

Amendment of Egyptian Takeover Rules

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In Egypt, the acquisition of the shares of a listed company is governed by the Capital Markets Law No. 95 of 1992 (the 'CML'), and its Executive Regulations No. 139 of 1993, as amended (the 'CML ER'), as well as the Egyptian Exchange Listing and Delisting Rules issued by the Financial Regulatory Authority (the 'FRA') Decree No. 11 of 2014, as amended (the 'EGX Listing Rules'). The acquisition of the shares of a listed company is either undertaken by way of a tender offer or through open market transactions. Chapter 12 of the CML ER regulates both mandatory and voluntary tender offers. In an effort to uphold the contemporary nature of the legislation, Chapter 12 of the CML ER was recently restated in November of 2018 to accommodate the dynamic nature of the market and to bridge the gaps between the original Chapter 12 and market and regulator practices in order to enhance the protection of minority rights and interests.

The focal point of this article is the fundamental conceptual changes prompted by the restated Chapter 12 of the CML ER (the 'Restated Chapter 12'), and the implication of such amendments on mandatory tender offers ('MTOs').

1. Takeover Triggering Events

(a) Triggering Events

One of the chief amendments effected by the Restated Chapter 12, are the amendments made to the MTO triggering events. The Restated Chapter 12 stipulates that an MTO is triggered where a person, whether directly or through its related parties: (i) acquires one third (33 percent) or more of the share capital or voting rights of the target company; (ii) if the acquirer holds more than one third (33 percent) and does not exceed half (50 percent) of the share capital or the voting rights of the target company, and within 12 consecutive months, the acquirer's ownership exceeds five percent above its existing stake; (iii) exceeds half (50 percent) of the share capital or the voting rights of the target company at any given time; (iv) if the acquirer holds more than half (50 percent) and does not exceed two thirds (66 percent) of the share capital or the voting rights of the target company, and within 12 consecutive months, the acquirer's ownership exceeds five percent above its existing stake; (v) if the acquirer holds more than two thirds (66 percent) and does not exceed three quarters (75 percent) of the share capital or the voting rights of the target company, and within 12 consecutive months, the offeror's ownership exceeds five percent above its existing stake; and (vi) exceeds three quarters (75 percent) of the share capital or voting rights of the target company at any given time.

It is worth noting that the Restated Chapter 12 introduced the two-thirds (66 percent) threshold and that the five percent referred to above used to be two percent in the original Chapter 12.

(b) Exceptions

Furthermore, the Restated Chapter 12 now includes additional events in which a MTO obligation is not triggered. Those are, in the event:

1. of a decrease in the share capital of the target company through the cancellation of treasury shares, since the former event will increase a shareholders' ownership, without such increase being the result of an acquisition;
2. the offeror obtains the approval of all of the target company's shareholders (this is relevant to non-listed companies which offered their shares to the public for subscription, as they are included in the scope of application of Chapter 12); and
3. the target company increases its share capital, save for in the case of a shareholder whose ownership increases due to his acquisition of another shareholder's subscription right.

It is interesting to note that under the original Chapter 12, the FRA was entitled to introduce exceptions to the submission of the MTO subject to its discretion. However, the Restated Chapter 12 came to limit those exceptions to the ones stipulated in the Restated Chapter 12.

(c) Minority Exit Rights

The Restated Chapter 12 also amended the provision pertaining to minority exit rights. Minority shareholders holding three percent of the target company's share capital (which had this right under the original Chapter 12) or voting rights or minority shareholders representing a minimum of 100 shareholders which represent no less than two percent of the free float (which now have this right under the Restated Chapter 12), may request the FRA to oblige the majority shareholder to submit a MTO during the 12 months following the majority shareholder's acquisition of the target company's shares, where such majority shareholder owns 90 percent or more of either the share capital or the voting rights of the target company.

The above amendment is a further attempt by the FRA to encourage the protection of minority interests by empowering the minority shareholders with an exit strategy in the event the majority shareholder's control over the target company increases.

2. MTO and Listing

The MTO is submitted for the acquisition of securities representing 100 percent of the share capital or the voting rights of the target company. However, the restated Chapter 12 introduced a new concept where, in the event an offeror intends to maintain the securities of the target company listed, such offeror may submit a MTO for 100 percent of the share capital or the voting rights of the company less the minimum free float requirement. The result of this amendment treats and circumvents a fundamental procedural issue faced by acquirers in the past. Under the original Chapter 12, once an offeror submits a MTO for 100 percent of the share capital or voting rights of a target company, such acquirer must either de-list the target company or rectify its situation within a certain period, in the event the free float requirement is no longer fulfilled, as per the EGX Listing Rules.

Accordingly, the Restated Chapter 12 allows acquirers post-acquisition to maintain the listing of the target company by removing certain procedural inhibitors, by also allowing the target company to remain in compliance with the EGX Listing Rules.

3. Method of Acquisition

Under the original Chapter 12, the acquisition method of the tender offer may be undertaken through cash or a mixed offer (i.e. cash or share swap at the option of the shareholder). The Restated Chapter 12 introduced a provision allowing offerors who intend to maintain the securities of the target company listed to submit the MTO through a pure share swap.

The benefit of this amendment is to allow M&A transactions involving listed companies, where the listing is maintained, to occur more easily, as the requirement of a mixed offer with confirmation of funding for a 100 percent cash option created a significant bottleneck.

4. Expansions and Further Clarifications

(a) Obligations on Majority Shareholders

The Restated Chapter 12 introduced a new obligation on majority shareholders owning one third (33 percent) the target company's share capital or voting rights. The Restated Chapter 12 requires such majority shareholder to notify the FRA once they receive an offer from a potential acquirer who has an intention to submit a MTO, in particular where the target company is unaware. Additionally, the majority shareholder may not trade its shares in the period between the announcement of the MTO and the execution of the MTO.

Prior to the promulgation of the Restated Chapter 12, in practice, and in an effort to avoid disclosure, target companies used to abuse the original Chapter 12 in order to make it seem like the target company was unaware of a potential takeover.

(b) Expansion of the FRA's refusal to accept an MTO

The Restated Chapter 12 elaborated on the reasons that the FRA may employ to refuse the submission of the MTO. Under the original Chapter 12, the refusal of the MTO was subject to the FRA's discretion, however, the Restated Chapter 12 now limits those reasons to the ones stipulated in the newly promulgated provision, thus limiting the powers of the FRA, and thereby making the process more transparent.

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