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LAW AND PRACTICE: p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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Walker Kontos is a nationally established and internationally recognised corporate and commercial law firm catering to diverse and world-class clientele consisting of development finance institutions, blue-chip companies, banks and financial institutions, governments, multinationals, state corporations, diplomatic missions and private clients. Based in Kenya, East Africa's trade hub and preferred investment destination, Walker Kontos possesses in-depth knowledge of the region and is suitably placed and regularly advises international investors on the establishment and structuring of their presence in Kenya, and on their financing and cross-border M&A transactions in support of their regional penetration and growth aspirations. In October 2016, the firm launched a strategic alliance with Norton Rose Fulbright, enabling it to marshal resources from around the world and keep pace with the globalised demand for top-tier legal services. Walker Kontos has wide-ranging industry experience as diverse as aviation, banking, horticulture, mortgage finance, pharmaceuticals, insurance, telecommunications, energy and manufacturing.

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1. Trends

1.1 M&A Market
Regional M&A activity has increased significantly in recent times, with Kenyan deals dominating the market. The East African regional economy (which has not contracted in recent years and in which Kenya has the largest economy) continues to be a key driver for Sub-Saharan Africa's growth.

Kenya's established business environment, robust legal and financial framework, and pillared development agenda provides an attractive investment platform and, for foreign investors with regional aspirations, Kenya remains the gateway to establishing and growing their East African presence.

1.2 Key Trends
According to I&M Burbridge Capital, East Africa Financial Review July 2017, M&A transactions dominated regional deals in the first seven months of 2017 as the disclosed value of such transactions went up by 45% to KES113.5 billion.

General expectations are that Kenya's economy will continue to grow by 5.5% on average in 2018 and various market projections retain an optimistic outlook, suggesting that M&A transactions are likely to continue to increase in Kenya in 2018 compared to 2017, with improved investor confidence following a protracted general election in 2017. In addition, private equity activity remains high both on the buy-side as a result of "pressure to deploy" and an appetite for increasingly diversified investments in Africa's emerging markets, and on the sell-side with initial investment horizons now nearing maturity.

1.3 Key Industries
The financial services sector has seen the most M&A activity in Kenya in recent years. A report issued by the Common Market for Eastern and Southern Africa (COMESA)

Competition Commission indicates that Kenya and Zambia are leading in M&A in the COMESA region, with financial services sector mergers accounting for 70% of the deals done between December 2015 and October 2016, while transactions in energy and construction followed closely, with deals in the petroleum sector constituting the majority reviewed by the COMESA Competition Commission in the first quarter of 2018.

As Kenya remains a hub for technological innovation, with pioneering mobile money platforms and high mobile-phone penetration, increased activity in the telecoms and Fintech space is expected, particularly in connection with private equity investments.

2. Overview of Regulatory Field

2.1 Acquiring a Company

In Kenya, acquisitions of companies are primarily achieved through share sale transactions or by acquiring the target's business through the purchase of specific assets and liabilities. Private M&A transactions are usually structured in either such manner pursuant to negotiated contracts, whilst acquisitions of listed companies (essentially involving the acquisition of effective control through contractual offers to target shareholders or court-sanctioned schemes of arrangement) are often structured to take advantage of legal mechanisms that enable the acquisition of minority interests.

The recently enacted Companies Act, 2015 (the "Companies Act") has amplified the regulatory framework around takeovers and schemes of arrangement. As business grows more sophisticated and potential targets increase their appeal with regional presence, deal structuring is becoming increasingly tailored to suit particular investment objectives within evolving legal frameworks, particularly to address complexities that arise with cross-border transactions.

2.2 Primary Regulators

The Competition Authority of Kenya is responsible for competition and antitrust matters in the country but any transactions with a regional dimension may also be subject to the COMESA and East Africa Community (EAC) competition law frameworks, which have extraterritorial reach. Whilst the COMESA Competition Commission has been established and is active, the EAC Competition Authority is not yet operational.

Listed company takeovers are subject to compliance with procedures set out in the Capital Markets (Take-overs and Mergers) Regulations, 2002 (the "Takeover Regulations") unless exempted by the Capital Markets Authority (CMA), which retains a supervisory function in connection with takeovers.

Sector-specific regulators in Kenya include the Communications Authority, the Insurance Regulatory Authority, the Energy Regulatory Commission and the Central Bank of Kenya.

2.3 Restrictions on Foreign Investments

There is no exchange control in Kenya, nor any universally applicable restrictions on foreign investment, but certain industry-specific restrictions may apply. For example, there are certain minimum local shareholding requirements with respect to telecommunication operators and insurance companies, as well as in the mining and aviation sectors.

Previously, Kenyan regulation required listed companies to reserve 25% of their shares for local investors; however, this requirement has been removed, with the Capital Markets (Foreign Investors) Regulations, 2002 (the "Foreign Investors Regulations") now providing that the maximum foreign shareholding in a listed company may only be prescribed where the government or its agency is divesting its shares to the public in a privatisation transaction or where some level of local ownership in a strategic industry or sector in the country is to be maintained or where it is in the national interest (no such limits have been prescribed as at the time of writing).

2.4 Antitrust Regulations

The Competition Act, 2010 (the "Competition Act") is the primary legislation governing competition and antitrust matters in Kenya. Under the Competition Act, all mergers (transactions involving the acquisition or establishment of direct or indirect control of the business of an undertaking) require approval of the Competition Authority of Kenya (CAK) prior to implementation. The Act was amended in 2016 to empower CAK in consultation with the Cabinet Secretary responsible for finance to set thresholds for the exclusion of mergers from the requirements under the Act but such thresholds remain to be set. That said, CAK had previously (prior to the amendment) published guidelines prescribing certain thresholds that, if satisfied, would enable a proposed merger to be effected without requiring CAK approval, which CAK continues to observe.

In connection with regional M&A transactions, COMESA and EAC competition regulations might apply with respect to merger notification and approval requirements where certain criteria and prescribed merger notification thresholds are met.

2.5 Labour Law Regulations

Kenyan law does not provide for the automatic transfer or assumption of employment contracts in connection with M&A transactions. Employment contracts are considered to be personal contracts incapable of transfer without the consent of the employee. Accordingly, where the transac-

tion involves a sale of business, parties should address their minds to the manner in which employment contracts are to be dealt with (whether as a consequence of redundancy or otherwise), the consultation procedures to be followed and which party is to bear the related costs.

It should be noted that CAK merger approvals are increasingly being issued subject to the condition that the acquirer assumes all contracts of employment entered into by the target.

2.6 National Security Review

There is no separate or independent national security review of M&A transactions in Kenya. That said, the CAK Consolidated Guidelines on the Substantive Assessment of Mergers (the "CAK Guidelines") requires CAK to take into account the "public interest test", which examines the extent to which the merger impacts, inter alia, the ability of national industries to compete in international markets and in a particular sector. Further, under the Foreign Investors Regulations, the Cabinet Secretary responsible for finance may prescribe the maximum foreign shareholding in a listed company where it is in the national interest.

3. Recent Legal Developments

3.1 Significant Court Decision or Legal Development

The Competition Act was amended in 2016 to include provisions governing the prevention and determination of abuse of buyer power in the market that is likely to distort competition and enabling CAK, in consultation with the Cabinet Secretary responsible for finance, to set out merger approval exclusion thresholds. Such thresholds remain to be prescribed but previously issued guidelines that prescribe thresholds for exclusion continue to be observed by CAK. In addition, CAK merger approvals are increasingly being made conditional on acquirers assuming all contracts of employment previously entered into by the target and parties to M&A transactions should be conscious of the implications of such condition.

3.2 Significant Changes to Takeover Law

A new Companies Act was introduced in 2015, the first significant review of and change to company law in Kenya since the prior Companies Act came into effect on 1 January 1962. The Companies Act has amplified the regulatory framework around takeovers and court-sanctioned schemes of arrangement, including "squeeze-in" and "sell-out" procedures. The Act further envisages Takeover Rules being promulgated by the CMA. These have not yet been formulated, although the CMA had previously issued the Takeover Regulations, which continue to apply with respect to listed companies, and it is hoped these regulations will be updated or that the new Takeover Rules will be published as soon as possible, particularly to harmonise approval processes and procedures for takeovers (including in the context of schemes of arrangement) under the Companies Act.

Following the 2016 amendments to the Competition Act, CAK is currently formulating and seeking stakeholder input on the proposed M&A guidelines and rules that will, inter alia, prescribe merger notification and exemption thresholds, and perhaps also bring clarity in respect of the multiple notification requirements to national and regional antitrust regulators.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Stakebuilding can be an effective tool in improving bid success or to deter competing bids (for example, a holding of over 10% would be enough to prevent a squeeze-in and a holding in excess of 25% would be enough to block a scheme of arrangement) but it is not a customary practice in Kenya, in part because of legal hurdles to stakebuilding that are summarised below.

4.2 Material Shareholding Disclosure Threshold

Generally, all companies are required to file annual returns containing particulars of shareholders and a 2017 amendment to the Companies Act introduced the requirement for the beneficial ownership of shares to be disclosed in each company's share register.

A public company may, by its own motion or at the request of the holders of 10% of its voting shares, issue notices requiring parties with an interest in the company's shares, or who may have held any such interest at any time in the three years preceding such notice, to confirm and provide further information regarding such interest, including the identity of the persons who hold interests in the relevant shares (an invaluable tool to establish true membership composition, particularly when potential takeover bids are contemplated).

The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 (the "Disclosure Regulations") prescribe certain continuing obligations for the issuers of listed or publicly offered securities, including the requirement to disclose, at the end of each calendar quarter, every person who holds or acquires 3% or more or, in the case of an issuer listed on the Growth Enterprise Market Segment (GEMS) of the Nairobi Securities Exchange, 5% or more of the issuer's ordinary shares. Issuers are also required to publish in their annual reports information on the distribution of shareholders in each class of shares and the names and number of shares held by their ten largest shareholders. In addition, issuers listed on the GEMS are required to pro-

vide information on the direct and indirect holdings of their controlling shareholders and management as well as historical information on the movement of any such holdings.

Under the Capital Markets (Licensing Requirements) (General) Regulations, 2002 (the "Licensing Regulations"), persons are required to notify a listed company upon acquisition of shares amounting to 3% or more of the listed company's share capital or when they cease to be interested in such shares. Further listed companies are required to make a monthly report to the securities exchange giving particulars of each person from whom it has received such notification, all directors holding 1% or more of its share capital and the directors' cumulative holdings.

4.3 Hurdles to Stakebuilding

However unlikely to do so, a company can provide for additional or more burdensome reporting standards in its articles of association of the company but cannot dilute legal requirements with the introduction of less stringent thresholds.

Apart from the risk of committing insider trading and market abuse offences, the key hurdles to stakebuilding lie in the restrictions imposed under the Takeover Regulations. Transactions by which a party, whether acting directly or in concert with others or by associated or related companies, acquires effective control (defined as 25% or more of the voting rights in a listed company) must comply with prescribed takeover procedures and the following persons (Presumed Offerors) are presumed to have a firm intention to make a takeover, and are required to comply with such takeover procedures:

- a holder of between 25% and 50% of the voting shares who in any year acquires more than 5% of the voting shares;
- a holder of 50% or more of the voting shares who acquires any additional shares;
- a person who (alone or in concert with others) indirectly acquires effective control of a listed company; and
- a person who acquires 25% or more of the shareholding of a subsidiary that has contributed 50% or more to the average annual turnover of the listed company for the three years preceding the acquisition.

If the target operates in a regulated sector, additional regulatory approvals may be required for the acquisition of any significant stake. For example, the approval of the Central Bank of Kenya (CBK) would be required for an acquisition of more than 5% of the share capital in a banking or financial institution and, save for certain exempted persons, no one is permitted to hold, directly or indirectly, more than 25% of the share capital in any such institution without the prior approval of the Cabinet Secretary responsible for matters relating to finance.

4.4 Dealings in Derivatives

Dealings in derivatives are permitted in Kenya and are regulated under the Capital Markets Act and the Capital Markets (Derivatives Markets) Regulations, 2015 (the "Derivatives Regulations"). The Nairobi Securities Exchange (NSE) has established a derivative market and has published rules to regulate and facilitate trade in derivatives. However, the market is in its infancy and is not yet fully operational.

4.5 Filing/Reporting Obligations

Save with respect to shareholding and membership in a derivatives exchange, no specific reporting obligations are prescribed by regulation in connection with derivatives transactions.

4.6 Transparency

During any stakebuilding exercise, there is no requirement to make known the purpose of the acquisition or any intention regarding control of the company. However, a public company may, on its own motion or at the direction of its members holding at least 10% of its voting shares, require a person to confirm its interest in the company and provide further information regarding such interest, including whether or not it is a party to an agreement for the acquisition of interests in shares in the company in which there are obligations or restrictions in the exercise of any rights, control or influence arising from those interests.

In the case of a takeover of a listed company, it is only after issuance of a notice of intention and a CMA-approved statement of the takeover scheme that submission of the takeover offer document is required, in which the offeror must state its intentions in relation to the continuation of the business, its intentions on major changes to be introduced to the business and continued employment of the target's employees, as well as any long-term commercial justifications for the proposed takeover.

In connection with competition approvals, merger notifications made to CAK (ordinarily done once a binding, albeit conditional, agreement has been entered into) must indicate the business rationale, including strategic, commercial and economic reasons for the transaction.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Information that could lead to material movements in the price of securities must be published where confidentiality cannot be maintained or has already been breached. However, under the Takeover Regulations it is only after the target has received a statement of the takeover scheme that it is required to notify the securities exchange and the CMA, and

publish a press notice of the proposed takeover offer within 24 hours of receipt of the offeror's statement.

Conversely, the offeror is required to serve a notice of intention of the takeover scheme to the target, the securities exchange, CAK and the CMA, and to announce the proposed offer by press notice within 24 hours of the making of a decision or the passing of a resolution to acquire effective control.

In connection with private M&A transactions that are subject to CAK approval, public announcement of the transaction is made by CAK only after it has determined whether or not to grant approval. In submitting merger notifications to CAK, parties may claim confidentiality in respect of the information supplied by them.

5.2 Market Practice on Timing

The timing of disclosures and announcements follows legal requirements.

5.3 Scope of Due Diligence

The acquirer typically carries out due diligence on the target before the acquisition. The scope varies depending on the structure of the acquisition and whether it is a public takeover (in which case the scope of due diligence is usually more limited than would be the case in a private transaction) but most negotiated transactions will be founded on a comprehensive due diligence typically covering all publicly available information and information supplied in response to a buyer's request list.

5.4 Standstills or Exclusivity

Exclusivity arrangements are common in private M&A transactions. With respect to listed companies, only the offeror is obliged not to dispose of shares it holds in the target during the offer period and share trading is only suspended if deemed fit by the CMA in connection with any announcements to be made or to gather information as may be required. The NSE may temporarily halt trading where, inter alia,there are unusual market movements in the price or volume of a security or where there are circumstances that exist or that are about to occur that could impair the transparent, fair and orderly trading of the specific securities. The Companies Act does permit "opt-in" resolutions, the effect of which are to render void any agreements restricting, inter alia,the transfer of shares to the offeror (or its nominee) or to any person during the offer period and in the case of the latter at a time when the offeror holds shares amounting to at least 75% in value of the voting shares of the company.

5.5 Definitive Agreements

The terms and conditions of a takeover offer must be in writing and must contain the information required by the Takeover Regulations.

With respect to private M&A transactions, it would be rare not to have in place definitive agreements setting out the terms of the transaction.

6. Structuring

6.1 Length of Process for Acquisition/Sale

There are no prescribed timelines for a private M&A transaction and much depends on the depth of due diligence required, the negotiations and whether regulatory or other third-party approvals are required.

The transaction timetable for a public takeover is prescribed by the Takeover Regulations and briefly summarised as follows. Within ten days of service of the notice of intent, the offeror is required to serve the target with a statement of the takeover scheme as approved by the CMA and 14 days thereafter to submit the takeover offer document to the CMA for approval. The CMA is required to approve the takeover offer document within 30 days or such longer period as it may determine and within five days of approval the offeror must serve the target with the approved takeover offer document for circulation amongst its shareholders. The offer is required to remain open for acceptance for 30 days following delivery and within ten days of close of the offer period, the offeror is required to inform the CMA and the securities exchange, and make an announcement by way of press notice of the acceptance and consequent change in structure.

For transactions requiring competition approval, a decision is to be reached by CAK within 60 days of either the receipt of a notification or any additional information it may have requested, or, if one is convened, within 30 days after concluding a hearing conference. CAK may extend the approval period but the extended period should not exceed 60 days.

For regional M&A deals that require COMESA Competition Commission approval, the Commission is required to examine a merger as soon as the notification (which must be complete) is received and to make a decision on the notification within 120 days, subject to any extensions approved by the Commission's board.

6.2 Mandatory Offer Threshold

Presumed offerors as defined above are presumed to have a firm intention to make a takeover offer and are required to comply with the takeover procedures under the Takeover Regulations.

Where a takeover offer under the Takeover Regulations results in an offeror acquiring 90% of the target's voting shares, the offeror is required to make an offer to purchase the remaining shareholders' shares at a price that is the higher of

the market value and the price offered to the other shareholders.

Under the Companies Act, if a takeover relates to all of the shares of a company, a shareholder that has not accepted the offer may, within prescribed timelines and where the offeror has acquired or is bound to acquire at least 90% of the voting shares that are the subject of the offer, require the offeror to buy its shares (and the offeror would be obliged to do so) on the terms of the offer or on terms agreed between them, or on terms imposed by the court following application by the shareholder.

6.3 Consideration

Both share and cash considerations are commonly used in Kenyan M&A transactions, with some transactions involving a mix of shares and cash, particularly for sellers looking for an upfront payout whilst retaining an equity stake in a buyer with sound prospects.

In connection with public takeovers, the takeover document must state whether the shares are to be acquired in whole or in part for cash and where payment is to be made in cash, the takeover document must include a confirmation by a financial adviser that the offeror has the financial capability to carry out the takeover in full and that the takeover would not fail on account of financial insufficiency. With reverse takeovers involving share swaps, the approval of the offeror's shareholders must be obtained prior to serving the takeover document, which must specify the proportion of the shares to be received in the swap and the timeframe for the receipt of such shares.

The Companies Act permits shares to be allotted for money or money's worth (including goodwill and know-how) but restricts public companies from allotting shares for non-cash consideration unless the consideration for the allotment has been independently valued or where the subscriber is another company, in certain circumstances.

6.4 Common Conditions for a Takeover Offer

The Takeover Regulations require that where the offer is conditional upon acceptances in respect of a minimum percentage of shares being received, the offer shall specify a date not later than 30 days from the date of service of the takeover offer or such later date as the CMA 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. Conditions relating to compensation for loss of office or other payments to the directors or other person related to the target are prohibited, but the following are examples of commonly included conditions: competition and other regulatory approvals, minimum acceptance levels, and shareholder and board approvals (where applicable).

6.5 Minimum Acceptance Conditions

An offer may be conditional upon the offeror receiving acceptances for a minimum percentage of shares. Where deals are not competitive, offers would typically be made subject to receiving at least 90% of the shares in order to ensure that the offeror will be able to rely on the statutory "squeeze-in" procedures to acquire compulsorily any remaining shareholders. Ordinary resolutions may be passed with more than 50% so it would be unusual to have minimum acceptances fall below this level. Special resolutions require a 75% approval threshold.

The Takeover Regulations permit withdrawals of offers in limited instances where:

- the target's shareholders have rejected the offer;
- the offeror has not obtained competition or any other regulatory approval;
- events occur that, according to the CMA, render the offeror and/or the target incapable of fulfilling their obligations under the takeover; or
- a counteroffer is accepted by the offeror.

Any withdrawal would require the prior written approval of the CMA.

Schemes of arrangement require 75% shareholder approval and would be subject to attaining such approval, approval of the court and registration with the Registrar of Companies.

6.6 Requirement to Obtain Financing

The Takeover Regulations prohibit anyone from making a takeover offer or announcing any intention to make an offer if it has no reasonable grounds for believing that it will be able to perform its obligations on acceptance and the takeover document must state that the bidder and bidder's financial advisers are satisfied that the takeover offer will not fail due to the bidder's insufficient financial capability and that every shareholder who wishes to accept the offer will be paid in full. Noting that independent confirmation of sufficient funding is required, any conditions as to financing would not be permissible.

For private M&A transactions, sellers may require guarantees for the purchaser's payment obligations and such transactions would be made conditional on the guarantee being issued. A purchaser would be at liberty to make the transaction conditional on financing but this is likely to be resisted by the seller.

6.7 Types of Deal Security Measures

Exclusivity, break fees and expense reimbursement terms are not prohibited by law. Parties may enter into voting arrangements to secure a minimum percentage of shares to be taken up to secure the deal; however, any such arrangements

must be disclosed in the notice of intent and the takeover document itself. The Takeover Regulations prohibit bidders from making arrangements to buy the target's shares on more favourable conditions than those contained in the offer either during a takeover or where a takeover is reasonably in contemplation.

6.8 Additional Governance Rights

In private M&A transactions, particularly those involving private equity investments, acquirers typically seek a number of governance rights, including rights to board representation and veto rights in connection with certain decisions. Such rights are usually captured in shareholder agreements and/or in the company's articles of association.

The CMA's Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 (the "CMA Governance Code") requires the boards of each such company to ensure that all shareholders, including minorities and foreigners, are treated equitably. The CMA adopts an "apply or explain" approach that requires companies to disclose fully any non-compliance with a firm commitment to move towards compliance. Satisfactory explanations for non-compliance may be accepted; however, mandatory provisions of the Disclosures Regulations carried forward into the CMA Governance Code must be adhered to.

It should be noted that a minority shareholding of more than 25% would be enough to block special resolutions and schemes of arrangement, whereas holdings in excess of 50% would enable the holder to pass ordinary resolutions.

6.9 Voting by Proxy

Under the Companies Act, a shareholder of a company is entitled to appoint another person as the shareholder's proxy and to exercise all or any of the shareholder's rights to attend, speak and vote at the meeting of the company. The appointing shareholder must give notice to the company of the appointment of the proxy before the relevant meeting is held.

6.10 Squeeze-out Mechanisms

Under the Takeover Regulations, an offeror who has acquired 90% of the target's voting shares pursuant to the offer is required to make an offer to remaining shareholders to acquire their shares at a purchase price that is the higher of the prevailing market price or the price offered to other shareholders.

These provisions are subject to the Companies Act, which prescribes "squeeze-in" and "sell-out" procedures under which acquisition of minority shareholding can be compelled. In a nutshell, where, pursuant to an offer for all shares in the target, an offeror acquires or is bound to acquire 90% of the shares and voting rights to which the offer relates, it may exercise its statutory rights to acquire compulsorily the remaining shareholders, effectively compelling such shareholders as may not have accepted the offer to sell their shares to it. The squeeze-in rights must be exercised within three months after the end of the offer period or six months after the date of the offer, whichever is earlier. It should be noted that such minority shareholders have a statutory right to apply to court to challenge the exercise of such squeeze-in rights or the terms thereof.

In addition, the offeror is required to give notice to shareholders who have not accepted the offer, prior to or within one month of the end of the offer period, notifying them of their rights under the Companies Act and the period within which these rights are to be exercised. These rights include "sell-out rights" (the right for such minority shareholders to require the offeror to purchase their shares) or to take court action to block the compulsory acquisition of their shares or to require the offeror to purchase the shares on specific terms.

In circumstances where an offeror has not attained the 90% threshold necessary to trigger its squeeze-in rights because shareholders are untraceable, the offeror may apply to court for orders authorising the offeror to issue the notice to buy out the remaining shareholders, which orders the court may grant if it is satisfied that the consideration is reasonable and that if such missing shareholders had accepted the offer, the offeror would have attained the 90% threshold required to exercise its squeeze-in rights.

6.11 Irrevocable Commitments

It would not be unusual to secure irrevocable acceptance or voting commitments for principal shareholders prior to announcing an intention to make an offer but any voting arrangements would have to be disclosed in the takeover documents.

7. Disclosure

7.1 Making a Bid Public

Private M&A transactions typically remain private unless competition approval is required, in which case it would come into the public domain once CAK publishes its approval or exemption of the transactions by way of Gazette notice.

As mentioned above, where the target is an issuer of securities to the public, information that could lead to material movements in the price of its securities must be published where confidentiality cannot be maintained or has already been breached. This is typically done by way of a cautionary statement. In the event of a takeover, the offeror is required to issue a press notice of its intent within 24 hours of the making of the resolution or decision to acquire effective

control that makes public the proposed transaction and any conditions attaching to the offer.

The Takeover Regulations set out the minimum disclosures to be made in the notice of intent, the press notice, the takeover statement and in the offer document and circulars to the target's shareholders.

7.2 Type of Disclosure Required

Where a share issue amounts to an offer of shares to the public, the offer prospectus must be approved by the CMA and comply with the disclosure requirements prescribed by the Disclosure Regulations, including disclosure of all material information, company information and capital adequacy, directors' interests, related party transactions, major shareholders, details of the offer, accountant's report and legal opinion.

Applications for CAK approval, referred to as merger notifications, can be quite detailed, particularly where the merging parties have vertical or horizontal relationships. Parties may, however, seek for price-sensitive information to be held confidentially by CAK.

7.3 Producing Financial Statements

The takeover statement issued by the offeror to the target is required to provide a summary of the offeror's latest audited financial statements. The independent adviser's circular must also contain a twelve-month outlook of the industry in which the offeror has its core business and a twelve-month outlook of the offeror's financial prospects.

Both the offeror's and target's audited financial statements for the three years prior to the application are required to be disclosed to CAK as part of the merger notification documentation.

Financial statements should be prepared in accordance with International Financial Reporting Standards.

7.4 Transaction Documents

Typically, any regulatory applications or procedural requirements requiring disclosure are satisfied by submission of proposed agreements in full.

The CAK merger notification form requires full disclosure of the asset purchase or share purchase agreement, although parties may make a claim for confidentiality in respect of sensitive information or documentation.

In connection with regional M&A deals requiring COMESA Competition Commission approval, notifying parties may request the Commission to accept a merger notification omitting certain information if such information is not reasonably available; for example, information on a target undertaking in circumstances where there is a competitive bid. The party must, however, provide reasons for the unavailability of the information and provide timelines as to when they expect to have access to it. Notifying parties may request that any documents or information submitted be treated as confidential by submitting a reasoned request for confidentiality.

The Takeover Regulations set out the minimum disclosures to be made in connection with takeover documents, which include:

- the ultimate offeror's identity;
- the offeror's intentions in respect of the business of the target;
- any arrangements with any persons acting in concert with them, or with any directors and shareholders, including past directors;
- the terms of the offer; and
- all information reasonably required by the target's shareholders and their advisers.

8. Duties of Directors

8.1 Principal Directors' Duties

Directors' general duties until recently were based on common law rules and principles of equity. These duties have now been codified in statute and are set out in the Companies Act. Each director must act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole whilst having regard to other matters, including the long-term consequences of the decision, employee interests, the need to foster the company's business relationships with suppliers, customers and others, the impact of the operations of the company on the community and the environment, the desirability of the company to maintain a reputation for high standards of business conduct and the need to act fairly between the directors and the members of the company.

However, where a company's solvency is in question, the directors' duties shift to the creditors of the company.

Directors also have a duty to avoid conflicts of interest, to declare situations of conflict and the duty not to profit from a position of trust that directors hold.

The CMA Governance Code sets out guidelines in connection with the discharge of directors' fiduciary responsibilities, including the duty to exercise reasonable care, skill and diligence, and to act in the best interests of the company as opposed to their appointors. Under the Takeover Regulations, directors are required to issue a circular to shareholders with their recommendation on whether or not to accept

the offer and in doing so they would be required to consider the merits of the deal and their duties.

8.2 Special or Ad Hoc Committees

The articles of association typically permit the board of directors to delegate their powers and functions to committees; however, decision-making and responsibility typically remains with the board. Accordingly, whilst it is not uncommon for special or ad hoc committees to be established to manage takeover offers, particularly where large boards are constituted, overall responsibility for the offer and compliance with regulations remains with the board.

8.3 Business Judgement Rule

Save in connection with court-sanctioned schemes of arrangement or objections to the exercise of squeeze-in rights or in derivative actions, Kenyan courts would not typically be involved in reviewing takeovers or in assessing the exercise of a director's judgement. Both the CMA Governance Code and the Companies Act require directors to exercise independent judgement and to act in the way that each director considers, in good faith, will promote the success of the company for the benefit of its members as a whole. The Companies Act provides that the directors' duties it codifies are based on common-law rules and equitable principles, and further requires that they are interpreted in the same way as and with regard to the corresponding common-law rules and principles. Kenyan courts recognise the business judgement rule and will have regard to its principles when determining derivative actions.

8.4 Independent Outside Advice

The Takeover Regulations require the board of directors of a target to appoint an independent adviser (either a licensed investment bank or stockbroker) to evaluate the offer. The independent adviser is required to issue a circular to the board, the CMA and the target's shareholders evaluating the offer and disclosing all information reasonably required by the board, the shareholders and advisers in order to make an informed assessment of the merits of the offer. In a reverse takeover, where the consideration for the acquisition comprises shares in the offeror, or where the board of the offeror is faced with a conflict of interest, it is required to appoint an independent adviser to perform similar functions. Further, a financial adviser is required to be appointed to evaluate and confirm the financial capability of the offeror to perform its payment obligations on acceptance of the offer where there is a cash consideration.

8.5 Conflicts of Interest

There have been numerous cases in which conflicts of interest of directors and advisers have come under scrutiny in Kenya but shareholder conflicts are not as common.

The Companies Act and the CMA Governance Code codify common-law principles in relation to a director's duty to avoid situations of conflict, to declare situations of conflict and the duty not to profit from a position of trust that directors hold over and above a director's duty to exercise independent judgement and to promote the success of the company for the benefit of its members. The CMA Governance Code specifically prohibits directors from taking part in discussions or decision making on any subject or transactions in which they have a conflict of interest.

Under the Takeover Regulations, an adviser would not be eligible for appointment as an independent adviser if the adviser:

- has or had during the year preceding the notice of intention in respect of a takeover scheme an interest of 10% or more of the voting shares in, or a substantial business relationship with, or advised in the planning or restructuring of, either the target or the bidder;
- is involved in the financing of the offer;
- has on its board a director who also sits on the board of the bidder or the target, or both;
- is a substantial creditor of the bidder or the target; or
- has a financial interest in the outcome of the offer.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile takeovers are permitted in law, although they are not commonplace in Kenya.

9.2 Directors' Use of Defensive Measures

With respect to listed companies, the Takeover Regulations restrict a target from undertaking certain defensive measures (i) where the target has had contact with the offeror or the offeror's agent, (ii) upon receipt of the notice of intention, if the target has reason to believe that a bona fide takeover is imminent, or (iii) during the course of the takeover. Restricted actions include the issue of authorised but unissued shares and selling, disposing of or acquiring or agreeing to sell, dispose of or acquire any of the target's assets or those of its subsidiary. These restrictions are disapplied where a bona fide contract was made for any of these actions, prior to contact with the offeror or its agent and prior to the receipt of the notice of intention. The Companies Act, however, permits companies to pass opt-in resolutions, the effect of which are to render ineffective any agreements that restrict (amongst other things) transfers of shares to the bidder or rights to vote at a meeting of the company that is to decide whether or not to take any action to frustrate a bid. Actions to frustrate a bid for this purpose include any actions that may be specified in the Takeover Rules to be formulated by the CMA.

9.3 Common Defensive Measures
Directors, if having applied themselves to their duties in law, may in their circular to shareholders recommend that the shareholders reject the offer, despite any contrary opinion issued by the independent adviser.

The Takeover Regulations enable competing offers to be made prior to expiry of the offer period and the board of the target may seek alternative bidders to make competing bids, although they would have to act within their statutory duties.

9.4 Directors' Duties
Directors are under a statutory duty in good faith to promote the success of the company for the benefit of its members as a whole and in doing so would take into account all aspects of the offer and (amongst other things) employee interests, and the long-term consequences of their decision. They are generally restricted from undertaking those actions to frustrate a bid as are described above.

9.5 Directors' Ability to "Just Say No"
Directors cannot "just say no". They are required to consider the offer and to discharge their statutory duties in assessing a bid.

10. Litigation

10.1 Frequency of Litigation
Litigation is not historically frequent in connection with M&A transactions but has occurred, particularly through applications made by the target's employees seeking injunctive relief pending determination of their grievances, which are usually founded on uncertainty as to whether their employment will be taken up by the acquirer or with a view to secure payment of any redundancy dues. Litigation has also emanated where competing bids have been made. Recently the proposed takeover of Rea Vipingo Plantations resulted in a flurry of competing bids that saw the regulator step in to issue administrative guidelines and to set a single timeline within which any competing bids were to be made or varied. Such action was challenged but the court of appeal ultimately upheld the action taken by the CMA as necessary in the circumstances and within its powers to foster and promote a fair and expedient process of takeovers and mergers.

10.2 Stage of Deal
Litigation would normally only be brought once information is in the public domain.

11. Activism

11.1 Shareholder Activism
Shareholder activism is gaining a foothold in Kenya as shareholders are becoming increasingly concerned with the manner in which companies are run. Indeed, the CMA Governance Code recommends that institutional investors take up the role of stewardship as representatives of their clients in listed companies and in particular are encouraged to make direct contact with the company's management and board to discuss performance and corporate governance matters, and to vote at general meetings. The CMA's Stewardship Code for Institutional Investors gazetted in 2017 (the "Stewardship Code") amplifies the provisions of the CMA Governance Code on the role that institutional investors, more so domestic investors (foreign institutional investors have the option to become signatories to the Stewardship Code), serve in promoting good governance and the success of companies with listed securities. The Stewardship Code sets out its fundamental principles as follows:

- stewardship or responsible investment policies;
- monitoring companies held in investment portfolios;
- active and informed voting practices;
- engagement, escalation and collaboration with other institutional investors;
- conflicts;
- focus on sustainability issues, including environmental, social and ethical factors; and
- public disclosures and client reporting.

11.2 Aims of Activists
Shareholder activism in the context of M&A transactions is not common but to unlock shareholder value, shareholders would support and sometimes initiate lucrative deals.

11.3 Interference with Completion
Activists may interfere with the completion of M&A deals to which they are not agreeable, primarily through objections or representations to regulatory authorities and CAK in particular. Indeed, the Competition Act allows any person not being a party to the transaction to submit any information in respect of a proposed merger to CAK.

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