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Corporate M&A 2024

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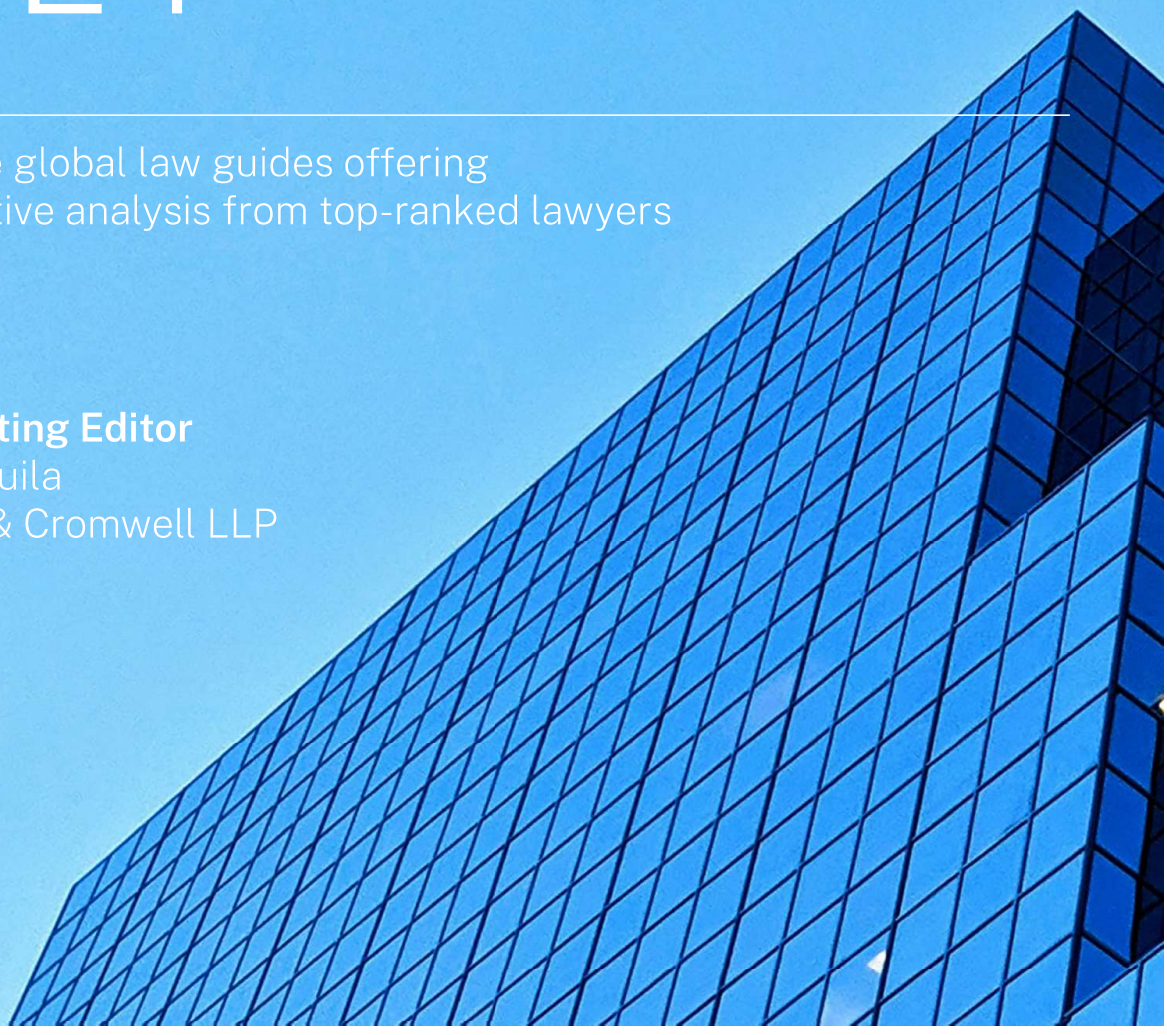
Contributing Editor
Frank Aquila
Sullivan & Cromwell LLP



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Global Practice Guides

Corporate M&A

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2024

MEXICO

Law and Practice

Contributed by:
Carlo Cannizzo, Marco Cannizzo, Stefano Amato and Enrique García
Cannizzo

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MEXICO CONTENTS

Cannizzo was established more than 40 years ago and has, owing to the international education and experience of its lawyers and their deep understanding of Mexican commerce, been a gateway for doing business in the country ever since. The firm has particular experience in the M&A, corporate, infrastructure, banking and finance, real estate and hospitality fields, where it has been one of the most active firms in Mexico and involved in multimillion-dollar M&A, corporate and financing transactions. Cannizzo assists public and private companies in their acquisition and disposition M&A activities, joint ventures and strategic alliances, and private equity investments in a wide range of industries, including regulated ones, as well as offering regulatory advice and related services. The authors would like to thank Emiliano Quiroz and Karla Fajardo for their contributions to this chapter.

Authors

Carlo Cannizzo focuses his legal practice on corporate, M&A, finance, real estate and infrastructure, with specialisms in the hospitality, industrial, manufacturing, services and luxury fashion industries. He has more than 26 years of experience and has participated as lead legal counsel and adviser in many strategic transactions, including mergers, acquisitions and joint ventures, both domestically and cross-border. He is member of the board of directors of several Mexican and multinational companies, some of which are listed on the Mexican Stock Exchange.

Marco Cannizzo focuses his practice on real estate, corporate, foreign investments and M&A transactions, with about 27 years of experience. He acts as counsel for several Italian pharmaceutical companies doing business in Mexico, including Alfasigma, Recordati Rare Diseases, Kedrion and SIFI. He has been involved and has acted as leading counsel in many strategic transactions in Mexico, some of them for several hundred million dollars, including the sales of insurance companies, hotel chains and large retail spaces. He is a member of the board or the secretary of several Mexican companies, some of which are listed on the Mexican Stock Exchange.

Stefano Amato focuses his practice on real estate, corporate, finance and M&A transactions, with more than 22 years of experience. He has been involved and has acted as leading counsel in many strategic transactions in Mexico, some of them for several hundred million dollars, including the sales of insurance companies, pension funds and hotel chains. He has acted as main counsel for large shopping centres, industrial establishments, hi-tech enterprises, foreign banks, entertainment companies and leading international fashion companies, among others. He acts as director for several Mexican companies, some of which are listed on the Mexican Stock Exchange.

Enrique García focuses his practice on real estate acquisitions, primarily tourism and industrial development, real estate structured finance and securitisation, construction deals, corporate and M&A transactions, and government contracts, advising both domestic and international clients on doing business and investing in Mexico, and on cross-border and multi-jurisdictional transactions. He has represented clients including multinationals, private equity funds and their portfolio companies in a wide range of industries, including hospitality, leisure, industrial, commercial and residential, manufacturing, infrastructure and government solutions.

Cannizzo

Moliere 39 - 11
Col. Polanco
Alc. Miguel Hidalgo
Ciudad de México
Mexico C.P. 11560

Tel: +52 55 52 79 59 80
Fax: +52 55 52 80 44 67
Email: cannizzo@cannizzo.com.mx
Web: www.cannizzo.com.mx

1. Trends

1.1 M&A Market

The M&A market in Mexico is the second largest market for M&A transactions in Latin America by volume according to Transactional Track Record's 2023 report. According to the same 2023 report, there was a decrease in the number of M&A transactions registered in 2023 with respect to 2022, with a total of 366 transactions registered for the year.

The leading sectors in the domestic market for M&A transactions during 2023 were industrial, information and technology related services, and real estate, followed by banking, investment, hospitality and leisure. Similarly to last year, the sectors that presented the least activity were energy, infrastructure and telecoms, mainly due to certain legislative reforms and proposals, which continue to cause uncertainty among investors.

1.2 Key Trends

The main trends in Mexican M&A during 2023 related to business expansion as the effects of the 2020 COVID-19 pandemic are slowly starting to dissolve. There has been a clear trend in the modernisation of the way transactions are being carried out, even after the restrictions caused by the COVID-19 pandemic have eased almost completely, as deals are still being closed remotely with the use of new technologies, which reduces costs and time.

Another clear trend has been in the new technologies market, as industry-specific software and IT-related transactions had an 8% increase in relation to 2022.

It is expected that during 2024, the upward trend of nearshoring activities in the country will continue to have a favourable impact on the M&A market, especially in relation to the industrial, manufacturing, engineering, real estate, construction and IT sectors.

1.3 Key Industries

According to information published by M&A Mexico, the leading industries in the domestic market in M&A transactions during 2023 were real estate, industrial, finance, mining, and infrastructure and transport, followed by technology, energy, gas and services.

Some of the most notable M&A transactions in Mexico during 2023, based on their value, were in the real estate and finance sectors.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The main legal mechanisms for acquiring a private company in Mexico are:

- the acquisition of shares or corporate interests through the execution of purchase and sale agreements;
- the assignment of rights agreements or endorsements of the securities representing the capital stock of the company to be acquired;
- acquiring all of the entity's assets; and/or
- a merger with another entity.

The acquisition of publicly traded companies is carried out through a takeover or sale bid (OPA).

2.2 Primary Regulators

As in other jurisdictions, the regulation applicable to M&A depends on the industry where the target company develops its activity. In some industries, apart from the general provisions that

apply to all industries, there are certain aspects which need to be reviewed from a regulatory point of view, such as in the oil, gas, telecoms, infrastructure, financial, insurance and healthcare markets.

In general terms, the primary regulator for M&A activity in Mexico is the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica* or Antitrust Authority), an autonomous body whose purpose is to guarantee free economic competition, as well as to prevent, investigate and combat monopolies, monopolistic practices, market concentrations and other restrictions of the efficient operation of the markets, and the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones* or IFT) for the telecommunications sector. These authorities operate at the federal level, that is, regardless of the domicile of the legal entity relevant to the M&A transaction.

In connection with M&A transactions involving publicly traded companies, the responsible authorities, also at the federal level, are the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores* or CNBV) and the Mexican stock exchanges (*Bolsa Mexicana de Valores* or BMV and *Bolsa Institucional de Valores* or BIVA). Likewise, as mentioned above, in cases of specific industries, other authorities may be involved, such as the National Insurance and Surety Commission (*Comisión Nacional de Seguros y Fianzas* or CNSF) in the event that the relevant transaction relates to the insurance and surety sector.

From the local point of view – ie, of the states into which the country is divided – the authorities that are usually involved in M&A transactions are the Public Registries of Property (Legal Entities Section) in the case of entities such as corporations, or the Public Registry of Commerce in the case of commercial entities in each state.

2.3 Restrictions on Foreign Investments

Mexico is an open country where foreign investments are authorised in most industries and, therefore, foreign investors may participate in any proportion in the capital of Mexican companies. The Foreign Investment Law (*Ley de Inversión Extranjera* or LIE) defines foreign investment as the participation of foreign investors in the capital of Mexican companies, and said law provides the rules regarding the participation of foreign investors in various aspects of the Mexican economy and the industries where there are limitations. By way of example, some of the key limitations provided by the law are set out below.

- Domestic land transportation of passengers, tourism and cargo may only be rendered by Mexicans or Mexican companies with a foreigner exclusion clause.
- In production co-operative companies, foreign investment is limited to 10%.
- In the printing and publication of newspapers for exclusive circulation on Mexican territory, foreign investment may only be up to 49%; this limit may not be exceeded directly, nor through trusts, agreements, social or statutory covenants, pyramid schemes, or any other mechanism that grants control or a participation greater than that set forth.
- A favourable resolution from the National Foreign Investment Commission (*Comisión Nacional de Inversiones Extranjeras*) is required for foreign investment in a percentage greater than 49% in various activities – eg, port services to vessels to carry out their inland navigation operations, such as towing, mooring of lines, and launching.
- A favourable resolution of the Commission is also required for Mexican companies in which

foreign investors intend to participate, directly or indirectly, in a proportion greater than 49% of the capital, only when the total value of the assets of the relevant companies, at the time of submitting the acquisition request, exceeds an amount determined annually by the Commission (currently, approximately USD1.5 billion).

It should be noted that for purposes of determining the percentage of foreign investment in economic activity subject to maximum participation limits, foreign investment that is indirectly made through Mexican companies with a majority of Mexican capital is not included in the calculation, provided that these companies are not controlled by the foreign investment.

Likewise, it is worth mentioning that, notwithstanding the limitations, the Foreign Investment Law authorises, in certain areas having limitations or maximum limits, "neutral investment", where the limitation or maximum limit of foreign investment may be exceeded in Mexican companies or in authorised trusts, through regulator authorisation, in which case the foreign investors will own neutral shares, meaning those with limited voting/control rights.

2.4 Antitrust Regulations

The antitrust regulations that apply to business combinations in Mexico are:

- Article 28 of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*) in matters of economic competition;
- the Federal Antitrust Law (*Ley Federal de Competencia Económica*) and the secondary regulation that the Antitrust Authority has generated to govern its actions; and
- the Federal Law of Telecommunications and Broadcasting (*Ley Federal de Telecomunicaciones y Radiodifusión*).

The Federal Antitrust Law sets forth which mergers – ie, those mergers, acquisitions of control or acts by virtue of which companies, associations, shares, social parts, trusts or assets in general between competitors, suppliers, clients or any other economic agents are joined – must be notified to or, as the case may be, authorised by the Antitrust Authority.

2.5 Labour Law Regulations

M&A transactions are primarily structured through the acquisition of shares, assets or mergers and, depending on the structure of the transaction, in labour matters acquirers should primarily be concerned with the provisions applicable to employer substitution, when a transaction is structured as the acquisition of the assets.

In terms of the provisions of the Social Security Law (*Ley del Seguro Social*), it is considered that there is a substitution of employer when there is a transfer, by any title, between the substituted employer and the new employer of the essential assets related to the operation, with the intention of continuing it, and when the partners or shareholders of the substituted employer are, for the most part, the same as those of the new employer and it is the same line of business.

It should be noted that in the event of employer substitution, the substituted employer will be considered jointly and severally liable with the new employer for labour obligations to the employees that originated prior to the date on which the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social* or IMSS) was notified of the substitution, for up to six months, at the end of which time all liabilities are

attributable to the new employer. In terms of the Federal Labour Law (*Ley Federal del Trabajo*), the six-month term starts on the date on which notice of the substitution was given to the union or to the employees.

However, the updating of the employer substitution can be overcome in the event that the original employer terminates the labour relations in legal terms and that, subsequently, the acquirer enters into new employment relations with the employees and, if applicable, with the respective labour union.

It is also important to consider from a labour perspective, when the transaction is structured as a merger between two or more entities, that they will probably have different unions even when it is the same industry, and it is therefore important to negotiate with the unions before the transaction is closed.

Subcontracting

The Mexican Congress has approved amendments to the Federal Labour Law that prohibit certain subcontracting of employees, when before, in many cases, Mexican companies used to have subcontracting structures for all of their employees or for a significant part of the workforce. These amendments affect the way traditional Mexican companies operate and should be considered in acquisition/M&A transactions.

2.6 National Security Review

In Mexico there are no national security review processes that need to be cleared for transactions to be completed, as is the case for example in the USA with FIRRMA or the European Union. As mentioned in **2.3 Restrictions on Foreign Investments**, Mexico's market is generally open to foreign investment. However, due to Mexico's proximity to the USA and its close relationship and market integration resulting from the United States–Mexico–Canada Agreement (USMCA), it is probable that in the case of certain industries similar to those protected in the USA there will be the need to get a national security authorisation for the transaction to be authorised.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Opening New Markets

Notable recent legal developments relevant to the M&A transactions market in Mexico include those that involve the opening of various markets or industries at the national level: for example, in 2018 the Law to Regulate Financial Technology Institutions (*Ley para Regular las Instituciones de Tecnología Financiera*) was approved, which opened the market to financial technology institutions, including crowdfunding and electronic payment fund institutions and, in general, other players in the fintech ecosystem, such as insurtech and regtech. More recently, the United States–Mexico–Canada Agreement (USMCA), which was ratified by Mexico and entered into force on 1 July 2020, substituting the North America Free Trade Agreement (NAFTA), has managed to consolidate a legal framework for trade among the three countries and has provided additional incentives for companies looking to move their operations to Mexico. The northern region of the country has become an area of focus for many companies which intend to assemble products and export them to the USA and Canada. The signing of the USMCA and nearshoring have significantly contributed to making real estate one of the primary sectors in the domestic M&A market in 2023, as per Transactional Track Record's 2023 report.

Shareholder Rights

Another relevant legislative amendment that impacted the M&A market was the amendment to the General Law of Commercial Companies (*Ley General de Sociedades Mercantiles* or LGSM), which allowed, among other things, shareholders of corporations to make agreements that previously were reserved exclusively to the shareholders of a stock investment promotion corporation (*sociedad anónima promotora de inversión* or SAPI) under the Securities Market Law (*Ley del Mercado de Valores* or LMV).

Thus, for example, under this reform shareholders are entitled to agree on mechanisms that alter voting rights. Accordingly, corporations may:

- provide in their by-laws for the possibility of issuing shares that do not confer voting rights or that restrict voting rights to certain matters;
- grant non-economic corporate rights other than the right to vote or exclusively the right to vote; or
- confer the right to veto or require the favourable vote of one or more shareholders with respect to the resolutions of the general shareholders' meeting.

In addition, under the reform, shareholders may agree drag-along and tag-along rights, call and put options, subscription obligations and forced payments, restrictions on the transfer of shares, mechanisms to be followed in the event that shareholders do not reach agreements on specific matters, and limit liability for damages caused by their directors and officers, etc.

Furthermore, on 20 October 2023, a decree was issued, introducing amendments to various articles of the LGSM concerning the utilisation of telematic means. As a result of this decree, several provisions were introduced regarding the use of telematic means in corporations and limited liability companies. Below are the key points:

- Companies' incorporation deeds must now include additional requirements, specifying rules for conducting partners' meetings and meetings of the management body through telematic means, provided that participation is simultaneous and interactive resolutions are permitted, equivalent to face-to-face meetings. Additionally, mechanisms or measures must be in place to verify the identity of attendees and their voting methods, whether in person or via telematics, for both partners' meetings and management body meetings.
- Partners' and shareholders' meetings, as well as meetings of the boards of directors and managers, may now be conducted through telematic means with the same validity as in-person meetings.
- It is clarified that the use of telematic means will not imply that a meeting is held outside the corporate domicile solely by its use.
- For the annual shareholders' meeting, directors' reports can be made available to shareholders via telematic means, eliminating the requirement for physical availability at the company's office.
- Partners' meetings of limited liability companies must be convened through notice publication in the electronic system established by the Ministry of Economy, in accordance with the by-laws or, if not specified, eight days before the meeting. This alignment in call publication formalities applies to both corporations and limited liability companies, which was previously not provided for.
- The possibility of using electronic signature to fulfil the requirements established in Article

194 of the LGSM regarding the signing of the minutes of the meeting is established.

This reform marks a significant advancement, representing a modernisation and adaptation of legislation to current global circumstances and digital-technological advances. It may also affect corporate transactions from an operational standpoint, as the reform is expected to increase participation in meetings and reduce associated costs.

Supreme Court Decisions

There are few judicial decisions that have been resolved and that have had an impact on M&A transactions. In the last decade there is only one decision that has been issued by the Mexican courts in this regard, namely the jurisprudence with digital registry number 2004913 dated 2013 regarding the moment in which the merger of commercial companies takes place with regard to tax matters. This decision sets forth that the merger – as a complex and contractual corporate business, developed in several successive stages and producing tax effects, among which are the early termination of the merged companies' fiscal year – does not depend on the registration of the merger agreement in the Public Registry of Commerce but is complete from the moment the merger contract or agreement is signed (except when there has been judicial opposition in the summary proceeding by any creditor, provided that it has been declared founded).

3.2 Significant Changes to Takeover Law

Originally, takeover law for private companies was provided for in the Securities Market Law applicable to SAPIs; however, the amended LGSM includes provisions that grant shareholders the possibility of agreeing, among themselves, rights and obligations that set forth purchase or sale options of the shares representing the capital stock of the company. These include:

- that one or several shareholders may only dispose of all or part of their shares, when the acquirer is also obliged to acquire a proportion or all of the shares of another or other shareholders, under the same conditions;
- that one or more shareholders may require another shareholder or shareholders dispose of all or part of its or their shares, when the former accepts an offer of acquisition, under the same conditions;
- that one or more shareholders have the right to dispose of or acquire from another shareholder, who shall dispose of or acquire, as the case may be, all or part of the shares that are the object of the transaction, at a determined or determinable price;
- that one or more shareholders be obliged to subscribe and pay for a certain number of shares representing the capital stock of the company, at a determined or determinable price; and
- other rights and obligations of a similar nature.

The aforementioned provisions have not been modified in the last 12 months and no significant changes are expected in the short term.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

It is common for a bidder to build a stake in the target prior to launching an offer. In this case, the applicable provisions of the target company's articles of incorporation and by-laws, the disclosure obligations under the Securities Market Law and the general provisions issued by the CNBV

for takeover bids that will be explained throughout this guide, must be taken into consideration.

4.2 Material Shareholding Disclosure Threshold

Public Companies

In Mexico there are different material shareholding disclosure thresholds and filing obligations which are included below for explanatory purposes but should not be considered as the only disclosure or notification obligations under Mexican law.

In terms of the provisions of the Securities Market Law, any person who holds less than 10% of the capital stock of an issuer, and acquires, directly or indirectly, shares of an issuer or certificates of participation representing the right to an aliquot part of the ownership of such shares, must inform the CNBV and the stock exchange, for its dissemination among the investing public, no later than the business day following its closing, of any circumstance that results in a shareholding position equal to or greater than 10% and less than 30% of the capital stock of the relevant issuer.

Likewise, persons related to the issuer who increase by 5% the holding of shares of the issuer to which they are related, must communicate such circumstance to the CNBV and to the stock exchange, so that the latter may disseminate it among the investing public no later than the business day following its acquisition.

The person or persons who directly or indirectly own 10% or more of the shares representing the capital stock of corporations registered in the National Securities Registry (*Registro Nacional de Valores* or RNV), as well as the members of the board of directors and relevant officers of such corporations, must inform the CNBV and, in certain cases, the public, of any acquisitions or disposals of such securities.

It will also be important to consider the obligation of the persons or group of persons who intend to acquire or attain by any means, directly or indirectly, the ownership of 30% or more of the common stock of a corporation.

Private Companies

In private companies it is relevant to consider that in June 2018 a second paragraph was added to Articles 73 and 129 of the LGSM, which sets forth that the entries in the special partners' book and in the shares registry book shall be published in the electronic system managed by the Ministry of Economy, it being the obligation of that authority to ensure that the information is kept confidential.

4.3 Hurdles to Stakebuilding

In Mexico it is possible to include in by-laws, or in private agreements entered into by and between shareholders, reporting thresholds different from those provided for in the law in such a way that more restrictive obligations are imposed and that, therefore, at least the minimum requirements provided for in the applicable legislation are complied with.

4.4 Dealings in Derivatives

Dealing in derivatives is allowed under Mexican laws, such as the Securities Market Law and the provisions issued by the Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público* or SHCP) and the CNBV, which have allowed the development and operation of a derivatives market in Mexico. Under Mexican law, derivative financial instruments include securities, contracts or any other legal act whose valuation is derived from one or more underlying assets, securities, rates or indices.

4.5 Filing/Reporting Obligations

Reporting obligations applicable under Mexican laws are no different in the case of dealings in derivatives.

4.6 Transparency

Pursuant to the terms of the General Provisions Applicable to Securities Issuers and Other Securities Market Participants (*Disposiciones de Carácter General Aplicables a las Emisoras de Valores y a Otros Participantes del Mercado de Valores* or the Issuers' Provisions), particularly Exhibit K regarding the instructions for drafting the prospectuses for tender offers, the documents that need to be filed to the CNBV jointly with the applications to obtain authorisation for a voluntary or mandatory tender offer include, among other elements, the intention and justification of the transaction as well as the purposes, plans and consequences of the offer.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

In order to know the stage when, and the authorities before which, a deal shall be disclosed, it will be necessary to consider the type of industry involved as well as to determine whether it will require authorisation from the Antitrust Authority.

In general terms, the obligation to notify or obtain authorisation from the Antitrust Authority, if required, must be made before the consummation of the deal. If the notice is submitted later, it is considered untimely and the Antitrust Authority will be authorised to impose sanctions without prejudice to the administrative, civil and criminal liability of the economic agents and of the persons who ordered or assisted in the execution.

In the case of deals involving public companies, there are two types of disclosure events: those that must be made at the time of the closing of the respective deal and the disclosure of subsequent relevant events. Thus, for example, as indicated in **4.2 Material Shareholding Disclosure Threshold**, the disclosure of an acquisition of certain percentages must be made no later than the business day following the closing of the deal. On the other hand, in terms of the provisions of Mexican stock exchange legislation, issuers must disclose through the stock exchange where their securities are listed, for immediate dissemination to the public, the relevant events defined by the law itself at the time they become aware of them together with all the relevant information in connection with such events.

For private companies, the obligation to give notice to the Ministry of Economy of the execution of a deal, in terms of the provisions of the LGSM and before the tax authority, in accordance with Article 27 of the Federal Tax Code, arises once the deal has been performed.

5.2 Market Practice on Timing

Market practices regarding disclosure do not usually differ from legal requirements.

In the matter of disclosure before the Antitrust Authority, it is possible and common for the parties to agree that the consummation of the transaction is subject to the condition precedent of obtaining the authorisation of the Antitrust Authority.

5.3 Scope of Due Diligence

In the case of business combinations, the practice is for a complete and thorough due diligence to be performed, as in other acquisitions. Some aspects of the due diligence process are still

impacted by the sanitary and administrative measures imposed by both federal and local governments in 2020, as a result of the COVID-19 pandemic. For example, some government offices remain understaffed, which may result in a delay in obtaining certain documents or confirmations needed for the due diligence.

5.4 Standstills or Exclusivity

Both standstill and exclusivity arrangements or provisions are usually included in M&A transactions in Mexico. Rather than contracts, in practice they are included as clauses or provisions in letters of intent and term sheets or other documents setting forth exclusivity until the contract is signed, authorisations are obtained, and standstills restricting certain activities – such as sale of assets, salary increases and sales promotion – are agreed.

5.5 Definitive Agreements

Mexican laws allow for tender offer terms and conditions to be documented in a definitive agreement.

6. Structuring

6.1 Length of Process for Acquisition/Sale

There is no defined timeframe for a sale and purchase process but, depending on the complexity of the negotiation and the need to obtain government authorisations to carry it out, it could take months. A merger authorisation process before the Antitrust Authority or the IFT, depending on the relevant industry, may take more than six months if the relevant authority considers that it is a complex case. In the case of transactions in regulated sectors, the time it takes for the corresponding regulatory authority to authorise the transaction must be taken into account. For example, in the banking sector, authorisation must be obtained from the CNBV, which must hear the opinion of the Mexican Central Bank to authorise an acquisition of shares.

The pandemic led to the implementation of online procedures such as the filing of merger notifications before the official electronic office of Antitrust Authority, which are still in place even after most government agencies and offices have returned to their physical offices.

6.2 Mandatory Offer Threshold

In the case of private companies, there is no threshold determined by law that requires an offer to be made for a certain number of shares.

However, in the case of public companies, and as discussed in **6.4 Common Conditions for a Takeover Offer**, if there is an intention to acquire 30% or more of the ordinary shares of a company registered in the Register, a mandatory takeover bid must be made, which is subject to the following terms and conditions.

- The offer shall be extended to the different series of shares, including those with limited, restricted or non-voting rights.
- The consideration shall be the same, regardless of the class or type of share.
- The offeror shall disclose the commitments assumed with the company or with the holders of the securities it intends to acquire.
- The offer shall be made:
  (a) for the percentage of the capital stock of the company equivalent to the proportion of common shares sought to be acquired in relation to the total of such shares or for 10% of such capital, whichever is greater, provided that the offeror limits its final holding on the occasion of the

offer to a percentage that does not imply obtaining control of the company; or
(b) for 100% of the capital stock when the offeror intends to obtain control of the company.

- The offer shall indicate the maximum and minimum number of shares.

6.3 Consideration

The payment of the consideration for the acquisition of shares or equity securities with cash is more common in Mexico than swaps for other shares or equity securities, a combination of shares and cash, or a merger. The most common practice in the market is to obtain financing.

Depending on the industry involved in the M&A transaction, formulas can be determined so that, at the closing date, the final amount of the consideration to be paid can be determined, avoiding valuation uncertainty, for example, in transactions related to the electricity industry or the financial market. The Issuers' Provisions in the case of tender offers allow the prospectus that is to be filed to the CNBV to set forth the consideration to be paid in terms of the type of securities offered in exchange (instead of a consideration in cash), as well as the procedure for calculating the exchange value.

Said provisions also set forth that the public offering notice submitted to the CNBV for its authorisation may omit information regarding the definitive price and amount, as well as information that can only be known up to the day prior to the beginning of the public offering.

6.4 Common Conditions for a Takeover Offer

Voluntary Tender Offer

Voluntary tender offers are subject to the following terms and conditions determined by the regulator.

- The minimum term of the offer shall be 20 working days.
- Offer allocation shall be on a pro rata basis.
- The offer and its characteristics may be modified at any time before its conclusion, provided that they imply a more favourable treatment for the addressees of the offer or this is set forth in the corresponding prospectus; in the event that the modifications are significant, the term of the offer must be extended for a minimum of five more business days.
- In the case of a modification, the public must be informed of the modifications through the same means by which the offer was made.
- The offeror may not, directly or indirectly, carry out transactions with the securities that are the object of the offer, outside the offer, from the moment it has agreed or decided to carry out the offer and until its conclusion.

Mandatory Tender Offer

If the intention is to acquire 30% or more of the common shares of a company registered in the RNV, a mandatory tender offer must be made, which is subject to the following terms and conditions.

- The offer shall be extended to the different series of shares, including those with limited, restricted or non-voting rights.
- The consideration shall be the same, regardless of the class or type of share.
- The offeror shall disclose the commitments assumed with the company or with the holders of the securities it intends to acquire.

- The offer shall be made:
  (a) for the percentage of the capital stock of the company equivalent to the proportion of common shares sought to be acquired in relation to the total of such shares or for 10% of such capital, whichever is greater, provided that the offeror limits its final holding on the occasion of the offer to a percentage that does not imply obtaining control of the company; or
  (b) for 100% of the capital stock when the offeror intends to obtain control of the company.
- The offer shall indicate the maximum and minimum number of shares.

Issuer Provisions

Mexican law permits any condition if it is not contrary to or prohibited by public interest laws. The Issuers' Provisions provide that the prospectus to be filed with the CNBV must indicate whether there are any conditions to which the offer is subject. The most common condition in Mexico for takeover offers is the authorisation of the transaction by the Antitrust Authority and the CNBV in the case of acquisitions of public companies.

6.5 Minimum Acceptance Conditions

The control threshold in Mexico applicable to tender offers is that the person or group of bidders seeking to obtain control of an issuer by means of a tender offer for less than 100% of the capital stock when the bidder intends to obtain control of the company must complete its application to obtain the corresponding authorisation from the CNBV.

On the other hand, those who, by making a tender offer for less than 100% of the capital stock, cause less than 12% of the paid-in capital stock of the issuer to remain among the investing public are required to extend the offer or to make a second tender offer within 30 days for up to 100% of the capital stock of the issuer on the same conditions on which the original tender offer was made.

6.6 Requirement to Obtain Financing

There are no prohibitions under Mexican laws for a business combination to be conditional on the bidder obtaining financing.

6.7 Types of Deal Security Measures

From a general perspective, there are no limitations with respect to the kinds of deal security measures that a bidder may request, including break-up fees, match rights, force-the-vote provisions and non-solicitation provisions. However, there may be internal limitations provided in the by-laws of the target entity or legal limitations inherent to the security measures, for example, the impossibility of break-up fees that are established as a conventional penalty exceeding the value and amount of the main obligation.

The Issuers' Provisions provide that the prospectus to be filed with the CNBV may include a mention of the right to decline the offer in the event of amendments to the offer that are significant in the opinion of the CNBV. In connection to new contractual considerations or tools for managing pandemic risk in the interim period, there have been certain changes, for instance, in relation to the interpretation of certain provisions, particularly with regard to material adverse changes, material adverse effects, force majeure, acts of God, etc. As a result of the COVID-19 pandemic, parties should make the wording as concise and clear as possible in order to be able to identify precisely whether one of the cases listed therein applies in a given case and to limit its effects depending on its duration and government directives.

6.8 Additional Governance Rights

If a bidder does not seek to acquire 100% ownership of a company, it may agree on the governance rights that work best for it to be included in the target entity's by-laws. For example, veto power in certain matters, the need for its vote with respect to certain resolutions to be taken by the general shareholders' meeting, or the special right to appoint members of the board of directors or officers of the company.

6.9 Voting by Proxy

The representation of the shareholders or partners of any company is possible and common through a power of attorney granted before two witnesses. No notarisation or legalisation is usually required. Usually, the representation or the form of representation is regulated by the provisions of the by-laws of the company.

It is important to consider that, unlike in other jurisdictions, the general rule is that the granting of a specific power of attorney is required for the representative to act on behalf of the partner or shareholder – ie, the mere appointment as an officer or director of the shareholder does not automatically imply the authorisation to act on its behalf.

In the case of public companies, shareholders may be represented by persons who can prove their faculties of representation by means of proxy forms drafted by the company and made available to them through stock market intermediaries or the company itself, at least 15 calendar days prior to the date of the meeting. In addition, in order to participate in the relevant meetings, the share certificates must be deposited with *Indeval Institución para el Depósito de Valores, S.A. de C.V.*, which will issue a certificate of deposit evidencing said situation.

6.10 Squeeze-Out Mechanisms

Some squeeze-out mechanisms used in Mexico are strategies to modify the capital stock of companies or agreements related to the purchase of shares that companies may foresee in their articles of incorporation and by-laws or even in agreements between shareholders. The LGSM provides that the by-laws may include grounds for exclusion of partners or grounds to exercise separation rights, withdrawal rights or rights to redeem shares, as well as the price or the basis for its determination.

6.11 Irrevocable Commitments

It is possible but not common to obtain both irrevocable and revocable offers or voting commitments from major shareholders of the target company. Negotiations with shareholders can be conducted at any stages of the deal. For the fulfilment of this type of commitment, it would be possible to grant irrevocable powers of attorney of the obligor, allowing the attorney-in-fact to exercise voting rights. This type of commitment and the granting of such irrevocable powers of attorney allowing the voting of shares are particularly common in M&A transactions involving financing and the granting of collateral.

7. Disclosure

7.1 Making a Bid Public

A distinction must be made between private and public transactions, since in the first case there is no regulation that obliges the parties to disclose a transaction publicly; the parties involved are free to decide whether to make the transaction public and, if so, at what time. Usually, a press release is made for significant transactions once they have been authorised by all the corresponding regulatory authorities.

In the case of public companies, they have an obligation to disclose any relevant event that may affect the value of their shares, so the confidentiality of the negotiations must be handled carefully until a takeover bid is carried out. The relevant information and documentation related to the request for authorisation of the tender offer must be disclosed to the public on the day of the commencement of the tender offer. In the event of relevant changes with respect to the information disclosed, the same must be substituted.

7.2 Type of Disclosure Required

For the issuance of shares of a private company, it is not necessary to make any kind of prior disclosure for a business combination to take place. If the combination is carried out through a merger, the merger agreements must be published in the Public Registry of Commerce and in the electronic system set forth by the Ministry of Economy, along with the last balance sheet of the companies involved and the system set forth for the extinction of the liabilities of the company or companies that will cease to exist.

In the case of issuers of securities registered in the RNV, they are required to submit to the CNBV and the stock exchange on which their securities are listed the relevant information for immediate dissemination to the general public, through various reports, including reports on corporate restructurings such as mergers, spin-offs, acquisitions or sales of assets.

Finally, according to the Issuers' Provisions, specifically those regarding the instructions for drafting prospectuses, these must contain the purposes and plans of the offeror after the public offering – ie, once it has been approved.

7.3 Producing Financial Statements

In general terms, bidders do not need to produce financial statements in their disclosure documents.

7.4 Transaction Documents

Private companies are not required to disclose transaction documents in full. In the case of public companies, the Issuers' Provisions do provide for the delivery of copies of contracts, acts or prior agreements with other buyers, shareholders and directors of the issuer, that are related to the issuer, its shares or the purchase offer, including the existence of facts or verbal agreements and their result and the draft brokerage agreement to be entered into by the offeror and the intermediary and through which the purchase offer will be made.

8. Duties of Directors

8.1 Principal Directors' Duties

The main responsibilities or duties of directors in the event of a business combination of private companies will derive from the LGSM, the by-laws of each of the companies involved, the meetings at which each of them agrees to merge and the respective merger agreement.

Public companies, both investment promotion corporations (*sociedades anónimas promotoras de inversión*) and stock exchange corporations (*sociedades anónimas bursátiles*) may adopt for their administration and supervision the same or a different regime regarding their integration, organisation and operation. The directors (who must act in good faith and in the best interests of the company and the legal entities it controls, and must not fail in their duty of diligence) and the chief executive officer of the company may be subject to the provisions relating to the

organisation, functions and responsibilities set forth in the Securities Market Law; otherwise, they will be subject to the regime of organisation, functions and responsibilities set forth in the LGSM.

In accordance with stock exchange legislation, the members of the board of directors shall perform their duties in such a way as to create value for the benefit of the company without favouring a particular shareholder or group of shareholders.

8.2 Special or Ad Hoc Committees

It is common for boards of directors to set forth special ad hoc committees in business combinations, including those that may be used when one or more directors have a conflict of interest. In the latter case, additionally, the members of the board of directors who have a conflict of interest in any matter must abstain from participating in the deliberation and voting on the respective matters.

8.3 Business Judgement Rule

In the case of public companies, the Mexican courts assume that the members and secretary of the board of directors of publicly traded companies, who have a conflict of interest in any matter, will abstain from participating in the deliberation and voting on such matters.

The same happens in the case of private companies, where the law presumes that the directors who have an interest opposed to that of the company must declare it to the other directors and abstain from all deliberations and resolutions, considering that the director who contravenes this provision will be liable for the damages caused to the company.

8.4 Independent Outside Advice

In the case of private companies in Mexico, external auditors are usually a form of independent outside advice, while in the case of public companies the external auditor of the company may also be called to the meetings of the board of directors, as a guest with a voice but without a vote. Auditors must abstain from being present with respect to those matters on the agenda in which they have a conflict of interest or that may compromise their independence, and in many contexts an opinion issued by them will be required.

Likewise, it will be important to consider the requirements set forth by the stock exchange legislation regarding the members of the board of directors who must comply with the "independence" requirement and who must be selected for their experience, capacity and professional prestige, also considering that, due to their characteristics, they may perform their functions free of conflicts of interest and without being subject to personal, patrimonial or economic interests.

8.5 Conflicts of Interest

The courts in Mexico have not produced many significant precedents with respect to conflicts of interest of directors, managers, shareholders or advisers; however, the legislation on the matter is extensive and quite complete.

9. Defensive Measures

9.1 Hostile Tender Offers

The Securities Market Law does not prohibit hostile takeovers and even recognises the right of companies to agree mechanisms in their by-laws that allow them to defend themselves against this type of operation.

Notwithstanding the above, it is important to mention that the Mexico securities market is very small in comparison with those of other jurisdictions such as the USA, which has a large number of listed companies and a very dynamic market. The only case in which a hostile takeover was intended to take place in Mexico was in 2015 and the target company had a mechanism to prevent a hostile takeover of the company that was declared valid by the Mexican Supreme Court. In 2021 there was another attempt for a hostile takeover between publicly listed real estate companies; however, after the implementation of a poison pill, the parties involved reached an agreement for the acquisition.

9.2 Directors' Use of Defensive Measures

The directors may use defensive measures against a takeover if these faculties are provided for in the by-laws of the target company, since neither the Securities Market Law nor the LGSM provide – in the catalogue of powers of attorney of the board of directors – for the use of defensive measures before a takeover. In general, this power of attorney is provided for in the shareholders' meeting.

In the event that such a power of attorney for the directors is not provided for in the by-laws, the participation of the board of directors could occur as long as they present to the meeting the information to which they have had access, or on the basis of which they consider it appropriate to reject a transaction and therefore make use of the defensive measures available to the company.

9.3 Common Defensive Measures

The by-laws may include clauses setting forth measures to prevent the acquisition of shares that grant control of the company to third parties or to the shareholders themselves, either directly or indirectly, provided that such clauses:

- are approved at an extraordinary general shareholders' meeting at which 5% or more of the capital stock represented has not voted against them;
- do not exclude one or more shareholders, other than the person seeking to obtain control, from the economic benefits;
- do not absolutely restrict the acquisition of control of the company; and
- do not contravene the provisions of the Securities Market Law for mandatory takeover offers or nullify the exercise of the acquirer's economic rights.

The hostile takeover prevention measure provided for in the by-laws of a target company, mentioned in **9.1 Hostile Tender Offers**, was a 10% shareholding limit scheme. The company that wanted to carry out the hostile takeover reached a stake of almost 25% of the target company's capital. The Mexican Supreme Court of Justice, in ruling on the validity of the defence mechanism of the target company, obliged the purchaser to reduce its equity interest to the limit established in the by-laws of 10%. The second example mentioned in **9.1 Hostile Tender Offers** included the implementation of a poison pill by the target company. However, there is no evidence that the hostile takeover defence measures have changed as a direct result of the pandemic. The prevalence of defensive measures has not changed noticeably because of the pandemic.

9.4 Directors' Duties

Directors must generally comply with the duties of diligence and loyalty to the company and its shareholders, which translates into acting in

good faith and in the best interest of the company, specifically:

- having sufficient information to make decisions;
- requesting the opinion of experts who can provide information for making decisions;
- adjourning board meetings if it is not considered that sufficient or necessary information is available to make decisions; and
- avoiding participating in deliberations and decision-making if there is a conflict of interest on the part of the relevant director.

These duties are applicable to a possible acquisition. The decision to carry out a transaction or not must be based on relevant and sufficient information to identify whether the transaction involves a benefit for the company, and without there being a conflict of interest. When determining the use of defensive measures to prevent a transaction, the directors should evaluate whether they are not causing harm to the company and consequently failing to comply with their fiduciary duties.

9.5 Directors' Ability to "Just Say No"

The faculties of directors are usually provided for and delimited in the by-laws of the companies; their authority to oppose a transaction must be provided for in such by-laws or in the law. In any case, the directors must act in accordance with their duties of diligence and loyalty, even in the case of private companies to which the LGSM applies. Although the LGSM does not expressly provide for such duties – whereas the Securities Market Law does – it does consider the exercise of a liability action against the directors in the event of damage being done to the company, which occurs when the aforementioned fiduciary duties are not complied with.

In the case of public companies, it should be noted that, according to the Securities Market Law, the possibility of implementing measures to prevent a takeover of a company is subject to certain requirements and conditions (as mentioned in **9.3 Common Defensive Measures**) that the directors must consider and comply with if they consider that it is necessary to make use of such mechanisms.

10. Litigation

10.1 Frequency of Litigation

M&A litigation is still uncommon in Mexico.

10.2 Stage of Deal

Most of the litigation that exists in this area relates to agreements between shareholders, and general agreements regarding the exercise of voting rights, compulsory purchases of shares, options, the tax effects of mergers and acquisitions, etc. As noted, M&A litigation is still uncommon in Mexico.

10.3 "Broken-Deal" Disputes

Although there are few jurisdictional controversies on the subject, from recent transactions related to the matter we can infer the clear relevance of an in-depth analysis of defence mechanisms in hostile takeovers, and the compliance of such mechanisms with the applicable provisions.

11. Activism

11.1 Shareholder Activism

Shareholder activism in Mexico in an attempt to provoke a change within the company or in the favour of the activists is considered an important force when the relevant shareholder has

control or a significant percentage of the capital stock of public or private companies. Likewise, shareholders may play an important role in the decision-making process by being part of committees or even on the boards of directors of such companies. It will be important to consider the existence of minority rights provided for in the relevant legislation.

11.2 Aims of Activists

Shareholder activism in Mexico in an attempt to provoke a change within the company or in the favour of the activists is considered an important force when the relevant shareholder has control or a significant percentage of the capital stock of public or private companies. Likewise, shareholders may play an important role in the decision-making process by being part of committees or even on the boards of directors of such companies. It will be important to consider the existence of minority rights provided for in the relevant legislation.

In the second example mentioned in **9.1 Hostile Tender Offers**, a case of shareholder activism was responded to by the target company with the implementation of a poison pill to compel the buyer to modify the terms for the acquisition. However, in Mexico many public listed companies are family-owned, which appears to result in the relative unlikeliness of shareholder activism for these types of company.

11.3 Interference With Completion

In Mexico, activists interfering with announced transactions is not common, except through the aforementioned mechanisms for exercising shareholding rights.

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