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Overview of Public Merger & Acquisition Regulations of the Kingdom of Saudi Arabia

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Introduction

Since the introduction by the Capital Market Authority (the "**CMA**") of the Kingdom of Saudi Arabia (the "**Kingdom**") of the amended Merger and Acquisition Regulations[1] (the "**M&A Regulations**") there has been a distinct increase in market activity[2], indicating that public M&A transactions will continue to drive deal flow in the Kingdom.

This note, updated in August 2019, provides a high-level overview of the current regulatory regime of the Kingdom governing public M&A transactions, and how certain of the M&A Regulations are tending to be applied in practice

Key Legislation

The principal legislative acts which regulate public M&A transactions in the Kingdom are:

- the Companies Law (the "**Companies Law**") issued by Royal Decree No. M/3 dated 28/01/1437H (corresponding to 10 November 2015);
- the Capital Market Law (the "**CML**") issued by Royal Decree No. M/30 dated 02/06/1426H (corresponding to 31 July 2003);
- the M&A Regulations;

[1] As issued by the CMA pursuant to its Board Resolution No. 2-94-2017 dated 25/01/1439H (corresponding to 15 October 2017), which became effective as of 19 October 2017, as further amended pursuant to its Resolution No. 3-45-2018 dated 7/8/1439H (corresponding to 23 April 2018).

[2] For instance, (1) Sahara Petrochemicals Company completed its merger with Saudi International Petrochemical Company on 21 May 2019; (2) Saudi British Bank (SAAB) completed its merger with Alawwal Bank on 19 June 2019; (3) Al-Ahlia for Cooperative Insurance Company signed a binding merger agreement with Gulf Union Cooperative Insurance Co., though, the merger was rejected by the general assembly of Al-Ahlia on 18 February 2019; (4) UAE-based NMC Healthcare acquired a 49.2% stake in the Tadawul-listed National Medical Care Company (CARE), including GOSI and Hassana's 38.88 percent in CARE, in May 2019; and (5) it has been reported that National Commercial Bank, the Kingdom's biggest lender by assets, has started initial talks with Riyad Bank for a potential merger, a deal that would create an entity with $183 billion in assets.

- the Rules of Offering Securities and Continuing Obligations (the "**ROSCO**") approved by the CMA pursuant to its Board Resolution No. 3-123-2017 dated 9/4/1439H (corresponding to 27 December 2017), as amended; and
- the Listing Rules of Tadawul (the "**Listing Rules**") approved by the CMA pursuant to its Board Resolution No. 3-123-2017 dated 9/4/1439H (corresponding to 27 December 2017), as amended.

Scope of Application of M&A Regulations

The M&A Regulations apply to:

- any private/over the counter purchase or sale of voting shares in a company listed on the Saudi Stock Exchange ("**Tadawul**") resulting in an ownership or control of a person (individually or collectively by acting in concert) of over 10% or more of voting shares of such company[3]; and
- any public offer to purchase voting shares in a Tadawul-listed company if the shares sought to be acquired by the offeror would increase its ownership (individually or collectively by acting in concert) or control over 10% or more of voting shares of such company[4].

It should be noted that the Listing Rules/ROSCO allow cross-listing of a foreign issuer whose securities are listed on another regulated exchange. As of today, all companies listed on Tadawul are Saudi incorporated joint stock companies. If in the future a foreign issuer is listed on Tadawul, the M&A Regulations will apply to any acquisition of 10% or more of voting shares of such issuer.

Appointment of Advisers

Except in Private Transactions (see below), the offeror and the offeree must appoint an independent financial adviser, who must be authorised by the CMA, and an independent legal adviser, who must be authorised to practise law in the Kingdom.

[3] In our view, the M&A Regulations apply, *prima facie*, only to private/OTC purchases of 10% or more of a target company's voting shares, even where the purchaser is already a 10% plus shareholder in the target company. However, if such a transaction took a shareholder's interest over 50%, this would trigger the mandatory takeover provisions M&A Regulations, which would then apply.

[4] This would also apply to shareholders with any stake in a company who simply look to increase their holding through a tender offer.

Competition Law Considerations

If the requirement to obtain competition clearance/non-objection from the General Authority for Competition of the Kingdom or foreign regulators applies to the offer, the offeror must state that in its announcement. The offer will lapse if the General Authority for Competition notifies the offeror or the offeree of its objection to the transaction.

GAC approval can take up to 90 days. Given that withdrawal rights may be available to accepting shareholders after 42 days if an offer has not been declared unconditional as to acceptances[5], offerors might consider a pre-conditional offer, to which GAC approval is a pre-condition, prior to launching a binding offer. Such an approach would need to be discussed with the CMA, but is permissable under the M&A Regulations.

Private Transactions

The M&A Regulations contain specific rules regarding "Private Transactions" which are defined as "*transaction involving the purchase and/or sale of shares carrying Voting Rights in any company listed on the Exchange, negotiated between the Offeror and selling shareholder(s) of the Offeree Company without making an Offer or involving the other shareholders or directors of the Offeree Company.*"

Key rules for Private Transactions are summarised below:

- No Private Placement Requirement: The private placement requirements contained in the ROSCO do not apply to the solicitation by a selling shareholder of multiple offerors to enter into a Private Transaction for the sale of part or all of its shares in the offeree.
- Advisers: The selling shareholder and the offeror may each appoint an independent financial adviser and an independent legal adviser.
- Approaching Offeree Board: The selling shareholder and the offeror may, at their discretion, inform the board of the offeree or its advisers of a potential Private Transaction in order to request price sensitive/confidential information. The offeree is deemed informed of a potential Private Transaction upon its board being formally notified regarding the same.
- Notification of Offeree Board: In the event of a leakage of confidential and/or price sensitive information about the offeree or the potential Private Transaction, or in the event of the offeree becoming subject of rumors relating to the potential Private Transaction, the offeror must promptly notify the offeree's board of directors and the CMA of the Private Transaction and announce the transaction to the public.

[5] Articles 17C(1)(g) and 46 of the M&A Regulations

- Disclosure of Information: After the offeree board is formally notified about a potential Private Transaction, the offeree may on a strictly confidentially basis share confidential/price sensitive information with a bona fide offeror to assist its due diligence over the offeree.
- Announcement: The offeror and the selling shareholder must announce a Private Transaction if:
  - definitive agreements (including the share sale and purchase agreement but excluding entering into preliminary agreements such as a memorandum of understanding) relating to the Private Transaction are entered into between the offeror and the selling shareholder; or
  - prior to formally notifying the offeree of a potential Private Transaction, the offeree is the subject of rumors and speculations[6], or where there is an untoward price movement since the start of the negotiations between the selling shareholder and the offeror, of 10% or more within a single day or 20% or more of the lowest share price since the start of the negotiations between the selling shareholder and the offeror, and there are reasonable grounds for concluding that it is the potential Private Transaction which has led to the situation. This announcement requirement also applies to the offeree, the offeror and the selling shareholder if the circumstances leading to the same share price movement occur after the offeree board has been formally notified about a potential Private Transaction.
- Purchase Price: The selling shareholder and the offeror may agree on any purchase price they deem appropriate for the acquired shares by applying a premium or discount on the market price of the offeree's shares on Tadawul. The purchase price must be disclosed in the announcement regarding the Private Transaction.
- Mandatory Offer and Control of 50% or More Voting Shares: If as a result of a Private Transaction the offeror purchases or increases its aggregate ownership or interest in the voting shares of the offeree so that such offeror or persons acting in concert with it become the owner (or controller) of 50% or more of the offeree's voting shares, such offeror (and beneficiary on behalf of whom the offeror is acting in the Private Transaction) will be subject to the provisions of Article 23 (Mandatory

[6] The CMA regulations do not provide clear guidance or an objective test regarding what would constitute "rumours and speculation". Significant share price movements might be deemed as evidence of rumours and speculation. In the absence of any price movements, reporting in the national press or other credible sources would likely satisfy this test if it triggered a significant movement in the share price that might not pass the 10/20% price movement test.

Offer) and Article 24 (Restrictions on Control of 40% or More Voting Shares) of the M&A Regulations (see below).

- Consequences of Non-Completion: If the Private Transaction is not completed, the offeror who has obtained confidential/price-sensitive information concerning the offeree may not deal in the offeree's securities for six months from the date of announcing the non-completion of the Private Transaction.

Rules of Tender Offers

The bulk of the M&A Regulations deals with tender offers made by the offeror to all holders of voting shares of the offeree. Key provisions dealing with tender offers are summarised below.

- Approaching the Offeree: An offer must be put forward to the board of the offeree or to its independent financial advisor before it is made to the shareholders of the offeree.
- Mandatory Announcement: A public announcement is required to be made promptly in the following circumstances:
  - when firm intention to make an offer is notified to the board of the offeree, irrespective of the latter's attitude to the offer;
  - upon an acquisition of shares by a person which gives rise to an obligation to make a Mandatory Offer under Article 23 of the M&A Regulations;
  - when a person (individually or acting in concert with the others) owns 40% of the offeree's voting shares;
  - when, before a bid approach has been made, the offeree is the subject of rumours and speculations or where there is an untoward price movement in the offeree's shares of 10% or more within a single day and there are reasonable grounds for concluding that it is the potential offeror's actions which have led to the situation;
  - when, following a bid approach, the offeree is the subject of offer-related rumours and speculations, or where there is an untoward price movement in the offeree's shares of 20% or more of the lowest share price since the time of the approach or a price movement of 10% or more in a single day; and
  - when:
    - negotiations or discussions regarding an acquisition relating to 30% or more of voting shares of the offeree include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisors); or

- the board of the offeree is seeking one or more potential offerors.

- Responsibility for Making Public Announcement:
  - Before the board of the offeree is approached, the responsibility for making an announcement rests with the offeror only.
  - Following an approach to the board of the offeree which may or may not lead to an offer, the primary responsibility for making an announcement will rest with the board of the offeree.
- Announcement of a Firm Intention to Make an Offer:
  - The offeror should make an announcement of a firm intention to make an offer only when it has every reason to believe that it can and will continue to be able to implement the offer. Responsibility for advising the offeror in this connection rests on the independent financial advisor of the offeror.
  - When there has been an announcement of a firm intention to make an offer, the offeror must, except with the consent of the CMA, proceed with the offer unless the offer is subject to the prior fulfilment of a specific condition which has been made public and which has not been met.
- Statement of Intention Not to Make an Offer: If the offeror makes a statement that it does not intend to make an offer, the offeror (and persons acting in concert) will be bound by that statement for a period of six months unless there is a material change of circumstances related to the statement or there has occurred an event which the offeror specified in its statement as an event which would enable it to be set aside.
- Offer Timetable:
  - The offer timetable must be agreed with the CMA in advance. The offeror must submit its proposed offer timetable to the CMA within three days from the date of mandatory announcement.
  - The offer timetable must include the following:

DAY	ACTION
	The delivery of the offer document to the CMA for approval within three days from the date of mandatory announcement. The CMA will grant its approval for the offer document within 30 days of receiving all information and documentation required by the M&A Regulations.[7]

[7] In practice, the review period should typically be shorter than 30 days, provided that the submitted offer document satisfies all requirements. However, as the CMA will insist on all requirements being satisfied before the 30-day clock starts, best practice should be to try to allow 60 – 90 days for discussions with the CMA in this regard.

Day 0	The publication of the offer document approved by the CMA and providing the same to the board and shareholders of the offeree must take place no later than three days from obtaining the CMA's approval of the offer document.
Day 14	The last date for the publication of the offeree board's circular (if it has not been published with the offer document).
Day 28	▪ The last date to obtain offeror shareholders' approval (if any) provided that the notice period for the general assembly meeting must not be less than 14 days. ▪ The last date to obtain offeree shareholders' approval (if any) provided that the notice period for the general assembly meeting must not be less than 14 days. ▪ The earliest permitted closing date of the offer (i.e., the first closing date).
Day 42	The last date to exercise the right of withdrawal of acceptances (if the offer has not become unconditional as to acceptances).
Day 60	▪ The last date on which the offeree may announce profit or dividend forecasts, asset valuations or proposals for dividend payments. ▪ The last date on which the offeror may revise its offer or publish new information. ▪ The last date on which the offer can be declared unconditional as to acceptances.
Day 81+	The last date on which the offer must remain open for acceptance after it is declared unconditional as to acceptances, which must be no earlier than 21 days from Day 60.
Day 81	The last date for the satisfaction of all other conditions of the offer.
Day 91	The last date for cash or other consideration to be paid to the shareholders of the offeree.

- Independent Advice: The board of the offeror (if the offeror is a listed company) and the board of the offeree must obtain competent, independent advice from independent financial advisors and inform their respective shareholders of the substances of such advice.
- Restrictions on Dealings by the Offeror: During the offer period, the offeror must not sell any securities of the offeree without obtaining the CMA's prior approval, and in any case it may not sell with a price less than the offer price. Note that an offeror will also be responsible, and attributed with the actions of, its concert parties.
- Irrevocable Commitments: The offeror's independent financial advisor must inform the CMA before any offeree shareholder or offeror shareholder, where offeror shareholder consent is required, is contacted with a view to seeking an irrevocable commitment to accept/approve or refrain from accepting/approving an offer.
- Minimum Level of Payment:
  - When the offeror has purchased shares in the offeree within the three month period prior to the announcement of firm intention to

make an offer, the offer to the shareholders of the same class must not be on lesser price than the price of the purchase made prior to the announcement of firm intention.

- If, during the period from the announcement of firm intention to make an offer until the end of the offer period, an offeror purchases shares at more than the offer price, or otherwise acquires any other interest in shares giving it control of the voting rights of such shares, it must increase its offer to not less than the highest price paid for the shares so acquired during that period.

- Mandatory Offer:
  - Where a person acquires (individually or collectively with persons acting in concert) 50% or more of the voting shares of the target[8], the Board of the CMA may, in exercise of its discretionary powers under the CML, require such person to purchase the shares of the same class of the offeree it does not own (a "**Mandatory Offer**").[9]
  - A Mandatory Offer will not be required for acquisitions resulting in ownership of less than 50% of voting shares in the Saudi-listed company; however, in the event of a subsequent increase in ownership to 50% or above the CMA may require the purchaser to make a Mandatory Offer.
  - A Mandatory Offer must be unconditional beyond an acceptance condition[10] and any regulatory approvals required to execute the offer, be in respect of each class of share of the offeree, be in cash or be accompanied by a cash alternative of not less than the highest price paid by the offeror, or persons acting in concert, for shares of that class during the offer period and within 12 months prior to its commencement.

[8] The correct threshold for mandatory offers under the M&A Regulations is 50%, not 40%. There has been some confusion in legal articles because of the English translation of Article 13(a) (Mandatory Offer Triggers) of the M&A Regulations, which erroneously cross refers only to Article 23 of the same (the Mandatory Offer provision); in fact, the reference should be to Article 23 or 24 as applicable (thereby referencing the six month restriction on disposals in Article 24 that applies when an offeror acquires 40% or more in a target company, as well as, if applicable, the mandatory offer provisions in Article 23).

[9] The CMA has discretion to waive the mandatory offer threshold, and may be inclined to do so given the current drive in the Kingdom to facilitate foreign investment. For instance, the CMA approved the Allianz Group's increase of its stake in Allianz Saudi Fransi Cooperative Insurance Company to 51%, completed in March 2018, without requiring a Mandatory Offer.

[10] Article 23(b) of the M&A Regulation implies that a mandatory offer must be unconditional. However, Article 27 which refers to Article 23, indicates that such offer can include an acceptance condition (though this seems redundant given that a mandatory offer only applies at 50% anyway). Following discussions with the CMA it is clear that the only condition (ex regulatory) that could apply to a mandatory offer would be an acceptance condition. If this is not satisfied, then the mandatory offer may lapse.

- Article 24 Restriction: If a person obtains or controls 40% or more of any class of voting shares, it may not dispose of those shares during the following six month period without the CMA's approval and in accordance with any conditions specified by the CMA. Public disclosure obligations on the acquirer and the offeree apply in this situation.
- Partial Offer: The offeror may, subject to obtaining the CMA's prior approval, make a partial offer (i.e. an offer to purchase a certain percentage of shares in the offeree) to the board of the offeree.
- Securities Exchange Offer:
  - An offeror (which is a joint stock company) may, after obtaining the CMA's prior approval, make a securities exchange offer to the offeree in consideration for all the shares in the offeree ("**Securities Exchange Offer**").
  - A Securities Exchanges Offer must be approved by the extraordinary general assembly of the offeror and the offeree by a 75% majority of the shares represented at the meeting.
- Cash Offer: In the event where shares of any class in the offeree are purchased in exchange for cash by the offeror (or any persons acting in concert) during the offer period or in the 12 months prior to it, in which case the offer for that class must be in cash or accompanied by a cash alternative of not less than the highest price paid by the offeror (or any persons acting in concert) for shares of that class during the offer period or in the 12 months prior to it.
- Special Deals: The offeror (or any person acting in concert with it) may not make any arrangements with offeree shareholders and may not deal, enter into arrangements to deal in shares of the offeree, or enter into arrangements which involve acceptance of an offer, if there are favourable conditions attached which are not being extended to all offeree shareholders.
- Equality of Information: Information about the offer, including announcements, statements, presentations, circulars and information concerning companies involved in an offer, must be made equally available to all shareholders as nearly as possible at the same time and in the same manner.
- Restrictions on Frustrating Actions by Offeree Board: During the course of an offer, or even before the date of the offer if the board of the offeree has reason to believe that a bona fide offer might be imminent, the board must not, except in pursuance of a binding contract entered into

earlier, and without the approval of the shareholders convened in a general assembly, effect any of the following[11]:

- issue any undisclosed unissued shares;
- issue or grant rights in respect of any unissued shares;
- create or issue, or permit the creation or issuance of, any convertible securities into shares or subscription for shares;
- sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a value equal to 10% of the net asset of the offeree;
- buy-back of the offeree's shares; or
- enter into contracts otherwise than in the ordinary course of business.

- Break-Up Fee: Any break-up fee must be of a minimal size (no more than 1% of the offer value), and the offeree board and its independent financial advisor must confirm to the CMA in writing that the fee is in the best interests of the offeree's shareholders. Any break-up fee arrangement must be fully disclosed in the offer document and in the announcement of a firm intention to make an offer.
- Offer Document: The content of the offer document must comply with the requirements set out in Article 38 of the M&A Regulations. As a rule of thumb, the contents are not too dissimilar to those required in a UK takeover offer document.
- Offeree Board's Circular: The board of the offeree must circulate its views on the offer to its shareholders, including any alternative offers, and must, at the same time, make known to its shareholders the substance of the advice given to it by the independent financial adviser to the offeree.

No Squeeze-Out Right

It should be noted that neither the Companies Law nor the M&A Regulations provide for the offeror's squeeze out rights to acquire minority shareholdings on a compulsory basis following the completion of a

[11] Frustrating actions are not permitted by an offeree company, as the intention is that it should let the shareholders decide on the facts. However, there may be some things that a target board can do such as: (1) Write to its shareholders if it does not recommend an offer, with explanations as to why it believes the offer undervalues the company (The board of the target is required to provide sufficient information and advice to the shareholders of the target to enable them to make an informed decision to accept or reject the offer, and can leverage this to its advantage); (2) Court other bidders, and make information available to them on the same basis; (3) Accelerate positive announcements of the offeree company's business, to try and drive up the share price and make an offer seem less attractive; or (4) Announce new strategic plans, and claim these are being announced unrelated to the offer and would be undertaken in the ordinary course.

takeover offer. Unless the takeover is implemented by way of a merger transaction (see below), the offeror is not guaranteed to purchase all voting shares of the offeree.

Merger Transactions

The M&A Regulations permit a listed company (merged company) to implement a merger using the following structures:

- Absorption by Another Listed Company (Merging Company):
  - A Security Exchange Offer to purchase all of the merged company's shares must be made by the merging company, and new shares in the merging company must be issued to the shareholders of the merged company.
  - Upon the completion of the merger transaction, all assets and liabilities of the merged company are transferred to the merging company, which will continue to exist and remain listed while the merged company will cease to exist and its shares will be delisted.
- Absorption by Unlisted Company:
  - A Securities Exchange Offer must be made by an unlisted company to the shareholders of the merged company.
  - Upon the completion of the merger transaction, all assets and liabilities of the merged company are transferred to the merging company, which will continue to exist while the merged company will cease to exist and its shares will be delisted.
- Forming a New Legal Entity:
  - A Securities Exchange Offer must be made by a newly formed entity (into which the merged company and the merging company will merge) to the shareholders of the merged company and the merging company.
  - Upon the completion of the merger transaction, the assets and liabilities of the merged company and the merging company are transferred to the newly formed legal entity and they will cease to exist and their shares will be delisted.
  - Should the newly formed legal entity wish to list its shares on Tadawul, a new application must be submitted to the CMA.

The implementation and closing of a merger transaction will be subject to the Companies Law requirement to obtain shareholder approval at an extraordinary general assembly of the offeror and the offeree by a 75% majority of the shares represented at the meeting.

The Companies Law imposes the following additional conditions on merger transactions:

- The participating companies must enter into a merger agreement detailing the terms of the merger, valuation of assets and liabilities of the merged company and the number of shares that the shareholders of the merged company are entitled to in the merging company.
- The merger transaction may not complete until 30 days have passed from the date of publication of the shareholder resolutions of both companies approving the merger. Creditors may object to the merger during such 30 day period, in which case the completion of the transaction is suspended until either the creditor withdraws his objection or his debt is paid off or he is provided with adequate security.

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