
Kenya Takeover Guide

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INTRODUCTION

This guide provides a brief overview of the Kenyan Law applicable to the Takeover of Shares in Companies listed on the Nairobi Stock Exchange.

This guide further provides information as to what constitutes a takeover, the manner in which takeover offers are regulated, the rights of minority shareholders and the role of the regulators authorised to approve takeovers.

WHAT CONSTITUTES A TAKEOVER

Takeovers & Mergers of listed companies are regulated by The Capital Markets (Takeovers and Mergers) Regulations, 2002 (“the Takeovers and Mergers Regulations”).

A takeover offer is defined under the Takeovers and Mergers Regulations as a general offer to acquire all voting shares in the Offeree company (“Target Company”). A reference to a takeover offer includes a takeover scheme.

A takeover scheme involves making an offer for the acquisition by or on behalf of a person of:

- all voting shares in the Target Company;
- such shares in a company which results in the Offerer acquiring effective control in a Target Company (namely 25% of the voting rights except where such person already holds 90% personally or by persons acting in concert or by related or associated parties);
- a shareholding of 25% or more in a subsidiary of a listed company that has contributed 50% or more to the average annual turnover in the latest three financial years of the listed company prior to the acquisition; or
- an acquisition deemed by the CMA to constitute a takeover scheme.

Where a person proposes to acquire shares or voting rights of a listed company, which together with shares and voting rights (if any) held by such person (or by persons acting in concert or by an associate person or related company) entitle such person to exercise effective control in the listed company (as defined above), such an acquisition constitutes a takeover, requiring such person to comply with the takeover procedures provided for under Regulation 4 of the Takeovers and Mergers Regulations.

In determining whether an acquisition will result in “Effective Control” being exercised, consideration needs to be given to the following definitions:

“A related company” is defined as:

- a holding company of another company;
- a subsidiary of another company;
- a subsidiary of the holding company of another company.

Persons “acting in concert” is defined as 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.

THE STATUTORY AND REGULATORY FRAMEWORK IN KENYA

The legal provisions on takeovers and mergers in Kenya are found in three pieces of legislation:

- The Capital Markets Act (Cap 485A);
- The Capital Markets (Takeovers & Mergers) Regulations, 2002; and
- The Competition Act No. 12 Of 2012.

The Capital Markets Act (Cap 485a)

The Capital Markets Act (“the CM Act”) establishes the Capital Markets Authority (“the CMA”), which is mandated to regulate, promote and facilitate the development of an orderly, fair and efficient capital market in Kenya.

The CMA is the principal regulator and supervisor of the securities and capital market in Kenya.

Objectives of the CMA

The main objectives of the CMA are stated to be:-

- the development of all aspects of capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in productive enterprises;
- to facilitate the existence of a nationwide system of stock market and brokerage services so as to enable wider participation of the general public in the stock market;
- the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self regulatory to the maximum practicable extent;
- the protection of investor interests;
- the operation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and
- the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.

Under the CM Act, the CMA is mandated to grant licences to persons wishing to carry on business as stockbrokers, dealers, investment bankers, fund managers, investment advisers or authorised securities dealers.

Various regulations and guidelines have been enacted by the CMA in exercise of its power to issue rules, regulations and guidelines as may be required for the purpose of carrying out its objectives. Among these rules, regulations and guidelines are regulations that control offers of securities to the public, licensing of stockbrokers, dealers, investment advisers and the procedures to be followed in undertaking any proposed takeover of a listed company.

The Nairobi Stock Exchange

Part III of the CM Act empowers the CMA to approve applications of persons wishing to carry on business as a securities exchange. The Nairobi Stock Exchange (“the NSE”), a limited liability company, has been licensed as a securities exchange under the foregoing provisions. The NSE, as a securities exchange, is required to make rules governing certain aspects of the regulation and supervision of the securities market.

In takeovers of listed companies, the NSE does not play any role in the approval of the takeover. Nevertheless, the takeover procedure requires an Offerer to serve certain mandatory notices on the NSE.

The Capital Markets Tribunal

The CM Act also establishes the Capital Markets Tribunal, which handles appeals from decisions, directions and actions of the CMA.

The Capital Markets (Takeovers And Mergers) Regulations, 2002

The Takeovers and Mergers Regulations outline the procedure that is followed in takeovers and mergers and spells out the obligations of the Offerer and the Offeree with respect to a takeover offer by way of purchase of shares.

As previously stated, the Regulations prohibit the making of an offer to acquire shares or voting rights in a listed company, which together with shares or voting rights (if any) held by the person making the offer or persons acting in concert or by associated persons or a related company would entitle such person to exercise effective control in the listed company, without complying with the takeover procedures set out in the Regulations.

Presumption of an intention to make a Takeover bid

Under the Takeovers and Mergers Regulations, a person may, in certain situations, be presumed to intend to takeover a listed company despite not having expressly indicated such an intention. When such an intention is presumed, the person is required to comply with the takeover procedures set out in the Regulations.

A person is prima facie presumed to intend to takeover a listed company where such person:

- holds more than twenty five percent but less than fifty percent of the voting shares of a listed company, and acquires in any one year more than five percent of the voting shares of such company; or
- holds more than fifty percent or more of the voting shares of the listed company and acquires additional voting shares in the listed company; or
- 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 person acting in concert with such person, will result in acquiring effective control of the listed company; or
- 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.

Takeover not intended

Where a person has or will acquire such effective control in a listed company but has no intention of making a takeover offer, that person may apply for an exemption from the takeover regulations. Such person will be required to serve notice in writing to the proposed Target Company, the NSE and the Commissioner of Monopolies and Prices and to make a public announcement of the broad reasons for exemption.

Exemptions

General grounds

The CMA may grant an exemption from complying with the procedural regulations to any particular person or takeover offer or to any particular class, category, and description of persons or takeover offers. The exemption may be subject to such conditions as the CMA may determine and must be on the basis that the circumstances of the case serve the wider interests of the shareholders and the public. These circumstances include:

- 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;
- a management buy-out involving a majority of the employees of the Offeree;
- a restructuring of the listed company's share capital including acquisition, amalgamation and any other scheme approved by the CMA;
- an acquisition of a listed company in financial distress;
- an acquisition of effective control arising out of disposal of pledged securities;
- the maintenance of domestic shareholding for strategic reasons; and
- any other circumstances which in the opinion of the CMA serves the public interest.

The CMA is required to make a public announcement through the print and electronic media of its decision on the exemptions granted.

Specific grounds

Regulation 5(3) provides another ground for exemption from the takeover procedure. Under this Regulation, a person who at the commencement of the Regulations:

- already holds 25% or more of the voting shares of a listed company; or
- 25% or more of the voting shares in a company applying for listing, at the date of listing, whichever is later

shall not be required to comply with the takeover procedure.

It is important to note that where a Company is already in control of 25% but less than 50% of the voting shares of a listed company it may acquire up to 5% in any one year in such a listed company, up to a maximum of 50%.

The takeover procedure is provided for under Regulation 4. This procedure is discussed in detail below.

The Competition Act No. 12 of 2010

This Act repealed the Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504)

The Act seeks to promote and safeguard competition in the national economy, to protect consumers from unfair and misleading market conduct and to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal.

In a bid to safeguard competition in the Kenyan economy, the Act bestows the Competition Authority with the function and power to control mergers. Accordingly, no person, individually or jointly may implement a proposed merger unless the proposed merger is approved by the Authority and implemented in accordance with the conditions attached to that approval.

For the purposes of the Competition Act and indeed for the need for authorization, a merger occurs when one or more undertakings **directly or indirectly acquire or establish direct or indirect control** over the whole or part of the business of another undertaking.

Acquisition or establishment of control can occur through various ways including:

- the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;
- the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently
- the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya
- acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
- vertical integration;
- exchange of shares between or among undertakings which result in substantial change in ownership structure; and
- amalgamation, takeover or any other combination with the other undertaking.

On the other hand a person / entity controls an undertaking if that person:

- beneficially owns more than one half of the issued share capital of the undertaking;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking; and
- is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);

- in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
- has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the preceding paragraphs.

Consummating a merger or takeover as contemplated in the Act without having obtained approval renders the merger or takeover null and void and constitutes an offence. Offender(s) may be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings.

** The Competition Authority has proposed Regulations which seek to introduce Thresholds for Merger Notification.

*** Kenya being a member of the Common Market for Eastern and Southern Africa (COMESA), is also subject to the COMESA Competition Regulations (2004) and Competition Rules as amended in 2012.

EFFECTING THE COMPLETION OF A TAKEOVER

The following steps need to be followed to effect a takeover:

- a company or person who intends or proposes to acquire effective control in a listed company must, not later than 24 hours from the resolution of its board to acquire effective control in the company or not later than 24 hours after 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 takeover scheme;
 - the Press Notice must contain certain information required by the Regulations and should be in a form approved by the CMA. It must be published in at least two English language dailies of national circulation;
 - the Notice of Intention is also required to contain certain information and should be delivered to the proposed Target Company, the CMA, the NSE and the Competition Authority;
- within 10 days from the date of service of the Notice of Intention, the Offerer shall serve an Offerer's Statement on the Target Company setting out the information specified in the First Schedule to the Regulations. The statement must be approved by the CMA prior to it being served on the Target Company;
- within 24 hours of receiving the Offerer's Statement, the Target Company is required to inform the NSE and the CMA and make an announcement of the proposed takeover by Press Notice in at least two English language daily newspapers of national circulation. The Press Notice should include all material information contained in the Offerer's Statement and must be approved by the CMA;
- upon receipt of the Offerer's Statement, the Target Company is required to appoint an Independent Advisor (which must be an investment bank or stockbroker licensed by the CMA) to advise the shareholders of the Target

Company on the merits of the Offer. The Independent Advisor must prepare a circular and send it to the CMA and the Target Company prior to it being served on the shareholders of the Target Company to which the takeover offer relates;

- within 14 days of serving the Offerer's Statement, the Offerer is required to submit to the CMA for approval a Takeover Offer Document in relation to the takeover offer. The Takeover Offer Document should include all information prescribed in the Second Schedule and such other information as the CMA may require. The Regulations prescribe various statements that must be contained in a Takeover Offer Document, including a statement to the effect that the Offer Document has been approved by the CMA and complies with the provisions of the Takeovers and Mergers Regulations;
- the CMA should approve the Takeover Offer Document within 30 days (if in compliance with the requirements of the Regulations) or such other time as it may determine. Where the CMA determines that it is not possible to grant approval within 30 days, it is required to advise the Offerer of this fact;
- the Takeover Offer Document must be served by the Offerer on the Target Company within 5 days from the date of approval of the Takeover Offer Document by the CMA;
- subject to the independent advice received from the Independent Advisor, the Board of Directors of the Target Company must within 14 days after the receipt of the Takeover Offer Document issue a circular the ("Board Circular") to the shareholders of the Target Company to which the takeover offer relates, indicating whether or not the Board of Directors of the Target Company recommend the acceptance of the takeover offer made by the Offerer under the takeover scheme;
- within 14 days from the date of receipt of the approved Takeover Offer Document, the Target Company is required to circulate the approved Takeover Offer Document as well as the Independent Advisor's circular to its shareholders to whom the takeover offer relates;
- the period of a takeover offer – an Offerer is required to keep an offer open for acceptances for a period of 30 days from the date the Takeover Offer Document is first served or such other period as may be determined by the CMA. A takeover offer is deemed to close on the last day of the offer period;
- within 10 days of the closure of the takeover offer, the Offerer is required to inform the CMA and the NSE of the closure of the offer and announce by way of press notice in at least 2 English language dailies of national circulation the total number of voting shares to which the takeover offer relates:
 - for which acceptances of the takeover offer have been received after having been served with the Takeover Offer Document by the Offerer to the Target Company's shareholders;
 - held by the Offerer and all persons acting in concert with the Offerer at the time of serving the offer document to the Target Company's shareholders;
 - acquired or agreed to be acquired during the offer period; and
 - the shareholding structure of the Target Company subsequent to the takeover offer.

The Offerer is required to undertake pro-rata acceptances in the event that the Offerer receives acceptances by the Target Company's shareholders in excess of the total number of shares to which the takeover offer relates. Pro-rata acceptance refers to an allocation of acceptance by the Offerer 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.

Effecting a complete takeover

Where a Takeover results in the Offerer acquiring 90% of the Target Company's voting shares, the Offerer shall offer to acquire the remaining shareholders shares at a consideration that is equal to the prevailing market price of the voting shares or the price offered to the other shareholders, whichever is higher.

Conditional Offers

When the Offer is conditional upon acceptances in respect of a minimum percentage of shares being received, the Offer must specify a date, not being later than 30 days from date of service of the Takeover 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 Offerer can declare the offer to have become free from that condition.

The form, content or manner of making a declaration that the Offer is free from that condition has not been prescribed under the Regulations, but the CMA has, in the recent past, held that a declaration must be made both to it and to the relevant shareholders of the Target Company prior to the expiry date of the condition. Furthermore, the Authority has held that any waiver of a condition as to minimum acceptances, constitutes a variation of the conditions of the Offer, for which the consent of the CMA must be sought and obtained. It should be noted that the Capital Markets Tribunal has rejected the CMA's position on this. However, the CMA has appealed to the High Court against the decision of the Tribunal. The appeal is yet to be heard and determined.

Accordingly, it would be advisable for an Offerer to take great caution and to consult the CMA when stipulating a minimum threshold in the Offer Document while at the same time reserving a right to unilaterally waive the same.

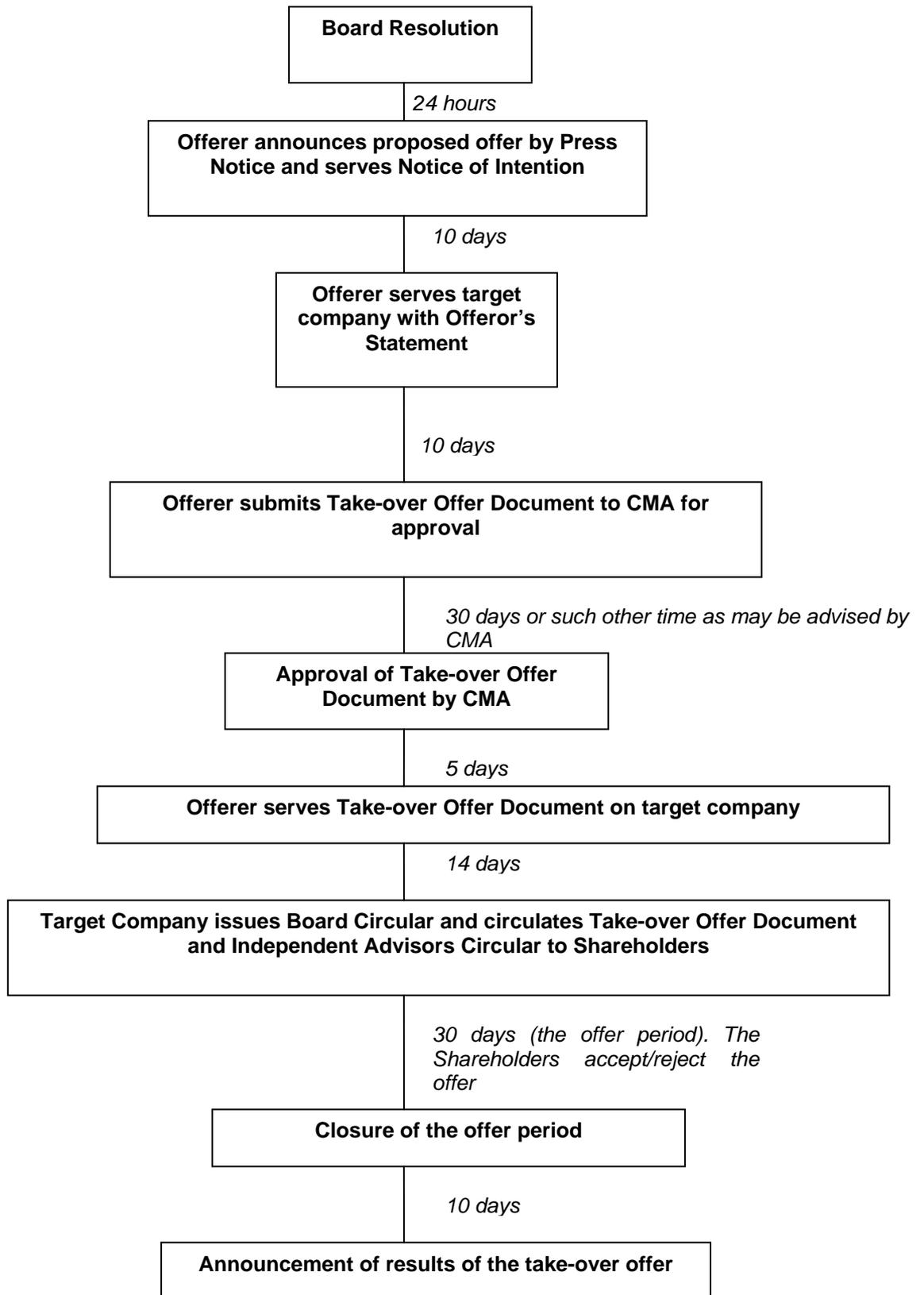
Counter Offers

Regulation 13(1) of the Regulations provides that where a decision has been made by the recipients of the Offer to make a competing Takeover Offer, all provisions of the Regulations relating to the Takeover procedures to be followed shall apply except that the competing Takeover document shall be served at least 10 days prior to the closure of the offer period.

TIMETABLE OF EVENTS FOR COMPLETION OF A TAKEOVER

The following is a sample timetable of a successful takeover offer and a flowchart containing the main procedural steps involved.

Date (From the first day of the First Month)	Action
First Month	
1st	<ul style="list-style-type: none"> ▪ Making of resolution by Board of Directors of Offerer to acquire effective control of Target Company
2nd	<ul style="list-style-type: none"> ▪ Offerer announces proposed offer by Press Notice ▪ Offerer serves Notice of Intention to CMA, NSE ▪ Offerer Notifies the Competition Authority
12th	Offerer serves Target Company with Offerer's Statement
13th	<ul style="list-style-type: none"> ▪ Target Company informs CMA, NSE and Competition Authority of proposed offer ▪ Target Company announces proposed offer by Press Notice ▪ Target Company appoints Independent Advisor
26th	Offerer submits Takeover Offer Document to CMA for approval
29th	Competition Authority deadline for request for further information
Second Month	
26th	CMA approves Takeover Offer Document (or otherwise advises Offerer that more time is required to approve it)
29th	Competition Authority approves Takeover proposal (where there was no request for further information) or calls of a hearing conference.
31st	Offerer serves the approved Takeover Offer Document on the Target
Third Month	
14th	<ul style="list-style-type: none"> ▪ Target Company issues a Board Circular to its shareholders ▪ Target Company circulates the approved Takeover Offer Document and the Independent Advisor's circular to its shareholders ▪ Opening of the offer
29th	Competition Authority approves Takeover proposal (where further information had been requested or a hearing conference called)
Fourth Month	
13th	Closure of the offer
23rd	<ul style="list-style-type: none"> ▪ Offerer informs the CMA and the NSE of the closure of the offer ▪ Offerer announces results by press notice



RIGHT OF APPEAL

Section 35 of the CM Act affords a right to any person aggrieved by a direction of the CMA to such person or a decision of the CMA:

- refusing to grant a licences granted under the Act (“a licence”);
- imposing limitations or restrictions on a licence;
- suspending or revoking a licence;
- refusing to admit a security to the official list of a securities exchange;
- suspending trading of a security on a securities exchange; or
- requiring the removal of a security from the official list of a securities exchange

to appeal to the Capital Markets Tribunal (“the Tribunal”) against such directions, refusal, limitations or restrictions, cancellations, suspension or removal within 15 days from the date on which the decision was communicated to such person.

Further, Section 35A(4) of the Act allows any party to make a written appeal to the Tribunal on any matter relating to the CM Act. The Tribunal has construed Section 35A(4) very widely, thereby allowing a party in a takeover offer to file an appeal against any decision, direction or position taken by the CMA concerning the takeover offer. Accordingly, a party may well appeal against various actions of the CMA ranging from a refusal by the CMA to approve an Offer Document to the CMA making a directive or assuming a position that would impede the success of an Offer. Such an appeal must also be filed with the Tribunal within 15 days from the date on which the decision, direction or position of the CMA was communicated.

Section 35A(4) also allows the CMA or any of its committees or officers to refer any matter relating to the Act to the Tribunal for inquiry and the making of an award. Accordingly, the Tribunal may be called upon to construe provisions of the CM Act to determine whether the CMA has an obligation to act in a certain way or discretion to make certain decisions.

Powers of the Tribunal

On receiving an appeal, the Tribunal shall inquire into the matter and may:

- confirm, set aside or vary the order or decision in question;
- exercise any of the powers which could have been exercised by the Authority or any of its committees in the proceedings in connection with which the appeal is brought; or
- make such order including an order for costs, as it may deem fit.

Appeal to the High Court

Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within 30 days of the decision or order, appeal against such decision or order to the High Court.