

## The Mergers & Acquisitions Review: Mexico

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*Gonzalez Calvillo SC*

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### Overview of M&A activity

Similar to the rest of the world, Mexico is still dusting off the effects of the covid-19 pandemic and is already looking into a forthcoming global and domestic recession. This is paired with a government headed by Andrés Manuel López Obrador (AMLO), who is almost in his fourth year of tenure, a government that has not favoured investments and economic development in our country, but rather has been protectionist and nationalistic.

AMLO's government has kept foreign investors wary and at bay after some continued controversial decisions; most notably his efforts to revoke the energy reform, the cancelation of relevant projects such as the new Mexico City airport and the Constellation Brand's plant in Baja California back in 2020, and the endorsement of massive public projects such as the Dos Bocas Refinery and the Tren Maya, of whose economic viability has been questioned, to say the least.

Conversely, Mexico's privileged geopolitical position in the context of a stressed relationship between the United States and the east (China and Russia) has resulted in an opportunity for economic growth and to become the main commercial partner of the biggest economy in the world. Furthermore, a shift in the profile of investors in our country, from conservative to risk friendly, has created buy-sale transactions and economic activity. Finally, Mexico remains a big consumer economy with significant growing potential, and a country that requires significant investments in the energy and infrastructure sector.

Considering the foregoing and despite the challenges, according to public sources, M&A deals resurged in 2021, although this surge could be followed by a moderate slump that results from the increase in interest rates and high inflation.

As per Transaction Track Record in 2021, 394 M&A deals were recorded in Mexico with a disclosed value of USD\$19.4 billion.

### General introduction to the legal framework for M&A

Mexico has a civil law system with its main body of law codified into a series of written statutes. Thus, judicial decisions and precedents have a relevant but limited role.

There is no single statute dealing with M&A but rather a body of intrinsic regulations that apply, depending on the deal structure and the regulations applicable to the target.

The more relevant statutes generally governing M&A activity include:

- a. the Federal Commercial Code, which is the primary statute governing commercial matters in Mexico;
- b. the Federal Civil Code, which contains the main civil regulations and supplements the Federal Commercial Code in matters not specifically regulated therein;
- c. the General Law of Business Companies, which regulates the formation and operation of Mexican commercial entities, including corporations and limited liability companies;
- d. the Foreign Investment Law, which contains the legal framework applicable to foreign investments, including limitations in certain sectors;
- e. the General Law of Negotiable Instruments and Credit Transactions, which contains the regulatory framework applicable to financing transactions, including credit agreements and commercial collateral; and
- f. the Federal Antitrust Law (FAL), which is the main statute governing antitrust matters in Mexico, including antitrust clearance.

In addition to the above, any transaction involving a regulated entity or activity would require an analysis of the relevant regulatory framework to determine its effects in the deal. Examples of this special regulatory framework applicable to M&A activity include:

- a. the Securities Market Law, which deals with, among others, securities issuers, public offerings, including tender offers, and regulates the securities market and its participants (e.g., stock exchanges, brokers and investment advisors);
- b. the Banking Institutions Law, which is the regulatory framework applicable to Mexican banking institutions;

- c. Ancillary Credit Organisations and Activities Law, which regulates a wide range of financial entities that conduct financial regulated activities (e.g., credit, financial leases and factoring); and
- d. the Federal Telecommunications and Broadcasting Law, which deals with all matters related to this sector, including antitrust review.

As for regulators, as in the case of applicable laws and regulations, their involvement depends on the characteristics of the transaction, such as the nature of the target (non-regulated versus regulated) and deal size, and the following agencies may be involved:

- a. Federal Antitrust Commission (COFECE). Among others, COFECE authorises and issues merger control measures for transactions (other than those related to telecommunications and broadcasting) that meet the relevant thresholds in the FAL (as further discussed below);
- b. Mexican National Commission of Foreign Investment (CNIE). The CNIE authorises foreign participation in certain sectors that have foreign investment restrictions in terms of the Foreign Investment Law;
- c. Mexican Banking and Securities Commission (CNBV). The CNBV is the main financial and securities regulator in Mexico and, as such, it oversees transactions involving securities, financial institutions and issuers;
- d. Federal Telecommunications Institute (IFT). The IFT regulates transactions related to the telecommunications and broadcasting sectors, and acts as the merger control agency in such sectors;
- e. Energy Regulatory Commission, which regulates the power industry and is responsible for the issuance of all permits for power generation, as well as oil and gas downstream and midstream activities;
- f. Public Registry of Commerce (RPC). The RPC records corporate acts that are generally implemented in M&A transactions; and
- g. Public Registry of Property (RPP). The RPP records the transfer of title deeds in the context of asset deals, involving real estate.

As mentioned above, court decisions play a significant role in the Mexican legal system but are limited in their reach, as they only have general application when constituting jurisprudence, which result from five uninterrupted court resolutions by the Mexican Supreme Court or Federal Circuit Courts in the same sense, or from a resolution from the Supreme Court or the Federal Circuit Courts resolving two contradictory resolutions. Considering the foregoing, decisions of jurisprudence rarely take place in our M&A sector.

### **Developments in corporate and takeover law and their impact**

There have been no major amendments to legislation of M&A. That said, one important development has been the increasing number of 'take private' transactions, whereby publicly traded corporations have sought to delist from the relevant Mexican stock exchanges. This is due to which players in the Mexican securities market have deemed to be a heavy regulatory burden. Moreover, such circumstance has naturally resulted in more tender offers, which had been traditionally scarce in Mexico. The rules regarding takeovers of Mexican publicly traded companies are set out within the Mexican Securities Market Law and its regulations.

### **Foreign involvement in M&A transactions**

Owing to its geopolitical location and the North America's Free Trade Agreement (USMCA), Mexico shares significant activity with the United States and Canada, and has traditionally been a receiver of significant investments from these countries. Furthermore, as a result of a shared historical and cultural legacy, significant activity has existed between Mexico and Spain.

Before the 1990s, Mexico had been protective against foreign investment, with several sectors and industries fully or partially closed to foreign investors.

However, most of those closed sectors and industries have been opened in an effort for Mexico to become an attractive destination for foreign investment.

Mexico's Foreign Investment Law sets out the few remaining restrictions applicable. Among these are coin minting, the issuance of paper currency, land passenger and freight transportation, and radio broadcasting.

### **Significant transactions, key trends and hot industries**

Recently, most M&A activity in Mexico has been related to the services, consumer, materials, industrials and information technology industries, the latter being of special relevance in the context of a shift from brick and mortar hubs to virtual and easily accessible consumer platforms. However, owing to a shift in public policy, sectors like the energy industry have generally shown a slowdown.

One transaction of special relevance in Mexico is the sale process engaged by Citigroup of its subsidiary Citibanamex (formerly Banamex) – Mexico's fourth largest bank, originally founded back in 1884 and acquired by Citigroup in 2002. Although there is yet no clear picture as to when the deal will occur or who the acquirer will be, this deal is expected to be highly relevant.

Another deal that is worth mentioning is the US\$4.8 billion merger between Televisa, a Mexican multimedia mass media company, and Univision, an American Spanish-language free-to-air television network.

Some other special mentions are the purchase of Ricolino by Mondelez, the tender offer of Grupo Aeromexico, the purchase of a significant stake in OMA by Vinci Airports and the upcoming tender offer for Aleatica.

On a related note, there is appetite in the Mexican startup sector, as more and more buyers are looking into these companies in order to acquire IP, data, fintech and engineering prowess.

Lastly, there has been a lot of speculation on the legalisation of cannabis and cannabis-related products. The related bills have somehow lost traction in congress but, when (if) passed, this sector could result in strong investment opportunities.

## **Financing of M&A: main sources and developments**

Structuring M&A transactions with proceeds obtained from financing sources is common. As in other jurisdictions, debt commitment letters are sometimes used to provide comfort to the seller that the buyer will indeed have the resources to close the deal and pay the purchase price.

Fully fledged leveraged buyouts – including structures where the acquired company or assets serve as collateral – to carry out an M&A deal is also usual. Seller financing arrangements are uncommon, but they can and have been structured in the past.

Finally, transactions or business combinations in Mexico may be conditioned upon the buyer obtaining financing.

## **Employment law**

The relevance of employment and social security matters will vary greatly depending on the structure of the M&A transaction, mainly on whether it is an asset or an equity deal.

In equity deals in which the acquisition is carried out at the stock-ownership level with the target entity remaining unaffected, employment-related issues are normally minimal to the extent that they are adequately handled by the target. That said, when in the face of an asset deal where the transaction involves the actual transfer of assets (including employees) from one entity to another, then Mexico's Federal Labour Law (FLL) and its regulations set out the rules to be followed for such transfer.

The most common way to acquire or transfer employees in Mexico is either to:

- a. terminate the labour relationship of the employees with their current employer (i.e., seller) and have them subsequently re-hired by a new employer (i.e., purchaser); or
- b. to carry out an employer substitution pursuant to the FLL, which entails an automatic transfer of employees.

Generally speaking, the first process (termination and re-hiring) will require the payment of accrued salaries and benefits to the terminated and re-hired employees, with the cost being assumed either by the seller or purchaser depending on the deal economics.

The second process (employer substitution) operates as a matter of law when a 'transfer of business' is deemed to occur. The employment relationship of any transferred employees remains unaffected, as the purchaser would acquire the obligations and rights of seller (as previous employer). Similarly, employment conditions and benefits cannot be modified, and seniority must be recognised.

Both processes must be assessed with the specifics of a deal in mind as concerns of joint-liability, severance and liability, among others, must be dealt with accordingly.

Finally, employment matters must be duly reviewed by the buyer as part of the due diligence as they can represent material liabilities depending on the size target. These will also be dealt with through representations and warranties and the corresponding indemnities. Market practice in Mexico is somewhat divided as to whether 'reps' on employment matters should be considered 'fundamental representations' and thus not subject to standard indemnity limitations.

## **Tax law**

There have been few developments and changes in tax legislation in connection with M&A. The last development worth mentioning is a judicial decision by Mexican courts back in 2019 in the context of an M&A deal for tax purposes. Stating that the relevant merger agreement will be deemed to be entered into – for tax purposes – at the moment it is signed.

## **Competition law**

Antitrust compliance is generally regulated by Article 28 of the Mexican Political Constitution, applicable international treaties, the FAL and its secondary regulations. This includes concentrations and monopolies.

In the context of M&A, the FAL sets out that certain concentrations are subject to pre-merger clearance review by COFECE. Such review will be based and depend on the value of the potential transaction or the size of the parties involved, or both.

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. As of 2022, one UMA is equivalent to approximately US\$4.81.

Pursuant to the FAL, in the event that an M&A transaction meets any of the following scenarios, antitrust clearance by COFECE will be required before closing:

- a. transactions worth, directly or indirectly, more than 18 million UMAs (approximately US\$86 million);
- b. transactions resulting in the accumulation of 35 per cent 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 US\$86 million); and
- c. transactions resulting in the accumulation in Mexico of assets or capital stock worth over 8.4 million UMAs (approximately US\$40 million) and involving two or more economic agents with annual sales originated in Mexico, or assets in Mexico, worth over 48 million UMAs (approximately US\$230 million).

Merger clearance is jointly requested by both parties and is typically structured as a condition to closing.

## Outlook

The year 2021 was a prolific one for M&A activity regardless of several global and domestic challenges. That said, it is yet to be seen if that trend will continue or if macro and micro economic circumstances will hinder M&A deals. Expert opinions are divided.

It will ultimately come down to whether Mexico – as a whole – will be able to withstand the global recession that is sure to come. To the extent that it does, then it will likely continue to show M&A activity notwithstanding the political and social aspects detailed above. In any case, both buyers and sellers will have a careful, steady and risk-averse approach when structuring M&A transactions in Mexico. If this will continue to represent a surge, or if it will become a slump, is yet to be seen.

## Footnotes

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