Merger Control

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

Consulting editor
John Davies

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GETTING THE
DEAL THROUGH

GETTING THE DEAL THROUGH

Merger Control 2019

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Twenty-third edition

Getting the Deal Through is delighted to publish the twenty-third edition of *Merger Control*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 Costa Rica, Egypt and Malaysia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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 consulting editor, John Davies of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
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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 notification and 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 Act (the Consolidated Guidelines), which have no force of law but are a guide on how the Authority assesses mergers, provide 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?

Currently, the Act does not have provisions relating to joint ventures. Nevertheless, under the Consolidated Guidelines, 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). 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 interests, board and management representations, contractual arrangements and other interests are captured where a 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?

Currently, all 'mergers' (as such term is defined in the Act) are notifiable. 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 Act (the

Merger Threshold Guidelines) indicate that transactions meeting any of the following thresholds require notification and approval before implementation:

- 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 that 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 to 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?

Presently, 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 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.

In determining whether it has jurisdiction over a foreign-to-foreign merger, the Authority considers 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 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:

- 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; and
- 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 provide the regulatory framework for the promotion and facilitation of foreign investment into Kenya including obtaining licences necessary to invest in the country as well as protecting foreign investments once made but do not have merger control provisions.

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 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 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 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 merging parties share the liability.

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.

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 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.

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

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?

Consummation or '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. 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.

In 2015–2016, the Authority became aware of the implementation of the acquisition of Amarjaro Trading Limited (ATL) by Ecom Agro Industrial Corp Limited (ECOM) without an authorisation order. ECOM had voluntarily reported itself to the Authority and disclosed that it had acquired ATL without an authorisation order from the Authority. Upon conducting its investigations, the Authority established that ATL was a failing firm and that ECOM had acquired it to save it from going into liquidation. The Authority, after taking into consideration the mitigating factors, which included voluntary disclosure, cooperation, the fact that ATL was a failing firm and the size of the transaction imposed a financial penalty of 3,526,057.25 Kenya shillings, which was approximately 5 per cent of the turnover of ECOM.

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 where the closing occurs prior to clearance.

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. At present, the Authority has taken the view that legal carve-outs may be acceptable (subject to its finding the proposed arrangements to be suitable). 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, and are there sanctions for supplying wrong or missing information?

The Authority has published a prescribed merger notification form that the acquiring undertaking and the target undertaking are required to separately 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, such undertakings are required to complete and file Schedule I (questions 1 to 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.

In addition, the merger notification form provides for the various documents to be filed:

- Schedule I requires parties to file a signed copy of the sale and purchase agreement, audited financial statements for the last three years, the latest annual reports, board resolutions and related documents regarding the merger and a breakdown of employees, and plans to realise cost savings, efficiencies and plans documenting investment evaluations;
- Under Schedule II, parties are required to file documents prepared for the board of directors and regulatory bodies in relation to the proposed merger as well as reports, surveys, analysis or other documents assessing the proposed transaction with respect to its impact on competition, and the latest business plans, marketing plans, sales report and strategic plan; and
- Schedule III requires each party to a proposed merger to submit business plans, marketing plans, including for relevant subsidiaries and divisions and current strategic plan, periodic (such as monthly and quarterly) review of sales and market trends including by customer category and by different geographic areas for the last three years; and pricing schedules including terms of discounts and rebates offered.

Supplying the Authority with materially incorrect or misleading information is an offence under the Act and persons found guilty may upon conviction be liable to a fine of 5 million Kenya shillings or imprisonment for a term not exceeding five years, or both.

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 and make their recommendations to its 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?

Please refer to question 11 for the statutory timetable.

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

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 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.

In the matter of the acquisition of 70 per cent of the issued share capital of Telkom Kenya Limited (TKL) by Jamhuri Holdings Limited (salvaging a failing firm), the Authority arrived at the decision that post-merger, the transaction would not raise any competition concerns and that with respect to public interest issues, the audited financial statements of TKL showed significant loses before taxation for five consecutive years. Therefore, in the absence of the proposed transaction, TKL would have been forced to seek alternatives to borrowing as it was already heavily indebted, and would otherwise be forced to exit the market. Based on the fact that the transaction was likely to salvage a failing firm, the Authority fast-tracked the assessment of the transaction and approved it unconditionally.

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 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.

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.

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.

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.

In the matter of the acquisition of 100 per cent of the issued share capital in Central Glass Industries Limited by Consol Glass Proprietary Limited from East African Breweries Limited, the competition test showed that the proposed merger would not lead to lessening or prevention of competition in the market for manufacture of glass containers. The Authority established that the proposed merger would instead lead to efficiencies in terms of increased production for the merged entity. In order to mitigate against any job losses and ensure efficiency in the proposed transaction, the merger was approved on condition that all existing 87 employees would be retained on the same terms and the merged entity would increase production from the current 31,500 metric tonnes to 36,500 metric tonnes within three years of the merger.

Update and trends

The Authority has recently circulated various draft rules and regulations to stakeholders for their review and comment. The rules and regulations include the Merger Threshold Rules, 2018 (the Threshold Rules), the Competition (General) Rules, 2018 (the General Rules) and the amended Consolidated Guidelines on the Substantive Assessment of Mergers under the Act.

Under the Threshold Rules, it is proposed that mandatory notification to the Authority should apply only:

- to undertakings that have a minimum combined turnover or assets (whichever is higher) of 1 billion Kenya shillings and the turnover or assets (whichever is higher) of the target undertaking is above 500 million Kenya shillings;
- 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 a merger exceeds 10 billion Kenya shillings; or
- in the case of undertakings operating in the Common Markets for Eastern and Southern Africa (COMESA) which meet the criteria set in the first item above and two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya, respectively.

The Threshold Rules further provide that any proposed transaction where the value of turnover or assets (whichever is higher) of the acquirer is above 10 billion Kenya shillings and the merging parties are in the same market or can be vertically integrated, then such a transaction must be notified to the Authority unless it meets the merger notification thresholds set out by COMESA.

With respect to exclusion from the provisions of Part IV of the Act, the Threshold Rules provide that transactions where the combined turnover or assets (whichever is higher) of the merging parties is between 500 million Kenya shillings and 1 billion Kenya shillings, and firms engaged in prospecting in the carbon-based mineral sector irrespective of asset value, may be considered for exclusion by the Authority.

The Threshold Rules make provision for the exemption from notification under the Act with respect to mergers where the combined turnover or assets (whichever is higher) is between 0 and 500 million Kenya shillings and also mergers that meet the COMESA merger notification threshold and two-thirds or more of their turnover or assets (whichever is higher), relevant in the COMESA market is not generated or located in Kenya.

In addition, the Threshold Rules seek to revise filing fees for merger notification as follows:

Combined value of turnover or assets (in Kenya shillings)	Merger filing fees (in Kenya shillings)
0 to 500 million	0 (exempted for notification)
500 million to 1 billion	0 (parties to apply for exemption from provisions of Part IV of the Act)
1 billion to 10 billion	1 million
10 billion to 50 billion	2 million
Above 50 billion	4 million

In calculating the applicable thresholds, the Authority intends to be guided by an undertaking's most recent audited financial statements. If the audited financial statements submitted by an undertaking are incomplete or unreliable, the Authority may determine the value of the sales or services of that undertaking by applying internationally accepted accounting standards.

In cases where a joint venture undertaking is jointly controlled by an undertaking and third parties, the joint venture's turnover or assets shall be attributed equally between its controlling parents, irrespective of the size of their financial or voting interests.

For investment funds, the investment entity is to be deemed to have control over the various investment vehicles through the general partners and therefore the relevant turnover or assets to be considered in a merger are the combined turnover or assets of all the entities of which the investment entity has control, either directly or indirectly through the various investment vehicles.

Under the Threshold Rules, undertakings are required to inform the Authority in writing when a transaction is notified to COMESA Competition Commission.

Under the General Rules, a person may submit a document to the Authority through delivery by hand, registered letter or electronic means.

In addition, the General Rules provide that notwithstanding the provisions of the Act, the following transactions shall not qualify as mergers:

- a joint venture that is not 'full-function';
- the appointment of a receiver or administrator or entry into an arrangement with creditors that does not result into change of control;
- the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question, referred to the Act where the acquisition is:
  - of shares or voting rights by a person acting as a securities underwriter or a registered stockbroker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stockbroking, as the case may be;
  - of current assets in the ordinary course of business;
  - solely as an investment or in the ordinary course of business insofar as the total shares or voting rights held by the acquiring undertaking directly or indirectly, does not entitle the acquiring undertaking to hold 20 per cent or more of the total shares or voting rights of the company, not leading to acquisition of control of the undertaking whose shares or voting rights are being acquired;
  - in the circumstance of the acquiring undertaking, prior to acquisition, already controlling 50 per cent +1 or more shares or voting rights in the undertaking whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control;
  - not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the undertaking whose assets are being acquired; except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the undertaking, of which assets are being acquired and do not comprise a business with a market presence to which a market turnover can be clearly attributed, irrespective of whether such assets are organised as a separate legal entity or not;
  - pursuant to a bonus issue, stock splits or consolidation of face value of shares, buyback of shares, subscription to, or renunciation of rights in a rights issue of shares, not leading to acquisition of control; or
  - of stock-in-trade, raw materials, stores and spares in the ordinary course of business.

The General Rules provide further clarification on merger as follows:

- a merger as defined under the Act involving a holding company and its subsidiary wholly owned by undertakings belonging to the same group or mergers or amalgamations involving subsidiaries wholly owned by undertakings belonging to the same group is not subject to notification; and
- a merger as defined under the Act is not subject to notification if it is taking place wholly or entirely outside Kenya and has no local nexus.

In determining whether a merger has been implemented without an authorising order, the Authority may consider other facts including:

- there has been an actual integration of any aspect of the merging businesses, including, but not limited to, the integration of infrastructure, information systems, employees, corporate identity or marketing efforts;
- there has been placement of employees from the target undertaking to the acquiring undertaking;
- there has been an effort by the acquiring undertaking to influence or control any competitive aspect of the target undertaking's business, such as setting prices, limiting discounts or restricting sales to certain customers or of certain products; or
- there has been an exchange of information between the merging parties for purposes other than valuation or on a need-to-know basis during due diligence.

Update and trends cont.

Under the General Rules, the Authority reserves the right to require any transaction that has been excluded from the provisions of Part IV of the Act to seek approval even if it falls beneath the exclusion thresholds when it is highly likely that it will substantially prevent or lessen competition or restrict trade or raise public interest concerns.

Moreover, the Authority may prescribe structural or behavioural remedies to address any detriment posed by a merger that is likely to substantially lessen competition in the post-merger market in Kenya or engage in discussions with an undertaking to the merger or any other relevant party or experts with a view to identifying structural or behavioural measures that would improve any effects of the merger on the public interest or competition in Kenya or any substantial part of Kenya.

In the event that a merger is approved with conditions, the Authority may require the merged entity to submit a compliance report on the implementation of the conditions that were issued.

In order to obtain more information and details on a proposed transaction, the Authority seeks to amend the merger notification form by introducing the following questions:

- state the names and business address of the shareholders directly or indirectly controlling you;
- provide a detailed organisational structure for both the acquiring and target undertaking;
- provide the names of the directors of the acquiring undertaking and their nationalities (attach a copy of current official search from the Companies Registry) or equivalent issued within the last two months;
- provide the names of the directors of the target undertaking and their nationalities (attach a copy of current official search from the Companies Registry) or equivalent issued within the last two months;
- list all the undertakings where the directors of the acquiring and target undertaking serve as directors and or shareholders;
- indicate previous merger applications involving the acquiring and target undertaking, or their affiliates, if any;
- indicate the nature of transaction of the previous transaction and the sector or market affected;
- if the parties have no operations in Kenya, kindly provide the global turnover or assets and countries of operation; and
- provide information on the market participants in this market and the number of entrants and exits in this market over the last five years.

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 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.

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 of notice of the Authority's decision being published in the Kenya Gazette. The Tribunal shall, within 30 days of receiving such application, give 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, 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?

See 'Update and trends'.

Members of the East African Community (including Kenya) are in the process of operationalising the East African Community Competition Act, 2006 and the East African Community Competition Authority established therein was expected to commence its operations in July 2018.

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