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Contents

Gonzalez Calvillo, S.C. has an M&A practice group composed of six partners, two counsel, 31 associates and six law clerks, with country-leading experience providing legal and business advice to foreign and domestic clients in all corporate, transactional and regulatory aspects of buying, selling or combining companies and businesses across regulated and unregulated industries. The team has participated in all types and sizes of domestic and cross-border transactions involving corporate matters, joint ventures, strategic alliances, planning and implementation of partnerships, negotiated acquisitions, public tender offers for acquisitions, spin-offs, split-offs, LBOs, privatisations, corporate restructurings, private equity, sales and purchases of all kinds of assets, stock, equity interests, and equity-type securities, minority stakes and assets, and capitalisations. The firm's experience includes privatisations of public entities, international public bids and working with entities of the Mexican government in strategic projects. The M&A lawyers are knowledgeable in connected practice areas such as competition and antitrust, project finance, capital markets and general commercial legal issues, allowing them to offer broad support appropriate to complex and cross-border transactions.

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1. Trends

1.1 M&A Market

The pattern of the M&A market for 2019 is yet to be assessed in parallel to the impact of diverse macroeconomic and political factors in the Mexican economy, together with the appetites of investors. Generally, however, it is anticipated that the transactional pace will decrease in certain sectors, and that certain macroeconomic indicators will be negatively affected. According to several sources, the overall M&A market is expected to grow around 14% in 2019 with respect to the number of transactions, and around 71% in deal value.

Reports state that the number of announced transactions in 2018 decreased by 12% with respect to 2017, with a total deal value of USD8.6 billion, 24% less. Notwithstanding, those results have been considered positive for a year in which fewer transactions were expected, derived from an uncertain environment existing amid presidential elections in Mexico and the negotiations of the USMCA (the US-Mexico-Canada Agreement). The sectors that were more active in 2018 were finance, insurance, property, distribution and retail. Mexican companies have primarily invested in the US, Spain and Brazil, whereas foreign investment mainly comes from the US, Spain and Chile.

Likewise, according to public sources for 2019, the value of the transactions is estimated to reach USD14.4 billion, in parallel to a general increase in transactions in Latin America in both number and value. These are expected to reach USD94 billion, which represents a 13% rise in deal value compared to 2018.

There are several reasons analysts have considered that the volume of transactions will increase in 2019. The USMCA is likely to reduce the existing uncertainty over the North American market and most of the potential risks for the economy of the region related to the previous unease from a potential cancellation of the North American Free Trade Agreement (NAFTA). Therefore, suspended or stalled transactions and potential opportunities that were yet to be assessed by investors from a new commercial deal standpoint are likely to be reinstated during 2019.

Additionally, the potential shrinking of the global economy, expected to result from trade wars between Asian and Western economies (China v US) might foster the need of investors and companies in those countries to look for business opportunities abroad, and thus turn their eyes to other targets, such as Mexico.

Finally, the uncertainty prevailing in the market (especially in the public sector) in connection with Mexico's economics and key indicators, the administration of the new president Andres Manuel Lopez (known as AMLO), is expected to reduce the trend of continuous liberalisation of the national economy. It is also likely to shake the market and trigger transactions, including divestments, exits from business ventures and acquisitions derived from transactional price reductions as a result thereof.

1.2 Key Trends

Transactions are likely to continue their pace in sectors that are regularly active in M&A, eg, property, retail, automotive, consumer goods, energy, telecommunications, etc. Due to legislative developments, there has been an increase of activity in other sectors over the past year, such as the FinTech industry, which now grants investors more legal certainty as to the applicable playing field, as a result of the enactment of the Law for the Regulation of Financial Technology Institutions, better known as the 'FinTech Law'. This Law has increased, and is expected to continue doing so, investments and transactions related to start-ups, scale-ups, and cryptocurrencies, among others.

Moreover, the potential liberalisation of the trade of cannabis in Mexico, which is allowed exclusively for scientific and medical purposes, might also result in companies willing to participate, increase and/or protect their stake in the existing market and those developing in the future.

In the education sector, the reforms to several public education-related laws carried out by the past administration resulted in changes to the market in the past. However, AMLO has announced his intention to cancel or modify the amendments to such laws and to create several new public universities. This is likely to encourage competition between old and new players.

In the energy sector, AMLO has indefinitely suspended pending rounds of auctions for oil blocks in the Gulf of Mexico and has also announced that his administration will carry out a thorough review of the contracts awarded previously during the energy reform of Peña Nieto – Mexico's former president. AMLO alleges bid-rigging in the awarding of more than 100 contracts. This might negatively impact inbound investments and transactions, but the market is still expected to be active in 2019.

The continuous and solid development of the information technology industry should continue benefiting operations and increase the number of transactions, through the implementation and creation of innovative tools and technology and resources for electronic commerce. These will allow for seamless, succinct and safer operations and is expected to steadily foster a rise in transactions in several sectors, including logistics.

AMLO's announcement to cancel the construction of the USD13 billion new international airport at Mexico City has been a driver of uncertainty (both economic and legal) for investors. It has affected the country's growth expectations,

according to analysts, who have questioned whether this administration will respect and guarantee Mexico's rule of law.

Additionally, the Federal Government has recently implemented tax incentives and the reduction of taxes in north-bordering cities, aiming to foster investments and develop the creation of jobs. This is likely to increase the appetite of companies to execute operations in the region, both locally and cross-border.

An amendment to the General Law of Business Organisations came into effect in December 2018, whereby the registration in a company's corporate books of partners or shareholders and transfers of equity interests and stock must be notified to the Ministry of Economics. The books must be made available for consultation by third parties who evidence a legitimate interest on being granted access, as certain sensitive information of partners and shareholders will now be publicly available.

1.3 Key Industries

Some of the industries expected to experience significant activity in 2019 are retail and consumer goods, food distribution, property, information technologies, education, healthcare, infrastructure, financial technology, financial services and energy.

Publicly listed investment vehicles such as Real Estate Investment Trusts (FIBRAs) and Trusts that issue Certificates of Capital Development (CKDs), Fiduciary Investment Project Securitization Certificates (CERPIs) and publicly listed Special Purpose Acquisition Companies (SPACs) are expected to be key players within M&As in these sectors.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The legal means for acquiring a company in Mexico are similar to those of any other developed economy. The transactions may be carried out mainly through the transfer of assets, purchase of stock, merger, consolidation or public tender offers.

The process of a normal private acquisition generally involves:

- the execution of a Letter of Intent and/or Memorandum of Understanding;
- a due diligence process;
- clearance by the Federal Economic Competition Commission, the antitrust regulator, in the event the transaction meets the applicable thresholds set forth by the Federal Economic Competition Law, as will be explained below, as well as any other authorisation that may be required from other regulators, as applicable;
- drafting and negotiation of transactional documents; and
- execution and closing of the transaction.

Mexican law, regularly governs transactional documents, thus facilitating enforcement of agreements. However, it is possible to submit to foreign laws. It is also possible and common to submit disputes to arbitration (under international or local rules), instead of Mexican courts, which are the general route for agreements executed under Mexican law.

2.2 Primary Regulators

There is not a specific statute or regulator for M&A transactions, although, depending on the type and the way in which each transaction is structured, the following agencies, among others, may be involved:

- the Federal Economic Competition Commission (COFECE) authorises and issues merger control measures for transactions that meet the thresholds set forth in the Federal Economic Competition Law;
- the Federal Telecommunications Institute (IFT) regulates operations in the telecommunications and broadcasting sector, as well as issuing merger control measures;
- the Mexican Banking and Securities Commission (CNBV) regulates transactions involving securities, financial institutions and publicly traded entities;
- the Mexican Foreign Investments Commission (CNIE) authorises foreign participation in certain sectors, in terms of the Foreign Investments Law;
- the Mexican Social Security Institute (IMSS) regulates procedures involving substitution of employers;
- the Public Registry of Commerce (RPC) records certain corporate acts;
- the Public Registry of Property (RPP) records the transfer of real estate ownership titles; and
- the System for the Publication of Business Organisations (PSM) in the Ministry of Economics publishes the registration of partners or shareholders of business organisations and the transfers of equity interests and stock.

2.3 Restrictions on Foreign Investments

Generally, Mexico is open to foreign investment and most of the industrial sectors are fully liberalised. However, as provided by the Foreign Investment Law, in force as of 1993, there are certain restrictions applicable for a few strategic activities and sectors, which are reserved for government agencies; to Mexican companies that do not admit foreign investors; or where foreign capital ownership is limited to a certain percentage or subject to prior authorisation by the CNIE.

2.4 Antitrust Regulations

Economic competition, concentrations and monopolies are regulated by Article 28 of the Mexican Constitution, international treaties, the Federal Economic Competition Law (FECL) and its Regulations.

The FECL provides that certain concentrations are subject to pre-merger review by COFECE, based on the value of the transaction and/or the size of the parties involved. The relevant amounts to calculate the value of transactions and assets are expressed in units that are adjusted on an annual basis, known as 'UMAs'. For 2019, one UMA is equivalent to MXN84.49, approximately USD4.44.

Pursuant to the FECL, the following transactions must obtain prior authorisation from the COFECE before closing:

- *The test based on transaction value in Mexico:* when the act(s) involved in the transaction, regardless of the place of execution, are worth, directly or indirectly, more than 18 million UMAs (approximately USD79 million).
- *The test based on size of the target:* When the act(s) involved in the transaction result in the aggregation of 35% or more of assets or stock of an economic agent with annual sales originated in Mexico, or assets in Mexico, worth over 18 million UMAs (approximately USD$79 million).
- *The test for control of smaller transactions by large economic agents:* when the act(s) involved in the transaction result in the aggregation in Mexico of assets or capital stock worth over 8.4 million UMAs (approximately USD37 million); and the transaction involves two or more economic agents with annual sales originated in Mexico, or assets in Mexico, worth over 48 million UMAs (approximately USD210 million).

2.5 Labour Law Regulations

A merger or acquisition transaction does not necessarily affect labour relations for the entities involved, as in many cases transfers of property or equity occur at stock ownership level, not affecting the actual operation of the target entity or employment structure. However, acquirers must observe applicable provisions of the Federal Labour Law (FLL), Mexico's statute regulating labour relations.

It is common that as a result of an asset or stock transfer, employees are terminated and/or transferred from one entity to another, depending on the structure of the deal. Here, acquirers must observe the corresponding rules provided by the FLL regarding employee indemnification in case of termination, as well as in connection with the general amendment of employee compensation. The FLL also establishes a specific procedure for transferring employees from one entity to another, without involving the termination or modification of labour conditions (the employer's substitution procedure).

2.6 National Security Review

All transactions, including acquisitions, are subject to complying with the applicable regulatory framework, depending on the characteristics of each transaction, including tax and anti-money laundering provisions. In that regard, Mexico has a well-established framework and a system for detecting illegal transactions. Particularly, the Ministry of Tax and its specialised agency for preventing and detecting transactions carried out with illicit resources, money laundering and finance of terrorism, and the Financial Intelligence Unit (UIF) are the main governmental agencies continuously reviewing transactions in Mexico.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Court decisions in Mexico, as a civil/Roman law-based country, are generally not applied, and their influence in M&A activity is limited. This is with the exception of resolutions forming jurisprudence (ie, five court resolutions from the Supreme Court or Federal Circuit Courts in the same sense or a resolution from the Supreme Court or from a Federal Circuit Court resolving two contradictory resolutions).

The last high-profile judicial resolution in Mexico was in 2015 and resulted in the preclusion to Grupo México from increasing its position in Grupo Aeroportuario del Pacífico, in violation of the 'poison pills' of the company. The case was ultimately resolved by the Mexico Supreme Court in favour of Grupo Aeroportuario del Pacífico.

3.2 Significant Changes to Takeover Law

There have not been any recent significant changes to takeover law in Mexico nor are any expected over the coming year.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

It is common for a bidder to build a stake in the target entity prior to launching an offer for a public company, provided that such stakebuilding strategies are always limited by:

- clauses used to prevent the hostile acquisitions and/or takeovers of the shares of a company known as 'poison pills' in the bylaws of the potential target;
- disclosure provisions that require acquirers to disclose acquisitions of shares of the potential target upon reaching certain thresholds; and
- mandatory tender offer requirements (which generally entail that a bidder who seeks to acquire 30% or more of a public company's capital stock must do so through a tender offer).

As for building a stake in private companies, that usually has more to do with business-end decisions than legal considerations.

4.2 Material Shareholding Disclosure Threshold

Shareholding disclosure and general filing obligations are only applicable to public companies in Mexico. Regarding shareholding disclosure, the following thresholds and requirements must be met:

- any person or group of persons who acquire shares of a publicly traded company resulting in them holding an equity interest equal or greater than 10% and lower than 30%, must inform the general investing public on the next working day;
- related persons (as per the Mexican Securities Market Law definition) of a publicly traded company who increase or decrease their equity interest in the company by 5% must inform the general investing public of the circumstance on the next working day.
- any person or group of persons who holds 10% or more of the shares representing the capital stock of a publicly traded company must inform the CNBV of any acquisitions or sales of shares during any calendar quarter within five working days from the end of the relevant quarter. This applies when the total trading amount performed by the person(s) in the applicable quarter is equal or exceeds the equivalent in Mexican pesos of 1 million Investment Units (Unidades de Inversión). In addition, the person or group of persons shall inform the CNBV about the acquisitions and sales carried out within five working days, when the total amount traded in such term is equal or exceeds the equivalent in Mexican Pesos of 1 million Investment Units, on the next working day after the day the amount is reached, calculating the value of the Investment Unit on the day of the last trade.

As to other filing obligations of publicly traded companies, these must generally disclose continuous reports regarding the overall status of the company to the investing public. These include quarterly and annual reports, reports regarding corporate restructurings (including mergers, spin-offs, and acquisitions or sales of assets), and other events that influence or may influence the price of the public company's stock.

4.3 Hurdles to Stakebuilding

It is possible for a company to introduce lower reporting thresholds if they benefit the general investing public; higher thresholds would clearly violate the provisions of the Mexican Securities Market Law. Other common hurdles are poison pills in the bylaws of public companies, which can include:

- the need of authorisation by the board/shareholders;
- minimum pricing requirements; and
- the implementation of a tender offer.

These apply in cases of acquisitions over certain percentages of the capital stock (ie, 10%, 20%, etc) or acquisitions that would result in a change of control.

4.4 Dealings in Derivatives

Dealings in derivatives are permitted in Mexico.

4.5 Filing/Reporting Obligations

In general, the same reporting obligations for shareholding disclosure, tender offer and poison pill requirements are applicable to derivatives whose underlying assets are shares. Additionally, public companies are required to disclose their positions in derivatives, including those in which the underlying assets are their own shares. Banks and other financial institutions are required to file reports before Mexico's Central Bank (Banco de México) with respect to the transactions they carry out connected to derivatives.

4.6 Transparency

In the case of publicly traded companies, shareholders have to make known the purpose of their acquisition and their intention regarding control of the company. Once a bidder seeks to reach a position of 30% or to gain control of a publicly traded company, it must do so by launching a mandatory tender offer for the company's publicly traded stock. Special requirements may apply under poison pills. To that end, pursuant to the general provisions applicable to Issuers and Other Securities Market Participants (known as the *Circular Única de Emisoras*) any such bidder must disclose, in its prospectus:

- the intention and reasoning for the tender offer being executed;
- the bidder's purposes and plans once the offer has been made; and
- the capital structure of the target company before and after the offer.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Generally, all prior agreements to launching (written or verbal) that are :

- consummated;
- between potential buyers, shareholders, and/or directors of the public target company; and
- related to such public target company, its shares, or the tender offer for its shares must be disclosed at the moment in which the offer is launched.

Also, specific disclosure requirements (eg, relevant events – *eventos relevantes*) regarding the existence of the afore-

mentioned agreements, may apply when the public target company is part of, or has knowledge of, prior agreements; although, generally, the disclosure can be postponed until the definitive agreements are signed and the acts provided have been consummated.

The tender offer filing may be treated as confidential until its authorisation and announcement. Regarding the target company, within ten days of the tender offer launch at the latest, its board of directors must issue a public opinion as to whether it considers the price offered by the bidder reasonable or not from a financial perspective. In issuing such an opinion, the board:

- must take into consideration the opinion of its corporate practices committee; and
- may engage an independent expert to issue a fairness opinion to serve as the basis for its corresponding opinion.

5.2 Market Practice on Timing

Generally, the timing of disclosure in the market practice does not differ from legal requirements.

5.3 Scope of Due Diligence

In the case of a private target company acquisition, due diligence is typically conducted under a broad scope with the purpose of weeding out potential contingencies and liabilities. Depending on the target entity itself, due diligence will cover anything from general corporate organisation and standing to tax matters, loans and other financial commitments, intellectual property, labour and workers' compensation, litigation, environmental issues and property.

In contrast, for the purchase of a public company, due to its nature and to confidentiality provisions, due diligence is generally limited to publicly available information that is presumed to be all the material information that is available. In addition, and as in private acquisitions, representations, warranties and indemnities can be agreed in favour of the purchaser.

5.4 Standstills or Exclusivity

Standstills and exclusivity are possible in the context of public acquisitions but not necessarily common based on Mexican precedents (there are fewer than 40 precedents of tender offers in Mexico, out of which only two are related to a change of control). As for private acquisitions, exclusivity provisions are often included as part of the negotiation phase under the corresponding Memorandum of Understanding (or an equivalent agreement).

5.5 Definitive Agreements

It is permitted to document tender offer terms and conditions in a definitive agreement but it is not commonly based on Mexican precedents. As noted in **5.4 Standstills or Exclusivity**, above, there are fewer than 40 tender offers precedents.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The length of a process for acquiring or selling a business in Mexico may vary depending on several factors, including the type of target asset, the competitive dynamic (ie, whether an auction process is being run), the amount and scope of due diligence required, the closing conditions to which the transaction is subject and the time needed to fulfil applicable regulatory requirements (including sector-specific requirements and merger clearance from the COFECE). Although timing will be highly specific to each transaction, the process can be expected to take a minimum of three-four months from the beginning of discussions to closing.

6.2 Mandatory Offer Threshold

Mexican law does not provide for any mandatory tender offer requirement in the case of the acquisition of shares of a privately owned company.

Regarding Mexican publicly traded companies and subject to certain exceptions, any person who intends to acquire (or to reach by any means) 30% or more of the company's shares is required to conduct the acquisition through a mandatory tender offer for:

- the same percentage of the company's shares that the acquirer intends to acquire (but at least 10% of the company's shares), if the acquirer does not gain control of the company; or
- 100% of the company's shares, if the acquirer intends to obtain control of the company.

Special requirements may apply under poison pills included in the target company's bylaws.

6.3 Consideration

Cash is predominantly used as consideration payable to target shareholders in the acquisitions of both private and public companies.

Stock (or some combination of cash and stock) is sometimes used by a private or public company when acquiring a private company. These stock-for-stock acquisitions are often implemented by means of a merger. Only a few stock-for-stock acquisitions of publicly traded Mexican companies have taken place in Mexico, in each case by another public company through an exchange offer.

6.4 Common Conditions for a Takeover Offer

Tender offers regarding Mexican public companies are often conditional on the bidder obtaining a certain percentage of

the company's shares. Another common condition is the receipt of applicable regulatory approvals.

Mexican law affords the bidder full flexibility in defining the conditions to its offer, provided that such conditions are not contrary to the law, morality or public order. The regulator will require that any conditions be clearly set forth in the offering memorandum.

6.5 Minimum Acceptance Conditions

Common minimum acceptance conditions for tender offers in Mexico are the number of shares required for the bidder to obtain either control of the target (usually 50% plus one share), or the supermajority required by Mexican law to approve the delisting of the target (95% of all shares).

6.6 Requirement to Obtain Financing

An acquisition transaction or business combination in Mexico may be conditional upon the bidder obtaining financing, but this is not common practice.

6.7 Types of Deal Security Measures

A bidder may seek any type of deal protection measure, including break-up fees, matching rights, non-solicitation provisions and force-the-vote provisions.

In the context of a publicly traded company, the approval or opinion of the board of directors could be required regarding such measures, depending on their nature, whereas for a privately owned company, the role of the directors in a takeover situation is limited.

6.8 Additional Governance Rights

In a private company context, a bidder for a non-controlling interest would typically seek protections with respect to governance and information rights, and transferability of its shares.

Governance rights can include the right to designate members of the company's board of directors and supermajority voting or veto rights regarding relevant matters. Information rights can include the right to receive periodic financial information and operating reports, as well as a general right to make reasonable requests for additional information. Transferability provisions can include a right to cause the company to list the shares held by the bidder for trading in public markets, as well as tag-along and drag-along rights.

Regarding public companies, a minority shareholder would generally settle with protections afforded by the target company's bylaws in line with the requirements set forth in the Mexican Securities Market Law.

6.9 Voting by Proxy

In Mexico, shareholders can vote by proxy on the decisions adopted at a shareholders' meeting. Shareholders of public companies typically vote by proxy. Proxies must be granted in writing. With regard to public companies, the proxy format must be prepared by the company and made available to shareholders at least 15 days in advance of the shareholders' meeting. The proxy format must comply with basic requirements of the Mexican Securities Market Law (ie, it must include the company's name, the meeting agenda and enough space for a shareholder's instructions). Proxy solicitation is not common in Mexico.

6.10 Squeeze-out Mechanisms

For private companies, Mexican law permits the redemption of shares as a squeeze-out mechanism, whenever it is expressly contemplated in the company's bylaws.

In principle, squeeze-outs are not permitted for public companies under Mexican law. However, shareholders of public companies may agree to call options (to be provided for in the company's bylaws or a shareholders' agreement) that could be employed as a squeeze-out mechanism. Also, the participation of minority shareholders could be diluted as a result of a capital increase approved in a shareholders' meeting, although all shareholders have a pre-emptive right to acquire new shares issued as a result of the capital increase in proportion to their shareholding.

6.11 Irrevocable Commitments

There has been limited experience of takeover offers in Mexico. Whether a buyer seeks to obtain irrevocable commitments from the principal shareholders of a target company to tender and/or vote in favour of a transaction is highly transaction-specific.

As most Mexican companies have defined controlling shareholdings, including those that are publicly-held, it would seem unlikely to achieve a successful takeover offer without some sort of agreement with the principal shareholders. It would make sense for such an agreement to be negotiated at early stages of the transaction, but timing also depends on the specific circumstances.

7. Disclosure

7.1 Making a Bid Public

If the target company is privately owned, there is no requirement for a bid to be made public, and a bid would not generally be announced.

In principle, publicly traded companies must disclose a bid to the public through the publication of a relevant event as soon as it gains knowledge of negotiations that could result in a change of control. This includes all relevant information regarding the proposed transaction (ie, the acquirer and the seller, the number/percentage of shares to be acquired and the purpose of the acquisition). The target company may

choose to delay disclosure of the bid until the bidder launches a public tender offer for the shares of the company (see below), as long as no information on the proposed transaction is leaked to the public.

Since the acquisition of 30% (special requirements may apply under poison pills included in a target company's bylaws) or more of a public company is required to be conducted through a public tender offer (with previous authorisation from the CNBV), any acquisition bid (negotiated or hostile) would be made public by the bidder during the process of launching the required offer, through the publication of the respective offering materials as required by Mexican regulations.

7.2 Type of Disclosure Required

In connection with a merger or other business combination involving a public target where the shares of the bidder would be issued as consideration payable to target shareholders, the bidder (assuming it is also a public company) would need to disclose, prior to the transaction, an information statement containing details of the transaction (including the share exchange ratio, the business combination rationale and the pro-forma shareholding structure following the transaction), general information of the entities involved in the transaction (ie, bidder and target), and financial information (including pro-forma financial statements) of the bidder.

Where the bidder is not a public entity, it is required to register its shares with the Mexican Securities Registry, which would entail a full authorisation process with the CNBV.

None of these requirements would apply in a business combination between private companies.

7.3 Producing Financial Statements

Only in case of a merger or any other business combination where shares of the bidder would be issued as consideration would the bidder need to disclose financial information (including pro-forma financial statements), as stated previously. Financial statements of the bidder (assuming it is publicly listed in Mexico) would be required to be presented in accordance with International Financial Reporting Standards (IFRS).

7.4 Transaction Documents

Transaction documents are subject to disclosure to the extent they constitute prior agreements or offering documents, as required by the applicable regulators, in the case of publicly traded companies.

Privately owned companies are not subject to disclosure requirements in connection with business combinations.

8. Duties of Directors

8.1 Principal Directors' Duties

Directors of public companies are expressly required by law to act in good faith and in the best interest of the company; to avoid conflicts of interest and to keep confidential all non-public information, within what the law addresses as a duty of care (*deber de diligencia*) and a duty of loyalty (*deber de lealtad*). Lack of fulfilment of these duties carries liabilities, including criminal, which can be claimed through specific actions. The law and the company's bylaws provide obligations directors are expected to comply with: good faith, the company's best interests and a mandate to avoid conflict.

Directors owe a duty to the company and to its shareholders, not to all stakeholders. Board members must abstain from taking advantage of business opportunities of the company. The law provides for an assumption that directors will take advantage of business opportunities for the company.

Under the special action afforded by the law against board members based on a breach of their duty of care or their duty of loyalty, liability for damages can be claimed by the company itself or its shareholders holding 5% or more of the company's stock. The Ministry of Tax, with the prior agreement of the CNBV, is the only body that may initiate an action arising from criminal liability.

Except for a suit arising from wilful misconduct or certain illegal actions, including a conflict of interest, directors' liabilities may be limited by a the company's bylaws. Indemnities and Directors & Officers insurance is also allowed, subject to the same exceptions.

Board members are expressly required to keep confidential all non-public information they hold as a consequence of their role, generally and in business combinations.

A business combination often results in the replacement of board members. New board members are required to disclose to the audit committee and external auditor any irregularities they know of arising from the performance of duties of their predecessors. otherwise they will be held jointly liable.

For private companies, specific duties regarding confidentiality and conflicts of interest apply to directors in terms of the General Law of Business Organisations.

8.2 Special or Ad Hoc Committees

Members of the board with a conflict of interest in a business combination shall refrain from voting on the conflicted business combination and from attending respective board meetings.

Public companies are required to have committees in charge of corporate practices and audit; it is precisely such committees that will be in charge of analysing and assessing the merits of potential business combinations. Such committees must be composed of independent directors. Whether members are eligible to be considered independent is determined by the shareholders under conflict of interest rules established in law.

8.3 Business Judgement Rule

Board members are required to act in good faith and to exercise their duties by aiming at value creation for the benefit of the company, without benefiting specific shareholders. In that sense they must act with due diligence, making reasonable decisions and fulfilling all duties imposed to them under the law and the company's bylaws.

Directors of public companies, hearing the opinion of the corporate practices committee, are required to disclose their own opinion in connection with the price offered and any conflicts of interest. The opinion can be added with that of independent experts.

While the fact that directors fulfil their duties, including rendering an opinion in connection with a business combination, would be central in a court's reliance on whether a business combination is supported legally and in business, it could still review any aspect of business combinations in the context of legal actions exercised under the law.

8.4 Independent Outside Advice

For business combinations of both private and public companies, investment bankers commonly provide outside advice to directors.

As addressed previously, with respect to public companies, directors are required to render an opinion on the reasonableness of the price offered from a financial perspective and any conflicts of interest. The law also provides that the directors' opinions may be added with those of independent experts. Note that many business combinations are completed without independent outside advice.

Likewise, auditors' positions are of relevance in business combinations, in the form of reports directly related to the combination and through background (historical) information.

8.5 Conflicts of Interest

The requirement of not participating in deliberations in connection with business combinations, disclosure obligations, committees' authority in connection with a conflict of interest and limitations the law provides in defensive measures, have all helped avoid conflicts of interest in business combinations. However, competent authorities always carefully review these and as a result, further judicial or other scrutiny is unusual.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are permitted in Mexico. The law and the bylaws of a potential target entity may contain special provisions, including in connection with rules based on minimum percentages to be acquired and acquisition of control, percentages subject to acquisition through public offering, those aiming to protect the target's shareholders through proper disclosure, and in the offer, the acceptance and the process.

That said, hostile tender offers are rare in Mexico and there has only been a very small number in recent years.

9.2 Directors' Use of Defensive Measures

Mexican law allows directors to use defensive measures. These must be set out in the company's bylaws. The law expressly allows that the bylaws contain provisions aiming to prevent shareholders or third parties from directly or indirectly acquiring control of the company, subject to the following conditions:

- being approved by 95% of the shareholders present in a meeting;
- non-exclusion of non-tendering shareholders from any economic benefits resulting from the application of the defensive measure provisions;
- not entirely restricting the acquisition of control of the company;
- when implying board approval for the acquisition of a certain percentage of the company's shares, the provisions must include the criteria the board is required to observe in approving or disapproving the defensive measure, including the fact that this must not take longer than three months; and
- allowing for the proper exercise of economic rights of the acquirer.

9.3 Common Defensive Measures

In some private companies, the need for direct approval from the board to acquire controlling or even less than controlling percentages is a common defensive measure. In public companies, some are based on board approval subject to the limitations discussed. In this sense, super-majority voting, requiring higher than ordinary percentages to approve a merger, rather than simple majorities, may also be in place. Staggered boards are sometimes also a relatively common defensive measure. Voting-rights plans, which separate certain shareholders from their full voting powers at a predetermined point, may also be used under limitations provided in the law.

9.4 Directors' Duties

Directors are required to act under a duty of care and the duty of loyalty already addressed. As also mentioned, directors, hearing the opinion of the corporate practices committee, are required to disclose their own opinion regarding the reasonableness of the price offered and any conflicts of interest. Their opinion can be put together with that of independent experts.

9.5 Directors' Ability to 'Just Say No'

For private companies, directors can 'just say no' and take action that prevents a business combination, if provided for in the bylaws of the target company.

In the case of public companies, directors cannot just say no and take action that prevents a business combination. Note that poison pills can only be implemented by a board of directors in the form and subject to the limitations listed previously, the law and the company's bylaws. This reduces the level of liability of directors when they do act under these limitations.

10. Litigation

10.1 Frequency of Litigation

Litigation is uncommon in connection with M&A deals in Mexico, particularly with respect to public companies. The law has moved forward in recent years in expressly allowing freedom of parties in different types of Mexican entities to agree on drag-along, tag-along, puts, calls and other special rights. Squeeze-out rights, not allowed under Mexican law, have been the subject of lengthy and international litigation in public companies.

10.2 Stage of Deal

While, as discussed, litigation in connection with M&A deals in Mexico is uncommon, it would usually be brought after the negotiation and workout stages have been unsuccessful. The action of securities authorities in public companies would many times prevent litigation, including a thorough preventive review. The fact that rights and obligations related to business combinations are clear enough under the law also helps to prevent litigation.

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11. Activism

11.1 Shareholder Activism

Shareholder activism is not a strongly significant force in Mexico.

Private equity, venture capital and strategic investment activity is considerable and generally occurs in the form of an approach to controlling shareholders and management. Negotiation with groups of minority shareholders is also sought.

Minority rights are afforded to shareholders in private and public companies. In the case of the latter, such rights have a broader scope and lower thresholds for further protection. Disclosure of acquisitions of 5% or more public companies' shares is required in the form of, and subject to, the various hypotheses set out in law.

11.2 Aims of Activists

There is no hedge fund or other parties' significant activism in place in Mexico and the activity of private equity, venture capital and strategic investors usually takes place through an approach to shareholders and management and negotiation with groups of minorities.

11.3 Interference with Completion

Activists do not usually interfere with the completion of announced transactions in Mexico. The disclosure, tender offer and offer acceptance process is carefully regulated by law. Activity by parties increasing their participation in public companies is progressive and subject to disclosure, notice or authorisation requirements.