
Colombia

Financial Assistance IBA Corporate and M&A Law
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INTRODUCTION

This document is intended to be a practical guide for foreign lawyers engaging in Mergers and Acquisitions transactions in Colombia and offers a brief overview of financial assistance for the acquisition of shares or quotas in any private company. The concept of financial assistance is not defined by Colombian law, however, there are some industry specific limitations which must be reviewed.

GENERAL OVERVIEW

✓ ■ **Origins of financial assistance in Colombia**

Mergers and Acquisitions are governed by articles 172 through 180 of the Commercial Code. However, this is a general regulation with no industry specific provisions. Colombian law does not include a definition for financial assistance, nevertheless it does provide with certain rules and restrictions for the repurchase of shares and a clear prohibition for interlocking, that is, when a subordinated company holds, at any tittle, interests, shares, or quotas from its controlling shareholder. Such prohibition applies to all companies, independently from its corporate purpose, sector, or industry.

In addition, there is a specific prohibition to the financial sector, by which credit institutions and insurance companies may not lend funds for the acquisition of their own shares or the shares of their controlling companies would be considered as a criminal offense.

It is important to note that if a company seeks financial support for the acquisition of shares in a third-party company or to fund its own operations, Colombian law does not restrict such financial support,

and in recent years has included new pathways for companies to obtain resources by applying to crowdfunding (recently regulated by means of Decree 1235 of 2020, which amended Decree 2555, 2010).

In order to provide financial support to Colombian simplified stock corporations (a very common type of corporations in Colombia) during the Covid-19 pandemic, in June 2020 the Colombian Government issued a new law (regulated by Decree 814 of 2020, which also amends Decree 2555, 2010) by which it allowed such companies to access the second market by issuing debt titles temporarily and until June 4th, 2022, which can be negotiated in the secondary market. Said second market is the Colombian capital market for qualified institutional buyers.

✓ **■ What is the meaning of financial assistance according to Colombian law?**

Despite the fact that there is no legal definition for the term “financial assistance-~~is~~”, such could be considered as any kind of financial aid granted by a company to any given third party, aimed at helping said third party in the acquisition of the shares of the assisting company or the shares of the controlling company of the assisting company.

✓ **■ Does the Colombian legislation accept financial assistance?**

As mentioned before, Colombian legislation sets restrictions for the repurchase of shares. In such sense, article 396 of the Colombian Commercial Code states that the repurchase of shares is a concept that only applies to stock corporations and simplified stock corporations (“*sociedades anónimas*” and “*sociedades por acciones simplificadas*” by its Spanish name) and it is subject to the following conditions: (i) the Shareholders General Assembly shall approve the repurchase of shares with the favorable vote of the majority established in its bylaws; (ii) the shares to be repurchased shall be priorly issued by the company; and (iii) the payment of the price of the shares shall only be made with funds taken of the net profits of the company (for which a special reserve in the accounting books shall have been priorly approved by the Shareholders General Assembly). Once the repurchase of shares has been made, the political and economic rights of such shares shall be suspended and the company will only be able to do certain activities with the repurchased shares for its disposition (Article 417 of the Colombian Commercial Code mentions, amongst others, the possibility to sell the shares and distribute the payment of its price as a net profit, or to distribute the shares among the shareholders as dividends).

As for the acquisition of shares of its controlling company, article 262 of the Colombian Commercial Code expressly establishes that interlocking is prohibited, that is, that a subordinated company shall not hold, in any manner whatsoever, any interest, shares, or quotas in the parent company that controls it. Any agreement or transaction that ignores this prohibition shall be considered ~~as~~ null and void.

In regard to the financial support that a company might provide to a third party for the latter to fund its operations or acquire shares in a third-party company, it should be noted that, in order to provide such financial assistance to third parties, the lending company should be authorized to act as a lender by its corporate bylaws.

FINANCIAL INDUSTRY

Colombian law prohibits credit institutions, including Banks and insurance companies, to lend funds to third parties in order to acquire shares or mandatory convertible bonds of the lending bank or its affiliates, unless the acquisition refers to a primarily issuance of shares.

Furthermore, Decree 663 of 1993 does not allow credit institutions to lend funds to acquire the control over financial institutions or insurance companies.

Pursuant to Decree 663 of 1993, financial institutions are defined as follows:

- a. Credit Institutions, which include:
 - Banks.
 - Finance Corporations.
 - Finance Companies.
 - Finance Cooperatives.
- b. Companies that provide other financial services, including trust funds and retirement funds.
- c. Companies that receive savings from the public.

Only Banks are allowed to lend funds to third parties in order to acquire the control of other companies different from financial institutions. Nonetheless, this possibility is limited due to the prohibition for Banks to lend funds to companies if the shares to be acquired belong either to the lending bank, to one of its affiliates, or to any company that belongs to the Financial Industry (Decree 663 of 1993 articles 7 e) and 10 c)).

Exceptions: Pursuant to Decree 663 of 1993, a bank is authorized to lend funds to acquire shares of the lending bank or its affiliates if:

- The acquisition of shares in the context of a primarily issuance.
- The acquisition of shares in the context of a privatization process.

OTHER RELATED MATTERS

In any case, if there is a merger or an acquisition of companies that are under control of the Financial Superintendence, it is required, before starting the process, to request an authorization before the Financial Superintendence.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE WITHOUT MEETING THE LEGAL REQUIREMENTS

- **Civil Penalties**

If any bank lends funds to third parties in order to acquire shares of the lending bank or its affiliates, the bank may have to pay a fine up to an amount equivalent to the funds that were lent.

- **Criminal Liabilities**

If the lending company misuses any kind of funds, from those collected from the public, and those funds are aimed to acquire the control of any company subject to surveillance of the Financial Superintendence, the director, legal representative or employee of the company may be subject to imprisonment from two (2) to six (6) years, and a fine of fifty thousand (50.000) minimum legal monthly wages¹ (COP \$50.000.000.000 in 2022).

¹ The minimum legal wage for 2022 in Colombia is COP\$1.000.000. This amount is adjusted on a yearly basis.

