

## Mergers and Acquisitions (public): Mexico

Resource type: Article: know-how

Status: Law stated as at 01-Mar-2012

Jurisdiction: Mexico

A Q&A guide to public mergers and acquisitions law in Mexico.

The country-specific Q&A looks at current market activity; the regulation of recommended and hostile bids; pre-bid formalities, including due diligence, stakebuilding and agreements; procedures for announcing and making an offer (including documentation and mandatory offers); consideration; post-bid considerations (including squeeze-out and de-listing procedures); defending hostile bids; tax issues; other regulatory requirements and restrictions; as well as any proposals for reform.

For a full list of recommended M&A lawyers and law firms in Mexico, please visit *PLC Which lawyer?*

To compare answers across multiple jurisdictions, visit the *Country Q&A tool*. This Q&A is part of the PLC multi-jurisdictional guide to mergers and acquisitions law. For a full list of jurisdictional Q&As visit [www.practicallaw.com/acquisitions-mjg](http://www.practicallaw.com/acquisitions-mjg).

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## M&A activity

### 1. What is the current status of the M&A market in your jurisdiction?

The Mexican M&A market is relatively thin compared to the international M&A market. Due to the world economic downturn and other domestic factors, during 2011 the Mexican market's deal volume contracted, and remains well below the 2006 to 2008 period. The M&A market is expected to improve during 2012, and the first quarter of 2012 already points to a higher volume and number of transactions. The largest M&A deal over the past year (and by far the largest merger in Mexico) was the acquisition by America Movil of Telefonos de Mexico. America Movil paid MXN62.5 billion (as of 1 March 2012, US\$1 was about MXN13) to the shareholders of Telmex who participated in the offer.

### 2. What are the main means of obtaining control of a public company?

Public tender offers and legal mergers are the main means of obtaining control of a public company.

## Hostile bids

### 3. Are hostile bids allowed? If so, are they common?

Hostile bids are allowed under the Securities Exchange Act (*Ley del Mercado de Valores*) but are extremely unusual due to the fact that most of Mexico's public companies are tightly controlled by a small group of persons (often family related). It is therefore very difficult to acquire control of a public company without having a prior arrangement with the controlling shareholders of the target.

## Regulation and regulatory bodies

### 4. How are public takeovers and mergers regulated, and by whom?

The National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) (Commission) is the main regulator of the Mexican securities market. Public takeovers are mainly regulated by the:

Securities Exchange Act.

General Regulations applicable to Issuers of Securities and Other Participants of Exchange Markets (*Disposiciones de Carácter General Aplicables a las Emisoras y a Otros Participantes del Mercado de Valores*).

Mexican Stock Exchange Internal Regulations (*Reglamento Interior de la Bolsa Mexicana de Valores*).

## Pre-bid

### Due diligence

#### **5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?**

Although it is common that a bidder carries out due diligence before the bid, its scope is limited because there is little information in the public domain. Public companies need only disclose their main corporate information, quarterly financial statements, relevant events and the annual report containing relevant information about the public company during the year. In light of this, the bidder and the management or controlling shareholders of the target usually pre-arrange the information that will be provided to the bidder before the offer (as hostile bids are uncommon).

### Secrecy

#### **6. Are there any rules on maintaining secrecy until the bid is made?**

Generally, secrecy must be observed until authorisation for the bid is obtained from the Commission (*Securities Exchange Act*).

### Agreements with shareholders

#### **7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?**

It is common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares. When applying for the authorisation from the Commission for the bid, the bidder must provide a copy of any prior arrangement with shareholders, board members or other acquirers related

to the bid (whether it be a memorandum of understanding, a transaction agreement or any other similar document). Even if the agreement is verbal, the bidder must provide the main terms.

## Stakebuilding

### **8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply?**

Under the Securities Exchange Act, certain acquisitions of the capital stock of a target must be disclosed to the public and to the Commission (regardless of whether the bidder already has a stake in the target). These include:

Any person related to the target that, directly or indirectly, increases or decreases by 5% their participation in the target's capital stock must inform the public through the Mexican Stock Exchange (*Bolsa Mexicana de Valores*) no later than the next business day.

Any person or group of persons who acquires, directly or indirectly, 10% to 30% of the ordinary shares of the target must inform the public through the Mexican Stock Exchange, on the next business day.

A person or group of persons who owns, directly or indirectly, 10% or more of the target's capital stock, as well as the members of the board of directors and relevant officers, must inform the Commission of the acquisitions or transfers made of the target's capital stock.

Bidders that intend to build a stake in the target of 30% or more must make a mandatory tender offer.

## Agreements in recommended bids

### **9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?**

It is common to have a formal agreement previously negotiated and agreed between the bidder and the shareholders of the target, which can be set out as a transaction agreement, a memorandum of understanding or other similar agreement.

The most typical obligations covered in this type of agreements are:

The bidder's obligation to launch the offer.

Terms and conditions, including price, duration, minimum shares to be tendered and other conditions precedent.

The selling shareholders' obligation to tender their shares.

Break fees.

Representations and warranties and related indemnifications.

Non-compete provisions.

Choice of law and forum.

Other miscellaneous provisions.

If the bid involves a merger, then a merger agreement is required under corporate law and practice, which customarily provides the rules of the merger (for example, ratio for the exchange of shares, transfer of assets and liabilities).

The target's board cannot undertake not to solicit other bids; and typically the target's controlling shareholders covenant not to solicit other bids. This obligation is contained in the agreement between the bidder and the target shareholders executed before the bid.

## **Break fees**

### **10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?**

Break fees are permitted and are commonly used as a deal protection device. Typically, break fees (which can be a fixed amount or a percentage of the purchase price) are agreed between the bidder and the target or its controlling shareholders in an acquisition or transaction agreement executed before the tender offer.

While there are no express statutory restrictions on the amount of a break fee, it must be reasonable considering the offer price, because the Commission has authority to limit a break fee if it considers that it is so high that it may prevent the solicitation or acceptance of a better bid.

## **Committed funding**

### **11. Is committed funding required before announcing an offer?**

Committed funding is not required before announcing an offer.

## **Announcing and making the offer**

### **Making the bid public**

**12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?**

A bid can be publicly disclosed once it is approved by the Commission. Nonetheless, when the bidder applies for the authorisation there is a preliminary publication of the main terms and conditions of the offer, without disclosing certain confidential information.

The length of the authorisation process varies and there are no mandatory timelines for the Commission to approve or deny a request. The overall timing is likely to be driven by the regulatory process, in particular, special attention must be paid to any the pre-merger filing process. At best, the anti-trust authorities can issue a corresponding clearance within 45 days of filing the pre-merger notification. However, this period may be extended and the clearance can take up to six months to be obtained.

Currently, there is no clear provision regarding the authority of the Commission to extend or modify the timetable of the first bid if a competing bid is launched by a second bidder.

**Offer conditions****13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?**

The bidder must prepare and deliver a prospectus that complies with the Commission's requirements. The prospectus contains any material information investors require to make an informed decision.

Generally, this includes:

Information related to the offer (such as, the offer period, expiration date, total amount of the offer, settlement date and exchange ratio).

Executive summary of the transaction.

Risk factors.

Detailed information of the target (such as, business description, litigation, corporate structure before and after the bid, and main shareholders).

Target's financial information.

An offer may be subject to the satisfaction of pre-conditions, such as minimum amount of shares to be tendered for the offer to be effective. The bidder can omit the information related to final price and amount, as well as any information that can only be known the day before the start of the acquisition public offering period.

**Bid documents**

**14. What documents do the target's shareholders receive on a recommended and hostile bid?**

A transaction agreement, memorandum of understanding, merger agreement or other similar agreement is customarily executed between the bidder and the target shareholders before the bid. This sets out the main terms and conditions of the bid such as the price, the minimum number of shares that must be tendered for the acquisition offer to be binding, and so on.

Besides the transaction agreement, an information prospectus (*see Question 13*) and any other ancillary documents related to the offer must be prepared by the bidder and delivered to the Commission to obtain its approval.

**Employee consultation****15. Are there any requirements for a target's board to inform or consult its employees about the offer?**

There are no requirements for a target's board to inform or consult its employees about the offer.

**Mandatory offers****16. Is there a requirement to make a mandatory offer?**

A mandatory tender offer must be made if the bidder seeks to acquire, directly or indirectly, 30% or more of the ordinary shares of the target, through one or more transactions. The mandatory tender offer must be made for either 100% of the target's capital stock if the bidder seeks to obtain control; or for the percentage of the target's total capital stock that equals the portion of the ordinary shares to be acquired, or 10% of the target's capital stock, whichever is higher.

A mandatory offer must also be made if the target does not comply with the maintenance requirements of the Mexican Stock Exchange or commits serious and continued violations of the Securities Exchange Act.

**Consideration****17. What form of consideration is commonly offered on a public takeover?**

Cash, stock, or a combination of both are the most common forms of consideration offered on a public takeover. The only restriction imposed by the Securities Exchange Act is that the compensation must be the same for all of the target's shareholders regardless of the class or kind of shares.

The bidder cannot pay, reimburse, deliver or furnish any compensation implying a premium or surcharge to the bidder's offered price in favour of a person or group of persons linked to the final recipient of the offer. However, this does not include the payment of any compensation arising from agreements imposing an obligation for the benefit of the bidder or the target, provided that such agreements have been approved by the target's board with the prior opinion of the Corporate Practices Committee and have been previously disclosed to the public.

The bidder must declare under oath that no such compensation has been paid in addition to the offer price.

**18. Are there any regulations that provide for a minimum level of consideration?**

There are no regulations providing a minimum level of consideration. Nonetheless, a fairness opinion on the offer price must be given by the board, taking into consideration the Corporate Practices Committee's opinion; as well as the opinion of an independent expert hired by the target.

**19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?**

There are no additional restrictions or requirements on the consideration that a foreign bidder must comply with.

## **Post-bid**

### **Compulsory purchase of minority shareholdings**

**20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?**

A bidder cannot compulsorily purchase the shares of outstanding minority shareholders. There are no squeeze or minority cash out provisions under Mexican law.

### **Restrictions on new offers**

**21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?**

There are not restrictions for launching a new offer. However, if the bidder seeks to, directly or indirectly, control or 30% or more of the ordinary shares of the target, a mandatory tender offer must be made.

## **De-listing**

**22. What action is required to de-list a company?**

De-listing of a public company can be either voluntary or mandatory under the Securities Exchange Act.



## **Voluntary de-listing**

The target can request to be de-listed by the Commission. De-listing must be pre-approved in a general extraordinary shareholders meeting with the affirmative vote of 95% of the shareholders (including holders of non-voting or preferred stock). A voluntary de-listing must comply with the same conditions as those provided for a mandatory de-listing.

## **Mandatory de-listing**

The Commission can suspend or cancel registration of securities in the National Securities Registry (*Registro Nacional de Valores*) if the company commits serious and continued violations of the Securities Exchange Act; or does not comply with the maintenance requirements of the Mexican Stock Exchange.

In a mandatory de-listing, certain rules must be observed:

The bid must be addressed exclusively to the shareholders that are not the controlling shareholders.

The offer must be at least the highest price between the quotation price and the book value price of the target's shares.

The target must set up and fund a trust for a period of at least six months to acquire, at the offering price, all the remaining shares not tendered in response to the mandatory tender offer.

The target's board (regardless of whether the de-listing is voluntary or mandatory) must issue a fairness opinion on the offer price, which must comply the same requirements as those required by a mandatory tender offer triggered by the bidder's intent to acquire control of the target.

## **Target's response**

### **23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?**

The target's board cannot defend the target from a hostile bid unless the target's bye-laws provide a defence mechanism, such as a poison pill. Even though the Securities Exchange Act allows poison pills, they are rarely used because hostile bids are rare in Mexico since most of the public companies are controlled by a small number of controlling shareholders, which prevents the success of a bid if it is not pre-approved by them.

## **Tax**

### **24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?**

There are no transfer duties payable on the sale of shares of a public company but the sale of shares is subject to income tax (even if the seller is a foreigner). However, the sale is exempt from income tax if it is made through the Mexican Stock Exchange and the requirements of the tax statutes are complied with (such as that control is not transferred and the taxpayer is not transferring more than 10% of the target's capital stock).

## Other regulatory restrictions

### **25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?**

Depending on the size of the transaction and whether the thresholds in the Competition Federal Act are surpassed, approval from the Federal Competition Commission (*Comisión Federal de Competencia Económica*) may be required before the offer opens. The Commission (whose authorisation is also required) will generally not approve the offer until the Federal Competition Commission has granted its approval.

However, in certain cases, Mexican law allows for the filing of a simplified notice if the completion of the bid will not have adverse anti-competitive effects on the market. Also, a favorable ruling from the National Foreign Investments Commission (*Comisión de Inversiones Extranjeras*) is required if a foreign bidder launches an offer that exceeds a certain amount that is set annually, which is currently about MXN2.958 billion.

The effect on the public offer timetable varies depending on the types of authorisation required.

### **26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?**

The Foreign Investment Act (*Ley de Inversiones Extranjeras*) sets out the rules for foreign investments. Generally, there are no legal restrictions on foreign investors. However, there are certain activities in which foreign investment is not allowed or is limited because the law reserves them for the Mexican State or exclusively for Mexicans.

The activities reserved for the Mexican State are:

Petroleum (including all other hydrocarbons).

Electricity.

Basic petrochemicals.

Generation of nuclear energy.

Radioactive minerals.

Telegraphs and radiotelegraphy.

Mail service.

Issuance of banknotes.

Mining.

The activities that are reserved for Mexican are:

Credit unions.

Development banks.

National land transport of passengers, tourists and cargo.

Retail sale of gasoline and distribution of liquid petroleum.

Provision of radio broadcasting and other radio and television services.

There are other activities in which foreign investment is not excluded but limited to certain proportion:

Up to 10% of national air transport.

Up to 25% of national air transport, air taxi transport, or specialized transport.

Up to 49% of certain companies, including (among others) insurance companies, financial leasing companies, money exchange firms, pension fund plans, certain shares of companies owning agricultural, livestock and forestry lands, suppliers of fuel and lubricants for ships and aircrafts and rail equipment.

Foreign investors can hold more than 49% in following the economic activities, if authorisation is obtained from the Foreign Investments Commission:

Insurance agents.

Cellular telephony.

Securities ranking institutions.

Legal services.

Private services of preschool, elementary, junior high, high school or college education.

Shipping companies engaged in the exploitation of ships exclusively in high traffic.

Postal services for ships carrying out interior navigation operations.

Perforation of oil and gas wells.

Construction, operation and exploitation of railways that are a general means of communication and provision of rail transport services to the public.

The favourable decision of the Foreign Investments Commission is only required for foreign investment to be greater than 49% in the above mentioned economic activities when the total value of the assets of the companies involved at the time of submitting the authorisation request is greater than a particular amount set annually, currently about MXN2.958 billion.

**27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?**

There are no restrictions on repatriation of profits or exchange control rules for foreign companies.

**28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?**

The target (including any company controlled by it) as well as the board and relevant officers must not carry out any acts or transactions against the target which would obstruct the bid's development, from the moment they are aware of the bid up until the end of its term.

Also, the target's board and the general director must disclose to the public, within ten business days after the start of the bid, the decision they will make on the target's shares they own.

## **Reform**

**29. Are there any proposals for the reform of takeover regulation in your jurisdiction?**

There are currently no proposals for reform of takeover regulation in Mexico.

## **The regulatory authorities**

**National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*)**

**W** [www.cnbv.gob.mx](http://www.cnbv.gob.mx)

**Main area of responsibility.** Market supervision vice presidency (*Vicepresidencia de Supervisión Bursátil*).

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### Recent transactions

Advised and represented The Coca Cola Company in the joint acquisition with ArcaContinental, of PET recycler PetStar, and subsidiaries from PASA. After the acquisition, TCCC and ArcaContinental sold an equity participation in PetStar to seven Mexican bottlers of TCCC, forming a joint venture. VWyS also represented and advised TCCC in forming this joint venture, which will double the capacity of PetStar in the medium term.

Advised and assisted Motorola Solutions in the sale of its wireless network infrastructure business to Nokia Siemens.

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## Resource information

**Resource ID:** 2-385-6584

**Law stated date:** 01-Mar-2012

**Products:** Mergers and Acquisitions multi jurisdictional guide, PLC Cross-border, PLC UK Corporate, PLC UK Finance, PLC UK Law Department, PLC US Corporate & Securities, PLC US Law Department

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