



Ishida & Associates
Legal Attorneys and Counselors

Caaguazú 1.759 c/ Avda., Médicos del Chaco. Tel. (021) 550.177- e-mail. Ishida.miguel@ishidalaws.com
www.ishidalaws.com Asunción - Paraguay

MERGERS AND ACQUISITIONS IN PARAGUAY

In Paraguay, mergers consist in: a) the union of two companies that are dissolved without liquidating in order to constitute a new one; or b) the absorption by one company of other companies that are dissolved without liquidating. In addition to mergers, there are other ways individuals or legal entities may acquire the entirety of a company or a business: by purchasing shares (assignment of shares) or by acquiring their assets (transfer of commercial establishments).

This summary contains general information regarding the Paraguayan legislation on mergers and acquisitions, transfer of shares and transfer of commercial establishments. In addition, it contains information on the Paraguayan Competition Law, which regulates the mechanisms through which acts against free competition are corrected and regulated.

1. Mergers (Law N° 1.183/85)

Article 1192 of the Paraguayan Civil Code recognizes two types of mergers:

- a) Merger in the traditional sense: occurs when two or more companies are dissolved to form a new one, which will take over the rights and obligations of the dissolved companies.
- b) Merger by absorption: occurs when a company completely absorbs the assets of another, while the absorbed company is dissolved.

In order to proceed with the merger, the approval by the shareholders' meeting of each merging company is required.

If there are shareholders disagreeing with the merger, they may leave the company with a reimbursement of the value of their shares. Those shareholders who were present at the shareholders' meeting and have recorded their opposition in the minutes of meeting may exercise this right within the fifth day from the shareholders' meeting. Those shareholders who were absent at the meeting must exercise this right within the term of fifteen days after the meeting.

The shares will be reimbursed for the value resulting from the last approved balance, unless the dissidents at the time of exercising their right to leave the company request, for this purpose, the readjustment in accordance with their market value.

Once the approval of the shareholders' meeting is obtained, the following will be required in order to continue with the merger process:

- a) The merger commitment agreement granted by the representatives of the companies. Each company will prepare a balance sheet at the date of the agreement, which will be made available to shareholders and creditors;
- b) The merger must be announced twenty (20) days in advance in two (2) newspapers of mass circulation for five (5) times alternated for ten (10) days.
- c) Creditors may file opposition to the merger in accordance with the rules of transfer of commercial establishments (see section 2, c) of this summary). It is not possible to proceed with the merger if creditors are not paid or duly guaranteed. In case of discrepancy on the guarantee, it will be judicially solved;

- d) The final merger agreement, which shall be granted if the aforementioned requirements are met, and which shall contain:
- proof of approval by the merging companies;
 - a list of the shareholders who exercise the right to leave the company with reimbursement of the value of their shares, and the share of social capital they represent;
 - a list of the opposing creditors and the amounts of their credits;
 - the basis of execution of the agreement, including information on the shares corresponding to the shareholders of the companies that are dissolved; and
 - the balances mentioned in subsection a).

The final agreement must be registered at the Office of Public Records in the section of Commerce as well as in the section of Legal Entities and Associations.

Mergers produce the following tax effects:

- a) Transfer of goods made as part of the merger will not be subject of payment of the Value Added Tax ("VAT") nor the Corporate Tax.
- b) Tax credits of the predecessor company(s) will be transferred to the successor company(s) in proportion to the net assets transferred in relation to the total net assets of the predecessor.
- c) The reorganization expenses resulting from the merger will be amortized in a period of 3 to 5 years, as the taxpayer may choose.

2. Transfer of commercial establishments (Law N° 1034/83)

A company may acquire the entire assets of another or its commercial establishment without merging with it. According to Law N° 1034/83, commercial establishments are comprised of the following elements: facilities, stock of merchandise, name and commercial label, right to the premises, patent rights, brands of products and services, industrial designs and all other rights derived from the commercial or industrial property.

The Paraguayan law provides the following requirements for the transfer of commercial establishments:

- a) The transfer must be announced twenty (20) days in advance in two (2) newspapers of mass circulation for five (5) times alternated for ten (10) days. The publications will contain the name, type and location of the establishment, name and address of the seller or notary public.
- b) The seller must deliver to the buyer a declaration of the credits and debts, specifying the name and address of the creditors and debtors, amount of the credits and debts and their respective due date.
- c) The transfer may be formalized after ten (10) days from the last publication. During those ten (10) days creditors may notify the buyer their opposition at the address mentioned in the publication, or to the auctioneer or notary public who intervenes in the transaction, demanding the withholding of the amount of their credits and to deposit them in a special account.
- d) Once the deposit is made by the buyer, auctioneer or notary public, the opponents will have a period of twenty (20) days from the expiration of the aforementioned ten (10) days period, in order to manage the embargo of the deposited amounts. If they do not do so within said period, the sums may be withdrawn by the depositor.
- e) Once the transfer announcement has been published and ten (10) days have passed since the last publication without any opposition being filed, the transfer document may be validly granted.
- f) For the transfer to take effect with respect to third parties, it must be formalized in writing and registered at the Office of Public Records in the section of Commerce.

Transfer of commercial establishments produces the following tax effects:

- a) The income obtained from the sale of real estate and other assets of the commercial establishments will be subject of payment of Corporate Tax.
- b) Furthermore, VAT is applied to the sale of the goods of the commercial establishments.

3. Assignment of shares (Law Nº 1183/85)

An individual or legal entity can obtain the control of a company by purchasing its shares/quotas. However, it is important to bear in mind that, in Paraguay, a single person cannot own all the shares/quotas of a company since the law dictates that companies are to be constituted by at least two shareholders/quotaholders.

Regarding the requirements for the assignment of shares/quotas, these vary according to the type of company. Below, the requirements for the assignment of shares/quotas of two of the most common types of companies in the country are explained:

a) Limited Liability Company

- Quotas may be freely assigned between quotaholders, unless the bylaws provide otherwise.
- When the company has more than five quotaholders, the quotas cannot be assigned to third parties unless quotaholders that represent three quarters of the social capital agree with the assignment. Not having more than five quotaholders, unanimity will be required.
- Whoever is interested in assigning their quotas shall communicate their intention to the other quotaholders, who will decide whether they consent the assignment within a period of fifteen days. Consent is presumed if opposition is not notified.
- Denied the authorization, whoever intends to assign their quotas may appeal this decision to a judge, who, after hearing the opponents, may authorize the transfer, if there is no just cause to prevent the assignment. If the opposition is deemed unfounded, the quotaholders may opt to purchase the quotas within ten (10) days from the notification of the judicial authorization. Otherwise, the company itself may acquire the quotas.

b) Joint-stock company

- The shareholders have the right of preference to acquire the shares to be assigned, so the transferor must first inform the other shareholders of their intention to assign their shares. The shares may be assigned to third parties when the other shareholders do not exercise their right of preference in acquiring the shares offered.
- Any assignment of shares must be notified to the company by the acquirer within a maximum period of five (5) working days from the date of the assignment, indicating at least their name, ID card number or taxpayer number and address, though it may be notified by the previous owner as well.
- In addition, any assignment of shares must be notified by the company to the Legal Office of the Ministry of Finance within a period of five (5) working days from the communication provided in the previous paragraph. Said notification shall contain at least the following information: name of the seller and buyer of the shares, ID card number or taxpayer number, address, number and par value of the shares, and who is the final beneficiary.

The assignment of shares/quotas produces the following tax effects:

- a) Assignment of shares/quotas of companies are exempted from VAT if the transaction is duly notified to the Tax Authority (SET);
- b) If the assignor is a commercial company, the income obtained from the assignment will be taxed by the Corporate Tax.
- c) If the assignor is a natural person with annual income that exceeds Gs. 76.052.232 (as of 2019) or a non-limited partnership the assignment will be subject of payment of income tax.

4. Competition Law (Law N° 4956/13)

The Competition Law (Law N° 4956/13) is intended to defend and promote free competition in markets and establishes the mechanisms that tend to correct and regulate acts against free competition. Among other things, this law provides that merger operations with certain characteristics must be notified to the Commission of National Competition (“CONACOM”) and must be evaluated by said institution, in order to determine whether they are compatible with the provisions of this law.

According to this law, a concentration operation is considered to take place when:

- a) two or more previously independent legal entities are merged;
- b) one or more individuals or legal entities, national or foreign, control at least one or more legal entities, by acquiring shares of a company, buying elements of its assets, or contract or when, by any other means, acquire, directly or indirectly, control over all or part of one or other legal entities.

It is important to bear in mind that, when two or more transactions of those previously contemplated take place between the same parties in a period of 2 (two) years, they will be considered as a single concentration operation.

Regarding “control”, according to this law, it results from rights, contracts or other means that, by themselves or together, confer to a person the possibility of exerting a decisive influence on the activities of a subject, in particular:

- a) Rights of property or use over all or part of the assets of a legal entity; y
- b) Rights or contracts that allow a person to influence decisively on the composition, deliberations or decisions of the board of directors and/ or other bodies of a legal entity.

It will be understood that individuals or legal entities have acquired the “control” when they are holders of the aforementioned rights or beneficiaries of such contracts, or that, without being holders of said rights or beneficiaries of said contracts, they can exercise the inherent rights to them.

Notification of concentration operations

Any concentration operation must be notified and registered at the CONACOM within 10 (ten) days when, at least, one of the following two circumstances occurs:

- a) As a consequence of the operation, a quota equal to or greater than 45% (forty-five percent) of the national market of a certain product or service, or of a geographic market defined within it, is acquired; or
- b) The overall annual gross revenue in the Republic of Paraguay of all the subjects participating in a concentration operation exceeds the amount of 100,000 (one hundred thousand) minimum monthly wages.

In the case of mergers, this notification must be made jointly by the individuals or legal entities that participate in the concentration operation. In the case of an acquisition of control, the notification must be submitted by the purchaser.

The notification must include, among others, the following information:

- a) Identification of the individuals or legal entities that are making the notification and of the other individuals or legal entities involved in the concentration operation.
- b) The original or certified copy of the power of attorney of the legal representative of the legal entity that makes the notification.
- c) Names of the persons responsible for the notification and/or who will serve as interlocutors with the CONACOM, informing their address, telephone number, fax, e-mail address and functions.
- d) Description of the ownership and control structure of each of the individuals/legal entities participating in the concentration operation.
- e) Financial statements corresponding to the immediately previous year of the individuals or legal entities involved in the concentration operation.
- f) Description of the operation of concentration and the type of operation at issue, as well as the clauses under which the individuals/legal entities are obliged not to compete.
- g) Name the individuals or legal entities involved in the transaction who directly or indirectly participate in the social capital, the administration or any activity of other individuals or legal entities that produce or commercialize goods or services similar or substantially related to the goods or services of the individuals or legal entities participating in the concentration operation.
- h) Value of the operation.
- i) Copy of the final or most recent version of the document in which the notified operation was or will be recorded.
- j) Listing and description of the products and services produced or offered by the individuals or legal entities involved in the concentration operation.
- k) The market share of the involved companies and their competitors, if such information is available.
- l) Location of the plants or establishments of the individuals or legal entities involved, the location of their main distribution centers and the relationship they maintain with said individuals or legal entities.
- m) Information on concentration authorizations in other jurisdictions; and
- n) At the option of the notifiers, analyzes, reports or other documents that seek to prove that the merger is compatible with the market.

In addition, individuals or legal entities may request a prior authorization for the concentration operation. In such case, the rules on notification, evaluation and decision of the Board of CONACOM on concentration operations shall apply.

Evaluation process

Once the notification is submitted, it will be subject of a preliminary evaluation. Within a maximum period of five (5) days after receiving the notification, the Concentration Department will determine whether the submitted information is complete. If it is determined that all the required information has not been submitted, the persons who made the notification will be notified so that within a maximum period of five (5) days they complete the missing information, otherwise the notification of the concentration operation will be regarded as to never been carried out.

The procedure for the evaluation of the concentration operations will take place once the preliminary evaluation has been completed. The evaluation of concentration operations will have a maximum duration of ninety (90) days and will be carried out in two (2) stages.

First Stage

Within a maximum period of thirty (30) days, from the date on which the Department of Concentration Control has verified that the information submitted is complete or from the expiration of the deadline for the missing information to be completed, the CONACOM may:

- a) Declare the application for authorization inadmissible because the notified concentration operation was not found to be within the scope of the Law.

- b) Authorize those operations that are compatible with the market.
- c) Declare that the concentration operation requires further analysis, and consequently, order the start of the second stage for sixty (60) days.

Second Stage

In this stage, CONACOM will analyze those notifications of concentrations that require further analysis and that have not been resolved in the first stage. CONACOM may request additional information deemed necessary.

The Department of Concentration Control shall send said request to the individuals or legal entities, granting them a period of fifteen (15) days extendable for a single time to submit the requested information. CONACOM may require the following information:

- a) Information about the objectives and/or economic and/or financial foundations of the concentration operation.
- b) Detailed information of the products and services involved in the operation.
- c) Detailed information on the relevant markets affected by the concentration operation.
- d) Information on competitors and the degree of competition in the relevant markets affected by the concentration operation.
- e) Information on the origin of the products and/or services produced or commercialized by the individuals or legal entities.
- f) Information about customers or consumers, the production process and the installed capacity of the individuals or legal entities.
- g) Cost of production, distribution, sale and supplies of the individuals or legal entities.
- h) Information on distribution and commercialization, distribution channels, prices, transport costs of the individuals or legal entities.
- i) Information on foreign trade and consumption, customs tariffs, countervailing duties and other import restrictions on the markets of the products and services involved in the concentration operation.
- j) Information on the elements that determine the ease or difficulty in accessing the market in which the concentration will take place.
- k) Detailed description of the effects of the operation on the markets of the products and services involved, as well as the economic efficiencies generated by it.
- l) Any other information that CONACOM deems necessary.

Within five (5) days after the submission of the required information or upon the expiration of the term granted for such purpose, the Department of Concentration Control will verify that the information is complete. When it is verified that all the additional information required has not been submitted, the Department will notify the individuals or legal entities so that within a maximum period of five (5) days they submit the missing information, otherwise, the notification to the CONACOM will be considered as to never been made.

In this stage, the evaluation of concentration operations can be carried out according to the following sequence of analysis:

- a) If it is determined that the concentration operation is compatible with the market, it must be authorized.
- b) If it is determined that the concentration operation is incompatible with the market, the ability of the concentration operation to produce economic efficiency gains in the market should be analyzed. In this case, the following rules apply:
 - i. If it is determined that the gains in economic efficiency outweigh the limitations to competition generated by the operation, the concentration operation shall be authorized.

ii. If it is determined that the gains in economic efficiency do not compensate for the limitations to competition generated by the operation, the merger shall not be authorized or it shall be authorized under certain conditions that make it compatible with the market.

It is important to bear in mind that the increase in the market share does not, in itself, constitute conclusive evidence about the incompatibility of the merger with the market.

In regards to economic efficiency gains, these may consist, among others, in the following:

- a) Productive efficiencies, related to the reduction of costs; and
- b) Dynamic efficiencies, related to the development of new or better products.

The Board of CONACOM shall have a term of sixty (60) days after the declaration that subjects the analysis of the concentration operation to the second stage, in order to issue its decision regarding the operation. This term may be suspended with the requirement of additional information only for once. In the event that CONACOM does not issue a ruling within the deadline.

In the event that CONACOM does not issue a resolution within the term of sixty (60) days, the merger will be understood to be tacitly authorized.

The Board of CONACOM, by resolution, may adopt any of the following decisions:

- a) Authorize the operation.
- b) Subordinate the authorization of the operation to the fulfillment of certain conditions.
- c) Deny the authorization.

CONACOM may subordinate the authorization of those concentration operations that represent an obstacle to effective competition in the market to the fulfillment of certain conditions, because the consequences directly derived from such operations are compensated by the gains in economic efficiency that are generated.

The conditions to which the Board may subordinate the authorization of the merger may include, among others, the following measures:

- a) Carry out a certain behavior or refrain from doing it.
- b) Sell certain assets, rights or shares to third parties.
- c) Eliminate a certain production line.
- d) Modify or eliminate terms or conditions of performed acts.
- e) Obliging to perform acts aimed at encouraging the participation of competitors in the market, as well as giving access or selling goods or services to them.
- f) Other measures that have the purpose of preventing the concentration from being incompatible with the market.

Before adopting the aforementioned decisions, CONACOM will offer to the individuals or legal entities the opportunity to express their views orally. In these hearings, individuals or legal entities may submit proposals of modifications of the concentration operation that have the purpose of removing the elements that could make it incompatible with the market. Said proposals may be taken into consideration by CONACOM.

Failure to notify a concentration operation

In the event that a concentration operation subject to control is not notified, individuals or legal entities will be notified to make the corresponding notification within a period not exceeding twenty (20) days from the receipt of such notification. Notwithstanding the above, an administrative procedure for the application of the corresponding sanctions may be initiated in parallel. In addition, the lack of notification will enable CONACOM to declare, aside from the fines imposed, the nullity of the concentration operation.

////////////////////////////////////