

## THE CAPITAL MARKETS (TAKE- OVERS AND MERGERS) REGULATIONS

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**THE CAPITAL MARKETS (TAKE-  
OVERS AND MERGERS) REGULATIONS**

[Legal Notice 126 of 2002]

**PART I – PRELIMINARY****1. Citation**

These Regulations may be cited as the Capital Markets (Take-overs and Mergers) Regulations and shall be deemed to have come into operation on the 24th July, 2002.

**2. Interpretation**

In these Regulations, unless the context otherwise requires—

"acquiring effective control" means the acquisition of shares in the offeree which together with shares if any, already held by the offeror or by any other person that is deemed to be associated or a company or by any other company that is deemed by virtue of being a related company to the offeror or by persons acting in concert with the offeror carry the right to exercise or control the exercise of not less than twenty-five percent of the votes attached to the ordinary shares of the offeree provided that such person already holding twenty-five percent or more but less than fifty percent of the voting shares may acquire no more than five percent of the shares of a listed company in any one year;

"acting in concert" means persons who pursuant to a formal or informal agreement or understanding actively co-operate through the acquisition by any of them of shares having voting rights in a public listed company to obtain or consolidate control of that company;

"Board" has the meaning assigned to it in the Act;

"competing take-over offer" means an offer made by a person with respect to the offeree's voting shares in response to an offer that has already been made and such other person shall be deemed to be the competing offeror;

"counter offer" means a take-over offer made by an offeree to an offeror;

"effective control" is where a person or a company makes an offer for the acquisition of effective control of an offeree which holds shares which together with shares, if any, already held by such person or an associate person or a company or by any other company that is deemed by virtue of being a related company or by persons acting in concert with such person carry the right to exercise or control the exercise of not less than twenty-five percent of the votes attached to the ordinary shares of an offeree which shall be deemed to be a take-over and the provisions of these Regulations shall apply except where that person or associate person or related company or persons acting in concert with the person, already hold shares carrying more than ninety percent voting rights in the offeree;

"days" means calendar days excluding Saturdays, Sundays and public holidays;

"merger" means an arrangement whereby the assets of two or more companies become vested in or under the control of one company;

"offeror" in relation to a take-over scheme or a take-over offer means any person who acquires or agrees to acquire effective control in the offeree either directly or with any associated person or related company or any person acting in concert with the offeror but does not include a person who holds shares carrying more than ninety percent voting rights in the offeree;

"offeree" in relation to a take-over scheme or a take-over offer means a listed company on a securities exchange with shares to which the scheme or offer relates;

"offer period" means the period commencing from the date the offeror sends an offeror's statement under regulation 4 until—

- (a) the first closing date of the take-over-offer; or

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- (b) the date when the take-over offer becomes or is declared unconditional as to acceptances, lapses or is withdrawn, if this date is later than that referred to in paragraph (a).

"press notice" means to announce or publish information on the take-over through the print of electronic media;

"related company" means a company which is—

- (a) the holding company of another company;
- (b) a subsidiary of another company; or
- (c) a subsidiary of the holding company of another company,

and for purposes of ascertaining the relation, the first mentioned company and the other company shall be deemed to be related to each other;

"reverse take-over offer" means a situation where an offeror makes a take-over offer for the voting, shares of an offeree by means of an exchange of shares such that if the take-over offer is accepted, the shareholders of the offeree would control the offeror;

"take-over offer" means a general offer to acquire all voting shares in the offeree company and includes a take-over scheme;

"take-over scheme" means a scheme involving the making of offers for acquisition by or on behalf of a person of—

- (a) all voting shares in the offeree;
- (b) such shares in any company which results in an offeror acquiring effective control in an offeree;
- (c) any shareholding of twenty-five percent or more in a subsidiary of a listed company that has contributed fifty percent or more to the average annual turnover in the latest three financial years of the listed company preceding the acquisition; or
- (d) any acquisition deemed by the Authority to constitute a take-over scheme.

"ultimate offeror" includes a person—

- (a) in accordance with whose directions and instructions the proposed offeror or any person acting in concert with the proposed offeror is accustomed to act; or
- (b) having an interest in the proposed take-over offer pursuant to an agreement, arrangement or understanding with the proposed offeror.

## PART II – TAKE-OVER PROCEDURE

### 3. Acquiring effective control

(1) No person shall make an offer to acquire shares or voting rights of a listed company which together with shares or voting rights if any held by such person or by persons acting in concert or by associated person or related company entitle such person to exercise effective control in the listed company without complying with the take-over procedure provided for under regulation 4.

(2) Where a person—

- (a) holds more than twenty five percent but less than fifty percent of the voting shares of a listed company, and who acquires in any one year more than five percent of the voting shares of such company; or
- (b) holds fifty percent or more of the voting shares of the listed company and who acquires additional voting shares in the listed company; or
- (c) acquires a company that holds effective control in the listed company or together with the shares already held by associated persons or related company or persons acting in concert with such person, will result in acquiring effective control of the listed company; or

- (d) acquires any shareholding of twenty five percent or more in a subsidiary of a listed company that has contributed fifty percent or more to the average annual turnover in the latest three financial years of the listed company preceding the acquisition,

the person shall be presumed to have a firm intention to make a take-over of such listed company and shall be required to comply with the take-over procedures set out under regulation 4:

Provided that a company that is already in control of twenty-five percent but less than fifty percent of the voting shares of the listed company may acquire upto five percent in any one year in such listed company upto a maximum of fifty percent.

#### **4. Take-over notice and statement**

(1) A company, or person who intends or proposes to acquire effective control in a listed company shall not later than twenty four hours from the resolution of its board to acquire effective control in the company or not later twenty four hours prior to making a decision to acquire effective control in the company in the case of any other person announce the proposed offer by press notice and serve a notice of intention, in writing of the take-over scheme containing the particulars set out in paragraph (2), to the—

- (a) proposed offeree at its registered office;
- (b) securities exchange at which the offeree's voting shares are listed;
- (c) Authority; and
- (d) the Commissioner of Monopolies and Prices appointed under the Restrictive Trade, Practices, Monopolies and Price Control Act (Cap. 504) where the offeror is engaged in the same business as the offeree.

(2) The press notice referred to in paragraph (1) shall—

- (a) be made in at least two English language dailies of national circulation;
- (b) be made after the notice of intention has been served on the proposed offeree;
- (c) state that the person intends to acquire or has acquired effective control in the company and has at a stated date served a notice of intention to make a take-over offer to the company or has made an application to the Authority for exemption from the take-over requirements, in compliance with these Regulations; and
- (d) include the following information where applicable—
  - (i) the identity of the proposed offeror and all companies related to or persons associated or acting in concert with the proposed offeror;
  - (ii) the identity of the proposed offeree and the exchange at which its shares are listed;
  - (iii) whether the proposed offeror intends to make a take-over offer or apply to the Authority, for exemption from making a take-over offer;
  - (iv) the type and total number of voting shares of the offeree;
    - (aa) which have been acquired, held or controlled directly or indirectly by the proposed offeror or any related companies or any person associated or acting in concert with the proposed offeror;
    - (bb) in respect of which the proposed offeror or any related company or any person associated or acting in concert with the proposed offeror has received an irrevocable undertaking from other holders of voting shares to which the take-over relates to accept the take-over offer; and
    - (cc) in respect of which the proposed offeror or any related company or any person associated or acting in concert with the proposed offeror has an option to acquire;

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- (v) where applicable, the details of any existing or proposed agreement, arrangement or understanding relating to voting shares referred to in paragraph (iv) between the proposed offeror or any related company or person associated or acting in concert with the proposed offeror and the holders of the voting shares to which the take-over relates; and
- (vi) the conditions of the take-over offer, including conditions relating to acceptances, listing and increase of capital.

(3) Where a person has acquired effective control in a listed company and has no intention of making a take-over offer, that person shall make a public announcement containing information that is specified in paragraph (2) including the broad reasons for exemption, immediately after having served the notice in writing to the parties specified in paragraph (1) and shall apply to the Authority for exemption from the take-over requirements under regulation 5.

(4) The offeror shall serve on the offeree within ten days from the date of the notice of intention, an offeror's statement of the take-over scheme containing the information specified in the First Schedule to these Regulations and such statement shall be approved by the Authority.

(5) Where a notice of an intention to make a take-over offer under paragraph (1) or an offeror's statement under paragraph (4) have been served upon the offeree, the proposed offeror shall not amend or withdraw the intention or the statement without the prior written consent of the Authority.

(6) The Authority shall on application of the offeror, permit the offeror at any time prior to the offeror serving the take-over document upon the offeree, to—

- (a) amend in writing any notice or statement lodged by the offeror pursuant to paragraphs (1) and (4); or
- (b) substitute in writing a fresh notice or statement for an earlier notice or statement lodged with the offeree pursuant to paragraphs (1) or (4) in such manner and subject to such terms as the offeror may consider as justified by the circumstances of the case and such notice or statement shall be approved by the Authority;

(7) For the purpose of paragraph (6), the computation of time shall be as from the date when the first written notice or offeror's statement is lodged by the proposed offeror.

## **5. Exemptions**

(1) Subject to this regulation, the Authority may in writing grant an exemption from complying with the provisions of regulation 4 to any particular person or take-over offer or to any particular class, category, description of persons or take-over offers subject to such conditions as may be imposed by the Authority.

(2) The granting of an exemption under paragraph (1) shall serve the wider interests of the shareholders and the public and such circumstances shall include—

- (a) an acquisition for the purpose of a strategic investment in a listed company that is tied up with management or any other technical support relevant to the business of such company;
- (b) a management buy-out involving a majority of the employees of the offeree;
- (c) a restructuring of the listed company's share capital including acquisition, amalgamation and any other scheme approved by the Authority;
- (d) an acquisition of a listed company in financial distress;
- (e) an acquisition of effective control arising out of disposal of pledged securities;
- (f) the maintenance of domestic shareholding for strategic reason(s); and
- (g) any other circumstances which in the opinion of the Authority serves public interest.

(3) Nothing in these Regulations shall require any person to comply with the take-over procedure provided under regulation 4 if such person at the commencement of these Regulations holds—

- (a) twenty five percent or more of the voting shares of a listed company; or
- (b) twenty five percent or more of the voting shares in an issuer applying for listing, at the date of listing whichever is later.

(4) The Authority shall make a public announcement, through the print and electronic media of its decisions on the exemptions granted pursuant to this regulation.

## **6. Offeree's obligation**

(1) Upon receiving the offeror's statement in accordance with regulation 4(4) the offeree shall inform the relevant securities exchange and the Authority and make an announcement by a press notice of the proposed take-over offer within twenty four hours of receipt of the offeror's statement.

(2) The press notice referred to in paragraph (1) shall be made in at least two English language dailies of national circulation and shall include all material information contained in the offeror's statement.

## **7. Take-over offer**

(1) The offeror shall within fourteen days from the date of serving the offeror's statement pursuant to regulation 4(4) submit to the Authority, for approval, the take-over offer document in relation to the take-over offer which shall include the information contained in the Second Schedule and such other information that the Authority may require.

(2) The Authority shall approve the take-over offer document within thirty days where the document is in compliance with the requirements of these Regulations or within such other time as may be determined by the Authority provided that where the Authority has determined it is not possible to grant approval within thirty days, it shall advise the offeror of this fact.

(3) The take-over offer document approved by the Authority shall include a statement in the following words—

"Approval has been obtained from the Capital Markets Authority for the compliance with the requirements relating to the take-over offer document under the Capital Markets (Take-overs and Mergers) Regulations, 2002.

As a matter of policy, the Capital Markets Authority assumes no responsibility for the correctness of any statements or opinions made in this take-over offer document. Approval of this take-over offer is not to be taken as an indication of the merits of this offer or recommendation by the Authority to the offeree's shareholders".

(4) The take-over offer document shall be served by the offeror on the offeree within five days from the date of approval of the take-over offer document by the Authority.

(5) The offeree shall within fourteen days from the date of receipt of the approved take-over document circulate it to its shareholders to whom the take-over offer relates, together with the independent adviser's circular referred to in regulation 10.

## **8. Requirements for take-over offer**

(1) The take-over offer shall be dated and shall unless varied under regulation 16, state that it will remain open for acceptance by the offeree for thirty days from the date of service of the take-over offer document by the offeror.

(2) The offer shall not be conditional upon the offeree approving or consenting to any payment or other benefit being made or being given to any director of the offeree or to any other person that is deemed to be related to the offeree, as compensation for loss of office or as consideration for, or in connection with, his retirement from the office.

(3) The offer shall state—

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- (a) whether the offer is conditional upon acceptance of the offer under the take-over scheme, being received in respect of a minimum number of issued voting shares of the offeree and if so, the percentage;
- (b) where the shares are to be acquired in whole or in part for cash, the period within which payment will be made and the method of such payment;
- (c) where the shares are to be acquired through a share swap, the proportion of the share swap and the period within which the offeree's shareholders shall receive the new shares;
- (d) whether the offeror is engaged in the same line of business as the offeree, and whether the offer is conditional upon receiving approval under the Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504) or other regulatory approval outside Kenya where the transaction involves companies incorporated outside Kenya;
- (e) whether the offer is conditional upon maintenance of a minimum percentage of share holding by the general public to satisfy the continuing eligibility requirements for listing; and
- (f) the circumstances that shall apply in the event the conditions in subparagraphs (a) to (e) are not fulfilled.

(4) Every take-over offer document shall contain the following words which shall be prominently displayed on the first page of the take-over offer document;

"If you are in any doubt about this offer, you should consult the independent adviser appointed by your board of directors, or your stockbroker, investment bank or other professional investment adviser".

#### **9. Offeree comments on the statement and take-over offer**

(1) Subject to the independent advice required under regulation 10 the Board of directors of the offeree shall within fourteen days after the receipt of the take-over offer document under regulation 7 issue a circular to the holders of voting shares in the offeree to which the take-over offer relates, indicating whether or not the board of directors of the offeree recommend to holders of the voting shares the acceptance of the take-over offer(s) made by the offeror under the take-over scheme.

(2) The circular referred to in paragraph (1) shall include the information contained in the Third Schedule.

(3) The board of directors of the offeree shall disclose in the circular referred to in paragraph (1) to every holder of the voting rights to which the take-over offer relates all such information as the holders of such voting shares and their professional advisers would reasonably require or expect to find in such a circular or for the purpose of making an informed assessment as to the merits of accepting or rejecting the take-over offer and the extent of the risks involved in such action.

(4) Without prejudice to the generality of paragraph (3) the statement shall include, but is not limited to information on—

- (a) the offeror's stated intentions regarding the continuation of the business of the offeree;
- (b) the offeror's stated intentions regarding major changes to be introduced in the business, including plans to liquidate the offeree, sell its assets, re-deploy the fixed assets of the offeree or make any other major change in the structure of the offeree;
- (c) the offeror's stated long term commercial justification for the proposed take-over offer;
- (d) the offeror's stated intentions with regard to the continued employment of the board of directors, management and employees of the offeree and of its subsidiaries;



- (e) the reasonableness of the take-over offer, including, the reasonableness and accuracy of profit forecasts for the offeree, if such forecast is included by the offeror in the offer document; and
- (f) any other information relevant for the informed assessment of the holders of voting shares and their professional advisers.

## **10. Independent adviser**

(1) The board of directors of the offeree shall appoint an independent adviser, on receipt of the offeror's statement under regulation 4 (4) in relation to the take-over offer.

(2) The independent adviser appointed under paragraph (1) shall be an investment bank or a stockbroker licensed by the Authority.

(3) The substance of the independent adviser's advice must be made known to the holders of the class of the voting shares to which the take-over offer relates, in a circular by the offeree to its shareholders.

(4) The board of directors of the offeror shall appoint an independent adviser, where the take-over offer being made is a reverse take-over or where the board of directors of the offeror is faced with a conflict of interest situation.

(5) The substance of any advice given to the board of directors of the offeror under paragraph (4) shall be made known to all the holders of voting shares of the offeror.

(6) In the case of a reverse take-over, the board of directors of the offeror shall obtain approval of the holders of voting shares of the offeror to which the reverse take-over relates prior to serving the take-over offer document to the offeree under regulation 7(4).

(7) Where the offeror has convertible securities outstanding, the appointed independent adviser shall make known its advice to the holders of such securities, together with the views of the board of directors of the offeror or of the offeree, as the case may be, on the take-over offer or proposal.

(8) The independent adviser appointed by the Board of directors of the offeree shall send a circular to the board of directors of the offeree and the Authority prior to the circular being served on the offeree's holders of voting shares to which the take-over offer relates.

(9) The circular required to be sent by the board of directors of the offeree to the offeree shareholders under regulation 9 and the independent adviser's circular shall be posted to the relevant holders of voting shares within fourteen days from the date of the take-over offer document being served in accordance to regulation 7.

(10) The independent adviser shall disclose all such information in the independent adviser's circular as the holders of the voting shares of the offeror, the board of directors of the offeree and all holders of voting shares to which the take-over offer relates and their professional advisers would reasonably require or expect to be informed about, in an independent advice or for the purpose of making an informed assessment as to the merits of accepting or rejecting the take-over offer and the extent of the risks involved in such action.

(11) The information required to be disclosed under paragraph (10) shall be that which—

- (a) is within the knowledge of the Board of directors and of the independent adviser; and
- (b) the independent adviser would be able to obtain by making such enquiries as were reasonable in the circumstances.

(12) For the purposes of paragraph (11), a person shall, unless the contrary is proved, be presumed to have been aware at a particular time of a fact or occurrence of which, an employee or agent of the person having duties or acting on behalf of the employer or principal was aware of at the time.

(13) Without prejudice to the generality of paragraph (11), an independent adviser shall include in the circular to the board of directors of the offeree and the offeree shareholders all the information and statements specified in the Fourth Schedule.

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[Subsidiary]**11. Requirements for independent adviser**

(1) No person shall be eligible to be appointed as an independent adviser under regulation 10 where such a person—

- (a) has an interest in ten percent or more of the voting shares of an offeror or offeree at the present time or at any time during the twelve months preceding the date of announcement of the offeror's intention of the take-over scheme;
- (b) has a substantial business relationship with the offeror or offeree at the material time or at any time during the twelve months preceding the date of announcement of the offeror's intention of the take-over scheme.
- (c) being a company, has a director on its board of directors who is also a director on the board of directors of the offeror if the offeror is a company or on the board of directors of the offeree, as the case may be;
- (d) is involved in financing the offer by the offeror;
- (e) is a substantial creditor of either the offeror or the offeree.
- (f) has a financial interest in the outcome of the take-over offer than that specified in paragraphs (a) to (d); or
- (g) has been an adviser in planning or restructuring of the offeror or offeree including acquisitions, at any time during the period of twelve months preceding the date of announcement of the offeror's intention of the take-over scheme.

(2) A person is deemed a "substantial creditor" if-

- (i) the loan extended represents more than ten percent of the loan outstanding in the offeror or the offeree; or
- (ii) the loan extended to either the offeror or the offeree represents more than ten percent of the shareholders' funds of the person based on the latest audited accounts; or
- (iii) the person is a lead banker in a syndicated loan extended to either the offeror or the offeree in the preceeding three years;

**12. Offer to dissenting shareholders**

Where a take-over results in the offeror acquiring ninety percent of the offeree's voting shares, the offeror shall offer the remaining shareholders a consideration that is equal to the prevailing market price of the voting shares or the price offered to the other holders, whichever is higher and the provisions of the Companies Act (Cap. 486) shall apply.

**13. Competing take-over offer**

(1) Where a decision has been reached to make a competing take-over offer, all provisions in these Regulations relating to the take-over procedures shall apply *mutatis mutandis* except the notice period to the competing offer.

(2) The competing offeror shall serve a competing take-over offer document required under regulation 7(4) at least ten days prior to the closure of the offer period and this period shall also apply to revisions that may be made to the competing offer.

**14. Offer period**

An offeror must keep a take-over offer open for acceptances for a period of thirty days from the date the take-over offer document is first served in accordance with regulation 7(4) or such period as may be determined by the Authority.

**15. Conditional offer**

Where the offer is conditional upon acceptances in respect of a minimum percentage of shares being received, the offer shall specify a date not being a date later than thirty days from the date of service of the take-over offer or such later date as the Authority may in a

competitive situation or in special circumstances allow as the latest date on which the offeror can declare the offer to have become free from that condition.

#### **16. Variation of take-over offer**

(1) An offeror may vary the terms and conditions of a take-over offer including increasing the consideration offered in relation to the whole or part thereof provided such variation shall be made at least five days prior to the closure of the offer period.

(2) The varied take-over offer document shall set out in an appropriate form particulars of such modification of the offeror's statements and information required under the Second Schedule as are necessary having regard to the variations.

(3) The offeror shall serve the varied take-over offer document on the offeree, the Authority and the securities exchange within twenty-four hours of making the decision to vary the take-over offer, and simultaneously make a public announcement by press notice in at least two English language dailies of national circulation disclosing material variations to the offer.

#### **17. Withdrawal of take-over offer**

(1) An offeror shall not withdraw a take-over offer without the prior written approval of the Authority.

(2) Where a take-over offer has been withdrawn the offeror and all related companies or all persons acting in concert or associated with the offeror shall not within twelve months from the date on which the take-over offer was withdrawn —

- (a) make a take-over offer for the voting shares that had been the subject of the take-over offer that has been withdrawn; or
- (b) acquire any additional voting shares of the offeree other than as provided under regulation 3.

(3) The offeror and all related companies or persons acting in concert or associated with the offeror shall furnish the Authority with details of any acquisition by the offeror and related companies or persons acting in concert or associated with the offeror of any share of the offeree including any option to acquire any share in the offeree each month for a period of twelve months from the date on which the take-over offer was withdrawn.

(4) Withdrawal of a take-over offer may occur where—

- (a) the offeree shareholders have rejected the take-over offer;
- (b) the offeror has not obtained an approval under the Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504) or any other regulatory approval as may be required;
- (c) events, satisfactory to the Authority occur, rendering either the offeror or offeree or both incapable of fulfilling their obligations under the take-over offer; or
- (d) a counter offer is accepted by the offeror.

#### **18. Closing of take-over offer**

(1) A take-over offer shall be deemed to close on the last day of the offer period.

(2) A holder of the voting shares in the offeree may withdraw acceptance out of his own volition at any time before the closing of the offer.

#### **19. Pro-rata acceptances**

(1) Where an offeror receives acceptance by the offeree shareholders in excess of the total number of shares to which the take-over offer relates, the offeror shall undertake *pro-rata* acceptance.

(2) For the purposes of this regulation, "*pro-rata acceptance*" means an allocation of acceptance by the offeror in the proportion of the total number of shares accepted by each offeree shareholder in relation to the percentage upon which the offer was conditional.

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[Subsidiary]**20. Announcement of acceptances**

The offeror shall inform the Authority and the securities exchange within ten days of the closure of the offer and announce by way of press notice in at least two English language dailies of national circulation the total number of voting shares to which the take-over offer relates—

- (a) for which acceptances of the take-over offer have been received after having been served with the take-over offer document by the offeror to offeree shareholders in accordance with regulation 7(4);
- (b) held by the offeror and all persons acting in concert with the offeror at the time of serving the offer document to the offeree shareholders in accordance with regulation 7(4);
- (c) acquired or agreed to be acquired during the offer period; and
- (d) the shareholding structure of the offeree subsequent to the take-over offer.

**PART III – OBLIGATIONS OF OFFEROR IN RELATION TO OFFER****21. Identity of offeror**

No person shall initiate discussions or negotiations with any person in relation to a take-over offer without disclosing the identity of the—

- (a) proposed offeror and all related companies or persons acting in concert or associated with the proposed offeror;
- (b) ultimate offeror, where applicable.

**22. Evidence of ability to implement the take-over offer**

(1) A person who is required to make an announcement under regulation 20 shall ensure and the person's financial adviser shall be reasonably satisfied that—

- (a) the take-over offer would not fail due to insufficient financial capability of the offeror; and
- (b) every offeree shareholder who wishes to accept the take-over offer will be paid in full.

(2) A person who has no intention of making an offer in the nature of a take-over offer shall not give notice or publicly announce the intention to make a take-over offer.

(3) A person shall not make a take-over offer or give notice or publicly announce that it intends to make such an offer if it has no reasonable or probable grounds for believing that it will be able to perform its obligations if the offer is accepted.

**23. Favourable deals**

The offeror shall not enter into any agreement, arrangement or understanding to deal in or make purchases or sales of voting shares of the offeree, either during a take-over offer or when such a take-over offer is reasonably in contemplation by the offeror where the agreement, arrangement or understanding contain favourable conditions which are not being extended to all offeree shareholders.

**24. Convertible securities**

(1) Where a take-over offer is made for the voting shares of an offeree and the offeree has issued convertible securities, the offeror shall make a take-over offer to purchase the securities and shall make appropriate arrangements to ensure that the interests of holders of convertible securities are safeguarded.

(2) The offeror shall serve the take-over offer document to purchase the securities referred to in paragraph (1) to the holders of the convertible securities at the same time as when the take-over offer document is served on the offeree shareholders in accordance with regulation 7(4).

(3) The take-over offer to holders of convertible securities referred to in paragraph (1) may be affected by way of take-over scheme approved at a meeting of the holders of the convertible securities.

(4) For the purposes of these Regulations, "convertible securities" of the offeree means securities that are convertible to ordinary shares of the offeree".

## **25. Sales and disclosure by the offeror during the offer period**

(1) The offeror shall not sell any voting shares to which the take-over offer relates during an offer period.

(2) A related company or a person associated or acting in concert with the offeror shall not sell any voting shares to which the take-over offer relates other than to the offeror.

(3) The following persons shall disclose the total number and price of all voting shares of the offeror and the offeree which are dealt in for their own account—

- (a) the offeror and all related companies or persons associated to or acting in concert with the offeror;
- (b) the chief executive, a director or an officer of the offeror who occupies or acts in a senior managerial position in the offeror, by whichever name called;
- (c) a person who is an associated person in relation to persons referred to in paragraphs (a) and (b); and
- (d) a person who is accustomed to act in accordance with directions or instructions of the persons referred to in paragraphs (a), (b) or (c).

(4) The disclosure under paragraph (3) shall be made to the relevant securities exchange where the securities of the offeror are listed and to the Authority, within twenty four hours of the transaction.

(5) All dealings in voting shares of the offeror and offeree made by an associated person for the account of investment clients who are not themselves associated persons shall be disclosed to the relevant securities exchange and the Authority, at such time and in such manner as is specified in paragraphs (3) and (4).

## **PART IV – OBLIGATIONS OF OFFEREE IN RELATION TO OFFER**

### **26. Information by offeree**

An offeree shall provide the offeror with the following information—

- (a) a list and addresses of the offeree's holders of voting shares in the offeree to which the take-over offer relates;
- (b) published annual accounts and reports including the latest half-yearly results of the offeree and its subsidiaries; and
- (c) a copy of the competing offeror's statement where there is a competing offer.

### **27. Frustrations of offers by the offeree**

(1) The offeree shall not after contact with the offeror or its agent or on receipt of the notice of intention of take-over offer under regulation 4(1), if the offeree has reason to believe that a *bona fide* take-over is imminent, or during the course of a take-over offer—

- (a) issue any authorized but un-issued shares of the offeree;
- (b) issue or grant options in respect of any un-issued shares of the offeree;
- (c) create or issue or permit the creation or subscription of any shares of the offeree;
- (d) sell, dispose of or acquire or agree to sell, dispose of or acquire assets of the offeree or of any of its subsidiary; or
- (e) enter into or allow contracts for or on behalf of the offeree to be entered into otherwise than in the ordinary course of business of the offeree.

(2) Paragraph (1) shall not apply where a *bona fide* contract has been entered into prior to contact with the offeror or its agent or on receipt of the notice of intention of the take-over

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notice under regulation 4(1) which is not designed to frustrate a take-over offer or change the activity of the offeree.

### **28. Disclosure of dealings by offeree**

(1) During the offer period the total number and price of all voting shares of the offeror and the offeree which are dealt in by the following persons shall be disclosed by them respectively—

- (a) the offeree;
- (b) substantial shareholders of the offeree;
- (c) any chief executive, a director of the offeree;
- (d) any officer of the offeree who occupies or acts in a senior managerial position in the offeree, by whatever name called;
- (e) a person who is an associated person in relation to persons referred to in paragraphs (a), (b), (c) and (d); and
- (f) a person who is accustomed to act in accordance with directions or instructions of the persons referred to in paragraph (a), (b), (c), (d) or (e).

(2) The disclosure under paragraph (1) shall be made to the relevant securities exchange, and the Authority within twenty four hours of the transaction, outside trading hours.

(3) All dealings of voting shares of the offeror or the offeree made by an associated person for the account of investment clients who are not themselves associated persons shall be disclosed to the relevant securities exchange and the Authority, as provided in paragraphs (1) and (2).

### **29. Transfer to the offeror**

On completion of the take-over offer, the offeree shall ensure prompt transfer of the accepted voting shares to the offeror in the register of members maintained as required under the rules of the securities exchange or the Central Depositories Act (Cap. 485C) in the case of electronic transfer and registration.

## **PART V – GENERAL**

### **30. False or misleading information**

(1) No person shall—

- (a) provide or cause to be provided to the holders of voting shares or their professional advisers any document or information in a take-over offer that is false or misleading;
- (b) provide, or cause to be provided to holders of voting shares or their professional advisers any document or information in a take-over offer in which there is a material omission; or
- (c) engage in conduct relating to a take-over offer that is misleading or deceptive or is likely to mislead or deceive holders of voting shares or their professional advisers.

(2) Where information or a document has been circulated or provided to holders of voting shares or their professional advisers and the person who provided the information or document, or engaged in the conduct becomes aware that the document or information was false or misleading or contains a material omission or the conduct in question was misleading or deceptive, the person shall immediately disclose the fact to the Authority and the relevant securities exchange and make an announcement by way of press notice in at least two English language dailies of national circulation containing such matters as are necessary to correct the false or misleading information omission, or conduct, as the case may be.

**31. Submission of information to the Authority**

A person involved in a take-over scheme, merger or compulsory acquisition, shall submit such information to the Authority as it may from time to time require.

**32. Suspension of trading during take-over**

In the event of a take-over the trading of shares of the security of the offeree shall not be suspended unless for the purpose of enabling the offeree to disclose information on the takeover offer or as may be directed by the Authority for the purpose of obtaining material information on the offer.

**33. Issuance of shares in a subsidiary**

(1) No issuance of shares of a subsidiary of a listed company comprising—

- (a) twenty-five percent or more of the share capital of that subsidiary; or
- (b) ten percent or more of the share capital of the subsidiary, that has contributed to twenty five percent or more to the average turnover in the latest three financial years of the listed company (preceding the proposed issuance of shares),

shall be made without full disclosure through an information circular to the shareholders of the listed company, of all relevant information relating to the transaction for which the shares are being issued subject to the prior approval of the issuance of such shares by the Authority.

(2) The information circular referred to in paragraph (1) shall be subject to prior approval by the Authority and shall comply with the requirements under the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations (sub. leg).

**34. Establishment of take-over committee**

(1) The Authority may establish a sub-committee of the Board that shall consist of the Board members and such other qualified persons as shall be appointed by the Authority, for the purpose of advising on the take-over on a case by case basis.

(2) Where a sub committee has been established under paragraph (1), the chief executive of the Nairobi Stock Exchange and the Commissioner of Monopolies and Prices appointed under the Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504) shall be invited to the sub committee meetings.

(3) The sub committee in exercise of its delegated responsibility may invite the offeror, the offeree, the independent adviser or any other person whose input is deemed necessary for the purposes of facilitating the take-over.

(4) The decision of the sub committee shall be subject to ratification by the Board.

**35.**

[Spent]

**FIRST SCHEDULE**

[r. 4]

**INFORMATION REQUIRED TO BE INCLUDED IN THE OFFEROR'S STATEMENT**

(1) The statement shall—

- (a) be dated and signed by two directors of the offeror;
- (b) specify the names, descriptions, addresses of all directors of the offeror;
- (c) contain a summary of the principal activities of the offeror company;
- (d) contain a list of major shareholders and subsidiaries of the offeror;
- (e) contain a summary of the latest audited financial statements including—

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- (i) balance sheet;
  - (ii) income statement;
  - (iii) statement of the changes in equity;
  - (iv) cash flow statement; and
  - (v) earnings per share (prior to the take-over offer and post take-over).
- (f) specify the number, description and amount of marketable securities in the offeree held by or on behalf of the offeror, or if none are so held contain a statement to that effect;

(2) Where the consideration for the acquisition of shares under the take-over scheme is to be satisfied in whole or in part by the payment of cash, the statement shall contain details of the arrangements that have been, or will be made to secure payment of the cash and, if there are no such arrangements a declaration shall be made in the statement to this effect.

(3) Where the consideration for the acquisition of shares under the take-over scheme is to be satisfied in whole or in part by a share swap, the statement shall contain details of the arrangements that have been, or will be made to transfer the shares and the proportion of the shares being swapped, and if there are no such arrangements, a declaration shall be made in the statement to this effect.

(4) The statement shall state whether—

- (a) it is proposed in connection with the take-over scheme that a payment or any other benefit shall be made or be given to any director of the offeree or of any company which is a related company to the offeree as a consideration for, or in connection with, his retirement from office and if so the particulars of the proposed payment or benefit;
- (b) there is any agreement or arrangement made between the offeror and any of the directors of the offeree in connection with or conditional upon the outcome of the scheme, and if so the particulars of such agreement or arrangement;
- (c) there has been within the knowledge of the offeror any material change in the financial position or prospects of the offeree since the date of the latest balance sheet laid before the offeree's general meeting and if so, the particulars of such change; and
- (d) there is an agreement or arrangement by which shares acquired by the offeror in pursuance of the scheme will or may be transferred to any other person, and if so—
  - (i) the names of the persons who are party to the agreement or arrangement and the number and description of the shares which will or may be so transferred; and
  - (ii) the number, if any, description and amount of shares of the offeree company held by or on behalf of each person, or if no such shares are so held, a statement to that effect.

(5) Paragraphs (6) and (7) shall apply where the consideration to be offered in exchange for shares of the offeree consists in whole or in part of marketable securities issued or to be issued by the offeror or by any company;

(6) Where the marketable securities are quoted or dealt in on a securities exchange, the statement shall state this fact and specify the securities exchange concerned and indicate—

- (a) the latest available market sale price prior to the date on which notice of the take-over scheme is given to the offeree;
- (b) the highest and lowest market sale price during the three months immediately preceding that date and the respective dates of the relevant sales including the latest market sale price immediately prior to the public announcement;

(7) Where the securities are listed on more than one securities exchange, it shall be sufficient compliance with paragraph (6)(a) if information with respect to the securities is given in relation to the securities exchange at which there have been the greatest number



of recorded dealings in the, securities in the three months immediately preceding the date on which notice of the take-over scheme is served upon the offeree.

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## SECOND SCHEDULE

[r. 7]

### INFORMATION REQUIRED TO BE INCLUDED BY THE OFFEROR IN A TAKEOVER OFFER DOCUMENT

1. The offeror shall disclose in the offer document all such information as the offeree shareholders and their professional advisers would reasonably require.
2. The offeror shall state the following in the offer document—
  - (a) the identity of the ultimate offeror as required under regulation 21;
  - (b) information regarding the offeror including the names of its directors and shareholders who hold notifiable interest in the offeror and the extent of their holdings;
  - (c) whether the offeror has any intentions regarding the continuation of the business of the offeree and if so, stating the offeror's intentions;
  - (d) the offeror's stated intentions regarding major changes to be introduced in the business, or strengthening the financial position of the offeree, whether such plans include a merger, or liquidating the offeree, selling its assets or re-deploying its fixed assets or making any other major change in the structure of the offeree or its subsidiaries and if so, stating the offeror's intentions;
  - (e) whether there are any long term commercial justifications for the proposed take-over offer, and if so, stating the long term commercial justifications; and
  - (f) whether the offeror has any intentions with regard to the continued employment of the employees of the offeree company and of its subsidiaries and if so, stating the offeror's intentions.
3. Where the take-over offer is for cash, either in part or in whole, the offer must include a confirmation by a financial adviser of the offeror that the offeror has the financial capability to accept and carry out the take-over offer in full.
4. In addition, the offer document should also include a statement that the offeror and the offeror's financial advisers are satisfied that—
  - (a) the take-over offer would not fail due to insufficient financial capability of the offeror; and
  - (b) every shareholder who wishes to accept the take-over offer will be paid in full.
5. The offer document shall contain a statement as to whether—
  - (a) any agreement, arrangement or understanding exists between the offeror or any person acting in concert with it and any of the directors, past directors, holders of voting shares or past holders of voting shares having any connection with or dependence upon the take-over offer, and full particulars of any such agreement, arrangement or understanding.

"past directors" or "past holders of voting shares" means such person who was during the period of six months immediately prior to the date of the written notice of the take-over offer, a director or a holder of the voting shares, as the case may be;
  - (b) any voting shares acquired in pursuance of the take-over offer will be transferred within a foreseeable period from the date of the offer document to any other person, together with the names of the parties to any such agreement, arrangement or understanding and the particulars of all securities

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in the offeree held by such persons, or a statement that no such securities are held; and

- (c) any settlement of the consideration to which any holder is entitled under the take-over offer will be implemented in full in accordance with the terms of the take-over offer without regard to lien, right of set off, counter claim or other analogous rights to which the offeror may otherwise be or claim to be entitled as against the holder.

**6.** The offer document shall state as at the latest practicable date, the number of and percentage holding of voting shares and convertible securities (if any) which—

- (a) the offeror and directors of the offeror hold, directly or indirectly, in the offeree;
- (b) persons associated or acting in concert with the offeror or related companies to the offeror hold directly or indirectly in the offeree together with the names of such persons acting in concert; and
- (c) persons who, prior to the sending of the take-over offer document, have irrevocably committed themselves to accept the take-over offer hold directly or indirectly in the offeree together with the names of such persons.

**7.** In the event that there are no holdings of the nature required to be stated under paragraph (6) the offer document shall contain a statement to this effect.

**8.** The take-over offer document shall state the names and shareholdings of the ultimate shareholders, if any, and of the persons acting in concert with the offeror.

**9.** Where any party whose holdings are required to be disclosed has dealt in the voting shares in question during the period commencing six months prior to the beginning of the offer period and ending with the latest practicable date prior to the sending of the offer document, the details, including the number of shares, dates and prices, must be stated. If no such deals have been made this fact should be so stated.

**10.** The take-over offer document shall state, whether the emoluments of the offeror's directors shall be effected by the acquisition of the offeree, except in the case of an offeror making a cash offer only.

**11.** The offeror shall state whether the offeree's securities shall continue to be listed at the securities exchange after the take-over offer has been successfully concluded.

**12.** The offer document shall contain particulars of all service contracts of any directors or proposed director of the offeror or any of its subsidiaries (unless expiring or determinable by the employing company without payment of compensation within twelve months) and where there are no-such contracts, this fact should be so stated.

**13.** Where the contracts under paragraph (12) have been entered into or amended within six months of the date of the documents, the particulars of the contracts amended or replaced should be given and where there have been no new contracts or amendments this fact should be so stated.

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THIRD SCHEDULE

[r. 9]

INFORMATION REQUIRED IN THE CIRCULAR  
ISSUED BY THE OFFEREE TO ITS SHAREHOLDERS

The circular shall state—

- (a) the number, description and amount of marketable securities in the offeree company held by or on behalf of each director of the offeree company, or in the case where no such securities are held, a statement to that effect;

(b) in respect of each director of the offeree company by whom or on whose behalf shares to which the take-over scheme relates are held—

- (i) whether the present intention of the director is to accept any take-over offer that may be made in pursuance of the take-over scheme in respect of the shares; or
- (ii) whether the director has decided not to accept such a take-over offer;

(c) whether any marketable securities of the offeror company are held by, or on behalf of, any director of the offeree company and, if so, the number, description and amount of the marketable securities so held;

(d) whether it is proposed in connection with the take-over scheme that any payment or other benefit shall be made or be given to any director of the offeree or of any other company related to the offeree as consideration, or in connection with, its retirement from office and if so, particulars of the proposed payment or benefit.

(e) whether there is any other agreement or arrangement made between the director or the offeree and any other person in connection with or conditional upon the outcome of the take-over scheme and if so the particulars of such agreement or arrangement;

(f) whether a director of the offeree has an direct or indirect interest in any contract entered into by the offeror and if so, the particulars of the nature and extent of such interest; and

(g) whether there has been any material change in the financial position of the offeree since the date of the last balance sheet laid before the company in general meeting, and if so, the particulars of such change.

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#### FOURTH SCHEDULE

[r. 10]

#### INFORMATION AND STATEMENTS REQUIRED TO BE INCLUDED IN AN INDEPENDENT ADVISER'S CIRCULAR

1. An independent adviser's circular whether recommending acceptance or rejection of the take-over offer, must contain comments and advice on the—

- (a) offeror's stated intentions regarding the continuation of the business of the offeree;
- (b) offeror's stated intentions regarding any major changes to be introduced in the business, including any plans to liquidate the offeree, sell its assets, re-deploy its fixed assets or make any other major change in the structure of the offeree;
- (c) offeror's stated long term commercial justification for the proposed take-over offer;
- (d) offeror's stated intentions with regard to the continued employment of the employees of the offeree and of its subsidiaries; and
- (e) reasonableness of the take-over offer, including the reasonableness and accuracy of profit forecasts for the offeree, if any, contained in the offer document.

2. The independent adviser's circular shall, in so far as is reasonable, contain comments on the—

- (a) outlook, for the next twelve months, of the industry in which the offeree has its core or major business activities; and
- (b) prospects, for the next twelve months, of the offeree in terms of financial performance as well as positioning in the industry including competitive advantage, threats and opportunities—

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3. The independent adviser's circular shall also state—

- (a) whether the offeree holds directly or indirectly, any voting shares or convertible securities in the offeror and if so, the number and percentage holding of such voting shares and convertible securities;
- (b) whether the directors of the offeree hold, directly or indirectly any voting shares or convertible securities in the offeror or the offeree and if so, the number and percentage holding of such voting shares and convertible securities so held; and
- (c) whether the directors of the offeree intend, in respect of their own beneficial holdings to accept or reject the take-over offer.

4. In the event that there are no holdings of the nature required to be stated under paragraph (3) the independent adviser's circular shall contain a statement to this effect.

5. The independent adviser's circular must also contain a statement from the directors of the offeree stating any other interest held by them in the offeror and in the offeree.

6. Where any party whose holdings are required to be disclosed pursuant to the Act has dealt in the voting shares in question during the period commencing six months prior to the beginning of the offer period and ending with the latest practicable date prior to the sending of the offer document, the details, including the number of shares, dates and prices, must be stated and where such deals have been made, this fact should be so stated.

7. The independent adviser's circular shall contain particulars of all service contracts of any director or proposed director with the offeree or any of its subsidiaries (unless expiring or determinable by the employing company without payment of compensation within twelve months from the date of the offer document) and where there are no such contracts, this fact shall be so stated.

8. Where the service contracts referred to in paragraph (7) have been entered into or amended within six months of the date of the document, the particulars of the contracts or amendments shall be given and where there have been no new service contracts or amendments, this fact shall be so stated.

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