

Mexico

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1 Form

How may businesses combine?

Usually, businesses combine through a merger. Joint venture agreements are used for new ventures. Asset or share purchase agreements are used as vehicles for acquisitions. Nowadays, public companies are often used to draw financing, of which there are two forms to attract stakeholders: public offerings or tender offers, which may practically be considered as a business combination.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In general, the laws applicable to business combinations are: Mexican General Law on Business Companies (GLBC), Foreign Investment Law (FIL) and its regulations (regarding specific activities), Federal Economic Competition Law (FECL) and its regulations (applicable only when the transaction exceeds the thresholds established therewith), New Securities Market Law which was published in the Official Gazette of the Federation on 30 December 2006 and which will become effective in the main 180 calendar days after said publication (NSML) (mergers, tender offers and public offerings). Furthermore, tax law, such as the Federal Fiscal Code and the Value Added Tax Law, are applicable to business combinations. The Federal Labour Law (FLL) is applicable when there are mergers and asset purchase agreements at hand (substitution of labour liabilities). With regard to 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, ie, financial institutions or companies that have gone bankrupt.

3 Legal documentation

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 and joint-venture agreements thereupon, whereas the CC and FCC are set forth as default provisions and will be applicable only if the GLBC does not foresee a specific rule.

Publicly-held companies, are regulated by the NSML, business combinations thereof will be additionally regulated by general bulletins issued by the National Banking and Securities Commission (NBSC).

4 Filings and fees

Which governmental or stock exchange filings are necessary in connection with a business combination? Are stamp taxes or other governmental 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, and mergers will be effective three months after publication thereof. Registration and publication fees are required.

Regarding joint ventures, the agreements must be in writing and there are no special registration requirements, unless 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 and 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. There are certain filing requirements before tax and foreign investment authorities when dealing with mergers. Filing a merger notification, cancellation of the taxpayers' registry, performing an external audit of the financial statements of both enterprises and presenting the last annual tax return of the merged company, may carry a tax advantage.

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

If the merger falls within the thresholds determined by the FECL, parties to such business transactions must file a notification or petition for an authorisation before the Federal Competition Commission. Furthermore, governmental fees for filing the corresponding notice will apply.

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 NSML provides that companies participating in the Mexican Securities Market should make available to the public certain relevant information and

events which affect the issue, ie, prospectus, corporate acts, relevant administration policies etc, as well as financial, legal and economic status of the issuer. These rules also apply to 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 thereof will be disclosed to the public.

As to private companies, only the information regarding the merger must be published in 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 FECL, if so, the appropriate pre-merger notifications or approval requests must be filed before the Federal Competition Commission.

6 Disclosure requirements for shareholders

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

Mexican law does not require disclosure for shareholders in a company. Publicly-held companies require the disclosure of relevant information to the investment community 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), ie, shareholders, corporate group, subsidiaries, and in kind or cash flow on foreign investment.

Regarding a merger, financial or ending balance sheet information will be disclosed through a publication made in the Official Federal 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 NSML as to publicly held companies', depending on the type of company adopted, 5 per cent 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 NSML, namely duty of care – to act in good faith and in the company's best interest – and the administrator shall act in loyalty to the company, and finally 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 the case of security exchange houses.

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

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 is first call, there must be at least 75 per cent of the corporate capital 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 capital.

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 to court a request to oppose the resolutions adopted by the shareholders' meetings. Regarding publicly-held companies, the NSML requires 20 per cent of the corporate capital 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, 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 will be governed by the NSML.

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 NBSC 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.

The offer shall not include any premium payable to any person or group of persons related to the offeror except for those considerations agreed in the contracts linked to the tender offer which impose certain obligations for the benefit of the offeror or the company, and if and when said covenants were previously approved by the board of directors and disclosed to the public.

The company and the corporations in control of the former, and the directors of the company and other relevant managers shall not perform any acts against the tender offer or that may impair its culmination during a period starting on the date they have knowledge of the tender offer and until this expires.

The board of directors must also produce an opinion in relation to the price of the tender offer and any potential conflicts of interest within a 10-day period after the tender offer becomes effective.

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 among

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) acquisitions that derive from capital reductions by virtue of which a person or group of persons end up holding at least a 30 per cent stake of the ordinary shares; (iii) acquisitions 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; (v) acquisitions made through inheritance, legacies, donation among spouses, concubines and other family members; as well as (vi) any transactions consistent with the protection of minority shareholders' interests, which are subject to the NBSC authorisation.

If any tender offer is carried out in violation of the aforementioned requirements, 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

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

Describe any 'financial assistance' restrictions and how they can affect business combinations.

As a general rule, the GLBC provides shareholders with preemptive rights to acquire new shares being issued; additionally it allows shareholders to establish options in the bylaws in case of third-party bids, and even subjects the transfer or assignment to any third parties to the prior authorisation of the board of directors. Regarding *Sociedades Anónimas Promotoras de Inversión (SAPIs)*, which are stock corporations designed to promote domestic and foreign investment by allowing certain exemptions from general corporate regulations created under the NSML, the shareholders of these may adopt almost any kind of contractual schemes 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 NSML 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 (antitrust) regulations, or in specific industries in which business combinations are regulated, can governmental agencies influence or restrict the completion of business combinations?

Certain business combinations exceeding given thresholds provided by the FECL 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 among 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: (i) the concentrations with a favourable resolution, except when that resolution has been obtained based on false information, and (ii) 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 among other companies are subject to approvals and authorisations from government agencies such as the Ministry of Finance, the NBSC and the Central Bank. 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 them into 'Affiliates of Foreign Financial Entities'.

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 refer to those mentioned in 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

Can 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 preemptive 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 NSML 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, 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 NBSC is in charge of registering securities, public offerings and 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 aforementioned registration 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.

If the aforementioned period of time elapses without opposition, 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 that 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?

Merger of companies shall not be considered as a taxable event for federal taxes if the following actions, notices, returns and information are fulfilled:

- 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
- The surviving company must present the last annual tax return of the merged company as well as the informative returns

- 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
- 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
- No VAT shall be paid 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
- 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
- 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: (i) 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 (ii) 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 and 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

Update and trends

The NSML constitutes the newest trend in connection with the Mexican Securities Market, with a wide array of new regimes and regulations applicable to public offers and tender offers. This new law strives to further develop an efficient and transparent securities market, protect the interests of investors, minimise the systemic risk involved, foster greater competition and regulate the operational and transactional issues involved in such market. In particular, the law aims to promote the access of medium-sized companies to the securities market, through implementing good corporate governance practices and regulations, and providing adequate protection for minority shareholders, as well as an improved legal framework governing publicly traded companies. It also seeks to: improve the operational framework applicable to the stock exchange, brokerage houses and institutions for the deposit of securities and other participants; increase sanctions and penalties for those directors and officers who violate the law; and redefine the

roles, scope and authority of the financial entities supervising and regulating the securities market.

These changes made in the securities law have been expected for a long time by the legal community. The law aims to align domestic regulations with modern international standards; this is particularly true of issues such as disclosure of information to investors, minority rights and corporate governance. The new law is expected to foster venture capital financing, increase the number of publicly traded companies, and boost securities activity in the market, as investors will have more certainty as to the financial information revealed, the protection afforded to minority shareholders, and stricter compliance rules imposed upon directors, auditors and individuals participating in the operation of corporations. Meanwhile, lawyers have welcomed the development, sharing a belief that it will provide a modern and well-designed framework to attract more capital into the market.

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 also 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 and 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 is proposed as part of a creditors' agreement aimed at 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.

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