

Acquisitions Under The New Kuwaiti Capital Markets Law and By-Laws

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Last year, Kuwait enacted the Capital Markets Law (CML) (Law No. 7 of 2010) followed by its executive bylaws (CML Bylaws) which seeks to regulate the securities businesses in Kuwait and provide protection to those involved in trading.

ACQUISITION OF 50-100% OF A COMPANY'S SHARES

One of the definitions given by the CML and the CML Bylaws on Acquisition is the offer, attempt or request to hold all the shares of a listed company or all the shares of any category or categories within a listed company regardless of the shares already held by the offeror or its affiliates on the date of submitting the offer.

The company that is the subject of the offer is any listed company or non-listed company, in the case of a reverse acquisition.

Kuwaiti law does not yet recognize the concept of categories of shares, as there is only one category of shares in shareholding companies in Kuwait. However, the use of the words category and categories above may be an indication that the Kuwaiti companies' law may be amended to expand the categories of shares.

The CML Bylaws states that any person may, after obtaining prior written approval from the Capital Markets Authority (CMA), submit an offer of acquisition at any time according to the provisions of the CML Bylaws. The absence of clarity on the phrase at any time creates a few issues: (i) there is no time limit on making an offer of acquisition.

after obtaining the approval from the CMA, therefore an offeror can hold on to such approval for an indefinite period; (ii) once the CMA approves an application for an offer of acquisition, the CMA can then grant another approval to a second offeror and, if the first offeror has not made an offer yet, there would exist two separate offers for the same company; and (iii) if the CMA can only grant one approval at a time, an offeror may misuse this restriction to block other parties from making offers of acquisition.

The offeror must give equal treatment to all the shareholders of the subject company and in particular the offeror, the subject company and any advisers may not submit any information gathered during the period of offer to some of the shareholders and not the others.

The offer parties (the offeror and the offeree) must appoint an investment advisor licensed by the CMA who must be independent and has no interest in the acquisition of the subject company. At this time, it is unclear if both the offeror and the offeree can appoint one investment advisor or if each is required to appoint one.

The Board of the offeror and the Board of the subject company must provide their respective shareholders with information and recommendations to enable them to reach a decision for accepting or rejecting the offer at least fifteen days before holding the general assembly of shareholders. From the wording of the CMA Bylaws on this provision, we assume that in the case of acquiring all the shares of the subject company, the approval of the shareholders' ordinary assembly of the subject company is required. In other words, at least 51% of the shareholders of the subject company have to approve the offer, subsequently forcing the non-approving shareholders to sell their shares as well. This concept is new to the Kuwaiti

practice and has never been applied before. The shareholders of the offeror have to approve the offer as well. The issue arising from this requirement is that when the offeror is required to obtain the approval from its shareholders, which are either before or after the application to the CMA seeking its approval for the offer of acquisition. If after, then the board of directors decides on the offer of acquisition and applies to the CMA on behalf of the offeror.

The offeror shall, before proceeding to acquisition procedures, obtain the approval of the Competition Protection Agency according to Law No. 10 of 2007 concerning competition protection. With respect to the timing of the application for approval of the Competition Protection Agency, which the exact timing for such application is, either before or after the application for approval of the CMA or the approval of the shareholders.

ACQUISITION OF MORE THAN 30% OF SHARES (MANDATORY OFFER)

Any person must within a period of thirty days of directly or indirectly obtaining equity of more than 30% of the voting shares of a company listed in the Kuwait Stock Exchange (KSE) immediately submit an acquisition offer for all the shares remaining from the same category. The CMA can make exceptions to this requirement if it is in the best interest of the shareholders or public policy. The question arises as to whether this article will apply to acquisition of 30% or more in the event of foreclosure, or pursuant to any court order. Would the mortgagee then have to extend a mandatory offer to the remaining shareholders? The offeror shall, in the case of a mandatory offer, submit its offer to the shareholders of the company, subject of the offer, directly without the need for holding a general assembly of shareholders of the company subject of offer. Each shareholder shall be allowed the option to sell its shares to the offeror or keep them during the offer period decided by the CMA.

The offer submitted under the mandatory offer shall be a cash offer not less than the likely average of the daily price per share in the KSE for the company subject of offer within the six years preceding the beginning of offer period, and the KSE shall calculate this price.

It should be noted that that the above provisions regarding the mandatory offer are the consequence of obtaining more than 30% of the shares, and not the method that an offeror is to acquire shares of more than 30%. The mandatory offer only kicks in after an offeror obtains more than 30% shares. For instance, if an offeror wishes to acquire 49%, it will have to complete the acquisition of the 49% and then shall have 30 days to submit a mandatory offer for the remaining shares. When using the method of acquisition of up to 49% (before reaching 30%), the following provisions of acquiring 5%-30% of shares will apply.

ACQUISITION OF BETWEEN 5% AND 30% OF SHARES

When a person holds, individually or jointly with parties affiliated thereto or allied therewith, about 5 % or more of the shares of any company listed in the KSE and intends to raise the holding percentage of the company shares, it shall disclose such intention when disclosing the interests pursuant to the provisions of Chapter Ten of the CML, and shall submit to the CMA the information it requires in this respect.

If the person holding, individually or jointly with parties affiliated thereto or allied therewith, 5 % or more of the shares of a company listed in the KSE, is willing to raise such percentage at no more than 30 % of the shares of the same company, it shall achieve the same in any of the following forms:

1. Purchasing shares directly through the KSE;
2. Submitting an application to the KSE for holding an auction for purchasing a specific number of shares. For submitting this application, there shall be a preliminary agreement with a person or group of company shareholders willing to sell a specific number of shares at a price agreed upon in advance. For holding the auction, the conditions and requirements laid down by the CMA and KSE shall be complied with in this respect.
3. Announcing submission of an offer to the shareholders of the company to purchase a specific number of shares at a specific price and within a specific period of time, provided that it shall obtain the prior written

approval of the CMA in this respect and to comply with the conditions and requirements laid down by the CMA.

It is unclear if the above provisions supersede the current block trading rules.

REVERSE ACQUISITION

Reverse acquisition means any arrangement under which a listed company offers new shares to shareholders of an unlisted company instead of their shares where the new shares represent more than 50 % of the voting shares in the listed company after acquisition.

Reverse acquisition operation, the listing of offeror's shares shall be suspended until the operation is completed. Once completed, the listing of offeror's shares shall be cancelled and the offeror shall submit an application for a new listing, provided that it shall meet the requirements of listing according to the regulation in respect of the same.

This acquisition, acceptable with a majority resolution, is passed by the general assembly of shareholders in the company subject of offer in approval thereof.

CONCLUSION

The passing of the CML and the CML Bylaws marked an important milestone in the Kuwaiti capital markets industry. Other than the provisions on acquisitions, the CML and the CML Bylaws introduced clearer provisions which clarified the earlier provisions on the protection of minority rights, disclosure obligations and insider trading which was either previously unregulated or the previous law relevant to these areas was unclear.

We have yet to see how the CMA will implement the CML and CML Bylaws and we look forward to the application of any new test case on the same. Hopefully, when more information becomes available and actual application of the CML and the CML Bylaws will take place, we will be able to shed more light on this subject in future articles.