GETTING THE DEAL THROUGH

Mergers & Acquisitions

in 52 jurisdictions worldwide

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1 Form

How may businesses combine?

Businesses may combine through merger, tender offer, public offer, joint venture and asset or share purchase agreements.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In general, business combinations are regulated by the Mexican General Law on Business Companies (GLBC), the Foreign Investment Law (FIL) and its regulations (regarding specific activities), the Federal Competition Law (FCL) and its regulations (applicable only when the transaction exceeds the thresholds established therewith), the Securities Market Law (SML) (mergers, tender offers and public offerings). The Federal Labour Law (FLL) applies to mergers and asset purchase agreements (substitution of labour liabilities). As default provisions, the Commercial Code (CC) and Federal Civil Code (FCC) may also be applicable.

On the other hand, specific regulations may apply, depending on the type of target company in the transaction, namely financial institutions or bankrupt companies as target companies.

3 Governing law

What law typically governs the transaction agreements?

Commercial conveyances regarding business combinations are governed by federal laws. As commercial acts are within the federal subject matter jurisdiction, the GLBC governs all forms of mercantile entities as well as mergers whereas the CC governs joint venture agreements thereupon, while the CC and FCC are set forth as default provisions and will be applicable only if the GLBC does not foresee a special provision.

Publicly held companies are regulated by the SML, business combinations thereof will be additionally regulated by general bulletins issued by the National Banking and Securities Commission.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination?

Are there stamp taxes or other government fees in connection with completing a business combination?

If the target company is a corporation, an extraordinary shareholders' meeting must be held, whereby shareholders will discuss and ultimately approve or reject the merger. The GLBC requires the meeting to be formalised before a notary public; in order for the merger to be effective against third parties, the public deed issued by the notary must be duly registered at the Public Registry of Commerce of the corporate domicile of the target company. Furthermore, both combined enterprises must publish their final balance through the *Federal Official Gazette*; mergers will be effective three months after publication thereof.

Regarding joint ventures, the agreements must be in writing and there are no special registration requirements, unless a certain contribution is made through real estate property. Share purchase agreements must generally be in writing and recorded in the company's corporate books.

Furthermore, certain authorisations are required when dealing with determinate economic activities, ie, authorisation by the Foreign Investment Commission, Federal Competition Commission, National Banking and Securities Commission (NBSC) (exchange security houses, financial institution mergers and public offerings require prior authorisation).

Under Mexican Law, there are no stamp taxes applicable to business combinations. However, there are certain filing requirements before tax and foreign investment authorities when dealing with mergers, such as a merger notification, cancellation of the taxpayers' registry of the merged entity, performance of an external audit of the financial statements of both enterprises and presentation of the last annual tax return of the merged company. Carrying out these requirements may carry a tax advantage.

Furthermore, participants in joint venture agreements may obtain a taxpayers' identification in Mexico.

5 Information to be disclosed

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

The information to be disclosed and made public will depend on the structure of the business combination.

Regarding publicly held companies, the SML provides that companies participating in the Mexican Securities Market should make available to the public certain information regarding relevant events and information which affect the issuer, ie, prospectus, corporate acts, relevant administration policies, etc, as well as the financial, legal and economic status of the issuer. Said rules also apply regarding tender and public offerings as forms of business combinations. Additionally, public offerings require prior authorisation from the NBSC; once the authorisation is granted, the public offering is registered before the National Securities Registry and information will be disclosed to the public.

As to private companies, only the information regarding the merger must be published at the Official Federal Gazette. On the other hand, joint ventures are not required to be registered,

unless these agreements exceed the thresholds determined in the FCL; if so, the appropriate notifications or approval requests must be filed before the Federal Competition Commission.

6 Disclosure requirements for shareholders

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

Mexican law requires disclosure for shareholders in a company. Publicly held companies require disclosing to the investment community of relevant information regarding the issuer, quarterly and annual reports. A disclosure of their corporate structure should be filed to certain authorities, such as the NBSC, specifically the National Securities Registry (open to the public), National Foreign Investment Registry (for statistical purposes only, not open to the public) – namely, shareholders, corporate group, subsidiaries and in kind or cashflow on foreign investment.

Regarding a merger, financial or ending balance sheet information will be disclosed through a publication made in the *Federal Official Gazette*. As to joint venture agreements, there are no disclosure requirements under Mexican Law.

7 Duties of directors and controlling shareholders

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

Administrators will respond to civil responsibility which may only be exercised followed by a shareholders' agreement made through a shareholders meeting.

Regarding privately held companies, 33 per cent of the corporate capital may directly file suit for civil responsibility against any administrator. On the other hand, according to the SML as to publicly held companies, depending on the type adopted, 5 to 15 per cent of the corporate capital is required to file suit for civil responsibility of the administrators. Both shareholders and the company itself can file for suit against the administration body.

The minimum fiduciary duties owed to the company's shareholders are imposed by the SML, namely due diligence duty – to act in good faith and in the company's best interest, the administrator acting in loyalty to the company and, finally, applying the best efforts rule regarding business decisions.

Furthermore, company administrators holding a public offering must deliver to the public their opinion regarding the suggested offer price, and shall refrain from participating in acts or operations which aim to obstruct the progress of the public offering proceeding.

Creditors have the right to oppose mergers in case of security exchange houses.

Controlling shareholders do not have the obligation or right owed to the company. However, the new SML provides broader rights to minority shareholders, rights which involve the ability to solicit information of the company.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Business combinations, such as a merger, must be previously approved by the company's shareholders through an extraordinary meeting. If the meeting convenes at first call, there must be at least 75 per cent of the corporate equity present, unless the company by-laws require a higher quorum. Regarding a second call, resolutions will be valid when adopted by more than 50 per cent of the corporate equity.

Furthermore, shareholders have the right to judicially oppose the business combination; in privately held companies a minimum of 33 per cent of the outstanding and issued shares may file before court a request to oppose the resolutions adopted by the shareholders' meetings. Regarding publicly held companies, the SML requires 20 per cent of the corporate equity to oppose a merger transaction.

As to appraisal rights provided to shareholders in business combinations, the GLBC determines the obligation to establish in the company's articles of incorporation the expression of the amount contributed by the shareholders, the value in case of asset contribution and the criteria followed regarding the assessment of such contribution.

9 Hostile transactions

What are the special considerations for unsolicited (hostile) transactions?

Unsolicited (hostile) transactions are governed by the Securities Market Law.

Hostile takeovers or public tender offers are made to acquire by any means, directly or indirectly, ownership of 30 per cent or more of the ordinary shares of a stock corporation registered with the National Securities Registry, in or outside the stock exchange, through one or several simultaneous or successive transactions of any nature.

They are subject to the authorisation of the National Banking and Securities Commission, based on a prospectus and must be extensively made to the different series of shares including those with limited or no voting rights and the consideration offered to all series must be the same. All offers will be subject to the following conditions:

- be held open for at least 20 business days and 5 additional business days if NSBC decides there are any material changes from the original offer;
- be made for at least 10 per cent of the capital stock of a publicly held company with bidders willing to take 100 per cent upon completion. If additional securities are available to a bidder who is unwilling to take them, the remaining securities will be pro-rated;
- while offers remain open, terms and conditions may be altered as long as the amendments are clear to the bidder. Any changes to original terms after a shareholder has tendered its securities gives the shareholder the right to withdraw its securities;
- be open to all shareholders at the same price;
- no premiums paid to any person without formal approval and written consent from the board of directors of the publicly held company, with full disclosure to the public;
- the board of directors, together with the general manager, must make a public statement regarding their planned response on any tender offers within 10 days. The board is also prohibited from preventive action against a proposed bid;
- false information to the public by market participants is prohibited (what constitutes false information is not currently clarified in the law).

The following acquisitions are exempted from being made through a tender offer: (i) acquisitions made at market value resulting from the redistribution of ordinary shares held amongst members of a same group of persons, even if said group disappears, as long as the acquiring parties have been shareholders for more than five years and the controlling group resulting from said acquisition has held a relevant percentage of the capital stock; (ii) those that derive from capital reductions by virtue of which a person or group of persons ends up holding a 30 per cent stake or more of the ordinary shares; (iii) where the viability of the company is at stake and the ordinary shares are acquired as a consequence of capital increases or business reorganisation means such as mergers, spin-offs, asset purchases and debt capitalisation; (iv) judicial or extrajudicial adjudication of shares by virtue of the foreclosure and execution of collateral created in favour of financial entities; and (v) acquisitions made through inheritance, legacies, donations among spouses, concubines and other family members; as well as any transactions consistent with the protection of minority shareholders' interests, which is subject to NBSC authorisation.

If any tender offer is carried out in violation of the requirements aforementioned, the resulting shareholders shall not be able to exercise any of the rights covered by the shares until the requirements have been satisfied. The exercise of any rights under such circumstance shall be null and void and the shareholders from other series shall have full voting powers until the tender offer is duly carried out.

10 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 company's ability to protect deals from third-party bidders?

Break-up and reverse break-up fees are generally allowed in Mexico as a deal protection device. Break-up fees imply fixed payments paid by one merger partner to another pursuant to specified conditions resulting in a planned merger failing.

Like other deal protection devices, break-up fees are included in the merger agreement. Broken down into its structural components, a break-up fee clause generally consists of the payment amount and a list of enumerated events that trigger the payment. The payment amount is fixed at either a percentage of the transaction's value or a specific amount of money. The triggering events usually fall into one of three broad categories: (i) the company's breach of any warranties or covenants; (ii) shareholder opposition/challenge of the merger; or (iii) the acceptance of a third-party bid. The board's exercise of a fiduciary out usually triggers the break-up fee, especially if the board then enters into another merger agreement with a competing bidder. The failure of the company to meet its material warranties and representations often dissolves the merger and also triggers the payment. For instance, a break-up fee may be triggered if one partner pledges to obtain the necessary antitrust or other regulatory approvals but does not do so. The common factor in most triggering events is that one party has intentionally reneged on its promises or negligently failed to take steps necessary to consummate the merger.

Break-up fees, as a deal protection device, are subject to the following conditions: (i) they must be approved in a special shareholders' meeting without the opposition of 5 per cent of the present shareholders; (ii) must not exclude one or more shareholders different from the person trying to obtain control, from the economic benefits resulting from the break up fees; (iii) do not totally restrict the takeover of the company; and (iv) do not contravene the regulations provided by the SML in connection with hostile takeover or nullify the equity rights of the acquiring company.

Additionally and as a general rule, the GLBC provides shareholders with pre-emptive rights to acquire new shares being issued; additionally, it allows shareholders to establish options in the by-laws in case of third-party bids, and even subject the transfer or assignment to any third parties to the prior authorisation of the board of directors. Regarding *sociedades anónimas promotoras de inversion* (SAPIs) which are stock corporations designed to promote domestic and foreign investment by allowing certain exemptions from general corporate regulations created under the SML, the shareholders of these may adopt almost any kind of contractual structures to protect deals from third-party bidders.

Unlike other jurisdictions, the GLBC expressly prohibits financial assistance in relation to the subscription and acquisition of the company's shares. Additionally, companies shall not issue shares under their face or nominal value. On the other hand, the GLBC prevents corporations from acquiring their own shares; however, the SML will allow the acquisition of such shares in the case of SAPIs. Such acquisition must be approved by the board of directors and shall be made with proceeds from the equity, in which case the latter does not need to be decreased, or said acquisition can be made against the capital stock, if and when they are cancelled or converted into issued unsubscribed treasury shares. The shares so held by the company cannot be represented or voted during any shareholders' meeting of any series of shares, nor exercise any corporate or economic right as long as said shares are owned by the company.

Publicly held companies may also acquire their own shares if such acquisition is made through a domestic stock exchange, at market value and the price is paid in similar terms as SAPIs. In any case, the resources destined to the payment of such shares shall not exceed the net profit balance of the company in any given fiscal year, and the company shall not be in default of any payment of registered debentures or securities, among other requirements.

11 Governmental influence

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

Certain business combinations exceeding given thresholds provided by the FCL, defined as the merger, acquiring of control or any other action through which corporations, associations, stocks, equity interest, trusts and assets in general are concentrated (combined) and carried out amongst competitors, suppliers, customers or any other economic agents, must be notified before they are made and may be challenged and sanctioned when their objective or effect is to diminish, damage or deter competition and free access to equal, similar or substantially related goods and services. Other than that, business combinations are not restricted in general.

The following may not be challenged pursuant to said law: the concentrations with a favourable resolution, except when that resolution has been obtained based on false information, and the concentrations that do not require prior notification, a year after they were carried out.

Additionally, mergers and share purchases regarding financial

institutions such as banks, corporations which control financial groups, securities brokers and intermediaries, mutual funds, corporations which operate mutual funds, corporations which distribute shares of mutual funds, authorised warehouses, credit unions, financial leasing companies, financial factoring companies, savings and loans companies, special purpose financial companies amongst other companies are subject to approvals and authorisations from government agencies such as the Ministry of Finance, the NBSC and the Central Bank, as the case may be. In particular, attention should also be paid to international transactions by virtue of which foreign financial entities acquire 51 per cent or more of local financial entities converting the latter into 'affiliates of foreign financial entities'.

Government agencies are not vested with any legal authority to influence or restrict the completion of business combinations including for reasons of national security. Nonetheless, the FIL provides certain express restrictions preventing private investment (either foreign or domestic) in sensitive sectors such as nuclear energy and airport control and supervision activities, among others.

12 Conditions permitted

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, can the financing be conditional?

The conditions allowed basically refer to those mentioned in response to question 9. On the other hand, the financing may be conditional as there are no express limitations or restrictions preventing it.

13 Minority squeeze-out

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

In general terms and pursuant to the GLBC, minority stockholders can be squeezed out by limiting their voting rights, specifically their ability to participate and vote regarding capital increases, even though they would still have pre-emptive rights to subscribe new shares resulting from such increase. In this case, however, such shareholders may face the choice of having to invest a large amount of additional or new capital over which they have no control or for which they receive little or no return, if they do not subscribe the new shares have their proportionate interest in the company reduced or diluted significantly.

More specifically, the SML allows shareholders to adopt almost any type of restrictive covenants and provides that SAPI's shareholders may covenant different schemes such as puts, calls, tag-alongs, drag-alongs, and so on which effect might be the squeezing out of certain shareholders. No specific time frames apply.

14 Cross-border transactions

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

Cross-border transactions may be structured through joint-ventures, mergers in and between a foreign and national entity, and asset or stock purchase agreements. Business combinations involving cross-border transactions in Mexico are usually structured through a joint venture agreement. This agreement is free from any registration requirements.

Foreign issuers may register before the National Securities Registry in order to trade their securities within the Mexican Stock Market. This registry is made public and the National Banking and Securities Commission is in charge of registering securities public offerings, intermediation in the stock market. The Registry will have information regarding public offers abroad, regarding securities issued in Mexico or by Mexican persons.

15 Waiting or notification periods

Other than competition laws, what are the relevant waiting or notification periods for completing business combinations? Are companies in specific industries subject to additional regulations and statutes?

Business combinations are not generally subject to waiting or notification periods; however, merger resolutions shall be recorded in the Public Register of Commerce and published in the *Official Gazette* of the domicile of the companies which are to merge. Each company must publish its last balance sheet and such company or companies as are to disappear will also publish the procedure adopted for extinguishing their liabilities. The merger shall not be effective until three months after the registration aforementioned has been made.

During this lapse of time, any creditor of the merging companies may start summary proceedings to oppose the merger, which shall be suspended until such time as a sentence declaring the opposition to be inadmissible has become final.

The aforementioned period of time having elapsed without opposition being entered, the merger may become effective and the subsisting company or that created as a result of the merger shall take over all the rights and obligations of the companies which disappear. Notwithstanding the foregoing, the merger shall take effect immediately upon its recording if it is stipulated that all liabilities of the merging companies be met, or if an amount sufficient to cover such debts is deposited in a credit institution, or if the consent of all creditors is obtained. For this purpose, all immature debts shall be deemed as having already become due and payable.

16 Tax issues

What are the basic tax issues involved in business combinations?

The merger of companies shall not be considered as a taxable event for federal taxes if the following actions, notices, returns and information are fulfilled: (i) the surviving company shall present a notice of merger to the tax authorities within the month following the date of the merger, and with some exceptions contained in the law, the surviving company must continue to carry on for one year the same activities it was engaged in before the merger as well as those of the merged companies; (ii) the surviving company must present the last annual tax return of the merged company as well as the informative returns; (iii) it is necessary to present notices of cancellation of the registration at the Taxpayers' Registry for each merged company, attaching copy of the minutes of the shareholders' meeting containing the resolution of merger. The merger of companies entails the obligation to audit the financial statements of the surviving company and of the merged company by an independent public accountant; (iv) if real estate is transferred as a consequence of the merger, the surviving or newly created company shall pay the Real Estate Acquisition Tax at the rate prevailing in each state, which currently throughout Mexico is between 2 per cent and 4 per cent on the value of the property; (v) no VAT shall be paid

Update and trends

The relatively new SML aims at further developing a securities market in an efficient and transparent fashion; protect the interests of the investors; minimise the systemic risk involved, foster greater competition and regulate the operational and transactional issues involved in such market. In particular, the SML intends to effectively promote the access of medium-sized companies to the securities market; implement good corporate governance practices and regulations and protection for minority shareholders; improve the legal framework governing publicly held companies (*sociedades anónimas bursátiles*) (PHCs), in order to improve their corporate governance system; make more flexible the legal framework applicable to broker-dealer firms, stock exchanges, securities depository institutions, clearing agencies (*contrapartes centrales*), and rating agencies, among others; provide better-designed regulations applicable to the liability regime applicable to directors and officers; and redefine the roles, authority and liability of the financial entities supervising and regulating the securities market.

in connection with property transferred as a result of a merger of companies if the requirements for not considering the merger as a taxable event are met. The balance of the net taxed profit account of the merged company may be transferred to the surviving or newly created company. Fiscal losses pending amortisation in the merged company are not transferable to the surviving company; (vi) an authorisation from the tax authority will be required to carry out a merger if the company participated in a split-off or merger in the past five years; and (vii) if the merger is being made as a result of a reorganisation of a group of companies, additional requirements must be fulfilled.

The Income Tax Law does not consider for income tax purposes that a merger produces transfer of property among the surviving company and the merged companies if the surviving company complies with the preceding requirements and as long as after the merger, the surviving company continues performing the same activities previously performed by itself as well as by the merged companies, during a minimum period of one year. This requirement shall not be applicable in the following cases: when income derived from the principal activity of the merged company related to the last 12-month tax year proceeds from leasing of goods utilised in the same activity of the surviving company; or when the merged company has obtained its income from the surviving company in more than 50 per cent or the latter has obtained its income from the merged company in more than 50 per cent.

Asset purchases (acquisitions) and joint ventures, on the other hand, may entail tax consequences as the payment of VAT in case assets, tangible or intangible, are sold, or if the transactions produce taxable income under the Income Tax Laws provisions.

17 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

A merger, an asset purchase and any other business combination entailing the transmission of an economic entity, constitute, for labour purposes, a substitution of employer. The acquisition of an ongoing business (assets and employees) entails such concept and the purchaser or acquirer of the business becomes liable with the former employer for all labour compensations and obligations for a period of six months counted as of the date of notification of the substitution to the employees or to the union. After the six-month period only the new employer will be liable.

18 Restructuring, bankruptcy or receivership

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

Business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring process are caught by the provisions of the Law of Commercial Insolvency which even applies to Mexican branches of foreign companies or corporations. Any merger or business combination involving a distressed company must be approved by the receiver or bankruptcy trustee and the court. In case of a merger, the surviving entity will absorb all liabilities, contingencies and obligations entailing an assignment of debt from the merged entity to the surviving one and therefore, creditors of the distressed company may oppose such merger if it impairs the ability of the merged company to pay its debts for which the insolvency or bankruptcy proceeding was initiated. If a business combination

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is proposed as part of a creditors' agreement aiming to the reorganisation of the distressed company, the latter must also be approved by creditors representing 50 per cent or more of the total amount recognised in favour of the recognised creditors and the amount corresponding to secured creditors.

19 Sovereign wealth funds

Are there any regulations governing investments by sovereign wealth funds?

No.