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# **Chile**

## Takeover Guide

### **Contact**

Roberto Guerrero V  
*Cuatrecasas, Santiago*  
[roberto.guerrero@cuatrecasas.com](mailto:roberto.guerrero@cuatrecasas.com)

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## INTRODUCTION

In Chile, change of control and tender offers over publicly traded corporations are regulated by Law No 18,045, and rules and regulations issued by the Commission for the Financial Market (Comisión para el Mercado Financiero or 'CMF'). All references to articles herein are for Law No 18,045. Regulations are intended to protect minority shareholders with reporting obligations and mandatory tender offers in most cases of change of control, with premiums being shared among all shareholders.

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## CHANGE OF CONTROL BY THE ACQUISITION OF SHARES

### General rule (Article 54)

Any person or legal entity that directly or indirectly intends to take control of a corporation that, according to Chilean regulation, 'publicly offers its shares' (ie, trades its shares on a stock exchange), must inform the general public about such an intention prior to the change of control.

For this purpose, written communication must be sent to the:

- target corporation;
- companies that control and that are controlled by the target corporation;
- CMF; and
- stock exchanges where the shares of the target corporation are traded.

Additionally, a highlighted notice must be published in two national newspapers and, if applicable, on the websites of the entities that intend to take control.

The communications and publications mentioned above must be made at least ten business days prior to the date on which the change of control is intended to take place and, in any event, as soon as negotiations tending to a change of control have commenced, or as soon as the delivery of information and documentation about the target corporation has taken place.

General Ruling No 104 issued by the CMF ('GR 104'), which establishes rules and standards regarding change of control and tender offers, contains the minimum required information that must be disclosed by the acquiring entity or offeror, which includes, broadly speaking: (1) a heading in capital letters with the name of the target corporation, the expression 'control' and the informant's name. In the event that the company over which control is sought is, in turn, the controlling entity of one or more other corporations registered in the Securities Registry, the names of the latter must also be indicated; (2) the way in which the interested party intends to take control; (3) the terms and conditions of the intended transaction, including the price; (4) purpose of the intended acquisition of control and business plan for the target and its subsidiaries for the upcoming 12 months; and (5) identification of the individuals or entities that intend to take control.

### Closing of the transaction (Article 54 A)

The closing of the change of control transaction must be disclosed to the general public within two business days following the date that the change of control took place. For this purpose, a notice must be published in the same national newspaper used for the notification of the intention to take control and communication must be sent to the same legal entities that were notified of said intention.

GR 104 establishes the minimum information that the aforementioned announcement must contain, including: (1) a heading in capital letters with the name of the corporation that has been taken control of, the expression 'control' and the name of the entities that took control; (2) the price, number of shares acquired and percentage that these represent, percentage of ownership previously held and outcome after the transaction; and (3) indication of the newspapers where the initial notice was published.

#### **Exception (Article 54 B)**

These rules do not apply where a change of control takes place through a tender offer.

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## **CHANGE OF CONTROL THROUGH A SHAREHOLDERS' AGREEMENT**

GR 104 states that any shareholders' agreement that may allow its members to obtain control of a publicly traded corporation must be communicated to the CMF and stock exchanges as soon as it takes place. The notice must include at least the following information: (1) heading in capital letters with the name of the target, the expression 'control' and the informant's name. In the event that the company over which control is sought is, in turn, the controlling entity of one or more other corporations registered in the Securities Registry, the names of the latter must also be indicated; (2) the purpose of the intended acquisition of control and business plan for the target and its subsidiaries; (3) the main terms and conditions of the shareholders' agreement; and (4) identification of the individuals or entities that are parties to the shareholders' agreement.

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## **INDIRECT CHANGE OF CONTROL**

GR 104 establishes that a change of control of the company that, in turn, controls a publicly traded corporation must also be disclosed following the regulations described above, *mutatis mutandis*.

If there is a change in the person or agent through which control is exercised, but there has not been an effective change of control in a publicly traded company, the entity that holds control (or its representative) must disclose the change to the CMF and stock exchanges, including: (1) a statement that control is held by the same entity as before; (2) identification of the persons through which control is exercised; and (3) the corresponding updated participation structure.

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## **INFORMATION ABOUT CHANGE OF CONTROL**

GR 104 states that companies that are subject to a change of control must report such a change to the CMF and stock exchanges as soon as they know about it.

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## **TENDER OFFER FOR THE ACQUISITION OF SHARES**

### **Concept**

This refers to an offer made for a limited period of time, through any means, to shareholders of a publicly traded corporation to acquire from them shares of stock and/or securities that can be converted into such shares that would allow the offeror to reach a certain percentage of the company.

The regulations on tender offers apply to mandatory as well as voluntary tender offers.

The CMF may exempt from compliance with one or more provisions tender offers of up to five per cent of the total issued shares of a company when they are made on the stock exchange and pro rata for the rest of the shareholders, in accordance with the stock exchange regulations approved by the CMF for this purpose. Individuals or legal entities making tender offers, the organisers and managers of the offer are also subject to the CMF's supervision in relation to such offers.

### **Mandatory tender offers**

The following acquisitions of shares issued by a publicly traded corporation must be made through a tender offer:

- those that allow the offeror to take control of the target;
- when the current controlling shareholder, by means of an acquisition of shares, reaches the control of two thirds or more of the issued shares with voting rights of a company or of the respective series;
- when the intention is to take control of a company that, in turn, controls another publicly traded corporation and represents 75 per cent or more of the value of the mother company's consolidated assets, in which case an offer must first be made to the shareholders of the latter for an amount not less than the percentage that will enable it to obtain control thereof;
- when the shareholder that took control acquires three per cent or more of the shares of the corporation within 12 months after the change of control; however, if the acquisition is made on a stock exchange, pro rata for the remaining shareholders, a higher percentage of the shares may be acquired in accordance with the stock exchange regulations approved for this purpose by the CMF; and
- any tender offer made for a series of shares that grants pre-eminence in the control of the corporation, which triggers the obligation to make a joint tender offer for the same percentage with respect to the remaining series of shares.

### **Exceptions to the obligation to make a tender offer**

- Acquisitions arising from a capital increase through the issue of new shares, that, given their number, allow the acquirer to obtain the control of the issuer;
- acquisition of shares sold by the controlling shareholders, provided that:
  - they have stock exchange 'presence', as defined by the CMF in General Rule No 327; according to that rule, securities have stock exchange presence if they: (1) are registered in the Securities Registry; (2) are listed on a Chilean stock exchange; and (3) comply with at least one of the following requirements: (i) have an adjusted presence equal to or higher than 25 per cent; and/or (ii) have a market maker;
  - the price of the purchase is paid in cash;
  - the price of the shares is not substantially higher than the market price;
  - for these purposes: (1) 'market price' means the price resulting from calculating the weighted average of the stock exchange transactions made between the 90th and 30th stock exchange business days prior to the date on which the acquisition is to be made; and (2) 'price substantially higher than the market price' means the price that exceeds that indicated in (1) above by a percentage to be determined once a year

by the CMF, by means of a general ruling, which may not be less than ten per cent or more than 15 per cent: the figure is currently ten per cent;

- acquisitions that take place as a consequence of a merger;
- acquisitions that take place as a consequence of a shareholder's death;
- acquisitions that arise from foreclosure proceedings; and
- acquisitions that arise from preferential rights for the purchase or sale of shares contained in shareholders' agreements registered prior to 20 December 2000.

#### **Purchase made in periods that are close to a tender offer**

Within the period between 30 days prior to the effective date of the tender offer and up to 90 days after the publication of the notice of acceptance, the offeror cannot acquire shares of those included in the tender offer with price conditions that are more favourable than those contemplated in the tender offer.

If the foregoing occurs, the shareholders that sold their shares before or in the tender have the right to demand the price difference or the benefit involved, considering the highest value that has been paid. In these cases, the offeror and those who have benefited will be jointly and severally liable for payment.

#### **Purchase of shares during the tender offer period (Article 201)**

During the period in which the tender offer is in effect, the offeror cannot acquire shares subject to the offer through private transactions or in national or foreign stock exchanges, but only through the tender offer procedure.

#### **Characteristics of the tender offer**

- **Recipients:** The offer must be addressed to all the shareholders of the company or of the applicable series of shares. If the number of tendered shares exceeds the number of shares offered to be acquired, the offeror must acquire them pro rata to all tenderers.
- **Conditions of the offer:** The same conditions apply to all shareholders, including American depositary receipt (ADR) holders.
- **Term:** The term is not lower than 20 nor higher than 30 days (unless the company has depositary entities in its registry, in which case, the term must be 30 days). The term can be renewed only once for a minimum of five and a maximum of 15 days.
- **Irrevocability:** Tender offers are irrevocable. However, the offeror may contemplate objective causes for their failure, which must be clearly included both in the prospectus and the notice of commencement of the tender offer.
- **Amendments to the offer:** Tender offers can be amended during their term only to improve the offered price or to increase the maximum number of shares offered to be purchased. Any increase in price must also favour those who accepted the offer at the initial price.
- **Retraction:** The acceptance of the offer may be retracted by the shareholder before the expiration of the term of the offer or its extension.

- **Guarantee:** Together with the offer, the offeror may include a formal guarantee of compliance, which must be constituted as set forth in Article 204.

#### **Procedure of the tender offer**

- **Commencement notice publication:** The offeror must publish a highlighted notice on the day prior to the commencement of the bidding period in two national newspapers, including the information required by the CMF in section II of GR 104.
- **Prospectus:** A prospectus containing all the terms and conditions of the tender offer as stated in Article 203 and in section II of GR 104 must be made available to interested people from the date of the notice of commencement and during the term of the tender offer. A copy of the prospectus must be available to the public at the offices of the company for whose shares the offer is made, at the office of the offeror or at the office of its representative, if any, as well as at the office of open stock corporations that are controlled by the target. On the same date on which the notices of commencement of the tender are published, the offeror must send copies of the prospectus to the CMF and stock exchanges.
- **Restrictions and obligations during the tender offer for the target company, as well as for its board members:**
  - unless otherwise authorised by the CMF and provided that operations do not affect the normal development of the tender offer, the target cannot: (1) acquire its own shares; (2) create subsidiaries; (3) sell assets representing more than five per cent of the total value of its assets; or (4) increase its indebtedness by more than ten per cent with respect to the indebtedness it had before the commencement of the offer;
  - within two business days from the date of publication of the notice of commencement, the target company must provide the offeror with an updated list of its shareholders; and
  - the directors of the target company must individually issue a written report with their well-founded opinion about the convenience of the offer for shareholders. In the report, the director must indicate his/her relationship with the controlling shareholder of the target and with the offeror, and describe any self interest in the transaction. The reports must be made available to the public within five business days from the date of the notice of commencement.
- **Notice of result:** On the third day after the date of expiration of the bid or its extension, the offeror must publish in the same newspapers in which the notice of commencement was published the result of the offer, stating the total number of shares received, the number of shares to be acquired, the pro rata factor, if applicable, and the percentage of control to be achieved as a result of the offer. All this information must be submitted to the CMF and stock exchanges on the same date that the notice of acceptance is published. For all legal purposes, the date of acceptance for shareholders and of the formalisation of each sale of securities is the date that the notice of acceptance is published.

#### **Competitive tender offers (Article 206)**

During the term of a tender offer, another tender offer may be launched with respect to the same shares.

Competitive tender offers are valid only if their commencement notices are published at least ten days prior to the date of expiration of the original tender offer.

The offerors in currently in force tender offers may not participate as bidders in the new simultaneous tender offers.

### **Simplified tender offers**

The CMF may exempt tender offers of up to five per cent of the shares of the target company from the obligation to comply with certain requirements, if such acquisitions are made on a stock exchange and pro rata to all shareholders, pursuant to the regulations to be approved by the CMF to this effect.

Ruling No 1,514 of the CMF establishes the requirements that apply to this exception:

- Requirements:
  - the acquisition must be made on a stock exchange;
  - the acquisition must be made pro rata among the shareholders who accept the tender offer; and
  - the percentage of shares to be acquired must not allow for a change of control.
- Exempted obligations:
  - to make a prospectus;
  - restrictions and obligations for the target and its directors; and
  - publication of the notice of result.
- Procedure:
  - publication of a simplified notice of commencement;
  - communication of the result within two days after the expiration of the term of an offer or extension thereof to the target, CMF and stock exchanges;
  - if the offer is made within 12 months after a change of control transaction undertaken by the same person or related party, the priced offered cannot be lower than the price paid in the change of control; and
  - those who make a simplified tender offer cannot take control or launch a tender offer at a higher price within the following 120 days after the communication of the result of the bidding process.

### **Rules for other actors in the capital markets**

- Fund managers: Fund management companies supervised by the CMF may participate as bid acceptors in the tender offers on behalf of the respective funds, selling the corresponding shares and exercising all the rights they are vested with.
- Intermediaries: Transactions arising from a tender offer may be traded by brokers outside a stock exchange.



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## ELIMINATING MINORITY SHAREHOLDERS

The elimination of minority shareholders after a change of control or tender offer process is very restrictive. Article 71 bis of the Chilean Corporations Law (Law No 18,046) contains an appraisal right in favour of minority shareholders of a publicly traded company if the controlling shareholder acquires more than 95 per cent of the issued shares. In addition, the by-laws of the company may establish a right in favour of the controlling shareholder to force the minority shareholders that did not exercise their appraisal right to acquire their shares, provided that: (1) a percentage of shares higher than 95 per cent was acquired through a tender offer for 100 per cent of the issued shares; (2) in which at least 15 per cent of such shares were acquired from non-related shareholders; and (3) at the same price as the tender offer duly adjusted and plus interest.

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## ANTITRUST ACQUISITION CONTROL

In general terms, antitrust law is organised around two paradigms. On the one hand, there is the ex ante preventive control of mergers and, on the other, the ex post detection and sanctioning of any act or agreement that prevents, restricts or hinders free competition, or that tends to produce such effects including, for example, agreements between competitors or abuses of a dominant position. Mergers, as such, are not illegal; however, they may give rise to substantial changes in the markets and thus affect free competition. This justifies the need to identify which of the multiple facts, acts or conventions that take place in the market qualify as mergers and qualify as concentration operations, and will require preventive control under antitrust regulations.

Decree Law No 211 ('DL 211') regulates the pre-emptive control of mergers that have effects in Chile by the National Economic Prosecutor's Office (Fiscalía Nacional Económica or FNE). Merger control may be initiated by a mandatory notification, a voluntary notification or ex officio by the FNE.

The notification obligation is subject to two related requirements: (1) the transaction represents a concentration of operations under Article 47 of DL 211, defined as any event, act or agreement, or a group of them, constituting a concentration of operations that has the effect of two or more economic agents that are not part of the same business group, and previously independent from each other, ceasing to be independent in any of their business areas, through any of the following means: (i) merger; (ii) acquisition of rights that grant decisive influence over the management of another company; (iii) association to set up an independent and permanent economic agent; or (iv) acquisition of control over the assets of another; and (2) when certain thresholds defined by the FNE are exceeded, although the voluntarily notification of transactions that do not exceed those thresholds is allowed. This requirement means, in turn, the fulfilment of the following related requirements: (i) sales in Chile by economic agents that plan to concentrate operations are, during the fiscal year prior to the one in which the notification is verified, equal to or greater than the threshold established by the resolution issued by the FNE (currently CLF 2.5m or approximately US\$95m); and (ii) at least two of the economic agents planning to concentrate operations have individually generated sales in Chile equal to or greater than the threshold established by the resolution issued by the FNE (currently CLF 450,000 or approximately US\$17m).

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## TAXATION

As a general rule, sellers are taxed on their capital gains. Notwithstanding, if certain conditions are met, in the case in which shares are acquired on a stock exchange, in an

initial public offering (IPO) or in a tender offer procedure and those same shares are then sold on a stock exchange or in a tender offer procedure, any capital gains will be tax exempt. This is currently being discussed in the Chilean Congress, and there is a high probability that capital gains tax will be imposed on any transaction.