



ICLG

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Mergers & Acquisitions 2014

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Different legal texts are applicable to mergers and acquisitions.

First of all, acquisitions are governed by the Moroccan civil code which sets out general principles applicable to all sales, including those that may intervene within the context of a corporate acquisition. In addition to the Moroccan civil code, some rules of the commercial code may also be applied to some extent.

Furthermore, mergers are governed by corporate law, mainly law n° 17-95 relating to joint stock companies and law n° 5-96 relating to other corporate forms as further amended and completed.

1.2 Are there different rules for different types of company?

Regarding acquisitions, it should be noted that certain corporate forms require the obtaining of the approval of the existing shareholders prior to the proceeding of a transfer of shares from one shareholder to a third party. The prior approval, when not mandatory or imposed by law, may also be imposed by the Articles of Association or the shareholders' agreement, if any, of some corporate forms, such as joint stock companies, which do not require such prior approval by nature.

Aside from the above, law n° 17-95 relating to joint stock companies as further amended sets out some conditions for the implementation of a merger. In this regard, this law provides for example that the authorisation of bondholders is necessary for the implementation of the merger. Should bondholders oppose such merger, then it will be necessary to proceed with their reimbursement (art. 309 of law n° 17-95).

Moreover, as a general rule, listed companies are bound by a strict regulation designed to protect the stock market. Such regulation notably sets out the details that have to be disclosed to the public regarding any merger or acquisition. These details are considered to be important pieces of information which may not be kept secret from the public.

1.3 Are there special rules for foreign buyers?

As a matter of principle, there are no special rules for foreign buyers.

1.4 Are there any special sector-related rules?

Yes, there are special sector-related rules.

Indeed, transactions entered into with respect to targets operating in some fields such as banking, insurance, stockbroking firms, etc. require the disclosure to and the prior authorisation of the respective regulatory authorities which are *Bank Al Maghrib*, the *Ministry of Finance*, the *Conseil Déontologique des Valeurs Mobilières* ("CDVM"), etc.

Besides, it should be noted that when the projected transaction results in creating or reinforcing the market position of a company in its field in a manner that exceeds 40% of the market share, then it would be necessary to go through the approval procedure before the competition authority which is still the competition department of the Ministry of general affairs. The latter would refer to the Competition Counsel for consultancy, if necessary.

1.5 What are the principal sources of liability?

There are several sources of liability. We may distinguish between the sources that are common to all types of companies, and those that are reserved for listed companies:

- common sources of liability: they relate to the preservation of the corporate interest of the target. Indeed, the entry into a merger and acquisition transaction requires important finance structuring. For example, in a leveraged buy out, it is necessary to obtain securities from the target itself for the financing of its own acquisition. In this regard, and for the sake of the protection of the target's corporate interest, Moroccan legislation prohibits financial assistance, which is the act of a target financing its own acquisition or providing securities to secure this financing; and
- sources of liability reserved for listed companies: these sources are mostly manoeuvres that result in market manipulation or insider dealing. In addition, other sources of liability for listed companies can include non compliance with mandatory rules such as those relating to the disclosure of information to the public or to the CDVM.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

It is possible to proceed with a public offering on a target pursuant to the provisions of law n° 26-03 dated May 6th, 2004 relating to public offerings.

2.2 What advisers do the parties need?

The parties need the following advisers:

- legal advisers: they will be in charge of (i) reviewing the main legal issues of the transaction, specifically the validity, legality, enforceability and binding effect of the transaction, (ii) the drafting of the relating documentation, and (iii) conducting the legal due diligences of the target in order to detect any irregularities or legal risks. The counterpart will also need to be assisted by other legal advisers;
- financial advisers: they will have to conduct the evaluation of the target's financial value and propose an acquisition price. They will also be in charge of drafting the necessary regulatory prospectus in case of a listed target; and
- auditors: they are mandatory in joint stock companies and in some other corporate forms when certain conditions are met. The auditors have to certify that the financial statements of the company are true and sincere and that they reflect its accrual financial situation.

2.3 How long does it take?

The timeframe for the implementation of a merger or an acquisition is different based on (i) the size of the target, and (ii) on whether the target is a listed or a non listed company. When listed, the process takes much longer as there are some additional regulations to comply with. When non-listed, the process is obviously quicker.

2.4 What are the main hurdles?

The main hurdles relate to listed companies on the first side and to companies which trigger the antitrust control referred to in response to question 1.4 above on the other side.

Target listed companies require the preparation of a prospectus and its acceptance by the CDVM, which is a relatively time consuming procedure. Besides, when the implementation of the merger and acquisition results in the exceeding of the 40% threshold indicated above, then it would be necessary to notify the Competition Counsel and to wait for its response. Failing a response, it will be necessary to wait for at least two to six months before the transaction can be implemented.

2.5 How much flexibility is there over deal terms and price?

As a matter of principle, the price and deal terms are a matter of negotiation between the parties.

Nevertheless, when the acquisition is made through a public offering (*offre publique*), the offeror decides on the price it wishes to propose to the target's shareholders. In any event, the proposed price has to be greater than the market price in order to be interesting for the shareholders. In this regard, article 25 of law n° 26-03 on public offerings provides that the price has to be established according to relevant evaluation methods and it has to be objective.

2.6 What differences are there between offering cash and other consideration?

There are two types of public offerings. The first offers cash and the second offers securities.

Takeover bid is the procedure whereby a natural or legal person, acting alone or in concert publicly discloses that he/she intends to acquire the securities of a listed company against cash compensation.

Takeover bid for shares is the procedure whereby a natural or legal person, acting alone or in concert makes public that he/she intends

to acquire, through a share exchange, the securities of a listed company.

2.7 Do the same terms have to be offered to all shareholders?

Yes, pursuant to the principle of the equality of shareholders, the same terms have to be proposed to all shareholders. In this regard article 14 of law n° 26-03 relating to public bids provides that a public bid must offer the same price and performance conditions to all shareholders.

2.8 Are there obligations to purchase other classes of target securities?

A public offering may be given to all the shares of a company or, if there are any, to a specific category of shares.

When there are no different categories of shares in the company, and all the shares are identic, then the public offering has to be made for all the shares of the company, without exception.

2.9 Are there any limits on agreeing terms with employees?

In case of a merger, all employment agreements are transferred to the new entity.

In case of an offer, they are not concerned because the transaction takes place between the shareholders and a prospective acquirer without affecting the company.

2.10 What role do employees, pension trustees and other stakeholders play?

Creditors are allowed to oppose the merger project if the latter jeopardises their chances of reimbursement.

Besides, generally employees may have their say on a consultancy basis through their delegates or company counsel as provided by Moroccan labour law.

2.11 What documentation is needed?

The documentation depends on the techniques used for the acquisition:

- for mergers: a merger treaty, the minutes of the Extraordinary General Assemblies of both companies concerned with the merger, the minutes of the General Assembly of bondholders, if any, etc.;
- for acquisitions: mainly a share purchase agreement (SPA); and
- for public offerings: mainly the prospectus to be filed with the CDVM and the SPA for sales to be entered into with the shareholders.

2.12 Are there any special disclosure requirements?

Please see responses to questions 1.2 and 1.4.

2.13 What are the key costs?

The key costs relate to (i) panel advisers fees, and (ii) the price of the sale as well as of the corresponding applicable taxation. Those costs are very different and vary on a case by case basis.

2.14 What consents are needed?

Please see the responses to questions 1.4 and 2.4.

2.15 What levels of approval or acceptance are needed?

Aside from the regulatory approvals that apply in some cases, no other approvals or acceptances are necessary. As such, the offeror may initiate a public offering in a hostile manner without obtaining the consent of the target or its board.

However, the projected offer has to be approved by the CDVM and the Ministry of finance and it has to comply with all the rules set out by law n° 26-03 dated May 2004 relating to public offers in order to be admissible by the CDVM and the administration.

2.16 When does cash consideration need to be committed and available?

Cash consideration needs to be available on the closing date of the offer.

3 Friendly or Hostile

3.1 Is there a choice?

Yes, indeed, there is a choice between friendly and hostile public offers.

3.2 Are there rules about an approach to the target?

There are no specific rules about an approach to the target. However, the offeror may try to approach the target in order to obtain its approval for the conduct of the public offering. Even if such approval is not necessary, it may be an important argument for the offeror in attracting the shareholders of the target.

3.3 How relevant is the target board?

The board is entitled to make a public statement whereby it makes public its position regarding the public offer. The board will then indicate whether it is supportive of the public offering or in the opposite, whether it considers that it is a hostile offer.

The board is also entitled to take some actions to ensure the protection of the company against any hostile public offerings.

3.4 Does the choice affect process?

The choice between a friendly and a hostile offer is a strategic choice in various regards. First of all, it determines the attitude of both the target and the offeror regarding the offer. In case of a friendly offer, they will both act together, notably by making joint statements.

4 Information

4.1 What information is available to a buyer?

The information available to the buyer will significantly vary depending on whether the offer is friendly or hostile. In the first case, the buyer may have access to all information that may be disclosed by the target.

However, in case of a hostile offering, the buyer will only have access to the information made public by the target through its mandatory periodic publication of financial statements and important information.

In this regard, it should be noted that this information is rather significant to the extent that the target, as a listed company, is bound to make important disclosures to the market. This publicly known information allows an overall view of the target's situation.

4.2 Is negotiation confidential and is access restricted?

First of all, it should be noted that pursuant to the Casablanca stock exchange regulations, all important information which is likely to have an impact on the market price of a security has to be disclosed to the public.

Nevertheless, this does not prevent preliminary negotiations taking place between the parties so long as no concrete steps have been undertaken. However, as soon as the negotiations lead to a concrete transaction, then the information has to be disclosed forthwith.

4.3 When is an announcement required and what will become public?

Please see the response to question 4.2 above. The announcement is made through a press release and a prospectus which informs the public of the occurrence of the offer.

In addition to this press release, the detailed elements of the offer (including the price, number of shares to be acquired, conditions of the offer, etc.) will have to be communicated to the CDVM and then to the public in order to allow the implementation of the offer.

4.4 What if the information is wrong or changes?

Intentionally leaking wrong information to the market may be a source of criminal and civil liability. Besides, if the information changes, a corresponding announcement has to be made to keep the market informed of such change.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Article 53 of law n° 26-03 relating to public offerings prohibits the target from directly or indirectly purchasing its own securities as from the date of the launch of the public offer. However, the target is allowed to pursue a buy-back programme if the latter has duly been authorised by the company.

In any event, the target has to inform the CDVM of all the transactions entered into on the securities upon which the public offer is ongoing.

5.2 Can derivatives be bought outside the offer process?

No, derivatives can not be bought outside the offer process.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

As a general rule, there is a disclosure obligation imposed on any

person that crosses one of the thresholds provided for by law n° 1-93-211 on the Casablanca Stock Exchange. Those thresholds relate to both the share capital and voting rights of a listed company.

Besides, please see the response to question 5.1 for the obligation of disclosure of the target to the CDVM regarding the transactions entered into during the public offering period.

5.4 What are the limitations and consequences?

Please see the response to question 5.1 above.

6 Deal Protection

6.1 Are break fees available?

There is no specific provision for break fees. As such, they are not prohibited. However, the provision for break fees should take into consideration both (i) the corporate interest of the company that agrees to it, and (ii) the fact that the Moroccan judge is entitled to increase or decrease break fees if they are deemed excessively high or excessively low (art. 264 of the Moroccan Civil Code).

6.2 Can the target agree not to shop the company or its assets?

Yes, the target can agree not to shop the company or its assets in case of a friendly public offering.

6.3 Can the target agree to issue shares or sell assets?

Please see the response to question 3.3.

6.4 What commitments are available to tie up a deal?

The commitments to tie up a deal are only available in case of a friendly public offering. In this case, various agreements may be negotiated with the target and its reference shareholders.

As such, it is for example possible to ask the board to support the offering or, to obtain the support of the reference shareholders so that the latter commit to follow the offer.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

The bidder is allowed to make its offer depend on the fulfilment of some conditions such as the obtaining of a minimum amount of securities or the prior approval of the Competition Authority as necessary.

Nevertheless, it should be noted that the offer becomes irrevocable and the obligations contained therein must be performed as soon as (i) the offering project is agreed by the CDVM, and (ii) the conditions set out by the offering are met.

7.2 What control does the bidder have over the target during the process?

The bidder does not have any control over the target during the

process. However, the law organises public offerings in order to prevent the target from proceeding with any actions that might be unfair or prejudicial to the market as a whole.

7.3 When does control pass to the bidder?

Control passes to the bidder when the latter acquires a significant amount of the share capital and/or voting rights of the target which allows it to have the majority of voting rights in the general meetings of the target.

7.4 How can the bidder get 100% control?

Pursuant to the provisions of law n° 26-03 relating to public offerings, a bidder is obliged, as long as a specific threshold is crossed, to launch an offer in order to acquire the totality of the target's share.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

The board of the target is entitled to make its position regarding the offer public by publishing a statement.

8.2 What can the target do to resist change of control?

There are a variety of techniques that allow a company to resist a change of control. Some of those techniques are preventive. For example, a company can separate the power of the company from its share capital so that the power of the company can be concentrated in the hands of the reference shareholders while the other shares are deprived from their voting right. Besides, it is also possible, thanks to the legal obligation of disclosure of threshold crossing, to detect which entities are secretly trying to gain the control over the company, and to take necessary action. It is also possible to create alliances among the shareholders.

8.3 Is it a fair fight?

Each of the bidder and the target display their techniques further to a defined strategy. However, their scope for action is limited by the legal restrictions which set out the rules of the game and guarantee an environment of fair and equilibrated play for the offering.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The major influences on the success of an acquisition largely depend on the position of the target and the reference shareholder. Indeed, if the latter agrees to support the offering, then its chances of success are very significant. Otherwise, the bidder will have to ensure that its offer is highly attractive in order to make the shareholders want to disregard the position of the board and follow the offer.

9.2 What happens if it fails?

If the offer fails, then the bidder will have to withdraw unless it wishes to start a new public offering.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Morocco.

To the best of our knowledge, there are no relevant new laws or practices in M&A in Morocco.



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