Merger Control 2022

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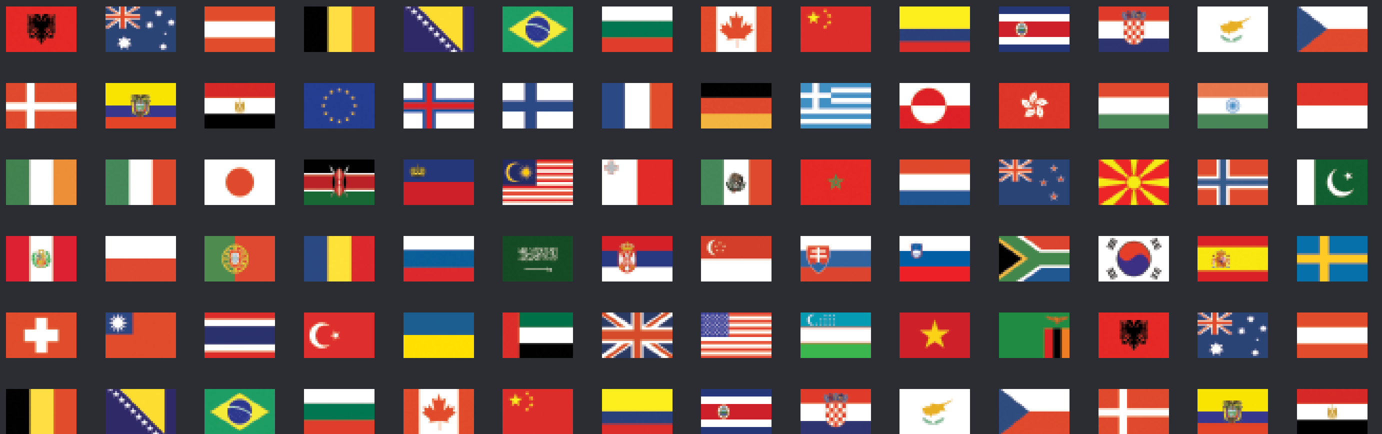
Thomas Janssens



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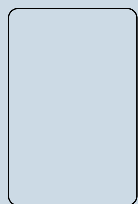

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Thomas Janssens
Freshfields Bruckhaus Deringer

Lexology Getting The Deal Through is delighted to publish the twenty-sixth edition of *Merger Control*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Peru, South Korea, Taiwan, Uzbekistan and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.

London
August 2021

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Kenya

Waringa Njonjo
MMAN Advocates

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In Kenya, merger control is regulated by the Competition Act No. 12 of 2010 as amended by the Competition (Amendment) Act No. 49 of 2016 (the Act) together with all subsidiary legislation and rules created thereunder. The Act is enforced by the Competition Authority of Kenya (Authority) and is headed by a Director-General who is vetted by the National Assembly.

Scope of legislation

2 | What kinds of mergers are caught?

The Act defines a merger as an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover. The Act also provides a non-exhaustive list of how a merger may be achieved, 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 whether or not the business in question is carried on by a company;
- 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;
- in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
- vertical integration;
- exchange of shares between or among undertakings that result in a substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
- amalgamation, takeover or any other combination with the other undertaking.

3 | What types of joint ventures are caught?

The Competition (General) Rules 2019 (the Rules) provide that a joint venture that is not full function does not qualify as a merger. A full-function joint venture is defined as a joint venture that must perform for at least 10 years or more all the functions of an autonomous economic entity.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

A person 'controls' an undertaking under the Act if that person:

- beneficially owns more than half of the issued share capital or business or assets of the undertaking;
- is entitled to 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;
- can appoint, or veto the appointment of, a majority of the directors of the undertaking;
- is a holding company and the undertaking is a subsidiary of that company as contemplated in the Companies Act;
- in the case of the undertaking being a trust, can 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
- can 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 points above.

Minority interests, board and management representations, contractual arrangements and other interests are captured where a person exercises 'control' as contemplated above. The Consolidated Guidelines on the Substantive Assessment of Mergers (the Consolidated Guidelines), which have no force of law but are a guide on how the Authority assesses mergers, indicate that the Authority will not ordinarily view an acquisition of a minority interest below 20 per cent of the voting securities of an undertaking held only for the purpose of passive investment without exercising influence over the affairs of the undertaking as an exercise of 'control'. When assessing 'control' of a private equity fund, including a venture capital fund, the Rules stipulate that control will be deemed to rest with the general partner.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Rules contain the Merger Threshold Guidelines (the Guidelines) that serve to identify notifiable transactions and transactions that qualify for exclusion.

Notably, Kenya has now introduced a minimum threshold where the following transactions are excluded from notification:

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- mergers where the combined turnover or assets (whichever is higher) of the merging parties does not exceed 500 million Kenyan shillings; or
- mergers where the transactions meet the COMESA (the Common Market for Eastern and Southern Africa) Competition Commission Merger Notification threshold and at least two-thirds of the turnover or assets (whichever is higher) is not generated in Kenya.

The Guidelines state that mergers that meet the following thresholds must be notified to the Authority:
- where the undertakings have a minimum combined turnover or assets (whichever is higher) of 1 billion shillings and the turnover or assets (whichever is higher) of the target undertaking is above 500 million Kenyan shillings;
- where the turnover or assets (whichever is higher) of the acquiring undertaking is above 10 billion shillings and the merging parties are in the same market or can be vertically integrated, unless the transaction meets the COMESA Competition Commission Merger Notification Thresholds;
- in the carbon-based mineral sector, if the value of the reserves, the rights and the associated assets to be held as a result of the merger exceed 10 billion Kenyan shillings; and
- where the undertakings operate in the COMESA, their combined turnover or assets (whichever is higher) does not exceed 500 million Kenyan shillings and two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya.

The Guidelines also provide that the following transactions may be considered for exclusion from notification, but only after application to the Authority:
- where the combined turnover or assets (whichever is higher) of the merging parties is between 500 million Kenyan shillings and 1 billion Kenyan shillings; and
- if the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.

Moreover, the Rules also provide that a merger shall not be subject to notification if it is taking place wholly or entirely outside of Kenya and has no local connection.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Under section 42 of the Act, filing is mandatory for all mergers that are not excluded by the Guidelines. Even where a merger is not excluded by the Guidelines, but is eligible for consideration for exclusion, the approval of the Authority is required.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Act has extraterritorial application with respect to the conduct outside Kenya by a citizen of Kenya or a person ordinarily resident in Kenya, or a body corporate incorporated in Kenya or carrying on business within Kenya, or any person in relation to the supply or acquisition of goods or services by that person into or within Kenya, or any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya.

The Guidelines also provide that the following transactions may be considered for exclusion from notification, however, upon application to the Authority:
- where the combined turnover or assets (whichever is higher) of the merging parties is between 500 million Kenyan shillings and 1 billion Kenyan shillings; and
- if the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.

In determining whether it has jurisdiction over a foreign-to-foreign merger, the Authority considers both the merger notification thresholds and other economic and business factors to determine whether a foreign-to-foreign merger has a connection to competition within Kenya or a substantial part of Kenya. In particular, the Authority has identified the following as additional factors that it will consider in making that determination:
- whether an undertaking party to the merger has a significant presence in Kenya, as evidenced by turnover or assets in or into Kenya;
- whether revenue is generated in Kenya by an undertaking party to the merger; or
- whether an undertaking party to the merger acquires direct or indirect control over the strategic commercial affairs of the other undertaking party to the merger and such strategic commercial decisions will have an effect on trade in or into Kenya.

Moreover, with the rollout of the Competition (General) Rules 2019, the merging parties are required to inform the Authority in writing within 14 days of notifying other the regional competition bodies such as COMESA.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act makes no provision restricting or regulating foreign investments into Kenya. However, the insurance, telecommunications, banking and air services industries are subject to sector-specific legislation that limits the extent to which non-Kenyan citizens can own undertakings licensed in Kenya. Moreover, mergers involving those industries must obtain approval from the relevant regulatory authorities concurrently with merger control approval from the Authority.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Competition (Amendment) Act No. 49 of 2016 (the Act) has no deadlines for filing. However, parties to a merger are required to notify the Competition Authority of Kenya (the Authority) and obtain approval before implementing the proposed merger. Anyone who fails to comply with the Act's Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenyan shillings, or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual gross turnover in Kenya of the offending undertakings.

10 Which parties are responsible for filing and are filing fees required?

The acquiring undertaking and the target undertaking in a proposed merger are each required to notify the Authority. Filing fees are payable based on the combined turnover or assets of the merging parties in Kenya. The Act does not prescribe which party is responsible for the payment of filling fees and in practice, the merging parties negotiate and apportion fees between them.

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11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Ordinarily, the Authority acknowledges receipt of a merger application within three days of receipt. Under the Act, the Authority is required to make a determination:

- within 60 days of the date that it receives a merger filing;
- if the Authority has requested for further information, within 60 days of the date of receipt of such further information; or
- if the Authority has convened a hearing conference, within 30 days of the date of conclusion of the conference.

Moreover, if the Authority is of the view that a transaction is complex, it is permitted to extend the determination period by an additional 60 days prior to the expiry of any of the foregoing determination periods, by giving a written notice to the undertakings involved.

Implementation of the merger transaction is prohibited before clearance and therefore in Kenya, its implementation will have to be suspended by the merging parties.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Implementation of a merger transaction including the integration of activities of the merging businesses (even partly) prior to receiving clearance from the Authority is an offence under the Act. Payment of the full purchase price is deemed to be 'implementation' for purposes of the Act, but payment of a deposit of up to 20 per cent of the purchase price is permitted. A merger that is implemented without complying with the notification and approval requirements of Part IV of the Act does not have legal effect in Kenya and parties cannot enforce any agreement in that regard in any legal proceedings.

Moreover, anyone who fails to comply with the Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenyan shillings, or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual gross turnover in Kenya of the offending undertakings.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, where the foreign-to-foreign merger is caught by the provisions of the Act.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Neither the Act nor the Consolidated Guidelines make any provisions for 'hold-separate/ring-fencing' arrangements being put in place in Kenya to enable foreign-to-foreign mergers to be implemented outside Kenya.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No, there are no special merger control rules. Where a public takeover is caught by the provisions of the Act, the provisions of the Act must be applied together with the requirements of the Capital Markets Act Chapter 485A, the Capital Markets (Takeover and Mergers) Regulations 2002, the Nairobi Securities Exchange Rules, the Companies Act 2015 and any other relevant sector-specific legislation.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Competition (General) Rules 2019 provide for Form III, the Merger Notification Form (the Notification Form). Undertakings applying for exclusion from the provisions of Part IV of the Act and the Guidelines are required to complete and file Part I (questions 1 to 26) and Part IV of the Notification Form together with the requested documentation.

Mergers that are at or above the prescribed thresholds and where the undertakings do not operate in the same line of business or where no vertical relationship exists between the parties require the undertakings to complete and file Part I and Part IV of the Notification Form together with the requested documentation.

Mergers that are at or above the prescribed thresholds and where the merging parties operate in the same line of business, or where there are vertical relationships between the parties, require the undertakings to complete and file Parts I, II and IV of the Notification Form together with the requested documentation.

Mergers at or above the prescribed thresholds and where the merging parties operate in the same line of business, or where there are vertical relationships existing between the parties; or there is a high likelihood that the combined market share of merging parties falls above 3 per cent in one or more markets or one or more of the parties are dominant in at least one market require the undertakings to complete and file Schedules I, II, III and IV of the Notification Form together with the requested documentation.

The Authority is not restricted to the questions and responses in the Notification Form. Where the information provided by either of the undertakings is not sufficient for the purposes of determining a proposed merger, the Authority may within 30 days of receiving the notification request further information from the undertakings concerned.

Further, the Notification Form provides for all or some of the following documents to be filed together with the duly completed Notification Form (this will depend on which Parts of the Notification Form apply to the merger):

- a signed copy of the sale and purchase agreement;
- duly signed audited financial statements for the last three years;
- the latest annual reports;
- board resolutions and related documents regarding the merger;
- copies of certificates of incorporation or registration certificates and similar documents including other shareholder companies where there is chain ownership;
- breakdown of employees and plans to realise cost savings, efficiencies and plans documenting investment evaluations;
- documents prepared for the Board of Directors of regulatory bodies in relation to the transaction;
- reports, surveys, analysis or other documents assessing the transaction with respect to its impact on competition;
- latest business plans, marketing plans, sales report and strategic plans including for relevant subsidiaries and divisions;
- periodic (such as monthly and quarterly) review of sales and market trends including by consumer category and by different geographic areas for the last three years; and
- pricing schedules including terms of discounts and rebates offered.

It is an offence to supply the Authority with materially incorrect or misleading information that results in a revocation of a merger under

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section 47 of the Act, and persons found guilty may upon conviction be liable to a fine of 10 million Kenya shillings or imprisonment for a term not exceeding five years, or both.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

After a merger notification form is received at the Authority's offices, the Authority ordinarily acknowledges receipt of the submission in writing and a case officer is assigned to analyse the proposed merger. At first instance, the submission is evaluated to determine:

- its completeness, and where necessary additional information, may be requested, or clarifications sought;
- if the proposed merger is a 'merger' within the meaning of the Act;
- if the Authority has extraterritorial jurisdiction over the proposed merger;
- if the proposed merger meets the thresholds under the Merger Threshold Guidelines to determine if an application for exclusion from the provisions of Part IV of the Act is appropriate; and
- any requests for confidentiality that may have been sought, and if acceptable such confidentiality is granted by a letter early on in the evaluation process.

The case officer together with the Authority's mergers and acquisition division then undertake a complete merger assessment during which time, the Authority may conduct interviews with the merging parties or convene a hearing conference. The mergers and acquisition division then makes its recommendations to the Authority's board for a determination. The board then makes its determination, within the prescribed periods and its decision is communicated to the submitting parties.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Ordinarily, the Authority acknowledges receipt of a merger application within three days of receipt. The Authority is required to make a determination:

- within 60 days of the date that it receives a merger filing;
- if the Authority has requested for further information, within 60 days of the date of receipt of such further information; or
- if the Authority has convened a hearing conference, within 30 days of the date of conclusion of the conference.

Moreover, if the Authority is of the view that a transaction is complex, it is permitted to extend the determination period by an additional 60 days prior to the expiry of any of the foregoing determination periods, by giving a written notice to the undertakings involved.

Implementation of the merger transaction is prohibited before clearance and therefore in Kenya, its implementation will have to be suspended by the merging parties.

As a matter of practice, the Authority will in the case of a submission from exclusion of the provisions of Part IV of the Act, communicate its determination within 14 days of receipt of the merger notification form. Where the Authority determines that the proposed transaction is not a 'merger' or where an advisory opinion on a proposed transaction is sought, the Authority communicates its decision to the enquiring party in writing within 10 days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition Authority of Kenya (the Authority) applies both the competitive effects test and the public interest test to any proposed merger transaction. In assessing the former, the Authority seeks to determine whether the proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. In determining the latter, the Authority will assess whether the proposed merger conflicts with government policies.

In applying the competitive effects test and the public interest test, the Authority will among other factors consider the extent to which the proposed merger is likely to:

- prevent or lessen competition or restrict trade or the provision of any service or endanger the continuity of supplies or services;
- result in any undertaking (including a non-party) acquiring or strengthening a dominant position in the market;
- benefit the public;
- affect a particular industrial sector or region;
- affect employment;
- affect the ability of small undertakings to gain access or be competitive in any market;
- affect the ability of national industries to compete in international markets; and
- benefit research and development and have an impact on technical efficiency, increased production, efficient distribution of goods and services or provision of services and access to markets.

Moreover, where a failing firm defence is used, the Authority considers the following:

- the failing undertaking would in the near future be forced to exit the market because of financial problems if not taken over by another undertaking;
- there is no less anticompetitive alternative acquisition other than the proposed merger; and
- in the absence of the proposed merger, the assets of the failing undertaking would inevitably exit the market.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. The tests for clearance apply.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Consolidated Guidelines indicate that the Authority will investigate all plausible theories of harm that would apply to each merger on a case-by-case basis.

The Authority will investigate market dominance and in so doing will define and identify the market of the goods and services produced by the parties to the proposed merger. It will also assess the unilateral and coordinated effects of the proposed merger where it is investigating a horizontal merger, and the vertical and conglomerate effects where it is assessing a non-vertical merger.

In all instances, the Authority's primary concern will be to ensure that the impact of the merger will not result in the prevention or lessening of competition by allowing the creation or increasing of market power or assisting in its exercise.

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Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The Competition (Amendment) Act No. 49 of 2016 (the Act) requires the Authority to take the interests of the public into consideration when assessing any proposed merger. The Consolidated Guidelines clearly indicate that the public interest test is applied regardless of the outcome of the competition test.

In considering the public interests, the Authority assesses the proposed merger's effect on employment, the ability of small and medium enterprises to gain access to or be competitive in any market; and the ability of national industries to compete in international markets and in a particular industrial sector.

In recent years, employment has been a specific area of focus for the Authority and in its assessment, it has evaluated the track record of the merging undertakings in relation to labour-related issues. Should the Authority determine that the proposed merger may result in job losses, it would require the merging undertakings to provide a justification and evaluate such justification against the countervailing public interest justifying the job losses. It may ultimately grant a conditional approval of the proposed merger and require written undertakings from the merging parties not to pursue redundancies for a prescribed period.

The Authority will also be likely to consider the impact foreign direct investment may have post-merger. Of particular concern is the potential of a foreign entity to move its procurement of goods and services from the local markets to the foreign markets, therefore negatively impacting local suppliers' ability to compete and maintain jobs.

The public interest guidelines under the Act seek to enhance and sustain employment through supporting measures to ensure no substantial job losses occur as a result of mergers and that the effects on employment are mitigated in the short run and salvaging of failing and dormant undertakings.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Consolidated Guidelines indicate that economic efficiencies are an important pillar of the competition test applied by the Authority when reviewing a proposed merger. The extent to which the negative effects of a proposed merger will be compensated for by economic efficiency are evaluated on a case-by-case basis, and it would appear only acceptable where there is no public interest concern.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority of Kenya (the Authority) has the power to prohibit merger transactions or approve merger transactions with conditions.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues. The Authority has the power to set conditions to a proposed merger that it deems anticompetitive or presents public interest concerns.

The Authority may require structural remedies to the proposed merger, which include among others:

- divestment of the whole or part of an undertaking's business;
- the immediate transfer of contractual rights; or
- an amendment to the intellectual property rights of an undertaking.

The Authority may also impose behavioural remedies (where structural remedies are not commercial feasible) that are intended to limit the potential for the merged entity to behave anticompetitively in the post-merger market. The behavioural remedies include, among others:

- the periodic provision of information to the Authority;
- an order requiring the merged entity to supply goods and services to a specific customer segment or geographical region;
- undertakings for the implementation of non-discriminatory pricing and supply or access of goods and services to customers;
- undertakings on price caps;
- restrictions on expansion;
- undertakings on access to critical technology; and
- restrictions on the merged entity not to approach any customers of the sold or divested business.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The stated objective by the Authority is that any remedial package it imposes on a proposed merger (including a requirement for divestiture), is meant to 'restore or maintain competition while allowing for the realisation of merger-specific efficiencies and benefits.

The implementation period for each remedial package is agreed to by the Authority on a case-by-case basis. Moreover, each remedial package agreed to by the Authority (whether structural or behavioural) must include the following elements:

- address the major areas of competition concern;
- have a low level of risk of not being successful;
- be capable of practical implementation and monitoring in Kenya; and
- be capable of resolving the identified areas of concern within a specified, preferably short, time frame.

If the remedial package includes a divestment, the Authority may require the appointment of divestment trustees to ensure the business to be divested is sold off to a suitable purchaser where the merging parties have been unable to offload that business within the agreed divestment period.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Competition (Amendment) Act No. 49 of 2016 (the Act) does not distinguish between local mergers and foreign-to--foreign mergers. The Authority has therefore approved some foreign-to-foreign mergers with conditions to remedy the anticompetitive effects of the merger and ensure compliance with the Act.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Authority will assess a proposed merger as a whole and where behavioural remedies are required, may impose ancillary restrictions. Such restrictions may include:

- restrictions on the merged entity not to approach any customers of the sold or divested business;

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- a moratorium on job losses for a specified period;
- restrictions on output;
- restrictions on expansion; and
- restrictions on the merged entity changing existing business models, such as distribution chains for a specified period.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Competition (Amendment) Act No. 49 of 2016 (the Act) permits any person (including a customer or a competitor) who is not a party to a proposed merger to voluntary submit information relating to such proposed merger to the Authority at the application stage. However, once the Authority makes a determination on a proposed merger, only a party to the proposed merger or any other person against whom an order is made by the Authority can appeal to the Competition Tribunal (the Tribunal).

Additionally, subject to any rights of confidentiality granted by the Authority to the merging parties, the Authority as part of its assessment of a merger may consult competitors and customers as well as conduct market testing on the effects of a proposed merger or the effectiveness of a proposed remedial package.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Act permits any person submitting information or documentation to the Authority to make a claim for confidentiality in respect of that information or documentation. The Authority has provided a prescribed form for this purpose. Upon receipt of such a claim, the Authority assesses the request and notifies the claimant of their decision. In circumstances where the Authority refuses to grant confidentiality, any information submitted will be treated as confidential for a period of 14 days.

A submitting party may withdraw any information submitted to the Authority within 14 days if a request to grant confidentiality on that information has been declined. A person aggrieved by the decision of the Authority in a request for confidentiality may appeal to the Competition Tribunal.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Act mandates the Authority to liaise with other regulatory and public bodies in all matters relating to competition and consumer welfare, and as a matter of practice, the Authority cooperates and shares information with antitrust authorities in other jurisdictions. Moreover, the prescribed merger notification forms require merging parties to inform the Authority if a proposed merger will be notified with other antitrust authorities. The Authority and the COMESA Competition Commission entered into a cooperation agreement that formally obliges each party to inform the other of any enforcement activities it becomes aware of that affect the other party's interests.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The Competition (Amendment) Act No. 49 of 2016 (the Act) established the Competition Tribunal (the Tribunal), which is mandated to hear and determine appeals against the decisions of the Authority. The Act requires the Authority and the Tribunal to give written reasons for their decisions. Both the Authority and an aggrieved party can appeal a decision of the Tribunal to the High Court of Kenya, whose decision shall be final.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An aggrieved party should give notice of its intention to appeal a decision to the Tribunal for review within 14 days of notice of the Authority's decision being published in the Kenyan Gazette and submit the substantive appeal 16 days thereafter. The Tribunal shall, within 30 days of receiving that application, give notice of the application in the Kenyan Gazette and invite interested parties to make submissions. If the application is designated by the Tribunal to be fast-tracked, the substantive hearing must be heard within six months of the application being so designated.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Authority has a mandate to enforce compliance with the Competition (Amendment) Act No. 49 of 2016 (the Act) and, in this regard, it regularly undertakes investigations into unauthorised implementations of mergers. In February 2020, the Authority penalised Asante Capital EPZ Limited (Asante) 549,019 Kenyan shillings for implementing a merger with Moringa Entities (Moringa SCA and Moringa Mauritius Africa) without seeking its approval. The Authority has, over the last few years, increasingly become concerned about the effects a proposed merger would have on public interest matters, such as the effects on employment and the competitiveness of SMEs in the Kenyan and international markets, as well as particular industries or sectors. The Authority has been known to give conditional clearances to mitigate these risks including obligations to maintain existing distribution chains or obligations to absorb employees or not to pursue redundancies for a prescribed period.

Reform proposals

35 | Are there current proposals to change the legislation?

There are no proposals to change legislation.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Competition Authority has recently published the Joint Venture Guidelines (JV Guidelines). The JV Guidelines are intended to provide clarity and predictability to stakeholders on the legal and economic analysis that the Authority will adopt when assessing 'full function' and 'greenfield' joint ventures.

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In the case of the acquisition of an 84.89 per cent stake by Branch International Limited (a digital lending platform) (the Acquirer) in Century Microfinance Bank Limited (a microfinance bank licensed by the Central Bank of Kenya) (the Target), the Authority decided to review the transaction as a full merger even though the Target's turnover and assets did not exceed 500 million Kenyan shillings on the basis of public interest concern as provided for under Rule 13 of the Competition General Rules 2019.

Of concern to the Authority was the fact that, because of the transaction, the Acquirer would now have access through the Target to list its defaulters with credit reference bureaus (CRBs), a position that is not available to digital lenders. Consequently, defaulting borrowers of the Acquirer would not have been able to access loans with either the Target or the banking sector generally. Moreover, the Competition Authority was also concerned that the transaction would enable the two entities to subject existing loans to new loan terms therefore disadvantaging existing borrowers.

The Authority approved the transaction on condition that:

- the Acquirer and the Target each maintain the terms agreed with the borrowers in respect of all the loans existing on their loan books at the time of the transaction; and
- the Acquirer and the Target each maintain their existing performing and non-performing loans in accordance with their terms up to and until the expiry of such loans so long as such terms are not in contravention of the provisions of the Competition Act No. 12 of 2010.

Based on the above, it is evident that the Authority is conscious of the importance of data in doing business and is also alive to the provisions of the Data Protection Act 2019.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Kenya	
Voluntary or mandatory system	Mandatory notification system.
Notification trigger/ filing deadline	There are no notification triggers under the Act, nor is there a filing deadline. Nevertheless, the merging parties are prohibited from implementing the merger without the Authority's approval.
Clearance deadlines (Stage 1/Stage 2)	The Authority has up to 180 days after the submission of a merger notification form to determine whether to approve the proposed merger, or approve it with conditions or reject it outright.
Substantive test for clearance	The Authority applies both the substantial lessening of competition and the public interest tests.
Penalties	Any person who fails to comply with the Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenya shillings or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual turnover in Kenya of the offending undertakings.

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