

High growth companies and how to fund them – a real driver of economic growth?

Corporate Acquisitions and Joint Ventures Commission

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National Report of Peru

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The working session in Prague is entitled “*High-growth companies and how to fund them – a real driver of economic growth?*” In the working session we plan to address funding alternatives for high-growth companies (i.e. companies with significant annual growth over time); opportunities and challenges that both entrepreneurs and investors may encounter in your jurisdiction. The working session will also look at corporate governance issues in connection with investments in high-growth companies. This questionnaire mainly concentrates on these two topics in relation to high-growth companies, but will also cover commercial and regulatory opportunities and constraints.

1. CORPORATE FINANCE – FUNDING ALTERNATIVES

1.1 Which financial instruments are typically used when investing in high growth companies; ordinary shares, preference shares, convertibles, warrants, stock options, debt instruments such as bonds, hybrid instruments such as participating debentures etc.?

In Peru ordinary shares and bonds are the typical financial instruments used when investing in high growth companies.

There is little experience with preference shares, convertible bonds and warrants while the using of stock options is limited because of labour regulations.

With regard to debt instruments, there is little experience with hybrid instruments.

1.2 Please elaborate on the pros and cons of the instruments used (ref. 1.1 above) (Describe 2-3 most widely used instruments more in-depth (any combinations as well, if applicable). Also other features, i.e. typically electronically registered instruments or not? etc.)

Shares may be issued with voting rights and with no voting rights. As a general rule shares give the right to dividends on a pro rata basis, unless otherwise agreed on the by-laws. The shares may be listed or not in a stock exchange. If listed in a stock exchange, then they will be mandatorily registered electronically in a securities clearing and settlement institution.

Bonds may be issued in a public tender offer or privately, although the most common way of issuance is public in which case they will be registered electronically in a securities clearing and settlement institution. The secondary market for bonds is not well developed in Peru.

1.3 Are there any regulatory constraints to the instruments used (ref. 1.1 above)?

The public issuance of shares and bonds shall be made subject to the regulations and surveillance of the Superintendency of Securities Markets, a governmental agency which is in charge of the supervision and regulation of the Peruvian securities market.

The securities and all information related to shall be filed in the Securities Market Public Registry managed by the Superintendency of Securities Markets. In the public tender offer a prospectus shall also be filed in the said Registry.

In the case of companies with shares listed in a stock exchange, the purchaser of said shares would be subject to the takeovers regulations if the purchase implies the direct or indirect transfer of ownership of voting stock that represent a percentage equal to or higher than 25% of the capital stock.

1.4 Is crowdfunding a funding alternative in your jurisdiction? How wide is the practice? If at all, please describe pros and cons.

Crowdfunding is not usual in Peru.

2. INVESTORS VIEWPOINT – OPPORTUNITIES AND CONSTRAINTS, LEGAL AND COMMERCIAL

2.1 Who are typical investors into a high growth company in your jurisdiction? Sources of funding (i.e founders-family-friends, angel investments, venture capital investments, private equity)

Typical investors are the private pension funds. In Peru employees have the obligation of contributing to pension funds, which may be public or private. Pension funds have to invest these funds and have limits to do it abroad.

2.2 Is there a typical size of the investment into a high growth company in your jurisdiction?

No, there is not a typical size of investment into a high growth company in Peru.

2.3 Describe the process of documenting the investment (Which documents are typical? Which terms need to be included in the articles to be enforceable? etc.)

If the investment is made in shares, then the acquisition of the shares shall be registered in the company's share ledger.

If the acquisition of shares is done through a capital increase, a shareholders meeting approval is required, as well as formalizing the capital increase before a notary through a public deed and registering it in a public registry. A capital increase may be done in money through the deposit of funds in a Peruvian account, contributing assets in kind, capitalizing accounts payable and capitalizing profits or reserves.

If the acquisition of shares is done through a purchase agreement, just a private agreement is needed. In this case also is required to verify if there is any restriction to the acquisition such as the right of first refusal, in the by-laws or in a shareholders agreement.

In the case of bonds, usually the acquisition is made through a stockbroker.

2.4 Are there incentive schemes for investing into high growth companies (governmental grants (including co-investment funds, state as a guarantor of loans, etc.)?)

There are incentives applicable to investments in general. The Political Constitution of 1993 establishes that local and foreign investment is subject to the same conditions. In addition, it establishes free private initiative, economic pluralism, free foreign currency disposition, and the right to property, subject to certain limitations.

Legal stability is offered to foreign investors and enterprises in which they invest through the execution of legal stability agreements. Legal stability includes the following:

1. Stability of the right to non-discrimination;
2. Stability of elements of the income tax system in force when the agreement is executed; and
3. Stability of the system of free availability of foreign currency and remittance of profits, dividends, and royalties.

Also, the enterprises receiving the foreign investment are subject to the following benefits:

1. Stability of the systems of labour engagement in force when the agreement is executed;
2. Stability of the export promotion system applicable when the agreement is executed; and
3. Stability of elements of the income tax system.

In order to have the right to execute a legal stability agreement, the investors must invest in Peru within two years at least ten million dollars of the United States of America in the mining and hydrocarbon sectors or five million dollars of the United States of America in any other economic activity, or acquire more than 50% of the shares of a company participating in a privatisation process conducted by the Peruvian government.

The term of the legal stability agreements is ten years, and it may be modified only by agreement between the parties. In the case of concessions, the term of the legal stability agreement extends to the term of the concession.

2.5 Any instruments referred to in section 1 preferred from the point of view of an investor? Why? Would the answer differ if the investor is international or domestic?

In Peru the shares in most of the companies is concentrated in few owners. There is not a tradition of diversified shareholders and few companies do tender shares to the public. The issuance of bonds is more usual as a way of financing. Thus, usually investors find more opportunities to invest in bonds than in shares. Nonetheless, if both shares and bonds are available in the market and there is a similar company risk, the investment will depend on the securities terms. There is no difference between international and domestic investors

3. ENTREPRENEUR'S VIEWPOINT – OPPORTUNITIES AND CONSTRAINTS, LEGAL AND COMMERCIAL
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3.1 Which company form is most popular? (Special company forms for high growth companies? Tiers of management typical for a high growth company? Liability point of view?)

The most popular form of company is the *sociedad anonima* (corporation). This a limited liability company with its capital represented by shares. The corporation has by-laws and is registered in a public registry.

Its highest authority is the shareholders meeting comprised by shareholders. Other authorities are the board of directors and the management, although the corporation may assume the form of closed corporation (*sociedad anonima cerrada*) in which case the board of director is optional. The board of directors shall be comprised of a minimum of three directors that must be natural persons. The management is led by a general manager which may be a natural person or a legal entity.

3.2 What sectors are most preferred by high growth companies in your jurisdiction (information and communications technologies, biotech, etc.)?

There are no specific sectors, but in the last years mining, construction and energy may have received the biggest investments.

3.3 Are there incentive schemes for entrepreneurs incentivising high growth companies (e.g accelerators/incubators? Other?)

Yes, please refer to the answer to question 2.4.

3.4 Any instruments referred to in section 1 preferred from the point of view of an entrepreneur? Why?

Not necessarily. As commented before, companies in Peru are usually concentrated in few shareholders. There is not much experience in Peru with the tendering of shares to the public.

4. CORPORATE GOVERNANCE – CONTROL ISSUES

4.1 In a typical investment into a high growth company, whether a loan related investment or equity investment, how much control would a typical investor take? and what is of particular importance to an entrepreneur? In particular, please elaborate on the following terms from the perspective of your jurisdiction and practice:

a. Anti-dilution measures

It is not common to agree on anti-dilution measures.

b. Rights of first refusal, pre-emption rights, drag and tag along

It is very common to agree on rights of first refusal, which may be in the by-laws or in shareholders agreements. In the case of closed corporations (*sociedad anonima cerrada*) the right of first refusal is granted by law. On the other hand, rights of first refusal are not allowed for open corporations (*sociedad anonima abierta*).

The right of first refusal may be granted to the shareholders and also to the same company. Also, it could be agreed that the authorization by the company is required to transfer shares, being that if such authorization is not granted then the company shall acquire the shares.

Pre-emption rights are granted by law for corporations (*sociedad anonima*). Nonetheless, if the corporation assumes the form of an open corporation (*sociedad anonima abierta*) the shareholders meeting may approve that this right is not applicable as long as the capital increase is been approved by shareholders that represent at least 40% of the shares with voting rights and it do not pretend to improve the share percentage of a particular shareholder.

Although the pre-emption right cannot be excluded, it may be waived by the shareholders in a particular capital increase.

Drag and tag along rights have been used in recent years and included in shareholders agreements. They are not regulated in the Peruvian law and similar figures like options (put and call) must be used.

c. Protective provisions

Protective provisions are usually included increasing the quorum and majorities to take decisions in the shareholders meetings and board of directors. In the case of board of directors it is not allowed to require the approval of all directors.

The protective provisions may be agreed regarding all decisions in general or only regarding major decisions like for example, reorganization, selling all assets, liquidation, capital increase and decrease, between others.

d. Information rights

It is usually included in shareholders agreements, although the law grants the right to any shareholder with more than 5% of shares to request information to the company. Exceptions exist regarding confidential information.

e. Dead-lock resolution

It is commonly included in shareholders agreements where shares are owned 50-50% or where there are protective provisions that may end on a dead-lock. The usual clauses include the “Russian Roulette” clause and the “Arbitration or Expert Resolution” clause.

f. Board seats / observer rights

It is usual to require board seats, depending on the percentage of shares acquired. It is not common to require observer rights.

g. Any other terms specific/important in your jurisdiction?

Arbitration is usually agreed for disputes resolution. An arbitration panel set abroad is usually considered.

Depending on the participation of the investor, the appointment of managers or co-signatures is also agreed.

5. EXIT STRATEGIES AND TIME HORIZON

5.1 Type of exit which is most common (sale to venture capital/private equity firms/funds, trade sale, write-off, initial public offering)? Typical transaction length?

Sale to venture capital and private equity firms are the most common type of exit. Initial public offering is not usual for shares. The length depends on the terms of the transaction, although a transaction of a high growth company, included due diligence, will hardly take less than six months.

5.2 How are new investors dealt with in your jurisdiction? How would the issues set out in section 5 above be dealt with? Are initial investment and shareholders' agreements/shareholders' agreements upheld in the next round, or new agreement is entered into?

There is not a particular rule. One possibility is executing a framework shareholders agreement into which new investors are bound by executing adherence agreements or amendments (addendum).

Shareholders agreements usually consider the inclusion of new shareholders and condition any sale of shares to the execution of the shareholders agreements by the new shareholder.

6. REGULATORY ISSUES

6.1 Any tax implications (positive or negative) that a high growth company encounters in your jurisdiction?

No, there are no additional tax implications then those applicable to all companies in general.

6.2 In addition to any of the issues set out above, any other regulatory incentives or constraints with respect to high growth companies? Any constraints deriving from obligation for local participation in a high growth company? Co-investment obligation? etc.

There are no additional regulatory incentives or constraints beside those that may be applicable in a specific sector to all investors in general.

7. OTHER

7.1 Please elaborate on any other issues relevant to your jurisdiction with respect to high growth companies which have not been discussed in responses to earlier questions (if any).

In general, issues arising in the investment in high growth companies do not differ from issues arising in the investing in companies in general. Usually beside tax and regulatory issues labour issues also generate greater concern taking into account that in Peru laws are very protective towards employees. Employee protection does not only include labour costs in addition to the payment of a monthly salary but also the payment of compensation or the reposition of an employee if an employee is dismissed with no cause.