

ONG'ANYA OMBO
ADVOCATES

INITIAL PUBLIC OFFER: CROSS LISTING IN KENYA – Q&A

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Ong'anya Ombo Advocates (the Firm) specialises in proffering strategic legal services to both natural and juristic persons in the Republic of Kenya, and beyond.

The Firm prides itself as an entity that proffers customised services that addresses a Client's needs by highlighting the direct and indirect factors that have implications to a Client's needs.

Service Portfolio

We have successfully secured the opportunity to proffer our Clients with services concerning Construction Law, Medical Law, Intellectual Property Law, Corporate Law, Securities/ Capital Markets, Anti-Trust/ Competition Law, Government Contracts/ Regulations, White Collar Crimes, Corporate Law, Information Communication Technology & Internet Law, Domain Disputes, Environmental Law, Oil & Gas/ Energy Law, Aerospace Law, Electoral Law, Insurance Law, Product Liability and Fashion & Entertainment Law and Sports Law.

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The growth and reputation earned by the Capital Markets Authority (CMA) of Kenya led to the CMA working towards opening its bourse to other countries across the globe. Initially, prior to making this step, the Republic of Kenya had established a Memorandum of Understanding between itself and the Eastern African Countries as the East African Securities Regulatory Authorities on matters pertaining cross listing.

In this write-up, focus will be on the recently adopted Guidelines that will be used for purposes of companies in the Republic of Kenya that wish to cross list in foreign bourse and foreign companies that would like to tap into the Kenyan market by cross listing. All these has been made possible as a result of the Policy Guidance Note on Global Depositary Receipts and Global Depositary Notes in Kenya (Policy Guide Note/ PGN) that came into effect in 2017.

Policy Guide Note/PGN

What does the PGN actually focus on?

The PGN is designed to provide a simplified model that companies can cross list without necessarily taking up the rigorous measures set under the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 – and will be addressed extensively in relation to this Q&A at a later stage. In addition, other than cross listing, it regulates the trading, settling and cancelling the Depositary Securities.

It is important to note that the PGN covers securities that are primarily setup in foreign jurisdictions and there is intention to have them listed in Kenya; and securities listed in Kenya and there is intention to have them listed in a foreign jurisdiction. The former is referred to as in-bound depositary securities while the latter is out-bound depositary securities.

What type of securities does the PGN cover?

According to the PGN, there are two distinct methods, which are by use of Depositary Notes or Depositary Receipts. The former being a negotiable certificate that represents ownership of bonds while the latter being a negotiable certificate that represents ownership of shares in a company listed in a foreign country.

All these are collectively referred to as Depositary Securities.

Who can cross list the Depositary Securities in Kenya?

The cross listing can be through the Issuer of the primary securities or a Depositary Bank – regulated financial institution that can legally create and issue Depositary Securities – acting on its own volition. The PGN refers to these events as Sponsored Depositary Security and Un-sponsored Depositary Security, which means that the Issuer is actively involved in the cross listing while for the latter the Depositary Bank effects the process without whatsoever participation or consent of the Issuer.

For instance, under Sponsored Depository Securities, Bank T is approached or approaches Issuer F for purposes of Bank T acting as a Depository Bank when cross listing in a target foreign countries securities market while under Un-sponsored Depository Securities Bank T will proceed to cross list Depository Securities of Issuer F in another country without their participation or consent whatsoever.

What are the bare minimum factors that an Issuer must exhibit?

These issues are highlighted under Paragraph 22 of the PGN. It considers factors such as incorporation status of the issuer, share capital, net assets, free transferability of underlying Securities and Depository Shares, competence and suitability of directors and management of issuer, dividend policy, track record, profitability and future prospects, solvency and adequacy of working capital, Depository Share ownership structure, and certificate of comfort.

The mentioned factors are further assessed based on the Issuer's compliance with the regulatory framework in the primary jurisdiction of the Issuer's listing, which can be factored in consideration with that of the secondary State – that will be Kenya.

Do the cross-listing regulations in Kenya operate in exclusivity without consideration of the laws of where the Issuer has been listed primarily?

The PGN acknowledges that every jurisdiction has at least some regulatory framework that is used for purposes of Initial Public Offers (IPO). Therefore, when a foreign company intends to be cross listed in Kenya, the primary factor is whether that company is cross listed in that foreign country, thereafter, the CMA will look into various regulatory factors such as whether there is some sort of commonality on the regulatory factors between Kenya's CMA laws, regulations, policies and guidelines. For instance, issues pertaining Code of Corporate Governance Practices for Issuers will be factored.

In the event that the laws in that country are quite similar to the ones in Kenya, there will be certain exceptions, and in the event that there are no such linking factors, the guidelines provide that the foreign company will have to comply with certain provisions including Paragraph 35.4 of the PGN.

What are the general salient factors that ought to be considered?

The transactions concerning the cross listing will be in Kenya Shillings, all documents must be in English. Further, it is upon the Depository Bank or Issuer to structure the Depository Security/ Securities it wishes to cross list. Also, companies can consider direct cross listing but as the wording of the PGN is worded, it appears that cross listing through PGN is more cost effective.

Will the Depository Securities be recognized as Securities?

Yes, the Depository Securities are considered as Securities. The PGN provides that the Depository Securities are similar to any other capital market security as per the definition under the Capital Markets Act 485A. It is relevant to note that the principal regulations concerning Public Offers

does apply to the PGN – to a certain extent – save for a few clauses which have been highlighted under Paragraph 6.2 of the PGN.

It is important to state that the regulation concerning Public Offers, the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002, heavily applies to the PGN or cross listing. The vital requirements around found under Part A of the Third Schedule of the regulations addressing Public Offers.

Will there be need to show the Issuer or Depository Bank has any approval?

There are a number of approvals that can be factored in at this stage, for instance, the approvals concerning listing of the Issuer at the primary jurisdiction. However, like the Kenyan companies that would like to cross list in foreign countries will need approval from the CMA, the CMA requires that companies intending to cross list in Kenya to provide any such approvals from their respective regulatory authorities – assuming that is a requirement in their respective jurisdiction.

What persons or professionals do I need for such an assignment to be carried out successfully?

As from Paragraph 10 to 17, the PGN provides the professionals or persons that the Issuer of Depository Bank will need for purposes of successfully accomplishing its targets. The PGN provides that one needs a Custodian, Depository Bank (in the event that it is a Sponsored Depository Security), Central Depository, Licensed Brokers and Investment Banks, Accountants, Lawyers, Investment Banks and Underwriters. The PGN not only mentions the needed persons but goes ahead to highlight their respective roles.

What is the needed bare minimum standards of the Depository Securities?

The Depository Securities ought to be in tandem with the regulatory framework of the primary and secondary State, backed with necessary consents, without whatsoever incumbrances and or restrictions on right to transfer not to mention that must be listed on an unrestricted market segment. It is imperative that the aggregate market value of all the Depository Notes or Receipts be at least Kenya Shilling Fifty Million (KES. 50,000,000.00) save where Depository Notes or Receipts of the same class are already listed.

There are some exceptions, for instance, the CMA can allow listing where the aggregate of KES. 50,000,000.00 is not met but it is satisfied there will be adequate market for the Depository Securities to be issued.

Any limitation on issues such as Affiliates?

In the Republic of Kenya and mainly through its laws such as the Companies Act, 2015, Capital Markets Act CAP 485A, the word used in substitute of “Affiliate(s)” is “Associate(s)”.

There are a number of restricted relationships by Association that can determine how the CMA renders its decision. The term has been adopted when going through Paragraph 20.3 and 20.4 of

the PGN on issues pertaining on twenty-five per cent of the Depository Securities ought to be in the hands of the public investors.

In the United Kingdom, 25% in reference to shareholding is considered as those individuals with significant control of the company, therefore, that concept – though not directly stated – takes precedence herein. Unless otherwise as considered by the CMA, any percentage below twenty-five may result to a suspension until the required standard is met.

Any chance of repetition?

Yes, under Paragraph 25 of the PGN on “Contents of the prospectus” which if keenly analysed, it is similar to some of the requirements under Paragraph 24.3 that refers one to Part A of the Third Schedule of the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002. However, it is not advisable to consider one part over the other but compare and contrast to avoid repetition.

What are some of the exceptions provided by the PGN?

The Issuer will not be obligated to provide a statement that a copy of the prospectus has been served upon the Registrar of Companies; written statements by auditors or accounts on any adjustments as the same can be as per the primary jurisdictions regulations; certain financial information as under Paragraph G.04 & G.05 as per Paragraph G.14 and G.15 as set out in the form of an accountant’s report of the Public Offer Regulations, 2002; and certain disclosures under Paragraph H.01 to H.03 and I.01 to I.08 of the Public Offer Regulations, 2002.

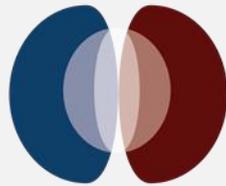
Is there a chance of transfer of securities outside a Securities Exchange?

It is also important to appreciate what Paragraph 30.1 of the PGN provides, which is:

To facilitate the process of creation and cancellation of Depository securities, it shall be necessary for the central securities depository to be able to transfer the underlying and Depository securities between the nominated account of the Depository Bank (or its agent) and other investors within or outside of the trading and settlement infrastructure on a “free-of-payment” basis, subject to payment of relevant fees and commissions, given that the Depository Bank (or its agent) shall be acting as a conduit for the transfer of beneficial ownership between one investor and another.

Therefore, there are instances that the Depository Securities can be transferred outside the Securities Exchange. Further, the Capital Markets Act CAP 485A under s 31, it provides that the CMA can authorise the transfer of listed security outside of the Securities Exchange either on a case-by-case basis or as provided for the by the CMA.

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