COUNTRY COMPARATIVE GUIDES 2022

The Legal 500 Country Comparative Guides

Egypt

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Egypt.

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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

Egyptian legal system is a civil law system, which is influenced by Islamic shariah and the French Civil Code. Hence, it is based on written legislation, rather than on judicial precedents as in common law jurisdictions. That said, the Egyptian Civil Code plays a prominent role in the legal framework.

Key legislations regulating to M&A:

- Egyptian Companies Law and its Executive Regulations, as amended ("**Companies Law**");
- Capital Market Law No. 92 of 1995 and its Executive Regulations, as amended ("**CML**"); and
- the Listing and De-listing Rules No. 11 of 2014, as amended issued by the Financial Regulatory Authority ("**FRA**") ("**Listing Rules**").

Furthermore, administrative decisions and decrees issued by the following concerned key regulatory authorities constitute an integral part of the regulatory framework, in particular to the Egyptian Exchange ("**EGX**"), the FRA and the General Authority for Investment and Free Zones ("**GAFI")** as well as the Egyptian Competition Authority. Subject to the specific activity of a target company, other regulatory bodies might be involved depending on the sector.

2. What is the current state of the market?

Egypt ranked second most attractive country for M&A deals in 2021, after the US, growing by 486 percent to post $9.9 billion over 233 deals.[1] We anticipate 2022 to be a prosperous year with deals that will re-shape the bigger players within the Egyptian market.

Reference

[1] https://english.ahram.org.eg/News/461843.aspx

3. Which market sectors have been particularly active recently?

FMCG, Fintech, healthcare and education have been largely active over the past three years, in particular since the beginning of COVID-19.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

- the new merger control regime which has been ratified by the cabinet and is being discussed in Parliament. Such merger control regime will require the pre-closing clearance of transactions of a certain profile and therefore may tend to slow down the pace of the M&A activity. In case of adequate application, it may be deemed to promote the competition which results in free and fair activities;
- Regulatory framework and increase in issuance of laws to regulate the activities and stop the legislative gap that exist due to the technological advances;
- Potential reforms arising from the recently engaged IMF discussions with the Egyptian Government; and
- Continuation of COVID-19.

5. What are the key means of effecting the acquisition of a publicly traded company?

A publicly traded company ("**PTC**") will be traded via EGX. The main factor to determine any deal mechanics would be the percentage of the acquisition stake:

- If, less than third the share-capital or voting rights of the company, it will be via open market, voluntary tender offer or block trades;

- If third or more of the share-capital or voting rights of the company is the envisaged target stake, the same can only be acquired via the submission of a mandatory tender offer ("**MTO**") via the FRA to acquire up to 100% of the share-capital of the company. In practice, acquirer may enter into a sale and purchase agreement with the majority shareholders to confirm deal certainty amongst other protections as per the due diligence outcome.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

There are two types of companies: PTC and private closed company ("**PCC**"). Typically, the following information/documents are available for a PTC:

- the board meetings minutes which discuss the day to day operations;
- general assembly meeting minutes which discuss the appointment of the board of directors, financial statements and dividends and extra-ordinary matters (e.g. amendment of the Articles of Associations);
- financial statements;
- list of major shareholders and important matters that should be disclosed as per the EGX Listing Rules; and
- commercial register extract which identifies the commercial mortgage, if any, the board composition and signatory powers, the share-capital of the company and address of the headquarters and branches, if any.

As for the PCC, the only available document is the commercial register extract.

There is no legal requirement to disclose information to a potential acquirer, disclosures are made in the course of a due diligence which scope is agreed upon between the parties. Target companies often request a non-disclosure and confidentiality agreement to establish a data room and disclose information.

7. To what level of detail is due diligence customarily undertaken?

This depends on the following:

- size of the acquisition; a majority stake acquisition would entail a bigger scope and detailed level of due diligence rather than the diligence undertaken in a minority stake acquisition.
- commercial aspects of the deal as may be determined by the acquirer and subject to its risk appetite; and
- type of company; the scope of the due diligence is more extensive in a private acquisition rather than if it is via an MTO on a PTC.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The key decision-making organs of a target company are as follows:

1. Board of director which ha the widest powers to manage the company other than for those decisions which are exclusively within the competence of the OGM and EGM as detailed below ; and
2. General assembly, whether ordinary ("**OGM**") or extra-ordinary ("**EGM**"), which is basically the shareholders of the company who have the following competencies:

A) OGM:

- appoint the directors, review their activities and consider their release from liability;
- review the report of the auditor;
- approve the related-parties transaction;
- approve the financial statements;
- approve the distribution of profits and determine the management's remuneration; and
- appoint the auditor and determine its fees.

B) EGM:

- increase/decrease the capital of the company;
- amend the articles of association, including increase/decrease the capital of the company, change purpose and duration of the company;
- approve the continuance of the company if its losses reaches 50% of its equity as per the latest financial statements;
- approve shareholders' agreements;
- approve the listing/delisting of the company; and
- decide on the closure, liquidation of the company.

9. What are the duties of the directors and controlling shareholders of a target company?

Directors have fiduciary duties towards the shareholders, and they have to safeguard the company's and shareholders' interests. In relation thereto, directors must ensure that there is no conflict of interests.

There is no specific statutory duty for controlling shareholders. CML and Companies Law stipulate additional protection mechanisms for minority shareholders who could be outvoted but all shareholders have the same duties of safeguarding the company's interests.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

Employees in a share deal are kept within the target and hence, they have no say in an M&A. In case of an asset sale, a statutory join liability exists by law between the buyer and the seller when it comes to employees' rights and hence in asset deals the employees may have a stronger impact on deal dynamics.

Further, the relevant regulator -depending on the activity of the target – may be required to approve the transaction.

11. To what degree is conditionality an accepted market feature on acquisitions?

Conditionality is customary in Egyptian M&A deals as are typically structured as Conditions Precedent to closing and which are subject to the due diligence outcome in addition to regulatory approvals

It is worth highlighting that in an MTO context, the only two legally acceptable conditions are the acquisition of no less than 51% or 75% depending on the context.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

Typically, acquirers either sign a non-binding offer which includes an exclusivity clause or sign an exclusivity agreement with the sellers to secure deal exclusivity over a specific period of time.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Deal protections are agreed upon between the parties including, *inter alia*, breakup fees. Further, R&I insurance is becoming more common in large transactions.

14. Which forms of consideration are most commonly used?

Cash consideration is the most customary form. Other forms may include share swap.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

On the assumption that public disclosure includes the disclosure of the transaction to any person other than the parties to the same, there is no statutory requirement in respect to the acquisition of a PCC, save for:

1. prior regulatory approvals required in case of acquisition to companies operating in specific sectors (e.g. healthcare); and
2. if an acquirer which is to acquire 5% or more in the share-capital or voting rights of companies operating in the financial and non-banking sector, it should disclose the same to the FRA within two weeks from the execution of such acquisition, noting that the preapproval of the FRA is required in the event the acquisition is to 10% of the share-capital or voting rights, where the shareholding increases by 5% or its multiples.

In respect to a PTC, certain disclosures are required, including:

1. In the event the shareholding of a shareholder and its related parties has been increased and less than one-third, whether through one transaction or a series of transactions by 5% or decreased by 5% or its multiples of the company's share-capital. Also, in case such percentage reached 25% or more and is less than one third of the company's share-capital, the shareholder should disclose his/her future investment plan and the vision of managing the company, if any.Such shareholder should disclose the same within two days as of the execution of the relevant transaction to FRA

and EGX.

2. The above shall be applicable mutatis mutandis in case acquisition was by a director of the board or an employee of the PTC who has acquired 3% (or its multiples) of the issued shares or voting rights of the PTC.
3. In case of an MTO, the acquirer must submit to the FRA for its approval an MTO application. Upon acceptance of the MTO application and information memorandum, the FRA should notify EGX of the MTO material terms. In case the target is a listed company, EGX discloses such material on the EGX screens.

16. At what stage of negotiation is public disclosure required or customary?

There is no statutory requirement to make any public announcement for PCC or unlisted PTC. Nonetheless, it is customary that the parties to a transaction agree an announcement to be made to the public following completion of the transaction.

For a PTC, the acquirer should immediately disclose its intention to launch an MTO to FRA and EGX. Similarly, a PTC should immediately disclose a potential MTO to FRA and EGX upon receipt of a written notification to that effect from the acquirer or in case of the entry into any agreement to commence a due diligence or any similar agreements whether binding or non-binding in nature.

The above is also applicable on shareholders who own more than one third of the share-capital whenever approach of the acquirer's intention to submit an MTO. or in cases where such shareholders have entered into any arrangement with the potential acquirer which have not been disclosed to the target.

17. Is there any maximum time period for negotiations or due diligence?

There is an implicit time limitation for the due diligence and negotiations when an MTO is launched as acquirers are under the obligation to submit their offer within 60 business days; such period may be extended by an additional period not exceeding 60 business days upon approval by FRA.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

For a PCC, there is no minimum price, noting that any acquisition which is below the market fair price may be subject to tax implications.

For a PTC, in case of an MTO, the minimum price should be the highest tender offer price submitted for the shares during the previous 12 months. Without prejudice to the foregoing, the FRA may reject or request an amendment to the MTO offer in the following cases: (i) the average closing price on EGX for the three months prior to the date the FRA obliged the offeror to submit the MTO; or (ii) the average closing prices for the shares during the six months prior to the submission date of the MTO application, or (iii) the average closing prices for the shares during the six months prior to the breach date, whichever is higher. This is without prejudice to the FRA's right to request that the price be determined based on the fair value report.

19. Is it possible for target companies to provide financial assistance?

This is not customary in the Egyptian market given that lending is deemed a banking activity which should be authorized by the CBE. Hence, financial assistance may be perceived as such in case lending is customary which is prohibited under the Banking Law. It is worth highlighting that in case the target company lend its shareholder(s), such shareholder cannot be a board member as it is prohibited under Companies Law to lend board members or guarantee any of their obligations.

20. Which governing law is customarily used on acquisitions?

Typically, English and Egyptian law are mostly commonly used as a governing law given the contractual protections provided thereunder.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

In case the acquisition triggers an MTO, the acquirer must prepare and submit to FRA for its approval a full MTO application in addition to an information memorandum including, inter alia, the buyer's envisaged business plan for the target company post-closing.

In case of an acquisition of more than 25% of a PTC and is less than one third of the company's share-capital, the acquirer should disclose its investment plan.

22. What formalities are required in order

to document a transfer of shares, including any local transfer taxes or duties?

Transfer of shares is undertaken through EGX. Depending on the type of company and type of security, the taxes and duties applies.

For PCC:

- Exchange Operations Committee Fees: 0.05% for the first EGP 100MM from the purchase price and 0.025% for the purchase price.
- FRA Fees: 0.025% of the purchase price.
- Execution Fees:
  - EGX Fees: 0.1% Per Leg with a ceiling of EGP 50,000 per ticket.
  - MCDR Fees: 0.01% Per Leg with a ceiling of EGP 5,000 per ticket.

CGT: 22.5% on the gain realised.

Stamp duty tax applicable on PTC and PCC: the purchase and sale of shares representing less than 33% of a company's issued capital (during a consecutive period of two years) is 1.25/1000 for residents is 0.5/1000. As per the Stamp Duty Law,[1] stamp duty should be borne equally by the seller and the buyer. If the transferred shares represent 33% or more of a company's issued share-capital (as bulk in one transaction), each party shall pay stamp duty at a rate of 0.3%.

CGT on PTC: 10%.

Reference

[1] No. 111 of 1980.

23. Are hostile acquisitions a common feature?

Hostile acquisitions are not a common feature in the Egyptian market.

24. What protections do directors of a target company have against a hostile approach?

There are not any statutory protections the directors have against hostile approach. Although target could have insurance policies in place in favor of the directors, such insurance is not common in the Egyptian market.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Without prejudice to the exceptions set out under CML, CML sets out the events when an MTO must be launched for up to 100% of the shares and convertible bonds of a PTC:

1. if a party, directly or indirectly, alone or through related parties, wishes to acquire one third or more of the issued shares or voting rights of the PTC.
2. if a shareholder who holds, alone or together with its related parties, one third or more and less than half of the shares or voting rights increases its shares or voting rights in the PTC by more than (5%) of the issued shares or voting rights during any twelve consecutive months. In all cases, the obligation to launch an MTO shall remain valid and will be triggered in case the ownership of shares or voting rights reached 50% at any time;
3. if a shareholder, who holds, whether directly or together with its related parties, more than half and not more than two thirds of the issued shares or voting rights increases its shares or voting rights by more than (5%) of the issued shares or voting rights during any 12 consecutive months. In all cases, the obligation to launch an MTO shall remain valid and will be triggered in case the ownership of shares or voting rights reached two thirds at any time;
4. if a shareholder who holds, alone or together with its related parties, more than two thirds of the issued shares or voting rights and less than or equal to 75% of the shares or voting rights increases its shares or voting rights in the PTC by more than (5%) of the issued shares or voting rights during any twelve consecutive months. In all cases, the obligation to launch an MTO shall remain valid and will be triggered in case the ownership of shares or voting rights reaches 75% at any time.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

a. Minority shareholders have some rights conferred by Companies Law and the Articles of Association of the company which include, inter alia, the right of shareholders who hold at least 5% of the company's share-capital to request the suspension of the general assembly's resolutions, noting that such request should have solid and serious grounds as such, said resolutions should be detrimental to those minority shareholders or should have been issued for the benefit of a certain class of shareholders or to bring personal benefit to the members of the board or others.

b. Pursuant to the Companies' Law, the articles of association may provide for a pro-rata representation of shareholders on the board of directors of the company, not exceeding one seat per each 10% shareholding in the company's share-capital.
c. Pursuant to the Companies' Law, minority shareholders holding at least 10% are entitled to request the inspection of the company regarding any material breach imputed to the board of directors or to the auditor.Furthermore, the shareholders are entitled to examine the books and records of the company.
d. Rights based on Specific Shareholding
    a. shareholders holding 5% are entitled to cause the board of directors to call the OGM to convene and include items to the agenda of the meeting.
    b. shareholders holding 10% are entitled to cause the board of directors to call the EGM to convene and include items to the agenda of the meeting.
    c. shareholders holding 25% +1 may veto EGM resolutions pertaining to increase or decrease of the capital or liquidation/dissolution of the company before its term, or changing the original purpose of its incorporation, or its spin-off.
    d. shareholders holding 33.33% +1 may veto EGM resolutions.

27. Is a mechanism available to compulsorily acquire minority stakes?

Apart from the MTO as highlighted above and the case stipulated under the CML if a party, alone or through related parties, acquires 90% or more of the issued share-capital and voting rights of a PTC, any of the remaining shareholders holding 3% of the issued share-capital or a number of shareholders of at least 100 representing not less than 2% of the free float may, during the 12 months following the acquisition by the majority shareholder of the above mentioned percentage, request FRA to notify the majority shareholder to launch a tender offer to acquire the minority shareholders. If such a request is accepted by the FRA, it shall notify the majority shareholder who shall be obliged to submit an MTO file during the period determined by FRA, Egyptian law does not recognize the squeeze-out mechanism by which the majority shareholders may force minority shareholders into selling their shares.

Notwithstanding the above, pursuant to the Companies Law, any merger must be approved an EGM resolution. Shareholders who objected the resolution of merger in the respective EGM or those who did not attend such EGM due to acceptable reasons may demand buy-out of their shares by the company via a written request, which should be received by the company within 30 days from the date of publicizing the merger decision.

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