



Bogotá's Legal Guide to Foreign Direct Investment

2026

08

MERGERS AND ACQUISITIONS (M&A) PROCESSES

Serrano
Martínez
CMA



Universidad de
los Andes

Facultad
de Derecho

Semillero de Investigación
Fusiones Y Adquisiciones

Address: Calle 27 No. 5A-12,
Bogotá, Colombia

Phone: +57 (601) 746 6072

Website: <https://serranomartinezcma.com/contacto/>

Corredor de la Autopista Norte

1. Acquisition Structures in Colombia

The acquisition of a business may be structured in different ways depending on factors such as tax implications, regulatory requirements, and risks identified during the due diligence process. In practice, the most common structures include:

1. Purchase and sale of equity interests.
2. Asset acquisition.
3. Merger.
4. Spin-off.
5. Purchase and sale of a commercial establishment.

Each of these structures entails different legal and tax implications; therefore, the appropriate structure should be selected based on the specific characteristics of each transaction.

i. Purchase and Sale of Equity Interests

Under this structure, the transaction does not involve the direct acquisition of the business assets, but rather the acquisition of the equity interests representing the company's capital. Although this may appear to be a relatively straightforward structure, it may be subject to statutory or contractual restrictions, such as compliance with rights of first refusal applicable to the transfer of equity interests. The following aspects should be considered:

- **Right of first refusal:** the transfer of equity interests may require the approval of the shareholders or partners or may be subject to a right of first refusal, either because such requirement is established by law (e.g., in a limited liability company) or in the company's bylaws (e.g., in companies with share capital). Failure to comply with these requirements may result in the transfer being deemed null and void or otherwise legally ineffective.
- **Tax considerations:** any gain derived from the sale of equity interests may be subject to capital gains tax if the interests have been held as fixed assets for two (2) years or more, or to ordinary income tax if they do not meet such holding-period or asset-classification requirements. The applicable tax is calculated on the gain realized, i.e., the difference between the sale price and the tax basis.

The transaction must also comply with the minimum sale price rules established under Article 90 of the Colombian Tax Code (Estatuto Tributario – E.T.), pursuant to which the sale price must reflect fair market value, subject to an accepted 15% variation. In the case of shares, the sale price may not be lower than the intrinsic value increased by 30%¹.

¹ Law 1258 of 2008, "Whereby the Simplified Stock Company (Sociedad por Acciones Simplificada – S.A.S.) is created." Bogotá D.C., 2008, Official Gazette No. 47,194.

ii. Asset Acquisition

Under an asset acquisition structure, the buyer directly acquires the assets, rights and, in certain cases, liabilities of the business, without acquiring control of the legal entity that owns them. This structure allows the buyer to select which assets to acquire and which risks to exclude. However, each component must generally be identified and transferred individually, which may result in greater legal and operational complexity.

This structure may be subject to specific restrictions. For example, where the assets and liabilities transferred represent **50%** or more of the company's net equity, approval by the shareholders' meeting with a qualified majority may be required, together with registration of the transaction with the commercial registry. The following should also be considered:

- **Tax considerations:** any gain derived from the sale of the assets will be subject, at the seller level, to either capital gains tax or ordinary income tax, as applicable. The corresponding tax is calculated on the gain derived from the sale of each asset considered individually.



iii. Merger

A merger occurs when one company (the surviving company) absorbs another company (the absorbed company), which ceases to exist without undergoing liquidation. The surviving company acquires, by operation of law and as a whole, the assets, liabilities, and equity of the absorbed company, and the shareholders of the latter become shareholders of the surviving company or of a newly incorporated company, depending on the agreed transaction structure². The following should be considered:

- **Tax considerations:** Pursuant to Articles 319-4 et seq. of the Colombian Tax Code, in qualifying acquisitive mergers and spin-offs, the transfer of assets between the companies involved is not treated as taxable income or as a sale for tax purposes, provided that:
 - i. The surviving company maintains the **same tax basis and tax classification of the assets**—whether as fixed assets or inventory/other movable assets—as those held by the absorbed company, without modifying their useful life or the basis used for depreciation or amortization;
 - ii. With respect to shareholders, partners, or equity holders, the transaction is not treated as a disposal of their shares or equity interests provided that at least **75%** of them retain an equivalent equity interest in the resulting entity and receive at least **90%** of the consideration in the form of equity interests in the resulting company, while maintaining the same tax basis and nature of their investment

- iii. If any shareholder does not receive equivalent consideration, such shareholder will be deemed to have disposed of their shares or equity interests, and the transaction will be treated as a taxable disposition accordingly.

iv. Spin-Off

In a spin-off, a company transfers, as a whole, part or all of its equity to one or more existing or newly incorporated companies. A spin-off may be **partial**, in which case the transferring company continues to exist, or **total**, in which case the transferring company ceases to exist. The transaction involves the transfer of assets, liabilities, and shareholders in accordance with the established exchange ratio.

- **Tax considerations:** spin-offs may qualify as **reorganizational or acquisitive**, depending on whether there is a relationship between the companies involved. If the applicable legal requirements are met, the transaction may qualify for **tax-neutral treatment** similar to that applicable to mergers. Otherwise, the transaction may trigger tax consequences for both the companies and their shareholders.



v. Purchase and Sale of a Commercial Establishment

Pursuant to **Article 515 of the Colombian Commercial Code**, a commercial establishment (*establecimiento de comercio*) is defined as a set of assets organized by an entrepreneur for the purpose of carrying out its business activities. Such assets may include, among others, trademarks, furniture and equipment, inventory, contracts, leasehold rights, accounts receivable, intellectual property, and customer relationships.

The following aspects should be considered:

- **Corporate considerations:** the sale of a commercial establishment is presumed to comprise the business as a whole, without the need to identify each asset individually. The seller must provide the purchaser with a balance sheet and a detailed statement of liabilities certified by an accountant.

The seller and purchaser are jointly and severally liable for obligations incurred prior to the transaction. The seller's liability ceases two months after registration of the transaction with the commercial registry, provided that all applicable legal requirements have been satisfied.
- **Tax considerations:** the sale of a commercial establishment is treated as the disposal of a fixed asset for tax purposes. Accordingly, the transaction is subject to withholding tax on the total transaction value.

² Reyes Villamizar, Francisco. La Sociedad por Acciones Simplificada. Second Edition. Bogotá: Legis, 2010, p. 239.

2. M&A Process: Key Stages

- **Due Diligence:** from the purchaser's perspective, it is particularly important to conduct a comprehensive review of the target company or, in the case of an asset acquisition, the assets to be acquired. This review generally covers, among others, legal, financial, tax, labor and employment, environmental, and contractual matters. Due diligence findings may affect the transaction structure, the commercial terms of the transaction, and the provisions of the acquisition agreement.
- **Negotiation and Drafting of the Acquisition Agreement:** in addition to the applicable essential contractual terms, acquisition agreements in Colombia commonly include representations and warranties, covenants, conditions precedent to closing (where signing and closing do not occur simultaneously), and indemnification provisions.
- **Obtaining Approvals and Consents:** depending on the nature and structure of the transaction, approvals or consents may be required from **government authorities** (for example, the Colombian Superintendence of Industry and Commerce in competition matters), the company's highest governing body, creditors, or other third parties.
- **Closing and Post-Closing:** closing entails the **consummation of the transaction**. Following closing, the parties may remain subject to certain post-closing obligations, including compliance with applicable **covenants**, among others.



Avenida NQS

3. Essential Elements of the Acquisition Agreement

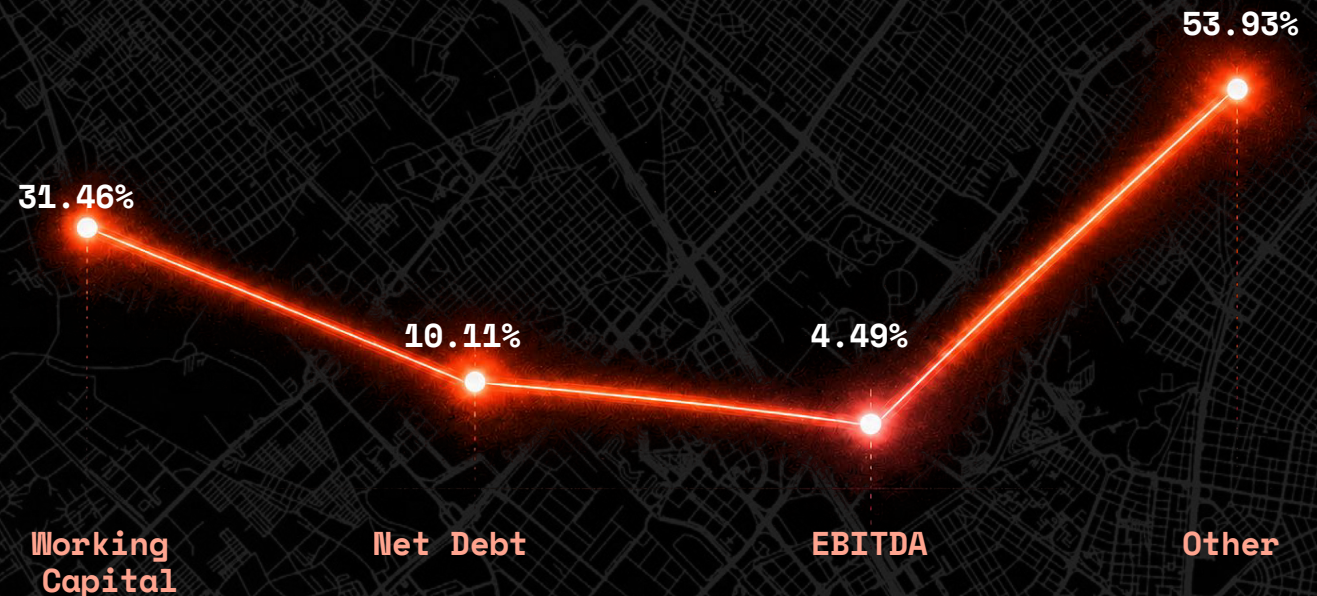
Acquisition agreements in Colombia have increasingly adopted an Anglo-American transaction structure, typically including the following provisions:

a) Purchase Price and Adjustment Mechanisms: under Colombian law, the purchase price must, among other requirements, be determined or determinable. It may be fixed, subject to adjustments as of the closing date based on certain financial metrics or include a contingent consideration component (earn-out) tied to the achievement of post-closing targets.

In Colombia, according to the 2024 Deal Points Report (the “Deal Points”) prepared by the Mergers & Acquisitions Research Group at Universidad de los Andes, the financial metrics most commonly used for purchase price adjustments include working capital, net debt, and EBITDA. However, in more than half of the transactions analyzed, the parties relied on other contractually defined criteria, as illustrated in the chart³.

³ Source: Carreño Mendoza, Sergio, and Archila Correa, Santiago. Fusiones y Adquisiciones. Deal Points – Colombia, No. 1, Deal Points 2024. Mergers & Acquisitions Research Group, Universidad de los Andes.

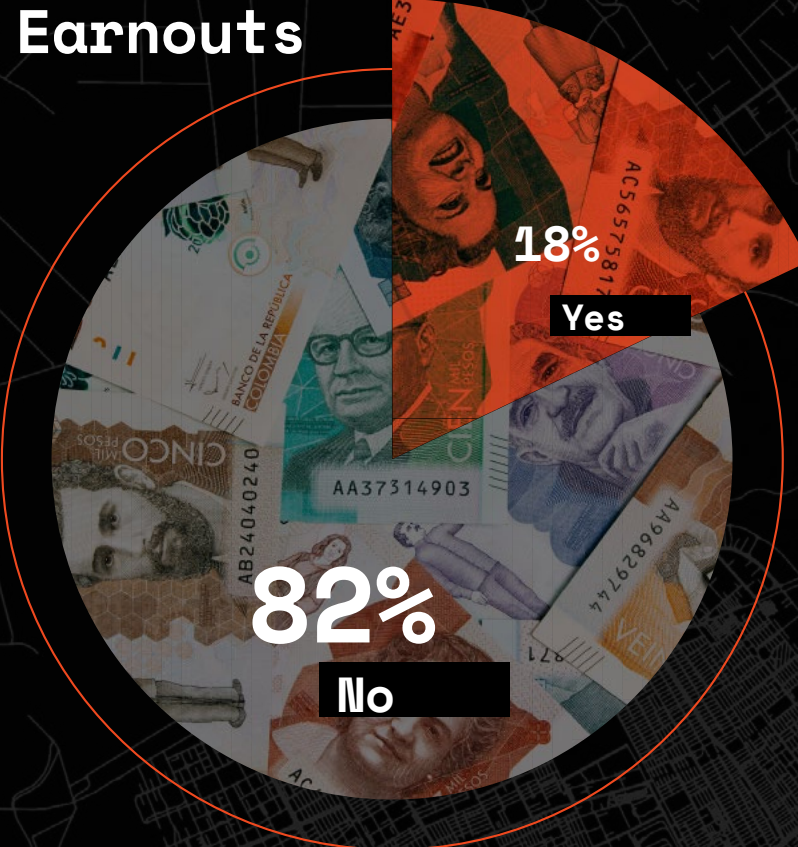
Price Adjustment Criteria



Contingent payments or earn-outs were agreed upon in 18% of the transactions analyzed in 2024, as shown in the following chart⁴.

⁴ Deal Points 2024, tabla 2 (earn-outs).

Earnouts

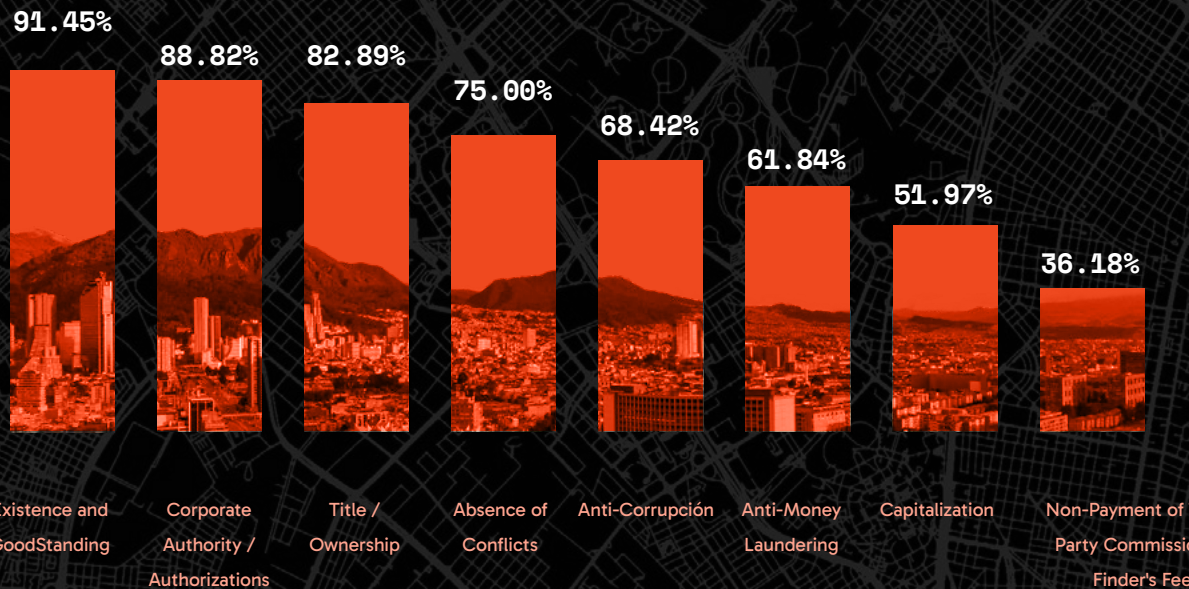


b) Representations and Warranties: representations and warranties are statements or assertions made by a party to an acquisition agreement regarding itself, its business, the company, or its assets. Their scope may be limited by materiality thresholds, knowledge qualifiers, and disclosure schedules.

According to Colombian arbitral case law, representations and warranties are considered ancillary provisions to the parties' principal obligations. If a representation or warranty proves to be false or inaccurate, it may constitute a breach of contract or a defect in consent, without such provisions themselves constituting obligations to give, perform, or refrain from performing an act.

Representations and warranties have become a fundamental component of M&A transactions in Colombia, as shown below:

D&G Fundamentales



c) Covenants : covenants are obligations to take, or refrain from taking certain actions. They may apply during the period between signing and closing—for example, with respect to the ordinary course of business—or may continue to apply after closing.

d) Conditions Precedent to Closing: closing is typically subject to the satisfaction of certain conditions precedent, including the continued accuracy of the representations and warranties as of closing (bring-down condition), compliance with applicable covenants, the absence of any material adverse effect, and the receipt of required approvals and authorizations.

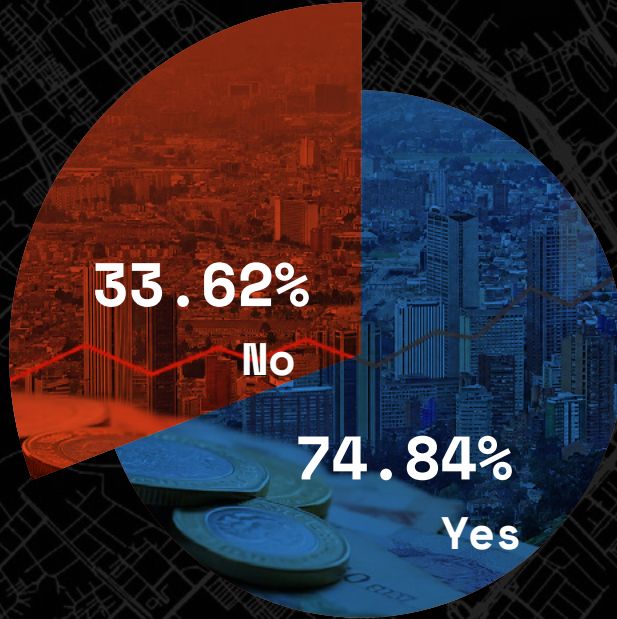
The specific conditions precedent applicable to each transaction will depend on the findings identified during the due diligence process and the regulatory, corporate, or third-party approvals required to consummate the transaction.

e) Indemnification Provisions: acquisition agreements typically include indemnification provisions under which each party agrees to indemnify the other party—and, in some cases, its affiliates—for losses arising from: (i) any inaccuracy or breach of representations and warranties; (ii) breaches of obligations under the acquisition agreement; and (iii) where applicable, specifically identified matters (special indemnities).

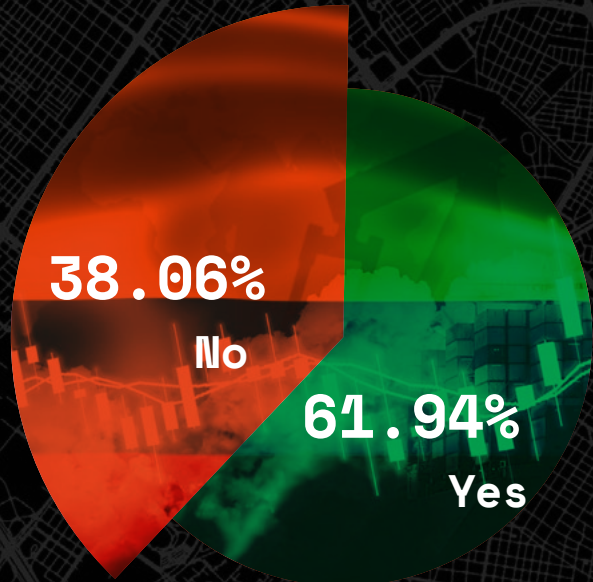
Indemnification provisions commonly include limitations on liability, which may take the form of time limitations or quantitative limitations, such as indemnification thresholds and liability caps. According to the Deal Points 2024 report, 74.84% of the transactions analyzed included liability caps, while 61.94% included indemnification thresholds, as detailed below:



Liability Cap



Basket (Threshold)



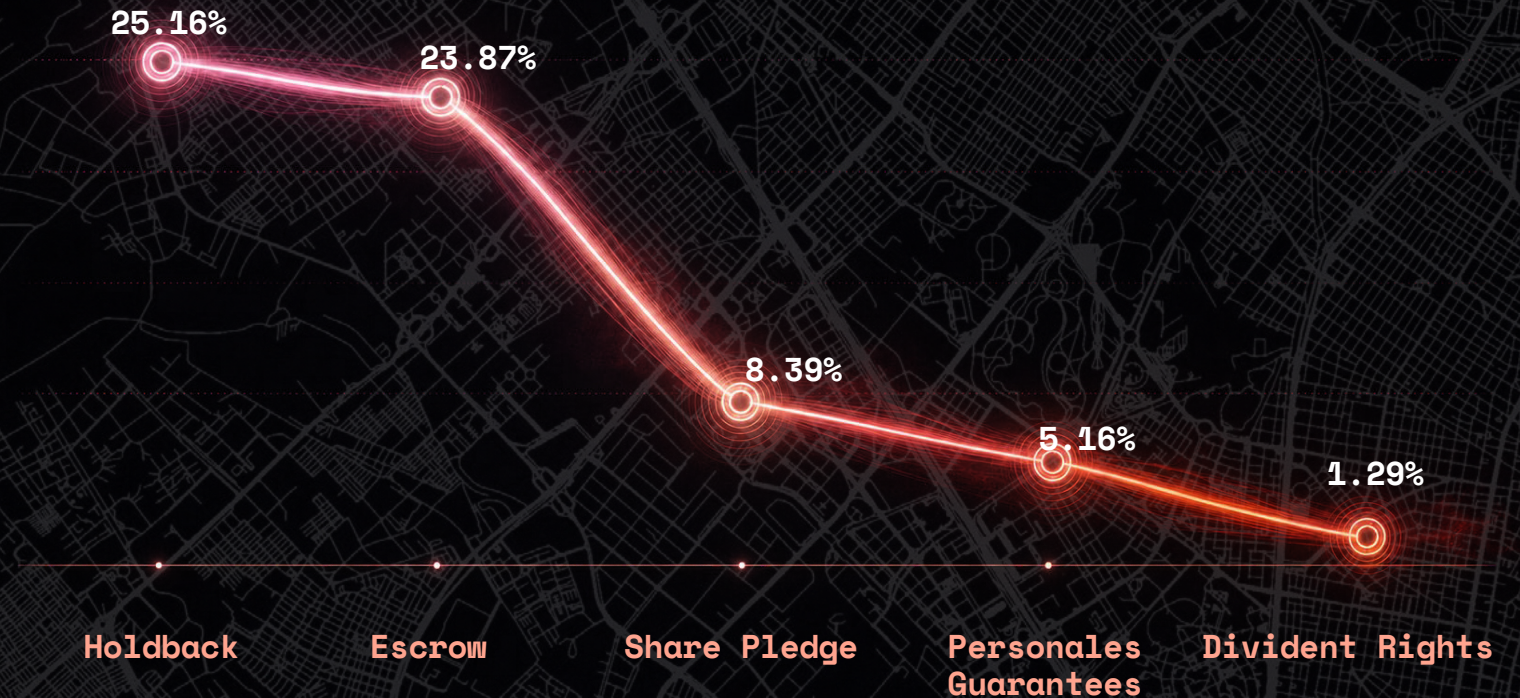
- **Other Considerations**

With respect to dispute resolution, arbitration clauses are commonly included due to the specialized nature, efficiency, and confidentiality of arbitration proceedings. In international arbitration, the parties may agree that the transaction be governed by a law other than Colombian law. Nevertheless, most transactions select Colombian law as the governing law, followed by New York law and other jurisdictions⁵.

From a foreign exchange standpoint, all foreign investments must be registered with the Central Bank of Colombia (Banco de la República). Where foreign currency is channeled through an authorized foreign exchange intermediary, registration is automatic; otherwise, the investment must be registered directly through the Foreign Exchange Information System (Sistema de Información Cambiaria).

⁵ According to Deal Points, 80.52% of the transactions analyzed selected Colombian law, followed by New York law (5.84%) and other jurisdictions (13.64%)

Type of Indemnification Security





Bogotá's Legal Guide to Foreign Direct Investment

2026



<https://en.investinbogota.org>



Invest in Bogotá

