an easily identifiable shareholder or economic group. Therefore, when acquiring a Peruvian publicly traded company, a customary practice is that the bidder (acquirer) directly acquires the shares owned by the controlling group or shareholder (seller), and afterwards such bidder launches a subsequent mandatory tender offer to acquire the remaining stock. In that sense, hostile takeovers are extremely rare in Peru.

As for M&A transactions regarding Peruvian targets that are privately held, the usual acquisition structure is the purchase of stock. In this type of transactions, the acquirer and the sellers (shareholders of the target) will directly negotiate and sign a stock purchase agreement to transfer the outstanding stock of the target, as well as other ancillary documents depending on the specific features of the operation.

Other remarkable structures are the asset acquisitions. Pursuant to them, the acquirer purchases:

- assets;
- a combination of assets and liabilities; or
- a specific ongoing business from the target company (which includes assets and liabilities).

The transaction is implemented by means of an asset purchase agreement between the acquirer and the target. Sometimes the shareholders of the target are also a party in this kind of transaction, usually when they involve the transfer of all assets or businesses of the target that require consent from the shareholders, or to transfer certain assets owned by such shareholders that comprise the business under sale (eg, intellectual property rights, and real estate property).

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Less common, yet not less important for the purpose of acquiring a company or business in Peru, are other structures such as mergers, spin-offs, and corporate reorganisations.

2.2 Primary Regulators

Currently, the primary regulator for M&A activity in Peru is the Peruvian Competition Agency (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* or “INDECOPI” per its Spanish acronym). INDECOPI is entitled to conduct the antitrust clearance proceeding and review M&A transactions that fall under the thresholds set forth in Law No 31112, the Merger Control Law (MCL) and its regulations, approved by Supreme Decree No 039-2021-PCM (“MCL Regulations”). Save for INDECOPI, there are usually no other regulatory authorities with oversight powers over M&A transactions when the target is a Peruvian privately held company.

In addition to INDECOPI, M&A transactions involving a Peruvian publicly traded target company are also supervised by the Superintendence of Capital Markets (*Superintendencia del Mercado de Valores* or SMV per its Spanish acronym). Among others, SMV oversees the compliance of disclosure requirements and enforces the Peruvian Securities Law, approved by Supreme Decree No 093-2002-EF (PSL), and the Peruvian Tender Offer Regulations, approved by CONASEV Resolution No 009-2006-EF-94.10 (“PTO Regulations”) during a tender offer process. It also registers public offerings and exchange offers (including takeover bids) and imposes sanctions and fines should the PTO Regulations be infringed by bidders, sellers, or targets.

If the target is a banking, financial or insurance entity or if it is a pension fund private adminis-

trator, the Superintendence of Banking, Insurance and Private Pension Fund Administrators (*Superintendencia del Banca, Seguros y AFP* or SBS per its Spanish acronym) may also have to approve the transaction. In the same way, targets that have been granted with authorisations to operate from the SMV will require the prior approval from such authority to complete the transaction (eg, securities brokerage companies (*sociedades agentes de bolsa*)). Certain target companies that operate public infrastructure or that have been granted with concessions, may also need prior approval for completion or closing M&A transactions depending on the terms and conditions of the agreements entered with the Peruvian government, and if those contain change of control provisions.

2.3 Restrictions on Foreign Investments

In Peru, foreign and Peruvian investors are vested with the same treatment and rights. Therefore, almost all economic activities in Peru may be conducted by foreigners without any restrictions. Save for some specific activities, foreign investment does not require prior approval from any Peruvian authority, and foreign investors can freely set up, carry out and direct their business in Peru. Peruvian laws, however, place limitations and restrictions for foreign investors (who will require prior approval) in the conduct of certain economic activities related to:

- media;
- private security and surveillance;
- weapons and explosives; and
- air and maritime transportation.

In addition, Peru does not have currency exchange controls, and the use, conversion and remittance of capital is allowed. Foreign investors in Peru are entitled, without prior authorisation from the government, to:

- acquire equity interests or property;
- transfer any post-tax profits, royalties and dividends to another jurisdiction in a foreign currency; and
- transfer their capital investment to another jurisdiction.

2.4 Antitrust Regulations

The antitrust rules that apply to business combinations in Peru are mainly contained in the MCL and the MCL Regulations (jointly, the “Merger Control Rules”). According to the Merger Control Rules, a business combination is subject to clearance and shall be notified to INDECOPi when such transaction involves a change of control as a consequence of:

- the merger of two or more independent economic agents;
- the direct or indirect acquisition of shares or rights;
- the incorporation of a joint company or the execution of a joint venture or any other form of association agreement; and
- the acquisition of productive operating assets or businesses.

In addition to falling under any of the above-mentioned types of transactions, the Merger Control Rules provide for certain financial thresholds that should be reached to trigger the antitrust clearance proceeding requirement. Such thresholds are as follows:

- the joint annual turnovers, gross revenues or book values of assets in Peru of the parties involved in the business combination (acquirer and target) are equal to or higher than PEN607.7 million (approximately USD164.2 million) during the fiscal year prior to that in which the transaction is reported to INDECOPi; and

- the individual annual turnover, gross revenue or book value of assets in Peru of any of the parties involved in the business combination is equal to or higher than PEN92.7 million (approximately USD25 million) during the fiscal year prior to that in which the transaction is reported to INDECOPi.

If the relevant transaction produces effects in Peru, qualifies as a business combination and meets or exceeds the thresholds set forth in the Merger Control Rules, it must be notified to INDECOPi prior to closing or completion for obtaining the antitrust clearance. INDECOPi has up to 25 business days to determine if the mandatory filing complies with all requirements provided for in the Merger Control Rules. Once the mandatory filing is deemed complete by INDECOPi, a first phase review period initiates. The first phase can last up to 30 business days, during which INDECOPi assesses whether the business combination may raise serious competition concerns. If INDECOPi determines that the transaction may potentially raise serious competition concerns, then a second phase review is conducted for a more in-depth analysis. The second phase review can take up to 120 business days.

If INDECOPi has not issued any ruling upon completion of the review terms, the transaction will be deemed to have obtained antitrust clearance. Applicants may also appeal the decision of the first administrative instance at INDECOPi within 15 business days. The appeal proceeding can take up to 90 business days until INDECOPi issues a decision.

2.5 Labour Law Regulations

Acquirers of Peruvian companies should note that labour regulations in Peru are rather inflexible and the great majority of employees’ rights

might not be opted out. The Peruvian Labour Productivity and Competitiveness Law (LPCL) sets forth the main features and characteristics of employment contracts, although it does not cover all the heterogeneous types of labour activities since labour regulation is scattered in Peru. As a general rule, employment agreements have an indefinite term. However, due to the special nature of some economic activities, the LPCL has exceptionally provided for fixed-term employment. Peruvian law allows employers to hire employees for a fixed term if justified by the temporary nature of the services to be provided. LPCL provides more flexible rules regarding the hiring and termination of employment agreements for executive-level employees (without the possibility to opt out of employment benefits or rights).

In the context of an M&A transaction, employees generally do not have specific approval, consultation, or other similar rights, unless granted by the target pursuant to specific agreements. Payment of closing bonuses for certain executive-level employees is a customary practice in M&A transactions carried out in Peru. Acquirers should also consider that in case of a stock acquisition, employment liability succession will not usually be triggered, since there would not be a transfer of work force from the target to the acquirer or any other entity (employees will remain as such of the target company). As for asset acquisition transactions (especially when purchasing ongoing businesses), if the business transfer comprises the allocation of the workforce of such business, then the liabilities and obligations that the target had before the allocated employees are to be, in turn, transferred to the acquirer (as the new employer of the allocated employees).

2.6 National Security Review

In general, there are no national security scrutiny reviews for the acquisition of companies in Peru. Notwithstanding, certain restraints apply to foreign investors based on national security. Indeed, unless exceptionally authorised by the government by means of a Supreme Decree and due to public need and national interest, foreign investors may not acquire or possess, directly or indirectly, within 50 kilometres of the Peruvian border or inside natural protected areas, mines, land, forests, water, fuel and energy sources.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

The most significant legal development related to M&A in Peru during the past three years has been the enactment of the Merger Control Rules. Before the MCL and the MCL Regulations were approved in January and March 2021, respectively, and entered into force in June 2021, there was no merger control legal framework applicable to business combinations in the entire spectrum of the economic activities in Peru.

Prior to the Merger Control Rules coming into force, only business combinations carried out within the power generation, transmission and distribution economic sectors were subject to antitrust clearance requirements in Peru. As for the banking, financial, insurance and private pension funds economic activities, business combinations required only the prior approval from SBS (currently under certain conditions they will also require the antitrust clearance from INDECOPI).

Since June 2021, more than 33 business combinations have been reviewed by INDECOPI.

Almost all of them obtained the antitrust clearance during a first phase review and only a few have been considered for a second phase review.

3.2 Significant Changes to Takeover Law

There have been no significant changes with respect to the takeover regulations in the past 12 months, and no significant changes are expected in the coming 12 months.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Since the majority of publicly traded Peruvian companies have a recognisable controlling group or shareholder, in Peru it is not a customary practice for bidders to build a stake in a target company prior to launching a tender offer. Therefore, stakebuilding strategies are rare and not commonly used. PSL and PTO Regulations are also dissuasive for bidders seeking to implement stakebuilding. In fact, if a bidder acquires equity interest in a target company pursuant to a series of four consecutive transactions within a three-year term, the SMV may perceive such acquisitions as an infringement of the PTO Regulations, since the bidder should have launched an ex-ante mandatory tender offer. What is more, bidders are prohibited from acquiring or committing to acquire, through stock exchanges or pursuant OTC transactions, target stock in the market during the time a tender offer is in place.

4.2 Material Shareholding Disclosure Threshold

The following are the material shareholding disclosure thresholds and filing obligations in Peru that must be fulfilled before the SMV and the Lima Stock Exchange.

- The direct or indirect transfer of the shares of a publicly traded company by an individual or entity that holds 10% or more of the capital stock of such company.
- The direct or indirect transfer or acquisition of 10% or more of the capital stock of a listed company.
- The identity of the shareholders of a listed company and the equity interest they hold in such company, provided that such shareholders hold at least, or more than, 5% of capital stock.
- The identity of the members of the economic group of a listed company, if applicable, as well as any change or modification of such information.
- The intention of any bidder to acquire substantial equity interest in a listed company through an ex-ante mandatory tender offer.

4.3 Hurdles to Stakebuilding

Even though it is in theory feasible for a Peruvian listed company to include provisions in its by-laws that may hurdle stakebuilding (eg, higher or lower reporting thresholds), this is not a standard practice. Publicly traded companies in Peru with by-laws setting forth ownership threshold provisions for disclosure purposes above the ones provided for in the PTO Regulations are extremely rare.

4.4 Dealings in Derivatives

Although not widely developed, in general, dealings in derivatives are allowed in Peru. This kind of transaction is subject to disclosure obligations and securities market regulations.

4.5 Filing/Reporting Obligations

Theoretically, if the underlying shares of a derivative reach or exceed the disclosure thresholds and filing obligations during a transaction dealing with such derivative, then such transaction

must be disclosed in accordance with the disclosure rules for transactions subject to securities market regulations. See **4.2 Material Shareholding Disclosure Threshold**.

Furthermore, in theory, if a transaction concerning derivatives (of which the underlying assets are shares) qualifies as a business combination and meets or exceeds the thresholds set forth in the Merger Control Rules, then such transaction will be subject to the antitrust clearance proceeding. As mentioned before, dealings in derivatives are not common in Peru, and therefore, there are no transactions regarding such financial instruments under review by INDECOPI to date. See **2.4 Antitrust Regulations**.

4.6 Transparency

Regarding transactions involving privately held companies, shareholders do not have to disclose the purpose of their acquisition and their intention regarding control of the company.

As for transactions related to publicly traded companies, bidders must disclose the intention and purpose of their acquisition of substantial equity interest during the process of launching a tender offer. Likewise, as mentioned, any individual or entity that, directly or indirectly, acquires or transfers 10% or more of the capital stock of a listed company should disclose such transaction before the SMV and the Lima Stock Exchange. See **4.2 Material Shareholding Disclosure Threshold**.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Regarding M&A transactions involving a privately held company, there is no legal obligation for target companies to disclose the deal at any spe-

cific stage. Therefore, that kind of transactions will remain confidential until the parties involved agree to make them public. In Peru, this usually happens at closing or when the relevant stock purchase agreement is executed (in transactions where there is a gap period between the signing date and the closing date).

Publicly traded companies, on the other hand, are obliged to disclose to the SMV any relevant information in accordance with disclosure and reporting regulations. Therefore, if a Peruvian listed company is the target in a M&A public transaction, the negotiations, execution of the agreement and completion of the transaction must be disclosed to the market as a material fact (*hecho de importancia*). It is also possible to disclose the negotiations and the execution of the relevant agreements as a reserved matter (*hecho reservado*). In this case, the SMV will not disclose the information to the market until the reserved matter has ceased at completion of the transaction and it becomes public. In case of acquisitions of listed companies carried out pursuant to a tender offer (either voluntary or mandatory), the bidder must disclose to the SMV and the Lima Stock Exchange the proposed takeover bid and certain additional information.

5.2 Market Practice on Timing

In Peru, market practice on timing of disclosure of M&A transactions does not differ from timing on legal requirements. It is important to note that this applies only for disclosure legal requirements for publicly traded companies, since the privately held ones are not subject to legal obligations for disclosure.

5.3 Scope of Due Diligence

The due diligence process is a key element and a customary practice in Peruvian M&A transactions. Nevertheless, the scope and depth of

the assessment may vary on the basis of the specific features of each transaction (eg, background and needs of the acquirer and seller, the type and value of the transaction, the economic sector in which the target carries out its operations, and the level of compliance with laws of the target).

M&A transactions involving a privately held company often require the conducting of due diligence with a higher level of scrutiny compared to those transactions that relate to listed companies. Regarding the acquisition of listed companies through tender offers, the capital markets regulations do not foresee any specific rules governing the conduct of due diligence procedures, although they are considered standard practice and generally accepted by the SMV.

In any case, the due diligence review aims to identify the risks and contingencies related to the target businesses and operations. Buyers will typically conduct three types of due diligence processes: financial, tax and legal. As for the legal due diligence, it normally will cover the review of corporate, contractual, real estate, tax, labour, regulatory, intellectual property, environmental and litigation matters. In negotiated transactions, it is standard for the parties to enter into non-disclosure agreements to shield the confidentiality of the information shared during the due diligence and negotiation stages.

The COVID-19 pandemic has heavily impacted the way that due diligence procedures are conducted. Nowadays, due diligence is also focused on identifying issues that might become significant contingencies or risks during crisis events like the pandemic. Furthermore, certain economic activities and industries were severely transformed by the pandemic. Industries like retail, hospitality, food-service, tourism, and

e-commerce had to evolve to adapt themselves to new normality rules. Thus, when it comes to assessment of risks or contingencies of companies operating in such industries, new aspects should be reviewed or taken into consideration during a due diligence process.

5.4 Standstills or Exclusivity

As mentioned, almost every listed company in Peru has a clear controlling group or shareholder (see 2.1 **Acquiring a Company**). The remaining stock, therefore, is usually not sufficient to grant control to other shareholders. Considering the described scenario, standstill agreements are very unusual and not frequently implemented for M&A transactions in Peru.

Conversely, as most M&A deals in Peru are conducted as private transactions, it is customary that acquirers demand exclusivity to safeguard the time and resources to be deployed for the due diligence and negotiation stages. In non-competitive M&A transactions, the exclusivity is commonly included as a provision in the non-disclosure agreements or non-binding offers signed between the parties, and it is limited to a period of time usually ranging from 60 to 90 days. Regarding competitive M&A deals, exclusivity is not common, but can be granted by sellers to a limited number of bidders during the final stages of the process and for a very reduced timeframe.

5.5 Definitive Agreements

In Peru it is not common for tender offer terms and conditions to be documented in a definitive agreement between bidder and seller. Launching a tender offer (either voluntarily or mandatorily) is an extremely regulated procedure with rules and regulations that impose severe restrictions and hurdles aimed to protect investors. Thorough and careful planning is suggested for this

kind of acquisition structure, since direct transactions between bidder and seller might be construed as an action that intends to infringe the securities market regulations. Notwithstanding the foregoing, from a practical standpoint taking into account that listed companies are controlled by identifiable shareholders/groups, it is common for the bidder and controlling group or shareholder to enter into an agreement for the acquisition of the shares held by the latter, being that the former is then obliged to launch a subsequent mandatory tender offer to acquire the remaining stock of the target.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The time span of a process for acquiring/selling a business in Peru will vary depending on the transaction structure, the complexity of closing conditions, and if antitrust clearance and other regulatory approval are required. Generally speaking, a private M&A deal in Peru may take four to six months if it is not subject to antitrust clearance. If the INDECOPI approval is required, the transaction may be extended for two to three additional months should the clearance be obtained during the first phase review. In the case of a transaction being subject to a second phase review such term may be extended for an additional four to six months.

With regards to the acquisition of a publicly traded company in Peru, (i) a voluntary tender offer should be open for not less than 20 days (as determined by the bidder) since its launch, and such period can be extended for an additional 20 days; and (ii) the mandatory tender offer should have a period of at least 20 days but no more than 40. Settlement after the tender offer period

shall be done in two days (T+2). The above-mentioned terms do not take into account any prior negotiation period.

The governmental measures taken to address the pandemic in Peru did not create major practical delays or impediments to the deal-closing process. Technology helped M&A transactions to keep the length of such process unaltered and even comparable to pre-pandemic terms. The use of digital signatures and virtual meetings through a variety of platforms made it possible in an efficient way to sort out the remote interaction problems faced during the COVID-19 pandemic.

6.2 Mandatory Offer Threshold

In Peru, the PTO Regulations, provides for mandatory offer thresholds. According to the Peruvian Tender Offer Regulations, the obligation to launch a tender offer is triggered when a bidder or a group of bidders acquires or intends to acquire substantial equity interest in a publicly traded target company. A bidder or a group of bidders will acquire substantial equity interest when:

- such bidder or group of bidders, in one or a series of transactions, directly or indirectly, acquires outstanding shares with voting rights or any other equity instrument above 25%, 50% or 60% of the total voting shares of the target; and
- the purchase of substantial equity interest allows such bidder or group of bidders to appoint the majority of the directors or amend the by-laws of the target.

The bidder or group of bidders that has acquired substantial equity interest in a listed company may be exempt from launching a mandatory tender offer in the following situations.

- When shareholders representing 100% of the voting rights give consent in writing to transfer all or part of the common shares to such bidder.
- When the bidder or group of bidders acquire substantial equity interest by means of a conversion of debt into capital stock in the midst of a bankruptcy procedure of target.
- When the bidder or group of bidders acquire substantial equity interest by means of the exercise of pre-emptive rights.
- When the bidder or group of bidders acquire American Depositary Receipts (ADR), Global Depositary Receipts (GDR) or comparable securities, except if the bidder or group of bidders demand the delivery or exercise the voting rights of the underlying shares.

6.3 Consideration

Whilst share-for-share and cash-shares combinations may be used in Peruvian M&A transactions (subject to the waiver of certain rights, like rights of first refusal), cash consideration is the most common mean to pay the purchase price in deals conducted in Peru.

Earn-outs have recently arisen as the most common tool used to bridge value gaps between the parties in a deal environment or industry with high valuation uncertainty in Peru. Pursuant earn-out price adjustment provisions, the parties of a M&A transaction are conditioning the payment of a portion of the purchase price to the future performance of the target, measured either by the EBITDA or the achievement of certain net profits figures. On the one hand, this approach mitigates the uncertainty of buyers in respect of the potential risk of the business carried out by target and the payment of the upfront cash price for the acquisition; and on the other hand, it works as an incentive for the seller to leave an effectively running business or to keep

involved in the management until the earn-out conditions are met.

6.4 Common Conditions for a Takeover Offer

In Peru, once a tender offer is launched it becomes irrevocable and firm and cannot be withdrawn by the bidder. It might be subject to certain objective conditions, though. Common conditions for a tender offer typically include regulatory approvals, reaching a minimum acceptance threshold (ie, a minimum percentage of shares should be acquired pursuant to the tender offer), and compliance with applicable laws and regulations. Additionally, tender offers may be subject to conditions related to due diligence findings or the absence of material adverse changes in the target company's business or financial condition.

As for restrictions on the use of tender offer conditions by the SMV, while there may not be explicit restrictions, the SMV typically oversees tender offers to ensure fairness, transparency, and compliance with regulatory requirements. Thus, the SMV may scrutinise the conditions set by the bidder to ensure they are reasonable and do not unduly disadvantage shareholders or impede the tender offer completion.

6.5 Minimum Acceptance Conditions

The minimum acceptance conditions for tender offers typically vary depending on the specifics of each offer. Nonetheless, common minimum acceptance conditions may include reaching a certain percentage of outstanding shares, often set by the bidder. This percentage can differ but is frequently above 50% to ensure control of the target. Additionally, regulatory requirements may dictate specific conditions regarding the acceptance of the offer, such as approval by relevant

authorities or compliance with certain legal and financial criteria.

6.6 Requirement to Obtain Financing

In M&A transactions involving privately held targets, closing can be conditioned to acquirer obtaining financing for the acquisition. In M&A transactions involving listed targets, although not prohibited, conditioning tender offers to bidder obtaining financing is not usual. As mentioned before, once a tender offer is launched, it is irrevocable, cannot be withdrawn, and is subject to a specific rigid timeframe for completion. In such regard, conditioning the completion of the tender offer on the bidder obtaining financing may result in a violation of the timeframes and the reasonableness and objectiveness principles of conditioning a tender offer. What is more, before launching a tender offer, bidders are required by the PTO Regulations to grant a guarantee for ensuring the payment of the consideration included in the bid. Such guarantee must be unconditional, irrevocable and automatic enforceable upon request.

6.7 Types of Deal Security Measures

In private M&A transactions, common deal security measures seek by acquirers are non-compete and non-solicitation provisions. Likewise, risk coverage mechanisms include special indemnification clauses and escrow agreements to maintain part of the purchase price as guarantee in case an event triggering such special indemnification happens. Exclusivity is other measure to secure a transaction used by potential acquirers of private companies in non-competitive deals. Break-up fees are not common, but when used they are focus on preventing a party of the transaction to opt out without reasonable cause prior to completion.

Since the COVID-19 pandemic, common tools to manage the risk associated to new disease outbreaks and government measures such as lockdowns and curfews; the political instability scenario; and the social crisis in Peru in interim periods have been the careful and rigorous negotiation and precisely inclusion of earn-out and MAE provisions in the stock purchase agreements.

There have not been any significant changes to the regulatory environment that have impacted the length of interim periods.

6.8 Additional Governance Rights

In Peru, if a bidder is not seeking to obtain 100% ownership of a target, most probably will try to enter into a shareholder's agreement with the remaining shareholders. In such cases, shareholders agreements usually will contain provisions regarding:

- the number of directors that each shareholder is entitled to appoint;
- rights for auditing the financial situation of the target, as well as the businesses carried out by it;
- higher quorum and voting majorities for specific business decisions; and
- certain rights related to the transfer of the target shares, such as tag along rights, drag along rights, pre-emptive rights, ROFR, put and options, among others.

In Peru, governance rights must be included in the by-laws of the target company or in shareholders agreements in which every shareholder is a party, so that they benefit every shareholder of the target company. It should be mentioned that the Peruvian General Corporations Law (PGCL) provide for several statutory rights of

minority shareholders. Below are the most relevant for acquirers to consider.

- Attend and vote at the shareholders' meetings.
- Request all information for the discussion at a called shareholders' meetings. According to the PGCL, the board of directors or the management may reject the request if it considers that granting such information will harm the company's best interests or businesses. If at least 25% of shareholders holding voting shares are attending the relevant shareholders' meeting and request such information, the board or the management cannot reject the request.
- Request information of the company's business and operations out of the shareholders' meetings, to the extent such information is not confidential or may harm the company's best interests or businesses (if requested by 5% of shareholders holding voting shares).
- Request the attendance of a notary public in the shareholders' meetings (if requested by 25% of shareholders holding voting shares).
- Request the audit of the company's financial statements (if requested by 10% of shareholders holding voting shares).
- Exercise pre-emptive rights on the basis of their holding percentage in the stock capital, provided that:
 - (a) it is otherwise agreed by 100% of shareholders holding voting shares (for the case of privately held companies); or
 - (b) by 40% or more of shareholders holding voting shares (for the case of publicly held companies and subject that such capital increase does not benefit only a certain group of shareholders).
- Participate in the distribution of dividends. If requested by shareholders representing at least 20% of the stock capital with voting

rights, the company shall distribute dividends up to 50% of the annual net profits.

- Request the board or the management to call a shareholders' meeting (25% of shareholders holding voting shares for the case of privately held companies and 5% in the case of publicly traded companies).
- Request its separation from the company when it:
 - (a) changes its corporate purpose;
 - (b) changes the place of organisation to a foreign country; or
 - (c) other cases contemplated by the PGCL or the company's by-laws.

6.9 Voting by Proxy

Shareholders can vote by proxy in Peru.

6.10 Squeeze-Out Mechanisms

In Peru, squeeze-out mechanisms are not expressly forbidden. However, neither the PSL nor the PTO Regulations have considered any methods or structures to force the remaining shareholders that have not tendered their shares to sell them to the bidder after the completion of a successful tender offer. In such cases, the only available strategy that can be adopted by bidders is to directly negotiate the acquisition of the remaining stock with such remaining shareholders.

6.11 Irrevocable Commitments

Since in Peru publicly traded companies usually have a controlling group or shareholder, commitments to tender entered by bidders and the controlling group or shareholder are usual when it comes to acquiring a listed company. As mentioned, it is common that bidders acquire directly the shares owned by the controlling group or shareholder first, and then launch a subsequent mandatory tender offer to acquire the remaining stock (see 2.1 Acquiring a Company).

The negotiations are usually undertaken prior to acquiring the controlling group or shareholder's shares. These commitments usually are part of the agreement pursuant which the bidder acquires the stock from the controlling group or shareholder. Parties, however, should be very careful on structuring this type of arrangements, since during the subsequent tender offer the SMV may examine and analyse them to ensure they do not infringe the securities market regulations, especially PTO Regulations (see **5.5 Definitive Agreements** and **6.4 Common Conditions for a Takeover Offer**).

7. Disclosure

7.1 Making a Bid Public

As for transactions involving the acquisition of a privately held company or business, such deals are not commonly disclosed to the public during negotiation stages since there is no legal obligation to do so. Often, after agreeing between the parties, they are disclosed at signing (when there is an interim period between signing and closing) or at completion (see **5.1 Requirement to Disclose a Deal**).

In the case of mergers, spin-off and corporate reorganisation, the resolutions approving such structures by the shareholders' meetings of the relevant parties are published in the official gazette (*diario oficial "El Peruano"*) and other national coverage newspaper three times during intervals of five days between each publication. The mergers, spin-offs and corporate reorganisations shall also be registered before the relevant offices of the registry of legal entities, making almost all the underlying information to such transactions generally available to the public. Furthermore, if a listed company is a party in a merger, spin-off or corporate reorganisation,

such transaction shall be disclosed as a material fact (*hecho de importancia*) before the SMV.

Regarding tender offers of publicly traded companies, the bid becomes public when bidder notifies the target company, SMV and the Lima Stock Exchange of its intention of acquire substantial equity interest in the target and it is accepted (see **5.1 Requirement to Disclose a Deal**). The notification of the tender offer shall include:

- the prospectus;
- the guarantee granted by the bidder;
- any previous authorisation granted by the relevant authorities; and
- the tender offer notice which shall be published in the Lima Stock Exchange Bulletin and in a newspaper.

7.2 Type of Disclosure Required

The only transactions related to business combinations in which the issuance of shares is required are the mergers, spin-offs and corporate reorganisations. If these types of deals involve a privately held company, the disclosure, as mentioned, is made public once the resolutions of the shareholders' meetings are published in the official gazette (*Diario Oficial "El Peruano"*) and other national coverage newspaper. The information related to this kind of transactions becomes generally available to the public once they are registered in the Peruvian public registry. In the case that the merger, spin-off or corporate reorganisation involves a publicly traded company, the negotiations, execution of the resolutions and completion of the transaction must be disclosed to the market as a material fact (*hecho de importancia*) (see **7.1 Making a Bid Public**).

7.3 Producing Financial Statements

In the case of mergers, spin-offs and corporate reorganisations, the companies involved in this type of business combinations are required to prepare audited financial statements of the previous year to the one in which the business combination enters into force. Also, each of the involved companies are required to prepare balance sheets up to date in which the business combinations come into force. Both the audited financial statements and the balance sheets shall be prepared in the IFRS (which are the generally accepted accounting principles in Peru).

As for tender offers, bidders are obliged to include in the prospectus (i) audited financial statements of the previous year to the one in which the tender offer is launched, and (ii) non-audited financial statement of the last quarter (both in the IFRS). If bidder is member of an economic group, then it should also include the consolidated financial information of such group. If bidder is a foreign company, then it can submit the mentioned financial statements according to the generally accepted accounting principles of the country in which it has been incorporated (meaning that they can also be submitted in GAAP if those are the generally accepted accounting principles in the country of origin of the bidder). In this last case, the bidder must file an auditor report stating the main differences of such generally accepted accounting principles with the ones accepted in Peru (IFRS).

7.4 Transaction Documents

Regarding acquisition of companies or businesses through stock or asset purchase agreements, there is no need to disclose any document of the transaction in full. In fact, there is no need to disclose any transaction document at all, save that (i) the transaction falls under the thresholds set forth in the MCL Regulations for

the antitrust clearance, in which case INDECOPI will require copies of the stock or asset purchase agreements (whichever the case) and some ancillary documents and agreements; and (ii) the Peruvian Tax Authority (*Superintendencia Nacional de Aduanas y Administración Tributaria* or “SUNAT” per its Spanish acronym) conducts an oversight proceeding for taxes payable as a consequence of the transaction, in which case SUNAT may request copies of the stock or asset purchase agreements.

In the case of tender offers of listed companies, the transaction documents must be disclosed in full since the tender offer is launched.

As for mergers, spin-offs and corporate reorganisations, there is no need to disclose all the transaction documents when the resolutions are published in the official gazette and the other national coverage newspaper. However, they will become generally available to the public once the specific transaction is registered before the relevant office of the registry of legal entities.

8. Duties of Directors

8.1 Principal Directors’ Duties

Fiduciary duties contained in the PGCL are the cornerstone when it comes to the directors’ performance during a business combination. As a general rule, in Peru directors must act with the diligence of a prudent business-person and a loyal representative. Thus, in a business combination, the directors shall:

- act in good faith and ensure that the transaction is in the best interest of the company and its shareholders – accordingly, directors should refrain from protecting the interests of certain groups of shareholders, including

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- the ones that appoint such director, and they must act in the benefit of all the shareholders;
- adopt reasonable measures to protect the shareholders and not make any decision that may benefit themselves or any other related party – the directors are obliged before the company and its shareholders to act with reasonable diligence and on an informed basis, without taking any personal benefit or directing any benefit to a third party; and
 - identify and disclose any potential conflicts of interest they may have in relation to the business combination and abstain from participating in any decisions related to the transaction.

PTO Regulations also pose some additional duties over the directors. During the conduction of a tender offer, the board of directors of the target shall (i) be absolutely neutral and impartial towards any competing bid, prioritising at all times the interests of the shareholders, and (ii) refrain from taking, conducting or agreeing on any act out of the ordinary course of the company's business, which may result in a disruption of the offer or the facilitation to any other bidder. These rules of conduct will be applicable upon the directors' acknowledgement of the existence of the tender offer and until the announcement of the results is made.

8.2 Special or Ad Hoc Committees

It is not common for boards of directors to establish special or ad hoc committees in business combinations in Peru, not even when some directors have conflicts of interests. The reason behind this is that in almost all cases the business combinations are directly negotiated by the shareholders of the target company (in case of private M&A transactions) or by the controlling group or shareholder (in case of deals involving a publicly traded company). What is more, one

of the duties of the directors during a business combination when they have any potential conflict of interest is to refrain from participating in the decision or agreement related to such matter. See **8.1 Principal Directors' Duties**.

8.3 Business Judgement Rule

Unlike Delaware, in Peru the board of directors' actions and decisions during a takeover situation are not scrutinised under a deferential standard like the business judgement rule (on the assumption that in making a business decision, the directors have acted informed, in good faith, and in the belief that the action was adopted for the benefit of the company).

In Peru, if a decision of the board of directors is contrary to the law, to the company's by-laws or is made with wilful misconduct, abuse of authority or gross negligence, the directors will be jointly and severally liable before the company, the shareholders and even third parties for damages.

Should a decision or action from the board of directors cause damages or losses to the company during a takeover situation, then a derivative action for liabilities can be filed if approved by the shareholders' meeting. Shareholders that hold at least 1/3 of the capital stock may also directly sue the directors for damages caused to the company, provided that (i) the claim is filed on behalf of the company and not for the particular interest of the shareholders, and (ii) they have not approved the relevant resolution of the shareholders' meeting pursuant to which it approves not to sue the directors. The Peruvian civil courts or the arbitration court (whichever is the case) will review the case and may hold the directors liable and apply monetary sanctions should there be a proven and sustained damage to the company.

8.4 Independent Outside Advice

As mentioned, in Peru business combinations are commonly negotiated and agreed by the shareholders of the target company and the acquirer. Considering such, directors do not usually seek independent outside advice during M&A transactions. The external advice is primarily given to the shareholders or to the controlling group or shareholder. In private M&A, it is common for the shareholders of the target to hire investment banks for generally:

- advising during the negotiation and execution phases of a stock purchase agreement;
- preparing the information to be shared during the due diligence proceedings; and
- preparing the valuation report of the target and other financial documentation.

Other common outside advisors that a seller may engage with during a business combination process are legal counsels, auditors, and tax and financial advisors.

8.5 Conflicts of Interest

Conflict of interest of directors and managers are commonly the subject of judicial review in Peru. According to the PGCL, and as a general rule for conflict of interest, the directors must not:

- make decisions in their own interest or the interest of third parties rather than in the best interest of the company;
- use the business or commercial opportunities they are aware of due to their position for personal or third-party benefit; and
- conduct any economic activity that competes with that carried out by the company.

If a director has a conflict of interest in any matter with the company, such director must refrain from participating in any act, decision or agree-

ment related to such conflict. Otherwise, the director will be liable for the damages caused to the company and may also be removed from the position of director. For damage actions against directors see **8.3 Business Judgement Rule**.

As for the conflicts of interests of shareholders, they are not commonly the subject of judicial review. Usually, they are more focused on administrative sanction procedures initiated by the SMV for insider trading and market manipulation during a tender offer. According to the PSL, if a shareholder becomes aware of information related to a tender offer while it has not yet been disclosed to the market, such shareholder must keep such information confidential and shall not:

- reveal such information to any third party;
- recommend operations to any third party based on such information;
- use the information to benefit from it directly or indirectly or benefit third parties; and
- manipulate the market to create artificial, false or misleading appearances related to the price of the target's stock.

9. Defensive Measures

9.1 Hostile Tender Offers

Under Peruvian laws, there is no express prohibition on hostile takeovers. They are not common, though. The reason for their extreme rarity lies behind the fact that there are very few listed companies with real spread ownership in Peru. The vast majority have identifiable controlling groups or shareholders. Notwithstanding the foregoing, there have been some hostile takeovers in the past few decades that are the subject of study.

9.2 Directors' Use of Defensive Measures

In Peru, there is not an express prohibition that prevents directors from using defensive measures or anti-takeover mechanisms, as with, for example, the “non-frustration rule” in the UK, or the “board neutrality rule” in the EU. However, it is almost impossible for a board of directors in Peru to implement defensive measures to avoid a takeover, as such may be challenged for infringing the principal duties of the directors in a tender offer scenario. See **8.1 Principal Directors' Duties**. The application of the principal director's duties contained in the PGCL and the PTO Regulations may in practice limit the deployment of the most used defensive measures under the Delaware Law in Peru. For example, defensive measures such as poison pills, shark repellents, share buy-backs, crown jewels, limitation on voting rights, among others, could not be applied in Peru, since (i) under the PGCL the board of directors does not have the authority to make the relevant decisions and take the actions to implement those defensive measures inside the company, and (ii) the board of directors must be neutral, act in the best interest of the company and all the shareholders, and refrain from acting or making decisions in the case of a conflict of interest with the company.

9.3 Common Defensive Measures

As noted, defensive measures are rare in Peru. Also, there has been little to no deployment of anti-takeover mechanisms. The result is that there has not been any case law that reviewed their legality under the Peruvian laws. Nonetheless, some defensive measures that may be or have been implemented in Peru are (i) the white knight defence, pursuant to which during a tender offer some minority shareholders find another bidder to launch a competitive bid, or (ii) golden parachutes, understood as provisions contained

in the labour agreements of some senior executives that allow them to be paid with preferential and substantial severance payments if they are terminated as a consequence of the change of control of the company. Another relevant measure actually contained in the PTO Regulations is the obligation of the board of directors to issue a report for the shareholders sustaining the advantages or disadvantages to accept or not accept the tender offer. Although not binding, sometimes the report has persuaded the shareholders to not accept the tender offer.

9.4 Directors' Duties

Peruvian laws set forth a number of fiduciary duties of the directors (see **8.1 Principal Directors' Duties**). Implementing a defensive measure can be construed as a violation of such fiduciary duties (see **9.2 Directors' Use of Defensive Measures**).

9.5 Directors' Ability to “Just Say No”

Regarding a tender offer or a privately negotiated stock purchase agreement, directors cannot “just say no” and take actions that prevent the completion of the transaction. Business combinations in Peru are directly negotiated by the shareholders of the target company or by the controlling group or shareholder.

10. Litigation

10.1 Frequency of Litigation

Litigation in connection with M&A deals is not very common in Peru. Peruvian judges and courts lack the institutional strength and expertise to review and decide on corporate acquisition transactions. Consequently, M&A deals in Peru are often subject to arbitration or to the court of a foreign country. New York is the customary jurisdiction agreed by the parties when

a party (seller or acquirer) is not a Peruvian individual or legal entity, and also for cross-border transactions in which Peruvian companies or assets are involved.

10.2 Stage of Deal

The few litigation disputes in Peru are commonly brought after closing and they usually relate to indemnification for losses arising out of, or resulting from, inaccuracy or breach of the representations and warranties contained in the stock purchase agreements.

10.3 “Broken-Deal” Disputes

At the moment when the outbreak of the COVID-19 pandemic took place, and therefore the implementation of lockdowns, curfews, and social distancing measures, several M&A transactions where in the middle of negotiations, signing phases and closing stages. The parties with pending transactions fortunately managed different ways to deal with the mentioned measures to ensure completion of the transactions. There were not many disputes over M&A transactions, and the ones that eventually arose were solved between the parties implementing certain risk management provisions. The lessons learnt basically involved the utilisation of certain provisions to handle the risks associated with the pandemic. Material adverse effect (MAE) and earn-out provisions gained a special importance not seen before when compared to pre-pandemic closed transactions.

11. Activism

11.1 Shareholder Activism

Shareholder activism in Peru is not as prominent as in some other regions or countries with more developed and sophisticated securities markets. Therefore, historically it has not been an important force. Nonetheless, during the past few years private pension fund administrators (AFP) have emerged as promoters of shareholder activism, in an initial way. These economic agents usually strive to implement best corporate governance policies inside the companies in which they invest.

11.2 Aims of Activists

Incipient shareholder activism in Peru is most keen in trying to:

- include corporate governance policies in the company;
- increase its level of compliance with laws;
- modify the management; or
- address perceived wrongdoing, rather than encouraging companies to enter into M&A transactions, spin-offs or major divestitures.

11.3 Interference With Completion

The few reported cases of shareholder activism in Peru did not seek to interfere with the completion of announced transactions. See **11.2 Aims of Activists**.

Trends and Developments

Contributed by:

Mauricio Olaya and Diego Muñiz

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados is a full-service law firm that provides cutting edge legal assistance. Muñiz is the largest law firm in Peru housing an impressive 330+ lawyers working in a broad range of practice areas. With a nationwide network of 13 offices, the firm ensures depth and sophisticated advice oriented to approach legal problems thoroughly and based on business objectives.

Muñiz has extensive experience assisting clients in business transactions both cross-border and locally. The firm does notable work in M&A, banking, capital markets, project development and project finance. With more than 35 practice areas, including tax, labour, environment, anti-trust, intellectual property, litigation and arbitration, mining, and oil & gas, Muñiz handles matters comprehensively.

Authors



Mauricio Olaya is principal partner of Muñiz and head of the corporate and M&A practice. He has handled an impressive number of the major M&A deals closed in Peru. In addition to his

extensive experience in corporate transactions, Mauricio is also a well-known promoter of issues linked to compliance, corporate governance, triple impact business, B Corps and ESG indicators. He graduated with honours from Pontifical Catholic University of Peru Law School. Mauricio is a member of the board of directors of several companies in Peru and is currently ranked Band 1 in Corporate/M&A by Chambers and Partners Global and Latin America.



Diego Muñiz is a senior associate at Muñiz. He concentrates his practice on M&A and corporate matters. Diego has vast and outstanding experience in both local and

cross-border deals, having been involved in various relevant and major M&A transactions in Peru. Diego graduated with honours from Pontifical Catholic University of Peru Law School and holds an LLM from Columbia Law School. He is currently recognised by Chambers and Partners Global and Latin America as Associate to Watch and is a regular contributor to World Bank's Doing Business publication regarding corporate and financial matters.

Contributed by: Mauricio Olaya and Diego Muñiz,
Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados

Calle Las Begonias 475
San Isidro
Lima
Peru

Tel: +51 1 611 7000
Email: molaya@munizlaw.com
Web: www.munizlaw.com



ESTUDIO
MUÑIZ

MUÑIZ
OLAYA
MELÉNDEZ
CASTRO
ONO
& HERRERA
Abogados

Overview of the Peruvian M&A Market Since 2020

The Peruvian economy, including M&A activity, was significantly impacted by the COVID-19 pandemic. During 2020, amid the peak and most critical phase of the sanitary crisis, there were only 102 transactions reported in Peru, with a heavy drop of nearly 82% of the negotiated total aggregate value (USD1.464 billion) compared to 2019 (USD8.36 billion). The described situation was just one of the consequences triggered by the pandemic, which also encompassed a significant decline in formal employment, poverty rates reminiscent of those in 2004, substantial issues regarding social and economic disparities, and insufficient availability of essential public services.

Despite the severe economic contraction and the still critical stage of the COVID-19 pandemic (mainly caused by waves of different virus strains, the lack of vaccines in the country, an inadequate hospital infrastructure, and a high number of ill people), 2021 showed an unusual recovery in M&A activity in Peru. The number of reported transactions was 130, which represented an increase by approximately 27% compared to 2020. What is more, the total

transaction negotiated aggregate value peaked to USD3.419 billion, which meant a variation of 134% relative to 2020. The driving forces behind such upturn were the stable macroeconomic figures during the first semester in relation to other countries in the region, market opportunity prices (caused by the election of left-wing former President Pedro Castillo), a beneficial exchange rate, and a worldwide reduction in interest rates.

Although 2022 denoted a pandemic phase characterised by greater steadiness and control, there was an overturn in the M&A activity. The first year of former President Pedro Castillo was marked by a highly political polarisation in the country, which finally resulted in a political and social crisis. This instability scenario in Peru, stemming largely from inadequate institutional structures and a fragile political system, escalated dramatically in December 2022 with the impeachment of Castillo due to a failed coup attempt. His ousting was followed by violent protests and widespread unrest, blockades in some major cities (including the capital city of Lima), and fires and assaults on businesses, media, and public institutions, resulting in disruptions and stoppage of economic activities. M&A transactions were also concerned by the

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situation with a significant reduction in both the number (only 112 reported deals) and negotiated value (USD2.597 billion, which represented a fall of 14%).

In 2023, however, Peru experienced a rapid rebound, bolstered by robust macroeconomic foundations. Additionally, the shift towards a period of relative calm amidst ongoing political and social turmoil seemed to be a key factor contributing to the swift recovery from the economic downturn. Peru's rapid GDP growth, effective central bank strategies, minimal country risk, and investment-grade rating positioned the country at a pivotal juncture for fostering competitive environments conducive to investment. A consistent uptick in M&A transactions begun in the last quarter of 2022 primarily propelled by favourable market prices, a new government with a more centrist-right approach compared to left-leaning administrations in Chile, Colombia and Mexico, and a widespread perception of economic stability and strength within the country. In that sense, there was a notable 25% increase in the number of transactions during 2023 compared to the previous year. Moreover, the total combined value surged by an impressive 166.69% in contrast to 2022. With 140 M&A transactions, 2023 nearly reached levels seen before the pandemic.

M&A trends

Current situation of the M&A market and expectations for 2024

Even though the existing data and information does not appear to give a clear picture on the behaviour of the M&A activity this year, it is expected that the pipeline of deals will continue growing during 2024. The M&A market in Peru is currently influenced by several factors that may confirm such trend. Firstly, private equity funds are reaching maturity stages in their invest-

ments, leading them to liquidate their positions. Secondly, there is a level of political and social stability along with a strong macroeconomic environment in Peru, making the country an eye-catching venue for investment. Thirdly, market risk across the region is playing a role in opportunity market prices. Lastly, some investors are exploring alternative regions and prospects outside South America, and therefore are entering into divestment processes.

Considering the above, there will probably be a similar number of transactions to that of 2023, with a slight upward trend depending on some circumstances such as a decrease in interest rates, political environment interacting with legal stability or economic policies, and impact of the "El Niño" phenomenon. Depending on the occurrence of those factors, however, several transactions may not progress to completion phases. While many are expected to culminate in successful deals during the year, some may not materialise into completed operations. In general, the transactions that occurred in the power and infrastructure sectors in 2023, which justified a significant percentage of the traded volume, may not necessarily be repeated in 2024. Therefore, to maintain or increase the volume, a greater number of transactions in other economic sectors may be required. In the event of a low conversion rate from ongoing to closed M&A transactions during 2024, the reasons might be traced to lingering investor apprehension and uncertainty regarding the Peruvian market.

This sense of instability is not unique to Peru but extends throughout the region. Countries like Chile, Brazil and Colombia are experiencing economic downturns, primarily due to policies and decisions made by their left-wing governments. The risk balance, the search for new markets, and other factors will continue to contribute

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to the occurrence of outbound transactions. The Central and North American markets, and even the European market, will be considered preferences over the South American one.

Notwithstanding the foregoing, Peru boasts one of the lowest risk levels for a country in the region and holds significant growth potential, making it still an appealing investment destination. While risk may act as a catalyst for the sale or acquisition of a company, it is not the sole factor driving decisions. Some actors with a thorough understanding of Peru's social and economic landscape and who are actively seeking opportunities to acquire assets that would otherwise be unavailable, secure advantageous market prices, and make strategic investments in long-term ventures. In that sense, there will be a greater involvement of strategic actors. On the one hand, investment funds will be part of several transactions depending on the economic sectors or their ability to be competitive at reasonable or opportunistic values. On the other hand, investment banks will need to strive for the identification of potential acquirers and with an adequate selling strategy to achieve correct or interesting values that align with the expectations of their clients. Prices, except for cases of very particular, strategic or unique assets, will remain at reasonable or opportunistic values.

In summary, the current state of the Peruvian market suggests that an uptick in M&A activity is anticipated for this year. However, many of those transactions will not reach closing stages due to a still present sense of instability and uncertainty of Peru in particular and of the region in general. The motivations behind the deals that will achieve completion this year may stem from various factors, including:

- companies grappling with financial imbalances as a consequence of not recovering after Peru's economic downturn during the pandemic and the political and social crisis;
- the threat posed by aggressive competitors jeopardising market shares;
- perceived risks associated with asset concentration in the Peruvian market;
- sophisticated investors (usually investment funds) interested in assets that in other circumstances would not have the possibility to buy and make strategic investments in long-run businesses;
- advantageous market prices in Peru; and
- loss of interest in the Peruvian and South American markets by investors, who are currently looking to invest in other regions like North America, Asia or Europe.

Material Adverse Effect (MAE) and earn-out provisions

The negotiations of M&A transactions inherited the inclusion of some provisions because of the COVID-19 pandemic. The deals underwent significant adaptation to a new operational landscape characterised by the use of technology. Due diligence processes were conducted fully remotely with no site visits and only reviewing information contained in data rooms. The negotiations took place in virtual meetings instead of face-to-face discussions. Electronic signatures started being used for the signing stage and closing ceremonies were handled pursuant to video conferences.

One of the provisions that captured interest from drafters of M&A paperwork were the MAE clauses. Although their inclusion was not new in share purchase agreements or asset purchase agreements in Peru, the negotiation and precise drafting of such clauses was not common. Due to the uncertainty caused by the COVID-19 pandemic,

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and as an element to lower the risk of unforeseen events, the MAE provisions have arisen as a fundamental piece of negotiation during an M&A transaction in Peru. The parties usually devote some time to shape a MAE clause applicable to each particular case and considering the features of each specific transaction.

Another trend that will be consistently repeated in 2024 is the impairment of the value of some target companies in Peru. Primarily driven by the social crisis and economic challenges stemming from the COVID-19 pandemic, certain businesses and assets have experienced a decline in their inherent value.

In the outlined circumstances, earn-outs have emerged as a safeguarding measure for potential acquirers of Peruvian companies and businesses. Generally, earn-outs serve as a compromise between acquirers and sellers regarding the valuation of a target company, its operations, or related assets. The perceived risk in Peru is impacting the cash prices that acquirers are willing to offer to sellers. Given the uncertainty surrounding business performance, many sellers and acquirers are opting to incorporate earn-out mechanisms into M&A transactions.

On one hand, this strategy alleviates the acquirer's uncertainty by ensuring they do not overpay upfront for the Peruvian target company or business. On the other hand, it incentivises sellers to maintain a well-functioning business, encouraging them to make decisions that support stable performance in an uncertain environment. Naturally, disagreements may arise regarding financial milestones, operational restrictions, earn-out timelines, and accounting standards, among other factors. However, in the current Peruvian context, earn-outs seem to facilitate M&A deal closures effectively.

Other trends for 2024: foreign investment, infrastructure, and corporate restructuring

Foreign companies and investors continue to demonstrate interest in the Peruvian market, whether to consolidate or expand their presence in the region or to boost their revenues. Consequently, Peru is still perceived as a market offering opportunities across multiple sectors and in general is considered attractive for foreign investment.

Foreign investment flows remained steady during the last semester of 2023, considering the restoration of political stability in the country and the financial recovery of several sectors that were affected by the pandemic in the last two years. The perspective is that the market will continue this positive trend during 2024 and experts forecast that investment inflows will primarily target infrastructure projects across the country.

For instance, 2023 marked the reactivation of the projects portfolio by the Peruvian Private Investment Promotion Agency (ProInversión), a trend that is expected to continue for 2024. The portfolio consisted of six transportation and communications projects worth more than USD4.4 billion, including the Lima Peripheral Ring Road (*Anillo Periférico de Lima*) for a total investment of USD2.38 billion (which was recently awarded), the Longitudinal Mountains Highway Section 4 (*Carretera Longitudinal de la Sierra Tramo 4*) for a total investment of USD929 million, the Huanayo–Huancavelica railway, and two port terminals (San Juan de Marcona and Chimbote).

Additionally, 13 water and sanitation projects are expected for USD1.2 billion, and 18 electric transmission projects for an estimated amount of USD900 million. In education, there are five projects worth more than USD600 million, includ-

PERU TRENDS AND DEVELOPMENTS

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Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Abogados

ing four at-risk schools in metropolitan Lima. The health sector has eight projects worth more than USD600 million, highlighting the operation and maintenance of both the new emergency hospital in Villa El Salvador and the hospital in Cajamarca. The agriculture and irrigation sector has projects worth USD1.2 billion, and the tourism sector has two projects worth USD200 million.

A further trend to highlight for 2024 is the establishment and landing of e-businesses in Peru, which started last year. This kind of business does not require a physical presence or defined facilities or infrastructure to operate. Overall, they are expected to increase over time due to their high mobility and ability to generate cash flows with low fixed costs.

Finally, as underscored, the aftermath of the COVID-19 crisis has severely impacted the financial performance of numerous companies in Peru. Despite the pandemic waning, ongoing social and political instability poses another significant challenge to the economic recovery of certain businesses. Consequently, there has been a surge in companies facing diminished profitability, financial fragility, and decreased cash flow, resulting in asset imbalance issues. Considering the still visible aftermath of the negative economic impact on the financial results of companies generated as a consequence of COVID-19, and the political situation in the country in recent years, many companies will find themselves immersed in one of the scenarios of asset imbalance established in the Peruvian General Corporations Law, which will lead to the implementation of corporate/financial mitigation measures to restore said balance.

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