ARTICLE

Merger and Acquisition : Relatedness and Discrepancies in light of the Tunisian Regulation

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MERGER AND ACQUISITION : RELATEDNESS AND DISCREPANCIES IN LIGHT OF THE TUNISIAN REGULATION

Mergers, acquisitions, and takeovers have been a part of the business world for centuries. In today's dynamic economic environment, companies are often faced with decisions concerning these actions, after all, the job of management is to maximize shareholder value. Through mergers and acquisitions, a company can (at least in theory) develop a competitive advantage and ultimately increase shareholder value.

PART I : Merger vs. Takeover: An Overview

In a general sense, mergers and takeovers (or acquisitions) are very similar corporate actions. They combine two previously separate firms into a single legal entity. Significant operational advantages can be obtained when two firms are combined and, in fact, the goal of most mergers and acquisitions is to improve company performance and shareholder value over the long-term.
Merger and acquisition transactions, relatedness, and discrepancies are governed by Tunisian laws and regulations, primarily outlined in the Tunisian Commercial Code and the Financial Market Law. These laws provide a legal framework for companies looking to merge or acquire other businesses in Tunisia.

The motivation to pursue a merger or acquisition can be considerable; a company that combines itself with another can experience boosted economies of scale, greater sales revenue, market share in its market, broadened diversification, and increased tax efficiency. However, the underlying business rationale and financing methodology for mergers and takeovers are substantially different.

A merger involves the mutual decision of two companies to combine and become one entity; it can be seen as a decision made by two "equals." The combined business, through structural and operational advantages secured by the merger, can cut costs and increase profits, boosting shareholder value for both groups of shareholders.
In a merger of two corporations, the shareholders usually have their shares in the old company exchanged for an equal number of shares in the merged entity.
For example, back in 1998, American automaker Chrysler Corp. merged with German automaker Daimler Benz to form DaimlerChrysler. This had all the makings of a merger of equals, as the chairmen in both organizations became joint leaders in the new organization. The merger was thought to be quite beneficial to both companies, as it gave Chrysler an opportunity to reach more European markets, and Daimler Benz would gain a greater presence in North America.

A takeover, or acquisition, on the other hand, is characterized by the purchase of a smaller company by a much larger one. This combination of "unequals" can produce the same benefits as a merger, but it does not necessarily have to be a mutual decision.
A larger company can initiate a hostile takeover of a smaller firm, which essentially amounts to buying the company in the face of resistance from the smaller company's management.

Unlike in a merger, in an acquisition, the acquiring firm usually offers a cash price per share to the target firm's shareholders, or the acquiring firm's shares to the shareholders of the target firm, according to a specified conversion ratio. Either way, the purchasing company essentially finances the purchase of the target company, buying it outright for its shareholders.
An example of an acquisition would be how the Walt Disney Corporation bought Pixar Animation Studios in 2006. In this case, the takeover was friendly, as Pixar's shareholders all approved the decision to be acquired.
Target companies can employ a number of tactics to defend themselves against an unwanted hostile takeover, such as including covenants in their bond issues that force early debt repayment at premium prices if the firm is taken over.

PART II : Tunisian Regulatory Framework

The following legislation principally governs public M&A activity:

- The Tunisian Commercial Companies Code (promulgated by Law No. 59-129 of October 5, 1959, and amended up to Law No. 2007-37 of June 4, 2007)
- ·Law no. 91-64 of July 29 1991, addressing the Reorganisation of Prices and Competition, amended by Act No. 2015-36 of 15 September 2015
- ·Act no. 94-117 of November 14, 1994, adressing Reorganisation of the Financial Market and creating The Financial Market Council (CMF)
- ·The General Regulation of the Stock Market of Tunis, Approved by decree of the Minister of Finance dated 13 February 1997, and amended in1999, 2005, 2007, and 2008.

The primary regulatory bodies are:

- The Financial Market Council (Conseil du Marché Financier)
- The Tunisian Competition Council (Conseil de la Concurrence)
- The Ministry of Commerce

The Financial Market Council supervises takeover bids, while the Tunisian Stock Exchange Market (Bourse des Valeures Mobilières de Tunis) monitors trading on all regulated markets.

As far as basic structures for friendly and hostile acquisitions are concerned, hostile acquisitions of a Tunisian public target are generally structured as a tender offer by the bidder to all or part of the target's shares at the same price in cash and/or shares. A friendly acquisition, on the other hand, is often preceded by the purchase of one or several blocks of shares. When the acquisition is paid in shares, it may be structured as a merger, subject to the approval of a two-thirds majority of an extraordinary general meeting of the two companies.

The choice of structure is nontheless not the simplest task, as the acquisition is often preceded by an acquisition of share blocks in the framework of an acquisition on a cash deal basis. In a share deal, the acquirer may structure its acquisition as a merger operation. The acquisition is preceded by a takeover bid to squeeze out minority shareholders, after which the company can execute the merger.

In a cross-border deal, the target company's activity must be considered. Certain sectors restrict foreign ownership and require prior authorisation of the Ministry of Trade and/or the Central Bank of Tunisia.

Regarding the length that the deal can take, an acquisition can take two to three months to complete. A higher offer or a competing offer may be filed with the Financial Market Council up to five trading days before the closing of the previous offer. The timeline can be extended when regulatory approval or antitrust proceedings are required.
As for the price offered and its form, a public offer can be made in cash, shares or a combination of the two. The Financial Council Market may need to review the price offered, depending on objective assessment criteria or the characteristics of the target's company.

The Minority shareholders have the right to withdraw from the capital of the target company through a public repurchase offer or mandatory public tender offer.
In fact, the general principle is that the bidder must treat all shareholders of the same class of a target's company the same. Minority shareholders do not enjoy specific protections against the payment of control premiums, or other preferential pricing for selected shareholders.
However, any person who, alone or in concert exceeds (even unintentionally) the 40% threshold of the shares or voting rights in the target must file an offer for 100% of the target's share capital and equity-linked securities.

Any person who, alone or in concert exceeds (even unintentionally) the 95% threshold of the shares or voting rights in the target must file a public repurchase offer.
Except for certain limited conditions for voluntary offers, public offers cannot be conditional and are irrevocable upon filing. The banks filing the offer on the bidder's behalf guarantee payment.

When it comes to tax considerations, the basic tax is for stamp duty and registration at the charge of the purchaser. Value added tax is also applicable. For cross-border deals, tax treaties with the Tunisian Republic will be applied.

What are the most important forms of anti-takeover defences and are there any restrictions on their use?

The most common anti-takeover defences that a company can use to resist a hostile takeover bid is to separate the power of the company from its share capital.
This means that the power of the company could be focused at the level of the reference shareholders, whereas the other shares are deprived of their voting rights. The company can also make a statutory ceiling for participations.

When it comes to deal protections, it is difficult to prevent an interloper from filing a competing offer because any competing offer must be approved by the Financial Council Market.
However, in practice, the acquirer may use break fees and undertakings from the target not to actively seek counter bidders.
As indicated in section 6.1, any competitor has the right to make a public offer as long as the offer remains open. Break fees are not provided for under Tunisian laws and as such, are not prohibited.
However, general principles regarding the liability of the directors to act in the target's interests make break fees rare in practice.

What are the antitrust notification thresholds in tunisian jurisdiction?

In accordance with article 7 of the Competition Law, antitrust review will apply only if:

the concerned companies have together achieved at least 30% of the sales, purchases or other transactions during the three fiscal years over a national market of substitutable goods, products or services or over a substantial part of such market;
 the global turnover achieved in the local market reaches at least TND 20 million (approximately $10 million).

Antitrust notification filing is mandatory if the transactions meet the conditions indicated in section 7.1.

As for penalties for not filing, any project of concentration or concentration operation shall be subject to the prior authorisation of the Ministry of Commerce by the concerned parties. This must be filed no later than 15 days from the date of conclusion of the concentration act, merger, and publication of the purchase offer of exchange of rights or obligation or acquisition of control participation.

Without prejudice to the sanctions stated by courts, the Competition Council may order the concerned operators in breach of these requirements to pay a fine of no more than five percent of their pre-tax turnover as achieved in Tunisia during the last financial year.

Regarding antitrust review periods, no response from the Ministry of Commerce for three months from the date of a transaction's referral can be taken as the Ministry's tacit acceptance of the deal.
The Ministry of Trade and/or the Competition Council do not have jurisdiction to review or impose penalties for failure to notify deals that do not have local competition effect.

What is the applicable anti-corruption legislation?

The relevant legislation includes: the Tunisian Penal Code; the Framework Decree (Décret-Cadre) of November 14 2011 pertaining to the fight against embezzlement; and Decree of February 18 2011, creating the National Commission on Investigation into Corruption and Embezzlement.

Article 91 of the Penal Code provides that:

a breach will occur where any person has bribed or attempted to bribe by donations or promises of donations, or presents or advantages of any kind to a public officer (and any person to be treated as a public officer within the meaning of the Penal Code) to perform any act related to his function, even a rightful act related to the function of the public officer, but not subject to a consideration, or to facilitate the achievement of an act related to his function, or to refrain from doing any act that it is his duty to do.

There is no offence for bribing either a private person or company under the Tunisian Penal Code.

The Framework Decree introduced criminal sanctions for corruption within the private sector. However, the laws criminalising corruption in the private sector have not been enacted.

In accordance with potential sanctions and their enforcement, violation of the prohibition on giving gifts or hospitality to government officials and/or public servants is punishable by five years imprisonment and a fine of TND 5,000.