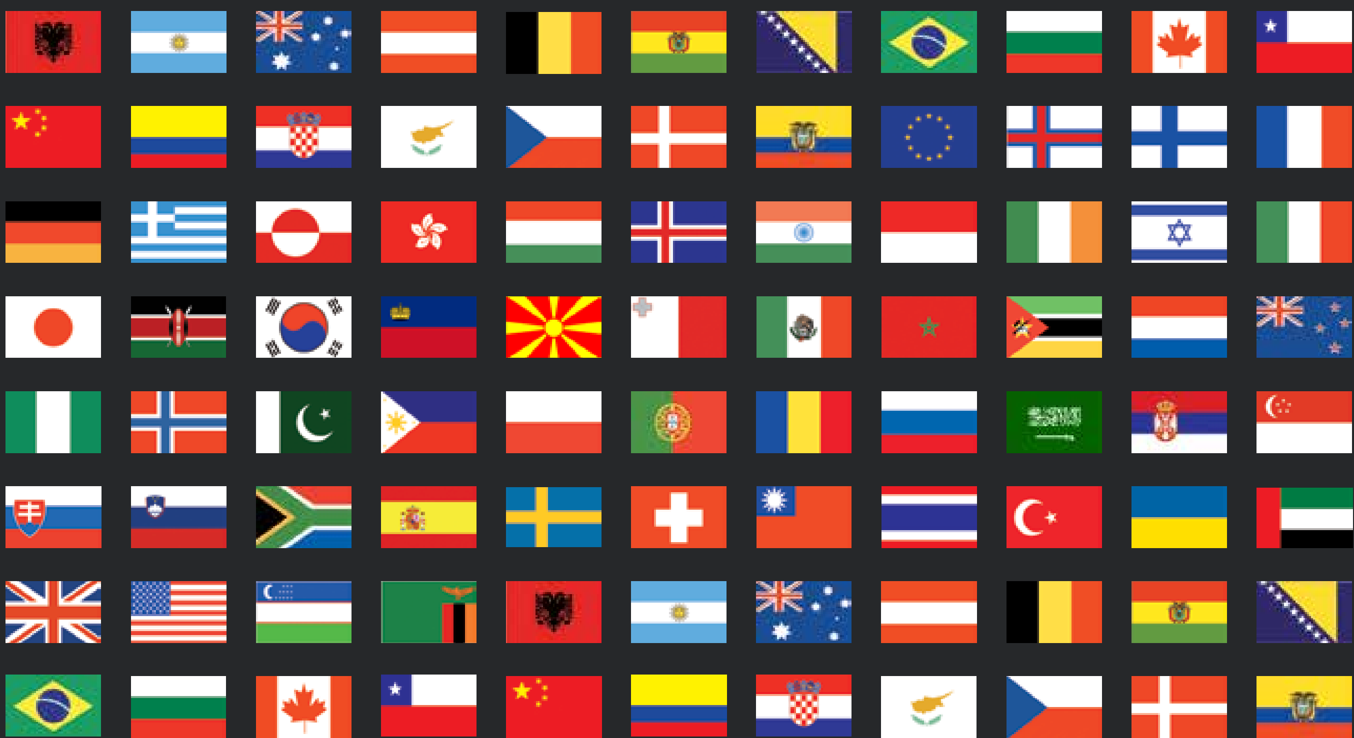
Merger Control

The international regulation of mergers and joint ventures in 71 jurisdictions worldwide

Consulting editor

John Davies



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Kenya

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Legislation and jurisdiction

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) which came into operation on 1 August 2011, together with all rules and subsidiary legislation created thereunder. The Act is enforced by the Competition Authority (the Authority) which comprises representatives from the Ministry of Finance, the Ministry of Trade, the Attorney General's Office, the Director-General and five other members vetted by the National Assembly. The Authority is headed by a Director-General who is vetted by the National Assembly.

The Act also establishes the Competition Tribunal, which has appellate powers to hear and determine appeals from decisions made by the Authority.

2 What kinds of mergers are caught?

Any transaction, irrespective of its size, which has the effect of being a 'merger' is subject to prior approval by the Authority. 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.

In particular, it involves any transaction that results in the direct or indirect acquisition or establishment of direct or indirect control over the whole or part of the business of an undertaking by one or more undertakings. The Act provides a non-exhaustive list on how a merger may be achieved including:

- a purchase or lease of shares, an acquisition of an interest, or a purchase of assets of the other undertaking;
- 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;
- the acquisition by whatever means of the controlling interest in a foreign undertaking that has a controlling interest in a subsidiary in Kenya;
- in the case of a conglomerate, the acquisition of the controlling interest of another undertaking or in a section of the undertaking being acquired capable of being operated independently;
- vertical integration; and
- the exchange of shares between or among undertakings that result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings or by an amalgamation, takeover or any other combination with the other undertaking.

Moreover, the Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act (the Consolidated Guidelines) which have no force of law but are a guide on how the Authority assesses mergers, provides direction on the Authority's exercise of its jurisdiction to review mergers. To the extent that a proposed transaction involves undertakings where at least one aspect of the merger will have an appropriate nexus on competition within Kenya or a substantial part of Kenya, the Authority will exercise jurisdiction.

For the extraterritorial application of the Act, see question 7.

3 What types of joint ventures are caught?

The Act makes no mention of joint ventures. Nevertheless, where a joint venture is structured so as to have the effect of a 'merger' as defined by the Act, then the merger control provisions will apply if the joint venture is a 'full-function' joint venture. A full-function joint venture is one that performs all the functions of an autonomous economic entity for a long duration (ordinarily 10 years or more). The Consolidated Guidelines provide that a joint venture that takes over the business activities of a parent company without direct access to the market or a joint venture that principally functions as the sales agent of a parent, or a joint venture formed for a specific period will not ordinarily be deemed to be a 'full-function' joint venture.

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;
- is able to appoint, or to 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, 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 points above.

Minority and other interests are captured in the last point above provided that such person exercises 'control' as contemplated above. The Consolidated Guidelines, however, 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'.

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

In Kenya, all 'mergers' (as such term is defined in the Act) are notifiable and the provisions of Part IV of the Act must be adhered to. In addition to the types of transactions identified in question 2, the Consolidated Guidelines and in particular, the Guidelines for Exclusion of Proposed Mergers from the Provisions of Part IV of the Competition Act, No. 12

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of 2010 (the Merger Threshold Guidelines) indicate that transactions meeting the following thresholds require notification and approval:

- undertakings that have a minimum combined turnover or assets of 1 billion Kenya shillings and the turnover of the target undertaking is above 100 million Kenya shillings;
- undertakings in the healthcare sector, where the undertakings have a minimum combined turnover or assets of 500 million Kenya shillings and the turnover of the target undertaking is above 50 million Kenya shillings;
- undertakings in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds 4 billion Kenya shillings; and
- undertakings in the oil sector, where the merger involves pipelines and pipeline systems which receive oil and gas from processing fields belonging to and passing through the meters of the target undertaking, even where the value of the reserves is below 4 billion Kenya shillings.

Equally, the Consolidated Guidelines identify the following transactions for which exclusion from the provisions of Part IV of the Act may be applied for from the Authority:

- any mergers where the combined turnover or assets of the merging parties is between 100 million Kenya shillings and 1 billion Kenya shillings;
- any mergers in the healthcare sector, where the combined turnover or assets of the merging parties is between 50 million Kenya shillings and 500 million Kenya shillings;
- any mergers in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger is below 4 billion Kenya shillings;
- any mergers in the carbon-based mineral exploration and prospecting sector;
- any acquisition of voting shares where the acquisition is less than 25 per cent, that does not amount to acquisition of direct or indirect control where the shares are acquired solely for investment purposes or in the ordinary course of business;
- any acquisition of further voting securities by an undertaking that already holds more than 50 per cent of the shares unless the acquisition is a transfer of joint control to sole control; and
- any acquisition of assets, which meet the merger notification thresholds, where the assets in question are those acquired solely as an investment or in the ordinary course of business, not leading to control of the acquired undertaking.

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

Notification is mandatory. Provision has, however, been made for mergers to be excluded by the Authority from the requirements of Part IV of the Act upon application and approval by the Authority. In particular, the Consolidated Guidelines and the Merger Threshold Guidelines stipulate certain thresholds below and within which the Authority may consider excluding a merger from 'full' notification. See question 5.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects 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.

In determining whether it has jurisdiction over a foreign-to-foreign merger, the Authority has indicated that it will apply both the merger notification thresholds (see question 5) 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 such a 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.

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, ICT, banking and air services industries as well as investments in the stock market 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 have to obtain approval from the relevant regulatory authorities concurrently with merger control approval from the Authority. In particular, banks must obtain the approval of the Cabinet Secretary-Ministry of Finance, where they intend to amalgamate or transfer the assets or liabilities of any banking institution. Insurance companies are required to obtain the approval of the Insurance Regulatory Authority before a transfer or amalgamation of any insurance business can be effected or before a party can acquire or dispose of more than 10 per cent of the paid-up share capital or voting rights of an insurer. In the ICT sector, a holder of a communications licence is required to seek the approval of the Communications Authority of Kenya where a change in shareholding shall exceed 15 per cent or where an acquisition by an existing shareholder results in a 5 per cent increase in shareholding.

Kenya also has legislation in place that guides foreign direct investment into the country. The Investment Promotion Act No. 6 of 2004, and the Foreign Investments Protection Act Chapter 518 do not have merger control provisions and merely promote and facilitate investment by assisting investors obtaining licences necessary to invest in the country as well as protecting foreign investments once made.

Notification and clearance timetable

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

The Act has no deadlines for filing. However, parties to a merger that should be notified are required to notify the Authority and obtain approval before implementing the proposed merger. For sanctions relating to implementation prior to notification and approval, see question 12.

10 Who is responsible for filing and are filing fees required?

Each party to the proposed merger is required to notify the Authority. Filing fees are required and are based on the combined turnover or assets of the merging parties in Kenya as follows:

- 500,000 Kenya shillings (for the health sector only) where the combined turnover or assets in Kenya is between 500 million and 1 billion Kenya shillings;
- 1 million Kenya shillings where the combined turnover or assets in Kenya is between 1 billion and 50 billion Kenya shillings; and
- 2 million Kenya shillings where the combined turnover or assets in Kenya is 50 billion Kenya shillings and above.

The Act does not prescribe which party is responsible for the payment of filling fees and in practice, the parties would apportion the payment responsibility.

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

As a matter of practice, the Authority acknowledges receipt of a merger application within three days of receipt and under the Act, it is required to consider the application and make a determination within 60 days of receiving a complete merger application. The Authority may, however, require further information within 30 days of receiving the application and in those circumstances is required under the Act to make a determination within 60 days of receiving such further information. The Authority may also require a hearing conference and in that case it shall make a determination within 30 days after conclusion of the conference. In total, the Authority is required to make a determination within

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180 days. As indicated in question 9, implementation of the merger transaction is prohibited prior to clearance.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Consummation or 'implementation' of a merger transaction that should be notified 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. It would seem therefore that any payment in excess of 20 per cent of the purchase price prior to clearance is prohibited. 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.

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 gross turnover in Kenya of the offending undertakings.

During the period 2012/2013, the Authority became aware of the implementation of the acquisition of the Synovate Group (including its Kenyan unit) by Ipsos in 2011, without clearance. The Authority recommended the prosecution of the offending parties to the Director of Public Prosecutions who subsequently forwarded the case to the Directorate of Criminal Investigations for further investigations. In 2014/2015, the Authority became aware of the implementation of the acquisition of Amarjaro Trading Limited by Ecom Agro Industrial Corp Limited without an authorisation order. The case is currently being handled by the enforcement and compliance department of the Authority.

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

Sanctions can, and as indicated in question 12 above the Authority will, exercise its jurisdiction to impose sanctions in foreign-to-foreign mergers.

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. As a matter of practice however, the Authority has (subject to its finding the proposed arrangements suitable) accepted such arrangements. It should be noted that such arrangements are evaluated by the Authority on a case-by-case basis.

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.

16 What is the level of detail required in the preparation of a filing?

The Authority has published a prescribed merger notification form that the acquiring undertaking and the target undertaking are required to complete. The level of detail required depends upon the merger characteristics.

For undertakings applying for exclusion from the provisions of Part IV of the Act under and the Merger Threshold Guidelines, less detail is required with such undertakings only being required to complete and file Schedule I (questions 1–18 only) and Schedule IV of the merger notification form.

For mergers at or above the prescribed thresholds and where the merging parties do not operate in the same line of business, or no vertical relationship exists between the parties, the undertakings are required to complete and file Schedule I (all questions) and Schedule IV of the merger notification form.

For mergers at or above the prescribed thresholds and where the merging parties operate in the same line of business or there are vertical relationships in existence between the parties, the undertakings are required to complete and file Schedule I, Schedule II and Schedule IV of the merger notification form.

For mergers at or above the prescribed thresholds and where the merging parties operate in the same line of business or there are vertical relationships in existence between the parties; or there is a high likelihood that the combined market share of the merging parties is above 35 per cent in one or more markets or one or more of the parties are dominant in at least one market, the undertakings are required to complete and file Schedule I, Schedule II, Schedule III and Schedule IV of the merger notification form.

The Authority is not limited to the questions and responses in the merger notification form and if the information provided by either of the undertakings is not sufficient for purposes of making a determination on the proposed merger, the Authority may within 30 days of receipt of such notification request further information from the undertakings.

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

The Act provides a maximum period of 180 days for the Authority to either approve a proposed merger outright, approve a proposed merger with conditions, or reject or prohibit a proposed merger. As stated in question 11, the Authority is required by the Act to consider an application and make its determination within 60 days of receiving the merger notification form. Should the Authority require further information, the Act permits the Authority to do so within 30 days of receiving the merger notification form, and thereafter make its determination within 60 days of receipt such supplemental information. Finally, the Authority may convene a hearing conference with the representatives of the parties, but it must make its determination within 30 days of such hearing conference.

As indicated in question 9, implementation of the merger transaction is prohibited prior to clearance.

18 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 usually acknowledges the submission in writing and a case officer is appointed 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 then undertakes a complete merger assessment and makes its recommendations to its board for a determination. The board then makes its determination, within the foregoing prescribed periods and its decision is communicated to the submitting 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 these findings to the parties within 14 days. In the case of its decision that a proposed transaction is not a 'merger' or in the case of an advisory opinion on a proposed transaction, the Authority will communicate its decision in writing within 10 days.

Substantive assessment

19 What is the substantive test for clearance?

The Authority applies both the competitive effects test and the public interest test to any proposed merger transaction. In assessing the

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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.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. The tests discussed in question 19 apply.

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

The Consolidated Guidelines indicate that the Authority will investigate all possible theories of harm that would apply to each merger individually.

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 cases, 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 establishment or increasing of market power or assisting in its exercise.

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

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 (SMEs) 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.

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.

Update and trends

In the past year, the Authority has channelled more of its resources towards increasing awareness of Kenyan competition laws and policies by hosting and participating in public sensitisation seminars.

This has in turn led to an upsurge in compliance with more entities seeking advisory opinions from the Authority and filing merger notifications before implementing transactions.

Moreover, increased interactions and exchange of information between the Authority and its counterparts in other jurisdictions have improved the merger control process.

The Act has recently been amended to impose financial and criminal penalties on the parties to a merger where it is subsequently revoked on account of such parties either having provided incorrect or misleading information, or not having complied with any conditions attached to a proposed merger that has been approved with conditions.

The Authority is in the process of reviewing the Consolidated Guidelines to enhance precision and ease of filing merger notifications in line with international best practice.

Remedies and ancillary restraints

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

The Authority has the power to approve merger transactions, approve merger transactions with conditions or reject merger transactions. All merger transactions seeking approval (and not exclusion from Part IV of the Act) have to be approved by the Authority's board, whereas merger transactions seeking exclusion from Part IV of the Act are excluded by the Authority's secretariat.

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 geographic 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:

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- 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.

In the event 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 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.

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;
- a moratorium on job losses for a specified period;
- restrictions on output; and
- restrictions on expansion.

Involvement of other parties or authorities

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

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 Tribunal.

Additionally, having regard to any confidentiality claims made by 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.

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.

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. In April 2016, the Authority and the COMESA Competition Commission entered into a cooperation agreement that formally obligates each party to inform the other of any enforcement activities it becomes aware of that affect the other party's interests.

Judicial review

32 What are the opportunities for appeal or judicial review?

The Act establishes 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.

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

The Act prescribes the time frames within which the Authority's decision can be brought to the Tribunal for review and the time within which such review should be heard and dispensed with. An aggrieved party should apply to the Tribunal for review within 30 days after notice of the Authority's decision is published in the Kenya Gazette. The Tribunal shall, within 30 days of receiving such application, give

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notice of the application in the Kenya Gazette and invite interested parties to make submissions. The application must be dispensed with by the Tribunal within four months of the application.

In addition, a party aggrieved with the decision of the Tribunal may appeal such decision to the High Court.

Enforcement practice and future developments

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

The Authority has increasingly become concerned about the effects a proposed merger will have on employment and in this regard, and has given conditional clearances requiring undertakings from the merging parties not to pursue redundancies for a prescribed period. The ability of SMEs to gain access to or be competitive in any market has also been another area of concern, particularly when a Kenyan SME enters into a joint venture with a foreign undertaking. As these are public interest concerns, we would expect the ability of national industries to compete in international markets and in a particular industrial sector to be yet another area of concern.

35 Are there current proposals to change the legislation?

There are proposals to amend the Act to allow the Authority to exclude mergers which will have minimal impact on competition from the provisions of the Act and to introduce subsidiary legislation to change the merger thresholds and permit block exemption approval.

Additionally, members of the East African Community (including Kenya) are in the process of operationalising the East African Community Competition Act, 2006.

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