LEXOLOGY®
Getting The Deal Through

Public M&A

in Mexico

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STRUCTURES AND APPLICABLE LAW

Types of transaction

How may publicly listed businesses combine?

Mexican and foreign entities may use different structures to implement a business combination. The most common structures are equity acquisitions, asset transfers or legal mergers. Stock purchases and asset transfers are regulated by Mexican law, permitting terms and conditions thereof to be generally agreed by the parties. Legal mergers consist of the combination of two or more Mexican entities, where one entity (the merging entity) ceases to exist and the surviving entity acquires all of its assets and liabilities, or alternatively, in the combination of two or more entities, all of which cease to exist, and a new entity is created with all the assets and liabilities of the merging entity.

In the acquisition of shares or merger of publicly traded companies, the bidder will be required to obtain the authorisation from the National Banking and Securities Commission and from any of the two authorised Mexican stock exchanges (MSEs) to issue an acquisition public offer through a tender offer. Once the bidder has launched the tender offer, the shareholders of the target entity are entitled to accept or reject the offer made by the bidder.

Law stated - 26 March 2021

Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The most relevant laws and regulation in Mexico applicable to business combinations are:

- the General Business Organisations Law, which provides the corporate legal framework applicable for business organisations and the formalities to implement a legal merger;
- the Commercial Code and Federal Civil Code, which provide the general contractual provisions for M&A agreements;
- the Federal Antitrust Law, which sets forth the thresholds for those operations that require the prior approval of the Mexican Antitrust Commission;
- the Stock Exchange Law and secondary regulations, which set forth the requirements and formalities for the acquisition or merger of publicly traded companies; and
- the Regulations of the MSEs: Bolsa Mexicana de Valores and Bolsa Institucional de Valores.

Law stated - 26 March 2021

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Except for certain foreign investment restrictions, Mexican law and regulations do not restrict or limit in any manner whatsoever the acquisition by foreign shareholders of a participation in the capital stock of Mexican companies, nor require a specific structure to implement cross-border transactions. The Mexican Foreign Investment Law restricts or limits foreign investment in certain activities, such as national inland transportation services (passengers and cargo) and certain technical and professional services, which are exclusively reserved for Mexican nationals or Mexican companies with a foreign exclusion clause. Other activities subject to foreign investment restrictions or limitations are,

among others, domestic air transport, air taxi transport and specialised air transport, radio broadcasting services, local newspaper publishing and shipping companies dedicated to the commercial exploitation of inshore navigation and coastal fishing.

Foreign companies whose intention is to publicly trade securities in Mexico will be subject to the same requirements and regulations applicable to Mexican companies.

Finally, Mexico is party to several free trade agreements, which may provide additional advantages, benefits and special treatments, as well as limitations or requirements, for foreign investors in their participation in Mexican companies.

Law stated - 26 March 2021

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

If the business combinations involve a Mexican financial entity (including banks, insurance companies, brokerage companies, retirements investment funds, among others), an authorisation from the respective authority must be obtained prior to the completion of the business combination.

Also, if the target entity's main activity is based under a concession title or special permit (such as mining, telecoms or transportation operations), the business combination will be subject to the prior authorisation from the respective authority.

Law stated - 26 March 2021

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Mexican law usually applies for this type of transaction. Asset transfer and stock purchase agreements may be submitted to foreign law; however, the parties usually submit to Mexican law to facilitate implementation and enforcement as the target entity or assets, or both, would be located in Mexico.

Law stated - 26 March 2021

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

The bidder requires prior authorisation from the National Banking and Securities Commission (CNBV) and the corresponding Mexican stock exchange (MSE) to acquire a publicly traded company, and must pay the corresponding duties to the CNBV and the fees to the MSE for the analysis and authorisation process of the tender offer. Also, the following filing may be required:

- the registration with the Public Registry of Commerce of the extraordinary shareholders' meetings approving the acquisition (if required) or the legal merger;

- the registration of the transfer of certain type of assets (eg, real estate transfer requires its registration with the Public Registry of Property); and
- the filing of an application and payment of the corresponding duties to obtain clearance from the Mexican Antitrust Commission (the current duty amounts to approximately US$10,000 at an exchange rate of 20 Mexican pesos per US dollar), if the transaction meets the thresholds set forth in the Federal Antitrust Law.

If the target entity is a regulated entity, such as a financial entity, the business combination may be subject to further filings or fees to obtain authorisations from the respective regulator.

Law stated - 26 March 2021

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

Regarding legal mergers, the extraordinary shareholders' meetings approving the legal merger must be registered with the Public Registry of Commerce and published in the electronic system of the Ministry of Economy. The minutes of the extraordinary shareholders' meeting must include, among others, the balance sheet, the merger agreement and the capital structure after the merger.

The Stock Exchange Law (LMV) and its secondary regulations contain disclosure obligations applicable to publicly traded companies with respect to any facts or circumstances that are likely to have a material effect on the price of the shares. Regarding an acquisition public offer (OPA), the LMV provides that the acquisition by any person or group of persons of the beneficial ownership of the shares from the target through an OPA must be disclosed to the public no later than the immediately following day. In this case, the bidder must also inform the terms and conditions of the tender offer, whether it intends to acquire a significant influence over the target or not, and any other information that may be deemed relevant for the purpose of the tender offer.

Other than the foregoing, there are no specific requirements on the information to be made to the public in business combinations.

Law stated - 26 March 2021

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

There are no special disclosure requirements for substantial shareholders. However, there may be limitations on shareholdings in public companies, which may lead to disclosure requirements. In general, publicly traded companies have the obligation to provide and disclose corporate information about their shareholders. Such information is provided to the CNBV and made public through the applicable MSEs.

Law stated - 26 March 2021

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

In general, the directors or managers of the target company are not required to comply with specific duties to the company's shareholders, creditors and other stakeholders in connection with a business combination. In general, the directors or managers must comply with their fiduciary duties and act in the best interest of the company and its shareholders, and must disclose any conflict of interest that may arise from a proposed transaction.

Regarding public companies, the board of directors of the target company must be neutral and will be required to adopt a public position on the tender offer within 10 business days of the tender offer being launched and, together with the general manager, publicly state how they are planning to act in connection with the shares they currently own from the target. The board of directors of the target must conduct itself in a neutral and transparent manner, complying, in all material respects, with its respective duties and disclosing any conflict of interests that may arise in connection with the tender offer or the bidder.

The Stock Exchange Law also requires that, from the date of the tender offer until conclusion of the same, the board of directors and the relevant officers of the target shall refrain from taking any action that may hinder the development of a tender offer. If any of them fail to comply with their duties before the target and cause any economic damage to it, they will be personally liable for the monetary damages and losses caused.

Controlling shareholders are not required to comply with similar duties as those provided for directors or managers.

Law stated - 26 March 2021

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

In a merger of public limited companies, the merging entities must approve the transaction in an extraordinary shareholders' meeting with a minimum quorum of 75 per cent of the total shareholders, and resolutions must be validly adopted with, at least, the vote of 50 per cent of the voting shares. If the by-laws of any of the merging companies provide a higher quorum or approval threshold, this threshold will be required to approve the transaction.

Minority shareholders of a public limited company representing 25 per cent of the voting shares and minority shareholders of an investment promoting corporation representing 20 per cent of the voting shares may exercise their opposition rights to the resolutions adopted by a shareholders' meeting, in case certain requirements are met, including that the resolutions were adopted in contravention or without the formalities set forth in Mexican law or the corporate by-laws.

Other than the foregoing, there are no additional approval rights of the shareholders set forth in Mexican law regarding business combinations or sales of a public company. Also, there are no specific appraisal or similar rights of the shareholders in business combinations. Minority rights, including veto rights, may be generally adopted for all sorts of Mexican companies. Some regulated companies may have restrictions in this regard.

Law stated - 26 March 2021

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

There is no specific regulation on hostile takeovers of publicly traded companies in Mexican law. The Stock Exchange Law allows friendly and hostile takeovers to take place. In hostile takeovers, the board of directors of the target has limited powers to prevent this type of acquisition as it must maintain its neutrality in the acquisition, and is limited to giving its opinion on the fairness of the offered price and informing how it will act with respect to shares owned by its members.

Notwithstanding the foregoing, the corporate by-laws of the target company may include special provisions or mechanisms to prevent the acquisition of shares or the control of the company, or both.

Law stated - 26 March 2021

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

There are no specific regulations or restrictions in Mexican law applicable to break-up fees or mechanisms to frustrate additional bidders. As it is not regulated, the parties to the transaction may freely agree and adopt break-up fees or similar mechanisms. These fees must be approved by the board of directors of the target and disclosed to the public.

Law stated - 26 March 2021

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Other than the authorisations and clearance required under Mexican law for a specific business combination (antitrust or regulatory), government agencies do not influence or restrict the completion of business combinations.

Law stated - 26 March 2021

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

There are no restrictions in Mexico regarding conditional offers. Any condition to a business combination will be valid and enforceable provided that it is not contrary to law, morals or public policy; therefore, a bidder is entitled to subject its tender offer, exchange offer or other form of business combination to any condition or term that it deems convenient, in the understanding that the condition or term is expressly provided in the offering memorandum. In a

cash acquisition, the financing may be conditional.

Law stated - 26 March 2021

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In relation to financing of the buyer, the M&A transaction documents and the financing documents are usually executed at the same time. The seller must obtain sufficient comfort from the financing entity that the disbursements would be made at closing, and the M&A transactions should be subject to the condition of full disbursement of the loan and payment for the acquisition. The seller must provide the financing entities with all the information and documentation they require and permit due diligence of the target company to obtain prior approval for the financing.

Law stated - 26 March 2021

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In principle, minority squeeze-outs are not possible under Mexican law; however, shareholders may adopt in the corporate by-laws of the public limited companies call options or other mechanisms that may lead to a minority squeeze-out. The process and the mechanisms for the valuation of shares are usually provided in the corporate by-laws or in a shareholders' agreement.

Also, the majority shareholders may dilute the participation of minority shareholders by approving a capital increase in a shareholders' meeting; however, all shareholders have a pre-emptive right to acquire the shares issued by the company from the capital increase in the same proportion to their participation in its capital stock. The shareholders must exercise this right within 15 days of notification of the approval of the capital increase, otherwise the other shareholders may exercise this right, diluting the participation of the non-exercising shareholders.

Law stated - 26 March 2021

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

Legal mergers

The extraordinary shareholders' meetings approving the legal merger must be registered with the Public Registry of Commerce and published in the electronic system of the Ministry of Economy. The merger will be effective until three months following the completion of the above-mentioned registration. Within this term, any creditor of the merging companies may oppose the merger by filing a complaint with the competent court, in which case the legal merger will be suspended until the competent court issues its final resolution. Alternatively, the legal merger will be effective as of the date of completion of the above-mentioned registration:

- if the merging companies agree on paying all the debts with creditors;
- if the merging companies deposit the amount corresponding to such debt in a financial institution; or
- with the prior consent of their creditors.

Publicly traded companies

Upon receiving the authorisation from the National Banking and Securities Commission (CNBV) and the applicable Mexican stock exchange (MSE) for the acquisition public offer, and when all transaction documents are approved, the tender offer will be made public for at least 20 business days and for additional periods of five business days, in case material changes to the original terms and conditions of the tender offer arise, which must be previously approved by the CNBV. The board of directors of the target company must take a public position on the tender offer within 10 business days of the launch of the tender offer and, jointly with the general manager, disclose to the public their position as regards the tender offer with regard to their shares in the target company. Upon expiration of the 20 business days given for the tender offer and no later than three business days following the expiration date of the tender offer, the applicable MSE will settle the tender offer.

Foreign investment authorisations

If the transaction requires the prior approval of the National Commission of Foreign Investments (the Foreign Investment Commission) based on the target economic activity, an application must be filed before the authority. The Foreign Investment Commission must issue its resolutions within 45 business days of the day of filing of the respective application. If the Foreign Investment Commission does not issue its authorisation within this term, it will be understood that the authorisation was granted for the foreign participation in the Mexican company pursuant to the terms of the application.

Law stated - 26 March 2021

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

Tax issues in business combinations in Mexico may vary significantly depending on the structure used for their implementation. One of the main reasons for the parties to adopt any specific structure is the tax efficiencies or costs that may derive from any type of business combination. The basic tax issues and implications involved in business combinations are the following.

Equity acquisition

The seller is subject to income tax for any capital gain arising from the sale of its participation in the target company. If the seller is a Mexican company, any capital gain will be levied at an income tax rate of 30 per cent, and subject to the authorised deductions. If the seller is a foreign entity, in principle, the income tax would be an amount equivalent to 25 per cent of the overall purchase price, without any deduction. However, the seller has the option to determine the income tax on the actual capital gain obtained from the sale of its participation in the target company, at a tax rate of 35 per cent and subject to the authorised deductions, provided that, among other requirements, the seller has a representative in Mexico (who must be a Mexican resident or foreign resident with permanent establishment in

Mexico) and the income tax was determined based on a tax report issued by a certified public accountant.

Asset transfer

Tax implications will vary depending on the type of asset to be transferred. In any case, if the seller is a Mexican resident company, it will be subject to corporate income tax on any gain from the transfer of assets at the 30 per cent rate, whereas non-resident sellers may be subject to different withholding tax rates depending on the type of asset. Additionally, a sale of assets is subject to value added tax at a rate of 16 per cent, payable by buyer. In 2020, this rate was reduced to 8 per cent for sales made in the northern region, subject to the fulfilment of various requirements.

Other taxes or duties may apply depending on the assets to be transferred (eg, a real estate transfer will be subject to the transfer of real estate tax payable by the buyer, in addition to any income tax or value added tax). These additional taxes are generally levied at the state or municipal level, and thus the applicable rate and basis may vary.

Legal mergers

In principle, a legal merger between Mexican resident companies would not be considered for tax purposes as a sale and transfer of assets and, therefore, would not have any tax implication for the surviving entity, provided that the following requirements are met:

- a cancellation of registration for legal merger notice is filed with the Tax Payer Registry;
- the surviving entity continues to carry out the same activities as those carried out by the merging entity for at least one year following the date on which the merger becomes effective; and
- the surviving entity prepares and files the tax returns of the merging entities before the Mexican tax authorities. If these requirements are not met, the legal merger would be considered a sale of assets for tax purposes, subject to the applicable tax rates.

Finally, Mexico is party to several tax treaties for avoiding double taxation, which must be considered for the structuring of the business combinations.

Law stated - 26 March 2021

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

The Federal Labour Law (LFT) sets forth the legal framework governing labour and employee benefits. There are no specific labour and employee benefits provided in the LFT arising from a business combination or acquisition involving a public company. From a labour standpoint, the business combination or acquisition should not have an impact on the labour relationship of the target company with its employees, and the labour relationship should be maintained at least on the same terms and conditions with no negative impact for the employees. If there is a change of employer as a result of a legal merger or acquisition, it would be understood that the resulting entity is the new employer and shall maintain the same labour terms and conditions as the previous employer (including the recognition of seniority). If the employee is negatively affected in its labour terms and conditions (owing to a change of location, change of daily work hours, change of employee benefits and perks, among other things), the employee may have the right to claim the termination of the labour relationship before labour courts, requesting payment of the corresponding indemnification

and severance payment. Often business combinations entailing transfers of employees may include agreements regarding the respective change of employer and the obligations assumed by each of the parties with respect to the employees.

Law stated - 26 March 2021

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

If the target company is declared in bankruptcy or receivership, in principle, the shareholders must obtain at least the approval of the majority of the recognised creditors under the proceeding to carry out a business combination, except in legal mergers, where any creditor may suspend the process until a final resolution is issued in the bankruptcy proceeding. Any resolution regarding the target entity must aim to preserve creditors' rights at all times.

Law stated - 26 March 2021

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

In Mexico, there is no specific law or regulation governing anti-corruption or anti-bribery practices applicable for business combinations. Bribery, corruption and facilitation payments are criminalised under the Federal Penal Code and subject to general administrative and criminal regulations sanctions under the National Anti-Corruption System that became effective in July 2017.

Law stated - 26 March 2021

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

M&A operations in Mexico have fallen with respect to last year. Some indicators state that the volume of operations fell 18 per cent in activity and 42 per cent in value. This significant reduction of M&A activity has many factors. The Mexican economy has been one of the most affected in Latin America by the covid-19 pandemic, and it has also been affected by the current Mexican political agenda.

The current federal administration has implemented actions and reforms that have caused uncertainty for new investors. One of the first actions of the government of Andrés Manuel López Obrador was to cancel the new International Airport of Mexico City, despite the fact that construction was well under way and was primarily financed by the private sector. Also, the protectionism of Pemex and CFE, the state-owned oil and electricity power companies, has brought an abrupt halt to investments by the private sector in those sectors. More recently, a reform to the Mexican Electricity Federal Law was passed that may have as an effect a decrease in investments by the private sector in the

electricity industry and in renewables projects.

Notwithstanding the foregoing, post-crisis periods usually bring attractive acquisition opportunities of companies with asset-depressed valuations. Also, there continues to exist a consolidation in certain industries, including in the finance sector. Private equity remains strong in a variety of sectors, including financial, real estate, projects and agribusiness. The stimulus packages recently passed by the USA are likely to have a positive effect in several Mexican industries, such as manufacturing, exports, hospitality and services. Considering the aforementioned, there will likely be a good environment to conduct a variety of M&A transactions in Mexico during 2021.

Law stated - 26 March 2021

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The General Health Council of Mexico declared a state of emergency because of the global pandemic generated by the SARS-CoV-2 (covid-19) virus.

As a consequence thereof, the federal government announced extraordinary measures to address the pandemic, including the immediate suspension of non-essential activities. This suspension lasted for most of 2020 and the beginning of 2021. The only activities deemed essential were:

- those directly necessary to deal with the health emergency, such as the national health system, pharmacies and areas of support;
- those regarding public safety and civil protection;
- activities that correspond to fundamental sectors of the economy, which if suspended, could suffer irreversible effects when resumed, such as banks, insurance companies, food and energy;
- activities related to the operation of social government programmes; and
- activities related to the preservation and maintenance of critical infrastructure.

In addition to the measures announced by the federal government, several public agencies announced the suspension of deadlines and legal terms, without implying the suspension of activities.

The Mexican Central Bank issued a relief package of approximately US$30 billion, through mechanisms aimed at maintaining the stability and liquidity of the Mexican financial sector. The package also included financing addressed to medium and small businesses.

The Mexican financial sector remains stable, with no major collapses during 2020. However, enterprises have been substantially affected and the package proved to be insufficient and, in most cases, it did not reach businesses at all. No relevant legislation was issued to address the pandemic, and no tax reliefs were granted by the Mexican government.

Law stated - 26 March 2021