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Public M&A

2021

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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 the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.



London
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Egypt

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STRUCTURES AND APPLICABLE LAW

Types of transaction

1 | How may publicly listed businesses combine?

Combining business of public companies listed on the Egyptian Exchange (EGX) may take place through asset-based or share-based acquisitions or merger between the businesses.

The Egyptian Capital Market Law No. 95 of 1992 (and its Executive Regulations) allows acquisition of listed shares through open market transactions, block trades, protected transactions or voluntary tender offers, subject to acquiring less than one-third of the issued share capital or voting rights of listed shares. If the acquired stake is one-third or more of the issued share capital or voting rights of a listed company, whether directly or indirectly, a mandatory tender offer should be submitted to acquire 100 per cent of the listed company's issued share capital. Exemptions from this mandatory tender offer may be granted by the Financial Regulatory Authority (FRA) in certain specific situations. Additionally, recent amendments have been made to the Executive Regulations of the Capital Market Law, where it is no longer a requirement to launch a mandatory tender offer if the acquisition stake exceeds 75 per cent of the issued share capital or voting right of the listed company, without prejudice to the requirement to launch a mandatory tender offer for the acquisition of the shares of the minorities as per applicable regulations.

Businesses may also be combined through a merger. A merger does not trigger a mandatory tender offer provided that notification of the merger is submitted to the FRA.

As for acquisition of assets, the EGX Listing Rules and their executive regulations issued pursuant to Decree No. 11 of 2014 by the board of directors of the FRA (the EGX Listing Rules) have set specific requirements for the disposal and acquisition of assets by listed companies. The requirements include, inter alia, prior approval by the company's general assembly if the assets that are the subject of the transaction exceed 50 per cent of the company's fixed assets and any other assets that relate to the company's performance of its activities, while acquiring assets representing 10 per cent of the shareholders' equity must be supported by a valuation report to be submitted to the EGX.

Statutes and regulations

2 | What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The main laws and regulations governing business combinations and acquisitions of publicly listed companies are:

- the Egyptian Capital Market Law No. 95 of 1992 and its Executive Regulations, as amended;
- the EGX Listing Rules and its Executive Regulations issued pursuant to Decree No. 11 of 2014 by the board of directors of the FRA, as amended; and

- the Egyptian Companies Law No. 159 of 1981 and its Executive Regulations, as amended.

Cross-border transactions

3 | How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Not applicable.

Sector-specific rules

4 | Are companies in specific industries subject to additional regulations and statutes?

Subject to the relevant sector, specific statutory requirements are applicable where a prior approval is required by the competent authority, such as:

- the Central Bank of Egypt, for the acquisition of 10 per cent or more of the share capital of a licensed bank in Egypt;
- the FRA, for the merger of a company carrying out mortgage activities with another company carrying out the same activities or transferring or acquiring any micro-finance portfolio, or to own by any means 10 per cent or more of any company carrying out insurance, reinsurance and insurance brokerage activities, operating in securities, including investment funds, real estate financing (mortgage finance and refinancing), real estate brokerage, real estate evaluation and financial lease; and
- the National Communication Regulatory Authority, for transferring any licence, merger or change of shareholding structure to companies carrying out telecommunication activities.

Transaction agreements

5 | Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

There is no legal requirement to conclude agreements between the sellers, buyers and target companies for listed shares' acquisition. However, parties remain obliged to execute the transfer documents required by the EGX. The acquisition of listed shares is usually evidenced by the account statements issued by Misr for Central Clearing, Depository and Registry upon being traded and transferred via the EGX while the purchase price is also transferred through the EGX.

It is customary in large acquisitions that parties conclude transaction agreements, such as a share purchase agreements and shareholders' agreements. A shareholders' agreement must not include any contractual restrictions on the ability to trade the listed shares freely, as this would render the agreement null and void.

In a merger, an agreement must be concluded between the involved entities setting out material terms, such as the underlying reasons for

the merger and the valuation methodology. The articles of association of the surviving entity post-merger also form part of the transaction documentation in a merger.

In an acquisition of assets, parties may be required to execute agreements before governmental authorities to effect the transfer depending on the type of asset (eg, real property should be transferred before a notary public and the agreement should be notarised). In addition to the documentation required by governmental authorities, there is a general set of transaction documents that are customarily concluded among the parties, including an asset transfer agreement and an escrow agreement to create the relevant contractual framework for the sale and purchase of the underlying assets.

With regard to the governing law, parties may choose any law to govern the transaction documentation, to the extent that there is no specific legal or statutory requirement to apply Egyptian law. Further, despite the parties' choice of law, the actual transfer procedures of the assets or shares and the merger are executed and enforced according to the relevant Egyptian laws and rules. Typically, the choice of law varies between English law and Egyptian law.

FILINGS AND DISCLOSURE

Filings and fees

6 | Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

The acquisition of listed shares takes place and is effected through the Egyptian Exchange (EGX) as evidenced on its trading screens. A filing in connection with a tender offer must be made with Financial Regulatory Authority (FRA) and the procedures involve submission of an information memorandum and other documents, such as a business plan and a valuation report of the shares' fair market value, which should be reviewed and approved by the FRA.

Additional documents as required by the EGX should also be submitted to the registered broker to effect the transfer of the shares with the EGX, such as sale orders and parties' acknowledgements. The following stamp taxes apply, as per the new amendments made to the Stamp Duty Law No. 111 of 1980, on the acquisition and sale of listed shares, to be borne equally by the buyer and seller, for an acquisition stake of less than 33 per cent:

- 0.125 per cent borne by a non-resident seller and 0.125 per cent borne by a non-resident buyer.
- 0.05 per cent borne by a resident seller and 0.05 per cent borne by a resident buyer.

The other main governmental fees include EGX transfer fees equivalent to 0.01 per cent for each party based on the value of the transaction. These fees are levied per transaction and are capped at 5,000 Egyptian pounds. Additionally, subject to the percentage of the acquired stake, FRA fees are applicable subject to a cap of one-thousandth of the offer's value in Egyptian pounds.

As for asset transfers, filings may be required subject to the type or nature of the assets. Nominal stamp duty may apply on the transfer documents, and additional (proportional or ad valorem stamp tax) may apply subject to the type of the transferred assets.

Information to be disclosed

7 | What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

Disclosure requirements and the authorised extent of public information depend on the structure used for the acquisition transaction.

A potential tender must be disclosed if any of the following events take place: the offeror notifies the target company of the offer; the conditions of a mandatory tender offer are met; requests are submitted to obtain the necessary approvals from the competent authorities; or there are rumours or unusual activity on the market in connection with a potential offer.

The target company, once it is notified by the offeror of the intent to submit an offer, is also obliged to disclose to the FRA and the EGX any documentation executed for the purpose of tender offer – for example, a memorandum of understanding, a letter of intent and due diligence arrangements.

With regard to public information, the EGX must disclose on its screens the material information of the tender offer proposal and the submitted information memorandum as approved and notified by the FRA. Following this announcement on the EGX screens, the target company's board of directors should issue a public report opining on and evaluating the offer in terms of its importance, seriousness and benefits to the target company, its shareholders and employees.

Further, specific disclosures must be also made as per Chapter 13 (on ultimate beneficial ownership) of the Egyptian Capital Market Law No. 95 of 1992 (and its Executive Regulations) to identify the ultimate and beneficial owner of the person submitting the tender offer. The disclosed information, however, is not shared with the public.

In addition to the above, transactions by board members and principal shareholders are subject to pre- and post-execution disclosure obligations.

For the acquisition and sale of assets, disclosures must be made if the underlying transaction is deemed a material event for the publicly listed company or if the latter is acquiring assets (real property or immovable assets) the value of which represent 10 per cent or more of the equity rights of the listed company, as evidenced in the latest financial statements of the company. In this case, the company must submit to the EGX a study of the fair market value of the assets in question, as supported by a report of the company's auditor and the board of directors' ratification on the report. The EGX in turn should disclose a summary of these documents on its screens and website.

Disclosure of substantial shareholdings

8 | What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Substantial shareholders, those holding more than one-third of the target company's capital, once they are notified of the offeror's intention to submit an offer, must disclose to the FRA any undisclosed arrangements or agreements in place between them and the offeror.

As per the EGX Listing Rules, shareholders whose direct or indirect participation exceeds 5 per cent (or its multiple) of the target company's listed shares must disclose the participation to the EGX. Also, if the indirect shareholding percentage of a shareholder reaches or exceeds 25 per cent of the capital, the shareholder must disclose this along with its future investment plan for the company.

Disclosure requirements are not affected if the company is a party to a business combination.

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

- 9 | What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

During the period between the date on which the offer is published as ratified by the Financial Regulatory Authority (FRA) and the date on which the outcome of the offer is announced, the board of directors and managers of a publicly traded company are prohibited from taking any action that may be deemed materially adverse. In particular, members of the board may not undertake any action that could materially affect the company's assets or increase its financial commitments or that may hinder the company's future activity. During this period, board members also must be prudent when it comes to disclosure of any information related to the offer.

The FRA may, in specific cases, oblige the company to appoint an independent financial adviser to evaluate the offer (eg, if the offeror is a related party to the target company, such as board member or a senior manager). In these cases, the report of the financial adviser must be disclosed to the shareholders during a specified period, irrespective of the opinion and feedback of the board of directors on the report.

Shareholders' duties include that shareholders holding more than a third of the target company's capital are restricted from disposing of their shares (unless it is for the purpose of the offer) during the entire period from the announcement of the offer until its execution.

Further, in principle, controlling shareholders should not prejudice the rights of minority shareholders. Therefore, as a protection for minority shareholders, the FRA, based on the request of the existing shareholders, may require a shareholder that severally or together with related parties has acquired 90 per cent of more of the capital and voting rights of the company to submit a tender offer for the shares of the minority shareholders. The minority shareholders' request must be submitted to FRA by shareholders holding at least 3 per cent of the capital, or a minimum of 100 shareholders representing no less than 2 per cent of the free float shares within the 12 months of the date the majority shares were acquired.

Approval and appraisal rights

- 10 | What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Disposal of at least 50 per cent of a company's immovable assets and those related to its activity must be pre-approved by the majority vote of shareholders representing at least two-thirds of the shares represented in an extraordinary general assembly meeting.

Mergers must be approved by the general assembly of both entities involved. The minimum voting threshold on this resolution is approval of shareholders representing at least 75 per cent of the capital. If, and to the extent, the merger would increase the shareholders' liability, a unanimous approval must be resolved.

In addition, the articles of association of a company may include pre-emption rights for the shareholders in the case of a sale of the company's shares and approval rights for the shareholders and management in respect of any actions related to business combinations and higher voting quorums in respect of relevant resolutions.

COMPLETING THE TRANSACTION

Hostile transactions

- 11 | What are the special considerations for unsolicited transactions for public companies?

A competitive offer may be submitted during the validity period of the original offer and up to five days before the lapse of this period. Accepting a competitive offer is conditional on having the price of the offer in cash with at least a 2 per cent increase from the original offer, or any other submitted competitive offer. The Financial Regulatory Authority (FRA) may still accept a competitive offer even if the offered price is not higher, if the offer terms contain a material amendment in favour of the shareholders that the existing offer does not have. If the FRA accepts a competitive offer, it may extend the duration of the original offer, as it deems necessary.

Break-up fees – frustration of additional bidders

- 12 | Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Neither break-up fees nor reverse break-up fees are mandated or regulated by Egyptian law. In private M&A, it is common that parties agree on break-up fees. Although break-up fees for public transactions are not prohibited by law, they are not common or customary.

Further, the FRA is entitled during the offer's validity period and up to five days before the lapse of this period to accept a competitive offer, hence the impracticability of break-up fees in tender offer transactions.

Generally, and despite the parties' agreement on break-up fees or liquidated damages, or both, Egyptian law allows a party to claim reduction of agreed damages, to the extent that the agreed amount is deemed excessive compared to the resulting damages.

Financial assistance under Egyptian law restricts companies from providing loans to any of its board members or guaranteeing the obligations of any its board members.

Government influence

- 13 | Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Although it rarely occurs, government agencies may influence or restrict the completion of a transaction based on justified grounds, such as national security.

Conditional offers

- 14 | What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

The Egyptian Capital Market Law No. 95 of 1992 (and its Executive Regulations) requires a mandatory tender offer to be final and not to be subject to conditions. Exceptionally, and subject to the FRA's approval, an offeror can make a mandatory tender offer conditional on the acquisition of a minimum stake of the voting rights or the capital of the target company. Offers can be conditional on acquiring at least 51 per cent with the purpose of controlling the company or 75 per cent if the acquisition

is for the purpose of a merger. If, however, the shares offered for sale do not meet the specified minimum stake – 51 per cent or 75 per cent (as the case may be) – the offeror may not acquire the offered lower stake without obtaining the FRA's prior approval. Further, if the tender offer is through a swap of shares that will be issued through a capital increase, the offer must be conditional on the company's approval of the issuance of the shares.

With regard to financing as a condition, the offer proposal submitted to the FRA must include a confirmation from a licensed bank in Egypt evidencing the availability of the financial resources to fund and cover the offer. Accordingly, unless there is confirmation of financial solvency, the FRA should not accept the offer proposal.

Subject to the parties' commercial agreement, financing may be structured as a condition (among other conditions) in asset-based transactions.

Financing

15 | If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The submission of evidence of financial solvency is one of the tender offer conditions in cash offers and mixed tender offer of cash or shares.

In asset acquisitions, transaction documents may reflect procurement of financing as a condition as supported by guarantees, warranties and provision of evidence confirming availability of financing. There are no typical seller's assistance obligations, but Egyptian law has set specific limitations in this respect, such as prohibiting the company from offering loans to board members.

It is not customary to enshrine in the transaction documents the seller's obligations to assist in relation to the buyer's financing.

Minority squeeze-out

16 | May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The squeeze-out mechanism is not recognised under Egyptian law, thus, there is no mechanism available to compel minority shareholders to sell their stakes. In fact, the Capital Market Law has allowed minority shareholders to request and oblige majority shareholders to acquire their stake.

Waiting or notification periods

17 | Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

In the context of a tender offer, the offeror must publish the tender offer no later than two days from the date it is ratified by the FRA. The validity of a tender offer may not be less than 10 days calculated as of the following day from the publishing date (or 20 days if the board of directors must obtain the opinion of an independent financial adviser). In all cases, the overall validity duration of a tender offer may not exceed 30 days but may be extended by the FRA.

The Capital Market Law provides for a blackout period of six months, unless otherwise authorised by the FRA, where an offeror does not submit an offer after disclosing its intent to do so. During this period, an offeror may not submit any offer on the target company or undertake any other dealings that could trigger a mandatory tender offer. Also, if an offeror withdraws its offer during its validity period, a blackout period of six months shall apply, which is extendable to 12 months in a mandatory tender offer.

OTHER CONSIDERATIONS

Tax issues

18 | What are the basic tax issues involved in business combinations or acquisitions involving public companies?

For listed companies, in addition to stamp duty tax, profits realised by a resident shareholder for the transfer of listed securities will be taxable at a rate of 10 per cent. However, the application of this tax has been suspended until 31 December 2021. Also, as per the latest amendments to the relevant law, capital gains tax is no longer applicable to non-resident shareholders for the transfer of listed securities.

Labour and employee benefits

19 | What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

Employees' and employers' rights and obligations are regulated and governed by the Egyptian Employment Law (No. 12 of 2003) and the decrees of the Ministry of Manpower. Generally, the Employment Law favours and protects the employees as supported by several court precedents issued in favour of employees.

Although Egyptian law does not oblige the employer to obtain the approval of or consult with the employees during an acquisition process, it has still restricted the employer's ability to make changes to the workforce during this process. In an acquisition, employees' rights (including their acquired rights) remain protected and may not be discretionally limited or changed by the employer. Dismissal of employees takes place by virtue of court orders and is limited to specific major events. Further, any redundancies during acquisitions must take place in coordination with the Ministry of Manpower and subject to its approval.

However, in a transfer of assets constituting a *fonds de commerce*, employees' and tax-related liabilities will remain shared from a statutory standpoint between the purchaser and the seller.

Restructuring, bankruptcy or receivership

20 | What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A Bankruptcy Law (No. 11 of 2018) has been issued in Egypt, replacing and cancelling the bankruptcy rules set out under the Egyptian Commercial Code. The Bankruptcy Law has introduced the concept of reorganisation. Provided that no bankruptcy verdict has been issued, any trader may request the reorganisation of its company, if it has not committed any fraudulent actions, has carried out the business for two years prior to the submitted request and has capital of no less than 1 million Egyptian pounds. A reorganisation request must be submitted to a committee affiliated to the competent economic court that must, in turn, prepare a reorganisation plan. During the reorganisation period, the trader may not carry out any actions that are out of the ordinary, borrow or create a mortgage, or lend.

Further, declaring the bankruptcy of a company takes place by virtue of a court verdict that, in turn, appoints a bankruptcy judge and a trustee. Any decisions in connection with the company must take place through the trustee and the competent economic court, while making the interest of the creditors and the settlement of the associated debts a priority. The trustees mainly carry out all bankruptcy procedures and act on behalf of the company for this purpose. A person or entity that has been declared bankrupt may not be appointed as a manager or board member in any company and may not carry out any banking,

commercial agency, export or import activities or act as a broker for the sale or purchase of securities unless reinstated.

Anti-corruption and sanctions

21 | What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

Egypt's anti-corruption and anti-bribery legal framework consists mainly of the Egyptian Penal Code and the Anti-Money Laundering Law. Active and passive bribery, corruption and money laundering are prohibited and criminalised by virtue of these laws.

The Capital Market Law also criminalises market abuse and insider trading, subjecting the offender to hefty financial penalties or imprisonment, or both. The amendments to the Capital Market Law provide that any person disclosing insider information, benefiting from insider information (including his or her spouse and children) or misrepresenting any details in a relevant report to affect dealing on securities shall be subject to (without prejudice to any stricter penalties under any other law) imprisonment of two years and a fine of between 50,000 and 20 million Egyptian pounds, or the equivalent of the amount collected or the mitigated loss, whichever is higher.

Any violation of the market abuse and insider trading rules laid out in the Capital Market Law and the Egyptian Exchange (EGX) Listing Rules would also result in delisting from the EGX.

UPDATE AND TRENDS

Key developments

22 | What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

While public M&A activity has been affected as a result of the covid-19 pandemic, it has been recently regaining activity. We also expect the Egyptian market to continue being driven by private M&A transactions in the short term, with a focus on the technology sector and consumer-focused sectors, such as healthcare and education.

Coronavirus

23 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Egyptian government and governmental and regulatory authorities have issued and adopted a number of regulations and initiatives to address the pandemic, including but not limited to:

- authorising companies regulated under the Egyptian Companies Law and Investment Law to hold their general assembly meetings via audio and visual communication methods;
- the stamp duty tax rate has been reduced for non-residents and residents, while immediate transactions on the EGX have been exempted from stamp duty tax, and the suspension of the application of capital gains tax for resident shareholders in listed companies has been extended to the end of 2021; and
- Law No. 170 of 2020 in relation to the collection of Solidarity Contributions to Alleviate some of the Economic Implications of



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the Spread of Epidemics or the Occurrence of Natural Disaster has been issued, regulating a mechanism for the collection of social solidarity contributions from state and private sector employees and pensioners to allow the state to mitigate the economic impact of covid-19 and other future threats. For a period of 12 months from the effective date of the law, employers must withhold 1 per cent from the monthly net salary of their employees, and a monthly deduction of 0.5 per cent from the monthly net pensions has been applied. Employees whose net monthly salary is less than or equal to 2,000 Egyptian pounds and pensioners whose net monthly pension is less than or equal to 2,000 Egyptian pounds are exempted from the foregoing deductions.

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Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Dispute Resolution			

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