

# National Government may acquire equity or debt in private, state-owned, or public-private companies as a manner to inject capital in economy

*Under the economic emergency declared for the second time by the Decree 637, 2020, and according to the measures adopted by the National Government to cope with the sanitary crisis and face the negative economic effects in the industries, Decrees 444 and 811 of 2020 paved the way for National Government's capital injections in business through the acquisition of shares and/or debt in private, fully state-owned, and state-owned/private companies which perform economic activities of national interest.*

Decree 811 includes two sets of rules: first, rules applicable to the investment and subsequent sale of the shares acquired by the National Government in the context of the economic emergency. And second, certain rules related to the sale of shares held by the National Government in publicly traded companies.

## **Rules applicable to the investment and subsequent sale of the shares acquired by the National Government in the context of the economic emergency**

As first measure, the National Government created the Fund of Emergency Mitigation (FOME, by its initials in Spanish) to obtain resources to face the emergency. FOME funds may be used to invest in equity (i.e. shares) or debt securities issued by private, state-owned, or public-private companies which perform economic activities considered as

“national interest”. The main driver of this measure is to provide transitional economic support to stabilize the financial position of businesses protecting employment without “nationalizing” the property of the companies.

The main characteristics of the proposed capital injection are the following: (i) it would be done directly by the Nation or National entities, so it is not permitted for territorial (district, provincial) entities (the recipients of the investment themselves could be regional entities); (ii) investments must be done consensually which means that these procedure do not allow for a State takeover; (iii) private regime will be applicable to the investments; (iv) capital injection may be done by subscribing equity interests or by acquiring debt, and (v) the beneficiaries of capital injections may be private,

state-owned, or public-private companies which perform economic activities considered as “national interest”.

These decrees do not establish which activities are to be considered as of national interest; such determination must be made by the Ministry of Finance through subsequent regulation. The notion of national interest may cover, among others, industries related to public services and economic sectors necessary for the reactivation of the national economy such as construction, pharmaceutical, telecommunications, transportation.

Decree 811 also established that, if the National Government acquires a minority stake in the equity of companies, the National Government may agree with the majority shareholders either a put option in favor of National Government enforceable to other shareholders, or drag along rights that would entitle the National Government, at the time it decides to exit, to force shareholders to transfer to the third party purchaser a number of shares that, together with the shares to be transferred by the National Government, would allow the purchaser to acquire control over the company.

Upon consummation of the investment by the National Government, Decree 811 determined that the target companies will maintain their private-owned nature and will be under the same mercantile applicable regime, regardless of the percentage of shares acquired by the

National Government. In the same vein, the company as a legal person separated from its shareholders will remain liable for its labor, tax, pension and all other obligations without transferring those obligations automatically to the National Government as a consequence of its participation as shareholder thereof.

Upon expiration of the investment period, the National Government, through the Ministry of Finance and Public Credit will sell in the domestic or foreign market. To complete the sale, it must conduct all required technical valuations aimed at safeguard public resources, and subsequently it must implement a sale process which guarantees compliance with principles of wide publicity and free concurrence. These sale processes will not be subject to the privatization rules of Law 226, 1995. As a consequence, those offers neither have to be addressed to the special conditions beneficiaries (solidarity sector) nor require the enactment of a Decree signed by all National Government ministers.

## Rules related to the sale of shares held by the National Government in companies listed in stock exchanges

As second measure, Decree 811 incorporated certain amendments to the sale process set forth in Law 226 of 1995, applicable to the sale of shares owned by the National Government in publicly traded companies, as long as the proceeds of the sale are directed to mitigate the economic effects derived from the Covid-19 pandemic.

The main amendments are the following:

- Those sales will not require the determination of a minimum price per share; if the National Government decides to fix a price per share, it can keep such price in reserve.
- The shares will be sold at their market value.
- The offer of the shares can be made simultaneously to the solidary sector and to the general public; however, the shares acquired by the solidary sector will be awarded first; the solidary sector may also receive preferential conditions on price and term for payment.
- The shares must be sold by public bidding or auction, and the book building mechanism may be used.

It is worth mentioning that Decrees 444 and 811 are law-equivalent, and therefore are subject to automatic control by the Constitutional Court, which must decide about their constitutionality soon.

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