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Privatisations and M&A Transactions with Government Entities

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Successful completion of M&A operations directly involving entities owned or controlled by a country's government or governmental agency as a transactional counterparty has always been a difficult and burdensome task in Latin America. Complex legal frameworks, political struggles and a high degree of legal exposure and liability for the public officials undertaking these transactions have been constant obstacles to prosperous development of this particular field of M&A practice. However, globalisation and the eruption of neoliberal democracies[2] in Latin America after the Washington consensus triggered an increasing trend to privatise state-owned companies.[3] Economic data reflects that Latin America accounted for an estimated 55 per cent of total privatisation revenues in the developing world in the 1990s.[4] Moreover, as the business environment in Latin America continues to evolve and markets become fiercely competitive, it is inevitable that governments increasingly use the sale of public assets or state-owned companies as means to obtain liquidity and successfully exit highly demanding and cash-intensive operations they are no longer able to run efficiently.[5] Even prior to the outbreak of the covid-19 pandemic, the sale of assets has served as a useful mechanism for governments and public entities to obtain the financial resources required to strengthen their budget, reduce fiscal deficit, improve sovereign debt ratio and undertake major projects of public welfare.[6]

The highly publicised *Isagen* case in Colombia,[7] which finally closed in January 2016 after years of political and legal struggles, is a revealing and useful example of the degree of complexity and uncertainty to which privatisations are subject. The transaction was of the utmost importance for the government, as the resources derived from such operation would be destined for the implementation and funding of a new generation of toll road programmes in Colombia.[8] Yet, it took more than eight years for the Ministry of Finance to successfully complete. Similar difficulties have been observed in other Latin American jurisdictions such as Uruguay, Argentina, Brazil and Chile.[9] Notwithstanding its troublesome nature, it can be expected that the fiscal deficit derived from the economic challenges entailed by the covid-19 pandemic[10] will act as a driving force in the increasing trend of privatisations and M&A with government entities for the foreseeable future, particularly in certain Latin American jurisdictions with conservative or neoliberal governments in office.[11] Hence, fully understanding its complexities and having a grasp of the main issues has become paramount for M&A practitioners.

This chapter intends to explore the main challenges faced when undertaking M&A transactions involving the government or government-owned entities, with a particular emphasis on privatisations in Colombia. The first section of this chapter contains a general overview of the legal framework applicable to the various types of M&A operations involving government entities, and identifies the main legal and transactional issues derived therefrom. The second section seeks to provide practitioners with an in-depth analysis of how some of these issues have been successfully tackled in previous privatisations. The third section analyses the current economic environment amid the covid-19 pandemic and how this situation can potentially impact M&A transactions with public entities.

The legal framework

M&A operations in Colombia involving government entities,[12] also referred to

The Guide to Mergers & Acquisitions - Third Edition

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Privatisations and M&A

as public entities, can be subject to different legal regimes, depending mainly on (1) the transactional role being assumed by the public entity and the specific type of asset being sold; (2) the legal nature and contractual regime of the public entity undertaking the transaction; and (3) the legal nature of the counterparty (public entity or private party). Properly identifying the applicable rules to the potential deal is a fundamental matter from a structuring perspective.

If the public entity is acting as seller of an equity interest to a private party, generally such process will qualify as a privatisation and, as such, shall abide by the rules and principles applicable to this type of operation. If the public entity is acting as buyer in an M&A transaction or if the sale encompasses assets different than equity interests, most likely the transaction will not be covered by privatisation rules but rather by the specific contractual regime applicable to the relevant public entity. If the M&A operation is not covered by privatisation rules, the legal nature of the public entity shall determine the rules applicable to the potential M&A transaction. For instance, most state-owned companies in Colombia[13] have a contractual regime under private law rather than under general public procurement laws.[14] M&A transactions that do not qualify as privatisations and that involve government-owned entities governed by private law can usually be structured under private law, which significantly facilitates the likelihood of a successful closing. On the other hand, certain government entities like state organs[15] are typically subject to regular public procurement rules or to special contractual regimes[16] that could affect M&A operations falling outside the scope of privatisation rules. Furthermore, if the target entity is a listed company and privatisation rules are not applicable to the operation, securities regulations regarding mandatory tender offers will need to be observed. Finally, the legal nature of the public entity's counterparty in the transaction is also relevant for determining the applicable legal framework. For instance, sales of equity interests among public entities are generally excluded from privatisation rules and are usually implemented through inter-administrative agreements under public procurement laws.[17]

In Colombia, following the adoption of the Constitution of 1991, major privatisation regulations were adopted through the enactment of Law 226,[18] which further develops the fundamental concepts contained in Article 60 of the 1991 Constitution. Particularly, this provision contains the principle of democratisation of state-owned equity interests, and grants a preferential right to workers, unions and the 'Solidary Sector'[19] to purchase the equity participation being sold under special and more favourable conditions than regular market investors or buyers.[20] On these grounds, Law 226 laid down the basic principles and procedural rules under which a privatisation in Colombia must take place. From a dealmaking perspective, some of the main structural challenges for the successful completion of privatisations in Colombia derive from this regulatory framework and the legal and practical complexities it can entail.

Rules of the game

Privatisation regulations in Colombia encompass partial or total sales to private parties of state-owned equity interests or mandatory convertible bonds. State ownership will be deemed to exist when the specific equity participation is held either directly or indirectly by a public entity, or when it was acquired using public funds or funds from the public treasury.[21] There are certain specific situations that constitute exceptions to the application of Law 226, such as:

- the sales of equity interests to other government entities;[22]
- M&A or general commercial transactions not consisting in the sale of equity interests;
- sales of equity interests outside of Colombia;[23] and
- mandatory or non-voluntary sales of equity interests.[24]

The first three exceptions are straightforward and should facilitate substantially the legal structuring of M&A operations with public entities as sellers. However, identifying mandatory or non-voluntary sales can be troublesome, as the legal grounds for such situation are not clearly distinguishable in the applicable laws or appear in an ambiguous or controvertible manner, often providing insufficient basis and lack of certainty to determine whether the exclusion of Law 226 is applicable, especially exposing the transaction to potential challenges from the Solidarity Sector and supervisory government entities in Colombia.[25] In certain cases, the applicability of the Law 226 exclusion on the basis of mandatory sales can be forthright, for instance if there is an

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unappealable decision by an administrative or judicial body ordering the divesture. In this scenario, the Colombian Council of State[26] has clearly identified such situation as grounds for excluding the application of Law 226. However, other scenarios such as industry-based regulations not allowing for certain kind of investments to be made in a given market or imposing thresholds on cross-investments in sector-specific supply chains (e.g., restrictions on permitted investments for financial entities[27] or regulatory restrictions to avoid anticompetitive effects in certain markets like gas,[28] energy and public utilities) can be harder to defend as grounds for a mandatory M&A deal that excludes the application of Law 226, considering that excluding privatisation rules in these cases will be unilaterally assessed by the selling entity and will not derive from a judicial or governmental order. An incorrect assessment of this matter can entail critical consequences, as M&A transactions that should abide by Law 226 in Colombia and are performed outside of such legal framework will be deemed as null and void under Colombian Law.[29] Thus, analysing if the intended transaction falls under privatisation rules is one of the first tasks to be performed by legal advisers, as such assessment will strongly dictate the possibilities of successfully closing the deal and the timeline for its execution.

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Basic principles

Law 226 establishes four guiding principles that must be observed when undertaking privatisations in Colombia. The legal effects and practical implementation of these principles can have a major impact on various aspects of the transaction – mainly on its legal structuring, the standard of review of the due diligence process and the bidder selection mechanism. These principles can be summarised as follows.[30]

- Democratisation: seeks to guarantee that all individuals and legal entities are allowed to have access to the equity participation that is being sold in the privatisation process. To accomplish this goal, it imposes an obligation on public entities acting as seller to implement mechanisms of wide publicity and free competition throughout the sale process.[31] In practice, this principle prevents the public entity acting as seller to unilaterally hand-pick the final buyer and requires the implementation of mechanisms that allow all potential and admissible bidders to participate in the privatisation process.
- Preference: pursuant to this principle, all privatisation processes must exhaust a mandatory two-months stage under special conditions, destined exclusively to the Solidarity Sector. This principle stems from the basic concept contained in the aforementioned Article 60 of the Constitution.[32]
- Protection of the public treasury: by virtue of this principle, the public entity acting as seller must act with extreme caution throughout the privatisation process and must deploy commercially reasonable efforts to sell the equity participation at a price that does not entail a detriment to the public treasury, which accurately reflects market conditions and the specific characteristics of the underlying asset.[33] The proper observance of this principle is one of the most highly scrutinised points by the Comptroller General in Colombia.
- Continuity of service: during a privatisation process involving the sale of a company that provides a public service, the public entity acting as seller must guarantee the continuity of these public services, which shall not be affected by the potential transaction.[34] On the grounds of this principle, many privatisation operations in Colombia have implemented a pre-qualification phase for potential buyers,[35] which seeks to verify that only investors that have the capacity and technical expertise to operate the target company without affecting the continuous supply of the public service can indeed participate in the final stages of the sales process.

The roadmap

Law 226 requires the public entity acting as seller in the privatisation process to design a sales programme for the equity participation being offered. This document constitutes the basic legal framework for the specific transaction being pursued and must include, at least, the following elements:

- the stages in which the privatisation process will take place, including the mandatory and preferential two-months phase destined to the Solidarity Sector;
- the special conditions destined exclusively for the Solidary Sector;

- payment structure and conditions; and
- minimum price per share of the target entity, which shall be a fixed price throughout the offer to the Solidarity Sector.[36]

The sales programme is customarily adopted through a decree issued by the public entity pursuing the privatisation and provides a limited time span to complete the transaction. Additionally, the sales programme usually delegates on a corporate organ, committee or person the faculty to issue special regulations for each phase of the privatisation,[37] which include the detailed legal and operational aspects of the transaction.

From a contractual perspective, privatisations in Colombia have a very particular structure. Typically, no purchase agreement is negotiated between the selling government entity and the purchaser,[38] and the company or equity interest is sold 'as is'. Thus, the transaction documents will not include customary M&A provisions such as representations and warranties or indemnity rules in favour of the purchaser. In cases of mandatory application of Law 226, the transaction will be necessarily governed by Colombian law, excluding the possibility of convening a different legal regime as the applicable law.[39] Additionally, from a dispute resolution perspective the sales programme of each privatisation usually grants jurisdiction over the process to Colombian courts and tribunals.

Regarding seller's liability, Law 226 does not contain any specific provisions regarding this matter. As mentioned, the general rule in privatisations is that the company or equity interest is sold 'as is' and no representations and warranties or indemnity rules are granted in favour of the purchaser. However, this legal structure should not be construed as granting sovereign immunity or other figure of similar nature. Under the 1991 Constitution, the government shall be liable in cases in which unlawful damages or losses are caused by acts or omissions of a public authority.[40] Furthermore, the Colombian Council of State has recognised that public entities acting as sellers in privatisation operations also must abide by the good faith principle,[41] which encompasses the duty of disclosing material information to a counterparty in the pre-contractual stage of negotiations. In privatisations, this duty also stems from the free competition element of the democratisation principle.[42] Colombian public entities such as the Ministry of Finance have been held liable and forced to indemnify buyers that have suffered damages in privatisation operations as a consequence of the government's disregard for the good faith and democratisation principles.[43]

The following section of this chapter will analyse the most critical aspects derived from the legal framework applicable to privatisations in Colombia and the lessons learned from our first-hand participation in these landmark cases.

Critical issues and relevant experiences

The Isagen case

Due diligence, valuation of assets and fiscal liability

After considerable legal and political turmoil, in January 2016 the Colombian Ministry of Finance successfully sold to a Brookfield investment vehicle its majority stake in energy generation company Isagen S.A. E.S.P. (Isagen). This landmark case, which constitutes the largest privatisation successfully completed in Colombia until 2021, raised numerous issues regarding the legal framework applicable to this type of transaction and the degree of liability assumed by the public entity and officials undertaking the operation. The *Isagen* case revealed the vulnerability of the privatisations regime to legal and political attacks, and how these attacks can seriously delay the bidding process and jeopardise the overall certainty of closing the deal. Among the several legal issues raised by the *Isagen* case, the due diligence process constitutes one of the main aspects to be considered for future transactions.

Pursuant to Law 226, sales programmes for privatisations must be based on technical studies that must include a valuation of the target company.[44] Considering the aforementioned protection of public treasury principle, this valuation becomes a critical aspect of any privatisation. After the Isagen transaction was finally completed, considerable issues were raised by control entities and opposing parties regarding the final value of the transaction. The Ministry of Finance faced numerous allegations from the Comptroller General's Office questioning the final price under which the transaction was completed,

alleging a potential fiscal liability derived from a possible detriment to the public treasury. These allegations constituted a direct challenge to the valuation exercise under which the sales programme of the Isagen process was structured, and, by extension, to the due diligence performed by the legal advisers to the selling party. These allegations were strongly dismissed by the Council of State, which concluded that the protection of public policy principle envisaged in Law 226 was properly observed when the minimum price per share set forth in the sales programme was determined based on an valuation of the target entity performed by an independent financial expert, relying on customary company valuation methods for M&A transactions.[45] However, the aftermath of the *Isagen* case raised significant concerns for public entities and officials engaging in privatisation operations, who reasonably feared possible fiscal liability and disciplinary findings by control entities in future deals.

When participating in due diligence processes for privatisation operations or assisting in the valuation process of the company, this particular situation can trigger a misguided tendency by public officials to attempt to minimise fiscal liability findings by maximising the sale value of the target asset, regardless of market conditions or financial capacity of the bidders.

The 'sole bidder' discussion and interaction with public procurement rules

Grasping correctly how the special privatisation rules contained in Law 226 interact with general public procurement laws and principles is one of the major challenges when engaging in privatisations in Colombia. Even though there is an express provision in Law 226 stating that general public procurement rules are not applicable to privatisations,[46] the practical objective of this exclusion is to carve out the selection of advisers to the selling entity and the final purchaser in the process from public procurement rules and selection mechanisms, not to exclude all rules from public procurement or public administration laws. General principles of public administration such as transparency, efficiency, due process and economy, among others,[47] must be fully observed by all public entities and officials undertaking privatisations.[48]

One of the major legal discussions stemming from the *Isagen* case was the legality of adjudication mechanisms allowing for a privatisation to be completed with a single bidder. In the *Isagen* privatisation, the regulation enacted by the Ministry of Finance for the second stage of the transaction envisioned a special auction at the Colombian Stock Exchange[49] as the adjudication mechanism of the shares, which did not require a plural number of bidders for the auction to take place. The auction took place with the sole participation of Brookfield, and numerous questions were raised regarding the legality of the mechanism mainly from a misconceived applicability of regular public procurement rules and selection mechanisms to privatisations. Fortunately, the Council of State affirmatively settled the matter, stating that the democratisation principle of Law 226 is correctly observed when the selling entity adopts all reasonable measures to allow interested investors to participate in the privatisation, without this entailing that multiple offers are required for the sale to be valid under applicable privatisation laws.[50]

The misconceived applicability of public procurement rules and selection mechanisms to privatisations is a sensible matter, as it can encourage the implementation of complex adjudication mechanisms that have counterproductive effects for the transaction from a dealmaking perspective.

Regional politics – the EPM and ETB experiences

From a procedural standpoint, Law 226 requires the selling party in a privatisation to obtain an authorisation from certain political bodies prior to the formal initiation of the sales process. If the seller is the Colombian Nation (i.e., the Ministry of Finance directly or a state-owned company controlled by the central government) the sales programme must be approved by the Council of Ministers, which also determines the minimum price per share for the transaction.[51] However, when the selling party is a territorial entity (such as the Capital District of Bogotá) or a state-owned company controlled by a territorial entity, the sales programme must be approved by a political organ within the territorial jurisdiction of such selling entity. These organs are the council (*Concejo*, for cities and districts) and the departmental assembly (*Asamblea Departamental*, for departments).[52] Unfortunately, these entities work significantly different than the Council of Ministers, and from a functional

perspective they operate more as legislative organs than as administrative or executive organs (although they are part of the executive branch of power and not the legislative branch).[53] This particular rule is one the most troublesome procedural requirements set forth in Law 226 and has become one the major deal-breakers for privatisations at the regional level. The main complications derived from this requirement are (1) the political cost and complexities of the authorisation process as such; and (2) the legal exposure to procedural defects that may jeopardise the overall validity of the transaction.

A case that perfectly depicts the complications derived from this requirement is the failed ETB privatisation, a long-lasting project pursued recurrently by conservative administrations in Bogotá and strongly opposed by left-wing counterparts. On 27 April 2017, the District of Bogotá issued Decree 207 of 2017, which contained the sales programme for the privatisation of the 86.35 per cent equity stake owned by the District of Bogotá and other public entities in telecommunications company Empresa de Telecomunicaciones de Bogotá S.A. E.S.P. (ETB). Prior to the enactment of this decree, the District of Bogotá had obtained approval from the Council of Bogotá.[54] The article authorising the District of Bogotá to undertake the privatisation was embedded in the Development Plan of Bogotá for the 2016–2020 term, an extensive document with more than 160 articles relating to numerous and diverse subject matters. A nullity action was filed against this article, alleging the inclusion of this authorisation in the Development Plan:

- had been made abruptly and with an insufficient degree of debate;
- violated the unity of matter principle;[55] and
- was flawed from a procedural standpoint.

A couple of days after the initiation of the Solidarity Sector stage, in May 2017 the Fourth Administrative Court of the Circuit of Bogotá issued an injunction ordering the immediate suspension of the process while the merits of the nullity claim were assessed, and in July 2017 declared the nullity of the provision. In December 2018, the Administrative Tribunal of Cundinamarca confirmed this ruling. In February 2019, the Secretary of Finance of Bogotá formally declared its decision to desist from the sales process of ETB.[56] From a strategic perspective, the failed ETB process provides valuable lessons for future privatisations regarding the process of obtaining authorisations from regional political bodies. As politically sensible transactions, privatisations require stand-alone debates and, if the authorisation is granted, it should be provided for a reasonable term and formalised through a single-purpose legal document.

Empresas Públicas de Medellín E.S.P. (EPM), a public utilities company owned by the city of Medellín, has faced similar difficulties regarding this authorisation. In 2019, EPM attempted to sell its 10.17 per cent equity stake in major energy transmission company Interconexión Eléctrica ISA S.A. E.S.P. (ISA). The Council of Medellín granted its authorisation in October 2018, giving EPM until 31 December 2019 to complete the operation.[57] The first stage directed towards the Solidarity Sector was finalised in June 2019 and the second stage was officially launched a couple of weeks later. Unfortunately, the remaining five months were insufficient for EPM to complete the deal and reopening the debate for a new authorisation with the Council of Medellín was not a feasible alternative, as there was a profound struggle taking place between the mayor and council members regarding a major accident at the Hidroituango hydroelectric power plant being developed by EPM, an immense energy generation project valued at over US$4 billion. With this political context in place, EPM had to desist from its intention to sell its equity stake in ISA. More recently, the potential sale of the equity interest held by EPM in telecommunications company UNE EPM Telecomunicaciones SA ESP was also denied by the Council of Medellín.[58]

Limits to the Solidarity Sector – the Invercolsa case

No case better illustrates the challenges that can derive from the mandatory two-months stage destined to the Solidary Sector than the *Inver*colsa deal.

In December 1996, the Colombian government issued a decree containing the sales programme for the privatisation of a 52.54 per cent equity stake owned by state-owned oil company Ecopetrol S.A. in Inversiones de Gases de Colombia S.A. (Invercolsa) a holding company with a portfolio of investments in the natural gas industry.[59] The offer directed at the Solidarity Sector was launched

the following year, and on 30 April 1997 Fernando Londoño Hoyos acquired 145 million shares, representing an estimated 8.53 per cent equity stake in Invercolsa. To participate in the offer directed exclusively at the Solidarity Sector, Mr Londoño submitted a certificate asserting that he was a former employee of the company. Ecopetrol strongly opposed, alleging Mr Londoño had never been a formal employee of Invercolsa but rather a legal adviser that, in such capacity, acted temporarily as president and legal representative of the company. Ecopetrol requested an intervention from the Superintendence of Companies, which deferred the dispute to the courts. The Supreme Court of Justice finally settled this matter in 2019, ruling in favour of Ecopetrol and concluding that Mr Londoño effectively had never been an employee of Invercolsa, which precluded him from participating in the Solidarity Sector offer and thus rendered his acquisition of 145 million Invercolsa shares null and void under Law 226.[60] However, during the 22 years in which the dispute was litigated before the competent courts, Ecopetrol was unable to continue with the privatisation process, primarily because of the inefficiencies derived from not being able to offer a controlling stake in Invercolsa.

This landmark case put the spotlight on the challenges derived from the Solidarity Sector phase, especially in cases of implementations contrary to the spirit of Law 226. As a consequence, in most privatisations following the *Invercolsa* deal in which controlling stakes were intended to be sold, selling parties started to implement a series of limitations to the participation of each individual member of the Solidarity Sector, based on the individual financial capacity of each member. Customary limitations contained in sales programmes for privatisations include the following.[61]

- For individuals: overall value of the shares to be purchased capped at the value of their liquid net worth for the prior year, or at five times their annual income or remuneration (the latter for directive employees) for the prior year.
- For legal entities: overall value of the shares to be purchased capped at the value of their adjusted liquid net worth for the prior year, or at five times their annual income for the prior year.

Additionally, sales programmes also include a maximum number of shares that can be purchased by each member of the Solidarity Sector and require (1) not negotiating or performing any act that entails a change in the ultimate beneficiary of the acquired shares during a given period of time; and (2) declaring under oath that each member of the Solidarity Sector is acting on its own behalf and for its own benefit. The legality of these limitations has been extensively recognised in Colombian case law,[62] as they are deemed valid mechanisms to:

- prevent the concentration of the equity participation being offered to certain persons or groups of interest;
- accurately reflect the acquisition capacity of each Solidarity Sector member; and
- foster an effective democratisation of state-owned property, as intended by Law 226.

Privatisation rules and securities regulations – the GEB experience

The interaction between Colombian securities regulations and Law 226 is also one the major topics that must be properly understood when structuring privatisations. Two issues must be particularly emphasised: interaction of tender offer rules with Law 226 and disclosure of information.

Like most Latin American countries, Colombia adopted a mandatory tender offer rule for the acquisition of voting shares in the secondary market for listed companies.[63] The mandatory tender offer rule forces an investor to launch a shares purchase offer for the benefit of all shareholders of the target company upon the occurrence of certain triggering events.[64] However, Colombian securities regulations provide a specific carve-out for privatisation processes.[65] As a general rule, if a public entity is selling its equity stake in a company listed in the Colombian Stock Exchange to a private party, and the transaction qualifies as a privatisation under Law 226, tender offer rules will not be applicable to the operation. However, the fact that privatisations are exempt from tender offer rules in seller-driven operations does not mean that public entities are not allowed to sell their equity interests in listed companies in

buyer-driven tender offers in place in the market. Such was the case with the sale of the Isagen shares owned by Grupo de Energía de Bogotá S.A. E.S.P. (GEB).[66] Pursuant to the sales programme of the Isagen privatisation described previously, the buyer had to launch two tender offers for the remaining shareholding of the company within the six months after closing had occurred. As a result, between March and September of 2016, two tender offers were launched for the remaining listed Isagen shares, including a 13.1 per cent equity stake owned by EPM and a 2.52 per cent owned by GEB. Both entities structured their sales programmes to allow the acceptance of tender offers in the market as a valid sales mechanism after the Solidarity Sector phase. Both companies successfully sold their Isagen shares through a tender offer and still remained within the framework of Law 226.[67]

Disclosure of information is also a sensitive issue, specifically when the target of the privatisation is a listed company. In these cases, milestones of the privatisation process that qualify as relevant information[68] under Colombian securities laws will need to be timely informed to the Superintendence of Finance and revealed to the market. Occasionally, this obligation can entail counterproductive effects for the transaction, but inobservance can expose the company to the imposition of fines that could affect the dialogue between the listed company's management and the selling party throughout the process, which is crucial for successful completion of the deal.

Covid-19 economic aftermath and upcoming challenges

The covid-19 pandemic has entailed devastating economic effects, particularly in emerging markets.[69] Many countries have entered into recessive economic cycles, experiencing situations such as substantial increases in unemployment rates, currency devaluation and skyrocketing fiscal deficits.[70] As of 30 April 2021, the fiscal deficit of Colombia had increased to nearly 8 per cent of the GDP,[71] although it is expected to fall to 5.6 per cent of the GDP in 2022.[72] In other Latin American jurisdictions, the fiscal situation is even more critical.[73] In times of recession or considerable economic turmoil, the sale of public assets can evolve from being a simple potential source of liquidity into a mandatory fiscal strategy for public entities.[74] In this context, it is reasonable that national governments are exploring all potential sources of income to face the economic crisis, including the sale of public assets and state-owned companies, either to private parties or to other state entities or state-owned companies. Thus, it can be reasonably expected that privatisations and M&A transactions involving public entities will rise significantly in the coming years.

As explored in detail throughout this chapter, privatisations constitute one of the most complex and challenging fields of work in M&A practice. Legal frameworks in Latin America tend to serve more as roadblocks rather than as deal facilitators, and political opposition from anti-neoliberal trends will be a constant opposing force for this type of deals. Even though there have been certain efforts intended to improve and add flexibility to the Colombian privatisations regime,[75] a long road lies ahead in the task of modernising and optimising the regulatory environment applicable to privatisations and M&A operations with public entities. This landscape makes the role of legal advisors crucial to the successful completion of these transactions.

Notes

[1] Lina Uribe García is a partner and Juan Pablo Caicedo De Castro a senior associate at Gómez-Pinzón.

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n-in-Latin-America-Myths-and-Reality.pdf ;(accessed 16 May 2021).

[4] Chong, A, López-de-Silanes, F, 2005. 'Privatization in Latin America: Myths and Reality'. *The Truth about Privatization in Latin America*. p. 5. Stanford Economics and Finance/The World Bank. **Publications.iadb.org**. Available at: **https://publications.iadb.org/publications/english/document/Privatization-in-Latin-America-Myths-and-Reality.pdf** ;(accessed 16 May 2021).

[5] See Boardman, A., and Vining, A.R. 1989. 'Ownership and Performance in Competitive Environments: A Comparison of the Performance of Private, Mixed, and State-Owned Enterprises.' *Journal of Law and Economics* 32: 1–33. See also Huizinga, H., and Bo Nielsen, S. *Privatization, public investment, and capital income taxation*. Amsterdam, Netherlands: Elsevier Science, 2001, p.399.

[6] Gonzalez III, J., and Kemp, R. 2016. Privatization in Practice: Reports on Trends, Cases and Debates in Public Service by Business and Nonprofits. Jefferson, North Carolina, United States of America: McFarland & Company, Inc., Publishers.

[7] The Ministry of Finance started to analyse the potential sale of its 57.66 per cent equity stake in major hydroelectric energy generator Isagen S.A. E.S.P. in 2008. The financial and legal advisors engaged by the Colombian government started structuring the operation in 2009. There is further information on this deal on p. 109 of this chapter ('The *Isag*en case').

[8] See **http://es.presidencia.gov.co/columnas/minhacienda/los-recursos-de-isagen-motor-para-la-infraestructura-del-pa%C3%ADs** (accessed on 16 May 2021).

[9] United Nations. *Foreign investment in Latin America and the Caribbean*. New York. N.Y., United States: United Nations, 2002.

[10] Frankel, J. *The Impact of the Pandemic on Developing Countries*. Cambridge, MA, United States of America: Harvard Kennedy School, 2020.

[11] Customarily, left leaning or socialist political parties are opposed to the privatisation of state-owned companies. It can be reasonably expected that Latin American countries with this type of government in office do not experience a rise in the field of privatisations within their M&A markets.

[12] Under Colombian Law, state entities (*entidades estatales*) are those encompassed by Article 2 of the Colombian Public Procurement Statute (Law 80 of 1993, as amended from time to time), Articles 10, 14 and 24 of Law 1150 of 2007 and all other entities that legally shall abide by public procurement rules. See **https://www.colombiacompra.gov.co/ciudadanos/glosario/entidad-estatal** ;(accessed on 17 May 2021).

[13] Namely mixed-equity companies (*sociedades de economía mixta*) and industrial and commercial state companies (*empresas industriales y comerciales de*l estado).

[14] Article 461 of the Colombian Commercial Code. Available at: **http://www.secretariasenado.gov.co/senado/basedoc/codigo_comercio_pr014.html#461** (accessed on 17 May 2021).

[15] Such as ministries, government agencies and territorial or regional entities.

[16] For instance, the sale of assets seized by the Colombian government as a consequence of criminal activities (*extinción de dominio*) is regulated by Law 1708 of 2014 and Law 1849 of 2017 Available at: **http://www.secretariasenado.gov.co/senado/basedoc/ley_1708_2014.html and http://www.secretariasenado.gov.co/senado/basedoc/ley_1849_2017.html**, respectively (accessed on 16 May 2021).

[17] See Article 2.4 of Law 1150 of 2007. Available at: **http://www.secretariasenado.gov.co/senado/basedoc/ley_1150_2007.html** (accessed on 17 May 2021).See also Article 20 of Law 226 of 1995, as referenced in footnote 18 of this chapter.

[18] Law 226 of 1995. Available

at **http://www.secretariasenado.gov.co/senado/basedoc/ley_0226_1995.html** (accessed on 17 May 2021).

[19] 'Solidary Sector' includes employees, pensioners and former employees of the target entity, employees' associations, unions, pension funds and similar organisations.

[20] See Ruling C-1260 of 2001 from the Colombian Constitutional Court (*Corte Constitucional*), Justice Rodrigo Uprimny Yepes. Available at: **https://www.corteconstitucional.gov.co/relatoria/2001/c-1260-01.htm** (accessed on 19 May 2021).

[21] Article 1 of Law 226 of 1995.

[22] Article 20 of Law 226 contains a special exception to the applicability of Law 226 for sales of shares between state organs (*órganos estatales*). Namely, this provision establishes that sales of shares between this type of entities will not be subject to the rules of Law 226 of 1995, but to the relevant rules of public procurement in force at the time in which the operation takes place.

[23] See Concept 2314 of 15 December 2016 of the Consultation and Civil Service Section (*Sala de Consulta y Servicio Civil*) of the Colombian Council of State (*Consejo de* Estado).

[24] See Concept 1513 of 9 October 2003 and Concept 1827 of 7 June 2007 of the Consultation and Civil Service Section (*Sala de Consulta y Servicio Civil*) of the Colombian Council of State (*Consejo de* Estado).

[25] Namely the Comptroller General of the Republic (*Contraloría General de la República*), the Colombian control agency that oversees the proper administration and execution of the public budget and public funds, and the Public Ministry (*Procuraduría General de la Nación*), responsible for protecting fundamental rights and guarantees of the citizenship and of imposing disciplinary action against public offers and servants.

[26] *Consejo de Estado*, maximum court for administrative law matters.

[27] See Articles 110 and 119 of Decree 663 of 1993 or Organic Statute of the Financial System (*Estatuto Orgánico del Sistema Financiero*). Available at: **http://www.secretariasenado.gov.co/senado/basedoc/estatuto_organico_sistema_financiero.html#1** ; (accessed on 17 May 2021).

[28] See Resolution 057 of 1996 issued by the Colombian Regulatory Commission on Energy and Gas (C*omisión Reguladora de Energía y Gas, CREG*). Available at: **http://apolo.creg.gov.co/Publicac.nsf/Indice01/Resoluci%C3%B3n-1996-CRG57-96** (accessed on 17 May 2021).

[29] Articles 14 and 15 of Law 226 of 1995. Available at **http://www.secretariasenado.gov.co/senado/basedoc/ley_0226_1995.html** (accessed on 17 May 2021). See also Ruling 11001-31-03-028-1997-09465-01 from 30 October 2019 of the Colombian Supreme Court of Justice (Corte Suprema de Justicia), Justice Aroldo Wilson Quiroz.

[30] See Concept 1663 of 28 July 2005 of the Consultation and Civil Service Section (*Sala de Consulta y Servicio Civil*) of the Colombian Council of State (*Consejo de* Estado).

[31] Article 2 of Law 226.

[32] Article 3 of Law 226.

[33] Article 4 of Law 226.

[34] Article 5 of Law 226.

[35] The legality of pre-qualifications has been ratified by the Colombian Council of State. See Ruling of 9 March 2017 from the Fourth Section of the Contentious Administrative Law Matters Chamber (*Sección Cuarta de la Sala de lo Contencioso Administrativo*) of the Colombian Council of State (*Consejo de Estado*), justice Jorge Octavio Ramírez.

[36] Article 10 of Law 226.

[37] Usually called *Reglamentos de Enajenación*, which form an integral part of the sales programme.

[38] Even though a formal written purchase agreement is not negotiated and executed, the essential elements for the formation of a basic purchase agreement under Colombian Law will be fulfilled.

[39] In cases of M&A transactions with government entities regulated under private law, different rules on applicable law and dispute resolution may be agreed upon by the parties.

[40] Article 90 of the Political Constitution of Colombia.

[41] As regulated in Article 1603 of the Colombian Civil Code and in Article 871 of the Colombian Code of Commerce.

[42] See the *Betania* case, settled through the Ruling of 19 November 2012 from the Third Section of the Contentious Administrative Law Matters Chamber (Sección Tercera de la Sala de lo Contencioso Administrativo) of the Colombian Council of State (Consejo de Estado), Justice Jaime Orlando Santofimio Gamboa.

[43] ibid.

[44] Articles 6 and 7 of Law 226.

[45] See Ruling of 10 September 2015 from the Fourth Section of the Contentious Administrative Law Matters Chamber (*Sección Cuarta de la Sala de lo Contencioso Administrativo*) of the Colombian Council of State (*Consejo de Estado*), Justice Hugo Fernando Bastidas Bárcenas.

[46] Article 2 of Law 226.

[47] Article 209 of the Colombian Constitution and Article 3 of Law 1437 of 2011. Available at: **http://www.secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991_pr006.html#209 and http://www.secretariasenado.gov.co/senado/basedoc/ley_1437_2011.html#3**, respectively (accessed on 17 May 2021).

[48] See Concept 2314 of 15 December 2016 of the Consultation and Civil Service Section (*Sala de Consulta y Servicio Civil*) of the Colombian Council of State (*Consejo de* Estado).

[49] *Bolsa de Valores de* Colombia.

[50] See Ruling of 9 March 2017 from the Fourth Section of the Contentious Administrative Law Matters Chamber (*Sección Cuarta de la Sala de lo Contencioso Administrativo*) of the Colombian Council of State (*Consejo de Estado*), Justice Jorge Octavio Ramírez.

[51] Article 8 of Law 226.

[52] Article 17 of Law 226.

[53] Articles 312 and 313 of the Colombian Constitution.

[54] Authorisation granted through Article 140 of District Accord No. 645 of 2016, approved on 9 June 2016. Available at: **https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=66271** (accessed on 17 May 2021).

[55] Article 158 of the Colombian Constitution mandates that every draft bill of law or regulation must refer to the same subject matter and that any provisions or modifications therein that are not related to such subject matter will be inadmissible. See Ruling C-507 of 2020 from the Colombian Constitutional Court (*Corte Constitucional*), Justice Jorge Enrique Ibáñez Najar. Available at: **https://www.corteconstitucional.gov.co/relatoria/2020/C-507-20.htm** ;) (accessed on 19 May 2021).

[56] See **https://www.larepublica.co/economia/alcaldia-de-bogota-desiste-de-la-venta-de-las-acciones-de-la-etb-2827419** (accessed on 18 May 2021).

[57] See Accord (*Acuerdo*) No. 090 of 2018 issued by the Council of Medellín. Available at: **https://www.medellin.gov.co/normograma/docs/astrea/docs/A_CONMED_0090_2018.htm** (accessed on 18 May 2021).

[58] See **https://www.semana.com/economia/capsulas/articulo/concejo-de-medellin-no-aprobo-venta-de-acciones-de-epm-en-une-e-invertelco/202221/** (accessed on 2 September 2022).

[59] See Decree (*Decreto*) No. 2324 of 1996 issued by the Presidency, the Ministry of Finance and the Ministry of Mines and Energy. Available at: **http://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Decretos/1436599** (accessed on 18 May 2021).

[60] See Ruling 11001-31-03-028-1997-09465-01 from 30 October 2019 of the Colombian Supreme Court of Justice (*Corte Suprema de Justicia*), Justice Aroldo Wilson Quiroz.

[61] See the sales programme for the privatisations of Isagen, ETB, Grupo de Energía de Bogotá S.A. E.S.P. and Colombia Telecomunicaciones S.A. E.S.P.

[62] See Ruling C-037 of 1994 from the Colombian Constitutional Court (*Corte Constitucional*), Justice Antonio Barrera Carbonell. Available at: **https://www.corteconstitucional.gov.co/relatoria/1994/C-037-94.htm**) (accessed on 19 May 2021). See also the following rulings from the Colombian Council of State (*Consejo de Estado*): 2919 of 10 February 1995, Justice Libardo Rodríguez; 2958 of 16 August 1995, Justice Yesid Rojas Serrano; 3566 of 5 December 2002, Justice Olga Inés Navarrete Barrero; 15739 of 4 September 2008, Justice María Inés Ortiz Barbosa and 15685 of 13 November 2008, Justice Ligia López Díaz.

[63] Mandatory tender offers (*Ofertas Públicas de Adquisición* or OPA) are regulated by Decree 2555 of 2010 and by the General Rules of the Colombian Stock Exchange.

[64] As per Article 6.15.2.1.1 of Decree 2555, any person or group of persons constituting the same beneficial owner who wish to purchase 25 per cent or more of the outstanding voting shares of a listed company must launch a mandatory tender offer to purchase such shares. Likewise, any person or group of persons that, being the same beneficial owner of 25 per cent or more of the voting shares of a listed company wishes to acquire more than 5 per cent of the outstanding shares of said company, must also launch a mandatory tender offer to purchase such shares.

[65] Paragraph 2 of Article 6.15.2.1.2 of Decree 2555 provides a specific exception for privatisations from tender offer rules, Article 6.15.1.1.2 of Decree 2555 grants a general exception from the transactional systems of the Colombian Stock Exchange for sales of shares made by the Colombian Nation.

[66] Operating as Empresa de Energía de Bogotá S.A. E.S.P. when the Isagen deal was completed.

[67] See Isagen's shareholding composition after the Brookfield tender offers of 2016 at: **https://www.superfinanciera.gov.co/jsp/loader.jsf?lServicio=Publicaciones&lTipo=publicaciones&lFuncion=loadContenidoPublicacion&id=61446** (accessed on 17 May 2021).

[68] See Article 5.2.4.1.5 of Decree 2555 for situations that qualify as relevant information that must be disclosed to the market.

[69] Frankel, J. *The Impact of the Pandemic on Developing Countries*. Cambridge, MA, United States of America: Harvard Kennedy School, 2020.

[70] Jackson, J., Weiss, M., Schwarzenberg, A., Nelson, R., Sutter, K., and Sutherland, M. *Global Economic Effects of COVID-19*. Washington, D.C., United States: Congressional Research Service, 2021.

[71] According to Colombia's Financial Plan, the fiscal deficit for 2020 was calculated at 7,8 per cent of the GDP, while it is calculated that the expected fiscal deficit for 2021 will be 8.6 per cent of GDP. Available at: **https://www.irc.gov.co/webcenter/ShowProperty?nodeId=/ConexionContent/WCC_CLUSTER-156938** (accessed on 14 May 2021).

[72] According to Colombia's Mid-Term Fiscal Framework presented by the Ministry of Finance in June 2022. See: **https://www.minhacienda.gov.co/webcenter/portal/SaladePrensa/pages_DetalleNoticia?documentId=WCC_CLUSTER-196967** (accessed on 2 September 2022).

[73] In Argentina the fiscal deficit for 2020 was calculated at 10.4 per cent of the GDP according to the IMF forecast (International Monetary Fund. 2021), and the Peruvian was calculated at 11.1 per cent of the GDP according to the peruvian Statistical Institute (Instituto Nacional de Estadística e Informática – INEI. 2021).

[74] Christodoulakis, George. *Privatization of State Assets in the Presence of Crisis*. Manchester, United Kingdom: Manchester Business School, University of Manchester, 2015.

[75] On 4 June 2020, the Ministry of Finance issued Decree 811 of 2020, which intended to establish a series of special rules relating to the investment and sale of state-owned equity interests within the state of emergency declared by the Colombian government due to covid-19. Specifically, Decree 811 established measures for (1) the investment and divestment of equity instruments acquired or received by the Colombian state within the context of the economic emergency; and (2) the sale of state-owned equity interests in companies listed in the Colombian Stock Exchange, which proceeds are destined to attend the effects of the economic emergency. However, Decree 811 of 2020 was declared unconstitutional by the Colombian Constitutional Court (Corte Constitucional) through Ruling C-416 of 2020, by Justice José Fernando Reyes Cuartas. Available at: **https://www.corteconstitucional.gov.co/relatoria/2020/C-416-20.htm**) (accessed 17 May 2021).

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