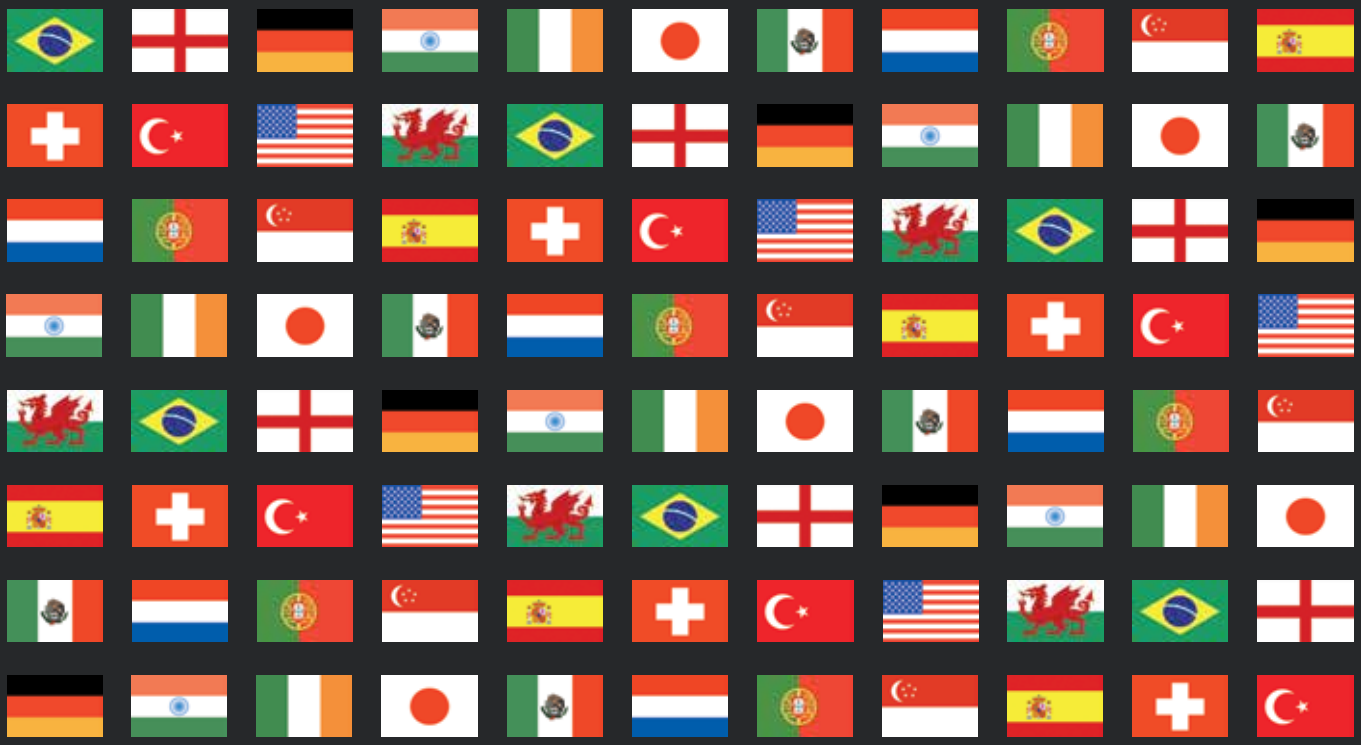
Corporate Reorganisations

Contributing editors
Nick Cline, Robbie McLaren and Dan Treloar



2018

GETTING THE DEAL THROUGH

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Corporate Reorganisations 2018

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Latham & Watkins

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First edition

Getting the Deal Through is delighted to publish the first edition of *Corporate Reorganisations*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Nick Cline, Robbie McLaren and Dan Treloar of Latham & Watkins, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
April 2018

Mexico

Carlos Enrique Mainero Ruiz
White & Case, SC

1 What types of transactions are classified as 'corporate reorganisations' in your jurisdiction?

Mexican law does not include any statutory classification of the concept of corporate reorganisation except in the context of bankruptcy. Practically speaking, however, a corporate reorganisation may be any type of transaction whereby an entity:

- changes its corporate legal standing (for example, from a corporation to a limited liability company);
- changes its controlling shareholders (for example, mergers, stock purchase agreements or other transactions that allow a change in shareholding ownership); or
- conducts a spin-off, whereby the legal entity segregates its assets and liabilities into two or more newly created entities, where the original legal entity either disappears or remains as a smaller entity.

Corporate reorganisations may adopt many forms, depending on various factors that need to be analysed case by case, such as tax, accounting and potential fraudulent conveyance considerations.

2 Has the number of corporate reorganisations in your jurisdiction increased or decreased this year compared with previous years? If so, why?

The value of M&A in Mexico from January to November 2017 reached US$9.6 billion, an 8.8 per cent decrease from the same period of 2016, the lowest amount since 2013 (public information does not differentiate between transactions conducted with third parties and transactions conducted for reorganisation purposes). Analysts believe that the main reason is attributable to uncertainties, particularly during the first months of the year, resulting from: the election of Donald Trump as President of the United States and his nationalist rhetoric; uncertainties associated with the current negotiations of the North America Free Trade Agreement (NAFTA); and, subsequently, potential negative effects on the commercial relationship between Mexico and the United States.

While there has recently been more optimism in this regard, it is still uncertain whether the number and amount of corporate reorganisations could increase during 2018. Additional uncertainty may be found associated with the elections for Mexican President, Federal Congress and for governors in states including Mexico City in July 2018.

3 Are there any jurisdiction-specific drivers for undertaking a corporate reorganisation?

President Enrique Peña Nieto passed a number of constitutional and statutory reforms during the first years of his administration. These reforms, commonly known as the 'structural reforms', include significant changes in important sectors such as energy, telecommunications, finance, antitrust and competition. In very general terms, the structural reforms sought to open the markets to a more flexible foreign and private investment scheme in the energy, oil and gas sectors, fostering the deployment of telecommunications infrastructure while opening the sector to more competition, and a finance industry that allows access to financial services to a broader range of the Mexican population.

The structural reforms have been an important driver for mergers, acquisitions and corporate reorganisations, particularly in the energy, oil and gas industry. To the extent that these reforms continue to be implemented as approved by the current administration, it could be expected that they continue to be drivers of corporate reorganisations in Mexico.

However, at least one presidential candidate, current frontrunner Andrés Manuel López Obrador, has made public his intention to seek a more nationalist agenda and, particularly, to block the implementation of the energy structural reform and other important infrastructure projects (such as the already initiated construction of the alternate Mexico City international airport). Whether or not these intentions materialise upon a victory of Mr López Obrador is still uncertain.

4 How are corporate reorganisations typically structured in your jurisdiction?

The structure of a corporate reorganisation in Mexico may take many forms. The form in which a corporate reorganisation is conducted will depend on various factors, such as tax, accounting or liquidity considerations, among others.

Corporate reorganisations may take the form of a stock acquisition, whereby one or more shareholders transfer ownership of their shareholding interest in a legal entity. This shareholding interest may or may not be a controlling interest, and therefore, the type of contracts and agreements negotiated will depend on such context. These transactions are typically structured through heavily negotiated stock purchase agreements, where the parties agree to the purchase price (either in the form of cash, stock or a combination of both), representations and warranties, affirmative and negative covenants, mutual indemnities and termination clauses.

Depending on the type of legal entity (eg, corporation, limited liability company) shareholders may be subject to mandatory rights of first refusal for the transfer of their equity interests in a company to non-current shareholders.

Corporate reorganisations may also take the form of a merger. In this scenario, the merged entity is absorbed by an existing merging entity, or otherwise, two or more merged entities disappear to form a newly created merging entity. A merger needs to be approved by the merger entities' shareholders and the corporate resolution will need to be recorded at the public registry of commerce of each of the merger entities. As a general rule, a merger will become effective three months after its recording in the public registry of commerce. This three-month period is included in the law to allow creditors of the merger entity to judicially oppose the merger until their credits are satisfied or otherwise secured. As an exception, Mexican law allows a merger to become effective precisely at the time of its recording with the public registry of commerce if the merger entities pay all their liabilities, secure such liabilities by depositing in escrow their full amount or otherwise obtain all of their creditors' consent to the merger.

Another form of corporate reorganisation is through a spin-off. In this scenario, the shareholders of the spin-off entity must approve the transaction, including the specific resolutions set forth in the General Law of Commercial Entities. The corporate resolutions should also be recorded with the public registry of commerce. A spin-off will become effective 45 days after the recording of the corporate authorisation in the public registry of commerce to allow creditors or dissenting shareholders to judicially oppose the spin-off. As opposed to a merger, there are no exceptional rules to allow a spin-off to become effective at the time of recording.

A change in corporate standing (for example, from a corporation to a limited liability company) may be conducted through a resolution by the shareholders of the entity. The General Law of Commercial Entities provides that this type of reorganisation should follow the same rules as a merger.

If the reorganised entity is publicly listed, the corporate reorganisation may take the form of a tender offer. The Mexican Securities Law provides that any acquisition of 30 per cent or more of the stock of a publicly listed entity must necessarily be conducted through a tender offer authorised by the National Banking and Securities Commission. Tender offers are heavily regulated and must be conducted following the particular rules set forth in the applicable Mexican securities regulation.

5 What are the key laws and regulations to consider when undertaking a corporate reorganisation?

A person intending to conduct a corporate reorganisation in Mexico should take into consideration the following laws:

- the General Law of Commercial Entities;
- if the legal entity is publicly listed, the Securities Market Law and the regulations applicable to issuers of the stock market;
- the Foreign Investment Law;
- the Federal Tax Code and Income Tax Law;
- the Federal Labour Law; and
- the Federal Antitrust Law.

Additional statutes and regulations should be considered, depending on whether the industry of the reorganised entity is regulated or not by a particular statute (eg, finance, telecommunications, railway or aircraft transportation). For entities doing business in heavily regulated industries, a corporate reorganisation would typically require the regulator's prior approval.

6 What are the key national authorities to be conscious of when undertaking a corporate reorganisation?

Under the Federal Antitrust Law, the previous authorisation of the Mexican Federal Antitrust Commission should be obtained in the possibility that a merger or reorganisation transaction exceeds the thresholds contained in the law. A person conducting a corporate reorganisation should always perform the basic analysis of whether its reorganisation transaction will require such prior authorisation, in order to avoid stringent penalties from the Federal Antitrust Commission. A corporate reorganisation where the participating economic agents are members of the same corporate group (with no participation from third parties) would, in principle, be excepted from prior antitrust approval.

Additional authorities may be involved in the authorisation process, depending on the industry of the persons involved.

For example, if the reorganised entity is a Mexican-licensed bank, broker-dealer or mutual fund, the Ministry of Finance and Public Credit, the National Banking and Securities Commission and the Mexican Central Bank will be part of the authorisation process. If the reorganised entity is an insurance company, the National Insurance and Bonds Commission will participate in the authorisation process. If the reorganised entity is a pension fund, the National Commission for the Retirement Saving System should grant its prior authorisation.

If the reorganised entity participates in the telecommunications sector, an authorisation from the Federal Telecommunications Institute will be required. It should be noted that the Federal Telecommunications Institute also has authority on competition and antitrust in the telecommunications sector.

If the reorganised entity participates in the railway or aircraft transportation industry, the Ministry of Communications and Transporation will be a part of the authorisation process.

Depending on the type of corporate reorganisation, notices should be filed with the Mexican tax authorities after the consummation of the relevant transaction.

7 What measures should be taken to best prepare for a corporate reorganisation?

A company should first and foremost engage tax, accounting and corporate advice in order to analyse the best strategy to conduct the corporate reorganisation. A company should also have a clear focus of its ultimate business objective, in order for counsel to be able to suggest a proposed approach to the corporate reorganisation that is consistent with such business objective.

As a general rule, a company should ensure that its corporate and tax records are up to date and in order before conducting its corporate reorganisation. Whatever the type of reorganisation being sought, the company will most probably need to make notations in its corporate books, and make filings with tax and other authorities. Failure to maintain up-to-date books and records could result in a process more complex than necessary for a reorganisation that could have been simple in the outset.

Due diligence will not typically be conducted where the corporate reorganisation does not involve a third party (eg, a potential third-party buyer). In exceptional circumstances, an incumbent non-controlling shareholder intending to acquire control as part of the corporate reorganisation would require some level of due diligence, the extent of which may vary depending on the circumstances.

8 What are the main issues relating to employees and employment contracts to consider in a corporate reorganisation?

It should be noted that Mexican labour law is particularly protective of employees, compared with other jurisdictions. While outsourcing schemes are permitted, the Mexican labour authorities will deem that the person effectively receiving the services also retains labour liability towards the outsourced employees. If the company subject to a corporate reorganisation maintains any such outsourcing scheme, it should be aware of this statutory liability.

A transfer of employees in Mexico is conducted through a process whereby the Federal Labour Law provides that the new employer will assume all the labour liabilities towards employees (including severance and seniority) from the former employer, and that the former employer will retain labour liability for a six-month term following the effectiveness of the 'employer substitution'. Indemnities between the new and former employers are acceptable and effective solely among the parties.

Social security authorities should be informed of any change of employer in order to avoid potential liabilities for the new employer.

Technically speaking, it is not necessary that the new employer executes new employment contracts with its employees – the substitution is effected as a matter of law upon notice of the substitution to the employees. However, an analysis should be made case by case to verify the need or convenience of including additional documents to avoid unnecessary liabilities.

Also, care should be taken if the company maintains a labour union. The union should be kept informed at all times of the potential transaction – subject to confidentiality terms – and be part of the process, to the extent possible, in order to avoid potential contingencies related to union relationships.

9 What are the main issues relating to pensions and other benefits to consider in a corporate reorganisation?

Through the 'employer substitution' scheme provided for in the Federal Labour Law, the new employer will assume all existing employment liabilities, including pensions and any other benefits granted by the former employer, in the exact same terms provided by such former employer. If a new employer intends to change any benefits previously granted by the former employer, advice from specialised employment and labour counsel should be sought to avoid unnecessary contingencies.

10 Is financial assistance prohibited or restricted in your jurisdiction?

Financial assistance by a company for the acquisition of its own shares is not restricted under Mexican law. Thus, a Mexican company may validly lend funds to a prospective purchaser of its own shares to fund the acquisition. A different scenario would be where the funding is made by the company to an existing or prospective shareholder for the subscription of newly issued shares. In this scenario, Mexican law expressly prohibits this type of funding. The rationale is that, by funding the subscription of its own shares, a company could be artificially increasing its stockholders' equity. This prohibition does not extend to the funding of the subscription of shares in its holding company.

Update and trends

The future of corporate reorganisations, M&A in Mexico will depend primarily on the progress of the following events.

NAFTA renegotiation

Mexico, the United States and Canada are currently in the process of renegotiating NAFTA, a commercial agreement that has shaped the economy of the three countries for the last 20 years. While several rounds of negotiations have been conducted between them, there are still a number of issues where an agreement has not been reached or where the positions of the parties appear to be rather far from agreement.

The President of the United States has stated on several occasions his intent to potentially initiate a process for the termination of NAFTA if certain matters are not agreed upon in his terms. A termination or renegotiation in terms that are less favourable than the existing terms could have an unfavourable effect on the M&A market in Mexico in 2018.

However, if the ultimate outcome is the termination of NAFTA, companies doing business in Mexico would have to analyse the suitability of their current corporate, financing and tax structures absent such an agreement. In that scenario, companies would have to align their business objectives to whatever new scenario arises, which could, in turn, result in a higher level of corporate reorganisations.

2018 elections in Mexico

Elections for President, Federal Congress and governors in various states (including Mexico City) in July 2018 will create an uncertain environment during the first two-quarters of the year. The main policies envisioned by the currently announced candidates involve either a public policy of continuing President Peña Nieto's structural reforms (through the candidate of the PRI party, Mr José Antonio Meade) or a public policy of stronger nationalism and social focus, led by three-times presidential candidate Mr Andrés Manuel López Obrador, who has, on several occasions, announced his intent to eliminate or block some of the structural reforms approved by President Peña Nieto's administration. These two far-reaching options will create an uncertain environment, which may result in prudence and a 'wait and see' approach from investors until the elections are decided by mid 2018.

11 What are the most commonly overlooked issues or frequently asked questions in a corporate reorganisation?

A company seeking a corporate reorganisation will typically require assistance in connection with the most efficient tax structure for the transaction. Failure to obtain proper tax advice may result in overlooked liabilities to the buyer or the target.

Also, proper employment and labour advice should be obtained in order to avoid unwarranted liabilities with employees, labour or social security authorities.

12 How will the corporate reorganisation be treated from an accounting perspective? How are target assets and businesses valued?

A target may account for goodwill as an intangible asset in its balance sheet as a result of a corporate reorganisation, in an amount equal to the excess between the purchase price and the net asset value of the target. The rules for accounting for goodwill are found in [NIF] B-7, the Accounting Principles issued by the Mexican Board for Financial Information Rules.

The valuation of assets and businesses may be conducted through any of the international market-standard procedures (eg, fair market value, investment value and intrinsic value) considering expected cash flows of the target or other considerations on a case-by-case basis. Mexican law does not provide for a specific valuation method when considering a potential acquisition.

13 What tax issues need to be considered? What are the tax implications of carrying out a corporate reorganisation?

The tax issues to be considered will depend on the structure being analysed for the potential reorganisation. For example, the parties should understand whether the target carries losses from previous tax years, and the value at which the stock was originally purchased by the seller (to determine whether income will be incurred as a result of the sale and, therefore, whether any withholding obligations will arise). The buyer may also need to understand the intercompany balance of the target and make sure that such transactions were performed at arm's length. Transfer pricing studies may be useful to avoid potential tax liabilities.

Withholding by the buyer will not be required if the seller obtains a report from a publicly certified accountant stating that the price at which the stock is sold is lower than the price at which the seller originally acquired such stock. Specialised tax advice is recommended in all types of corporate reorganisations to verify exact compliance with tax laws and whether or not withholding will be required.

Some types of corporate reorganisations will not necessarily have a tax effect on the target or the parties involved. Tax advice should be obtained in advance to ensure whether the ultimate objective of the company seeking reorganisation may be obtained through a tax-efficient structure.

14 What external consents and approvals will be required for the corporate reorganisation?

The prior authorisation of federal agencies may be required in order to complete a corporate reorganisation (see question 6).

In addition to governmental authorisations, the parties should be aware of third-party consent. Typically, as part of its due diligence, a buyer should review all existing financing agreements to verify whether or not consent from lenders or noteholders are required. The parties should ensure that any required lenders' consent are obtained significantly in advance in order to avoid unwarranted delays in the completion of the reorganisation.

Also, a buyer should analyse the target's by-laws to verify whether any particular corporate approval is required to perform the reorganisation (see question 15).

The shareholders' agreement should also be reviewed to confirm whether additional authorisations from shareholders are required other than those provided in the target's by-laws.

While it is not customary that ordinary course commercial contracts include change of control or negative covenants restricting corporate reorganisations, potential buyers and other participants in the reorganisation should conduct due diligence on such contracts to ensure that no third-party consent is overlooked when seeking to complete a corporate reorganisation.

15 What internal corporate consents and approvals will be required for the corporate reorganisation?

Depending on the type of reorganisation, the board or shareholders' approval may be required in order to complete the reorganisation. As a matter of law, any merger or spin-off requires shareholders' approval, where a quorum of at least 75 per cent of the shares are represented, and with an affirmative vote of at least 50 per cent of the capital stock – these percentages may be increased in a company's by-laws.

Additionally, the Mexican Securities Market Law allows publicly listed companies to include poison pill clauses to limit the risk of hostile takeovers. These clauses will typically consist of the need to obtain prior board approval before a person effectively acquires shares exceeding a stated interest in the company.

16 How are shared assets and services used by the target company or business typically treated?

Shared assets and services will typically continue in the status quo absent a particular agreement between the parties involved in the transaction.

17 Are there any restrictions on transferring assets to related companies?

Mexican law does not include any general restriction for the transfer of assets to related companies. As a general rule, a party will be able to transfer assets to a related company. However, the parties should be aware that the transaction should be conducted at arm's length in order to avoid potential tax liabilities. A transfer pricing study from a

reputable tax adviser will be required in order to ensure that the transaction is made at arm's length. Also, transfers to related companies could be subject to stringent scrutiny in the context of bankruptcy, if the transfer was made during the look-back period of 270 days prior to a bankruptcy declaration by a court.

18 Can assets be transferred for less than their market value?

Generally, an asset may be transferred at any value agreed upon between a buyer and seller. There is no specific restriction under Mexican law that provides that assets should be sold at a specific value. However, the parties should be aware that a sale of an asset for less than its market value may be subject to stringent scrutiny by a court in a bankruptcy context, and could be subject to annulment if made during the look back period, for fraudulent conveyance reasons (a general 270-day period before the declaration of bankruptcy, as per the Mexican Bankruptcy Law, which period may be extended in certain circumstances). If the transaction is performed between related parties, the transaction would be subject to strict tax scrutiny and could result in potential liability to the parties (see question 17 regarding transfer pricing studies).

19 Can a corporate reorganisation be backdated or deemed to have already taken place, for example from the start of the financial year?

As a general rule, backdating is not acceptable as a sound or legal practice in Mexico. A transaction should be given effect at least as of the date in which the relevant contract is executed. As discussed above, a transaction may become effective after a certain period of its recording with the public registry of commerce, in order to allow creditors to judicially oppose the transaction (eg, mergers or spin-offs). See question 4.

20 What documentation is required in a corporate reorganisation?

The documentation required will depend on the structure of the corporate reorganisation. An analysis should be conducted case by case to ensure that all documents required for a particular structure are duly covered.

If structured through a stock purchase, the documents required will typically include a non-binding term sheet (or binding term sheet if so agreed by the parties), a stock purchase agreement, disclosure schedules, separate non-compete and confidentiality agreements, and, to the extent legally required, filings with the appropriate competent governmental authorities.

If the corporate reorganisation does not involve any third party or there is no change of control among the incumbent shareholders, a simple stock purchase agreement should suffice. In any case, new stock certificates and notations in the company's books should be executed to ensure that the stock or equity interest transfer is duly recorded by the reorganised company.

If the target is a publicly listed company, the parties will have to prepare a disclosure memorandum that structure and contents should follow the rules set forth in the applicable securities regulations issued by the National Banking and Securities Commission. The disclosure memorandum includes a business overview of the target, information on the buyer and seller, risk factors, the management's discussion and analysis, and pro forma financial information of the last tax year and the most recent quarterly periods, showing information as if the corporate reorganisation had been completed as of those periods.

A corporate reorganisation where the participating economic agents are members of the same corporate group (with no participation from third parties) would, in principle, be excepted from prior antitrust approval. If the corporate reorganisation needs to be previously authorised by the Federal Antitrust Commission as a result of exceeding the statutory thresholds (or by the Federal Telecommunications Institute if the target is a telecommunications company), the parties should submit a large set of documents, including articles of incorporation, current corporate by-laws, market information, historical audited financial statements, and copies of any transaction documents to effect the reorganisation.

Additional documents will be required if the transaction is being financed, including but not limited to, a loan agreement and applicable security interest agreements. If the transaction is being financed through a capital markets transaction, the parties will have to prepare a prospectus complying with the rules set forth by the National Banking and Securities Commission.

21 Should representations, warranties or indemnities be given by the parties in a corporate reorganisation?

A stock purchase agreement in the context of a corporate reorganisation not involving third parties will not typically require the granting of heavy representations and warranties or indemnities among the parties. Basic representations and warranties would typically suffice, such as those related to capacity and authority, corporate organisation, title to shares and corporate records showing valid interest to the shares subject to the reorganisation.

To the extent the buyer is a non-related party, or otherwise, a non-controlling shareholder is intending to acquire control as part of the corporate reorganisation, such buyer or shareholder will typically request the seller and the company for more complex representations, warranties and indemnities.

22 Does it make any difference whether assets or a business as a going concern are transferred?

Parties may elect to effect the corporate reorganisation either as an asset purchase or as a business as a going concern transfer. In the first scenario, the buyer will only acquire certain assets (and if so agreed, liabilities) considered strategic as part of the corporate reorganisation, while in the second scenario, the buyer will acquire the business as a going concern, typically through the purchase of stock or similar equity securities.

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A buyer acquiring a business as a going concern will assume all assets and liabilities of the business (including tax, labour and environmental liabilities, whether disclosed or undisclosed). A buyer not intending to incur the risk of assuming undisclosed liabilities may prefer to conduct the purchase through an asset acquisition.

Tax considerations will be essential to determine whether the best approach should be an asset or a stock acquisition.

23 Explain any differences between public, private, government or non-profit entities to consider when undertaking a corporate reorganisation.

Publicly listed entities are subject to more stringent rules than private companies, particularly those established by the National Banking and Securities Commission through the Securities Market Law and the Regulations applicable to issuers of the Stock Market. These rules include the need to prepare and publish a disclosure memorandum similar to a prospectus, or the need to conduct a tender offer if the purchase involves 30 per cent or more of the stock of the target.

The acquisition of private companies is typically subject to less stringent statutory requirements than those imposed on publicly listed companies. Generally, the parties will have to comply with basic statutory requirements to complete the reorganisation, depending on the type of structure elected by the parties (eg, merger, spin-off or stock purchase).

Other types of entities may be reorganised or acquired, and a case-by-case analysis should be made to verify whether particular requirements should be met.

In any case, regardless of the type of entity being acquired, to the extent that the transaction or the size of the parties exceed the thresholds set forth in the Federal Antitrust Law (or otherwise the transaction does not qualify as a corporate reorganisation exception for antitrust purposes), the parties should obtain the previous authorisation from the Federal Antitrust Commission.

24 Do any filings or other post-reorganisation steps need to be taken after the corporate reorganisation takes place?

Post-completion filings will depend on the type of structure elected to perform the corporate reorganisation. As discussed above, a merger or spin-off will have to be recorded at the public registry of commerce to allow for judicial opposition by creditors or dissenting shareholders. Also, filings with the competent tax authorities may be required depending on the type of reorganisation conducted (eg, mergers or spin-offs). The Mexican Social Security Institute should be informed of any corporate reorganisation involving an 'employer substitution' in order to update the appropriate social security records of all transferred employees. Finally, if the reorganisation involves any transfer of intellectual property rights (such as trademarks, patents or similar) the parties should give notice to the Mexican Institute of Industrial Property.

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