

# Kenya

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### 1 Types of transaction

How may businesses combine?

Mergers and acquisitions (M&A) in Kenya follow the usual paths adopted in other countries. The majority of cases involve private companies, with relatively few transactions involving public listed companies. Thus the common forms are:

- acquisitions of control of private companies;
- acquisitions of businesses as a going concern – asset acquisitions;
- creation of joint ventures;
- acquisitions of minority or majority holdings by strategic investors in particular sectors, such as banking or telecommunications;
- acquisitions of state-owned companies or business assets from the Kenyan government in the country's privatisation programme; and
- mergers involving the creation of new holding companies for existing entities.

### 2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Kenya's company law is essentially derived from the English Companies Act, 1948 and the common law of England, which is regarded as being of persuasive value in the High Court of Kenya. The Kenya Companies Act (the 'Act') is in need of modernisation and does not make any specific references to how business combinations are regulated. It does deal with such matters as company formation, publication of prospectuses, prohibition of financial assistance, schemes of arrangement (an unused provision), and compulsory acquisition of minority shareholdings on a takeover and on registration of foreign companies in Kenya.

Under the Kenyan Law of Contract Act the common law of England relating to contract applies in Kenya but is subject to any written Kenyan law.

The Transfer of Businesses Act applies in the case of transfers of a business or assets and deals with the issue of assumption of liabilities and provides a means of protection for creditors.

All the current laws governing Kenya's capital markets are set to be overhauled entirely by a new legislative framework. The existing Capital Markets Act (CM Act) and the regulations issued under the CM Act provide a comprehensive, if at times opaque, regime for M&A activity involving companies that are listed on the Nairobi Stock Exchange (NSE). The regulations that are of particular relevance in M&A transactions are: the Capital Markets (Take-overs and Mergers) Regulations, 2002, the Capital Markets (Foreign Investors) Regulations, 2002 and the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002. The Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya (2002) are also relevant for the time being.

The Restrictive Trade Practices, Monopolies and Price Control Act (RTP Act) is Kenya's competition law statute and has specific reference to takeovers and mergers that require vetting by the Monopolies and Prices Commission (MPC) and approval from the minister of finance. Kenya's Competition Bill, currently nearing its final stages of passing is set to replace and modernise the regulatory approach on competition issues in M&A in Kenya.

Specific sectoral legislation applies to M&A transactions including in banking, insurance and telecommunications.

Kenya has a broad spectrum of legislation requiring licensing of certain activities, many of which may be relevant in the context of an M&A transaction. Examples include banking and financial institutions, licensing of insurance companies, telecommunications service providers of all kinds, electric power generation, mining and prospecting and the capital markets sector, such as stockbroking, investment advisory, fund management and investment banking activities.

### 3 Governing law

What law typically governs the transaction agreements?

Parties are free to choose the applicable law and the method by which disputes may be resolved, such as through court proceedings or by arbitration. Transaction agreements are usually governed by either Kenyan law or by English law.

### 4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Under the Companies Act, Kenyan companies must file returns with the Companies Registry to record changes in directors and officers, changes in the authorised and issued share capital and other statutory matters, including an annual return of particulars of the company. However, only public companies are required to file their audited annual financial statements at the Companies Registry; private companies are not subject to this disclosure. All companies are required to file shareholders' resolutions that make changes to their memorandum and articles of association. Kenyan-registered branches of foreign companies are also required to file certain documents with the Companies Registry upon establishment of the branch office and upon certain changes being made in respect of the officers of the company, its constitution and by-laws as well as copies of the annual report and accounts.

The above returns require payment of relatively nominal filing fees to the registrar of companies.

Business combinations that are subject to the RTP Act must be notified through completion of a MAT Form with the Monopolies and Prices Commission (MPC). The MAT Form has to be completed

by the acquirer and by the target company. No official fees are levied for a filing. The MPC makes its recommendations to the minister of finance whose approval has to be published in the Kenya Gazette (the official government legal publication).

Transactions such as mergers or takeovers involving banks and financial institutions must be notified to the Central Bank of Kenya for vetting and approval under the Banking Act. The CBK then makes a recommendation to the minister of finance regarding the proposed transaction, which has to be published in the Kenya Gazette. The CBK Prudential Guidelines contain comprehensive schedules specifying the information disclosures required by the parties. No filing fees are payable.

In the insurance sector where an approval is required under the Insurance Act from the Insurance Regulatory Authority (IRA) a notification procedure must be followed, although there is no prescribed format for this and filing fees are not levied.

In a business combination involving a change of control or a transfer of licences issued to telecommunications service providers such as telephone companies, internet service providers, courier and postal service companies and broadcast media companies, the prior approval is required from the Communications Commission of Kenya (CCK).

Business combinations involving companies that are listed on the Nairobi Stock Exchange (NSE) require certain filings to be made to the CMA. The filing will be necessary whether or not the transaction involves an issue of new securities by one or more of the parties. There is no prescribed form for these filings, which are made through a licensed intermediary such as a firm of stockbrokers or a local investment bank. Fees become payable once and if an approval is given by the CMA for the proposed transaction. The fee amounts vary depending on the type of transaction involved and are cast as a percentage of the value of the transaction, subject in some cases to a cap. Generally, these fees are regarded as being high and efforts are underway to see them revised.

If the transaction involves the issue of new securities by the listed company an application has to be made to the listing committee of the NSE for approval to list the new securities on the NSE. A listing fee is payable once the approval has been given by the NSE.

Stamp duty is payable under the Stamp Duty Act at a rate of 1 per cent of the higher of the consideration being paid and the market value of the securities being transferred. Determination of the value is made by the auditors of the target who must issue a certificate of value (Form D). Where new shares are being issued and additional capital is being created, the increase in authorised capital of the company must be stamped at a rate of 1 per cent.

Transfers of securities of companies that are listed on the NSE are exempt from stamp duty as are increases in the authorised share capital of listed companies.

Certain exemptions from stamp duty are available in connection with business combinations under section 95 and 96 of the Stamp Duty Act. These relate to reliefs on duty otherwise chargeable in amalgamations.

Under section 9 of the Banking Act stamp duty and other registration fees are exempted on mergers of licensed financial institutions.

Care needs to be taken on assets-only transactions to ensure (if possible) that the transaction involves a sale of a business as a going concern as otherwise there might be a taxable supply of goods on which value-added tax has to be levied at a rate of 16 per cent.

## 5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya issued in 2002 provides recommended practice on corporate governance. This requires that there should be shareholder participation in major decisions of the

company. The board should therefore provide the shareholders with information on matters that include, but are not limited to, a major disposal of the company's assets, restructuring, takeovers, mergers, acquisitions or reorganisations.

The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 contains disclosure obligations for companies listed on the NSE. This applies to companies that are involved in business combinations. The fifth schedule provides that information to be disclosed shall include, but not be restricted to, any major development in the issuer's sphere of activity or expectation of performance that is not public knowledge that may, by virtue of the effect of such development on its assets and liabilities or financial position or on the general course of its business, lead to substantial movement in the price of its securities.

If information about the transaction might become public before the transaction is ready to be announced, for example if confidentiality has been or is likely to be breached, the listed company must publish a cautionary announcement if the information could lead to material movements in the ruling price of its securities.

Announcements must be made within 24 hours of the board's decision on a matter, and must be approved by the CMA prior to publication in the national newspapers. Copies of all announcements must be filed with the NSE simultaneously.

A listed company is required to obtain the approval of its shareholders and make a disclosure in its annual report regarding any:

- acquisition of shares of another company or any transaction resulting in such other company becoming a subsidiary or related company of the issuer;
- sale of shares in another company resulting in that company ceasing to be a subsidiary of the issuer; or
- substantial sale of assets involving 25 per cent or more of the value of the total assets of the issuer.

The company should also make a public announcement of the matter.

There are no specific compliance requirements in respect of the information to be disclosed. All public disclosures by listed companies are required to be true and accurate and not misleading and must provide sufficient information to enable an investor to make an informed assessment of the subject matter. For significant transactions listed companies usually prepare a circular to the shareholders that convenes an extraordinary general meeting in accordance with the articles of association of the company. The circular will provide detailed information on the transaction, including financial information and reports.

The Fourth Schedule of the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations 2002 provides more guidance on the disclosure obligations if the listed company is issuing its own shares in connection with the transaction, for example in a share swap with another party.

Thus disclosure is required of:

- the names of the parties involved in the acquisition and the date of the contract entered into;
- the transaction, and the assets or business to be acquired, in sufficient detail to indicate the relative value thereof in relation to the consideration to be paid;
- the principle followed and factors considered in determining the consideration to be paid in the acquisition, and the persons making the determination and their relationship to the applicant;
- why the management of the issuer regards the acquisition as a favourable one from its point of view; and
- whether or not any officer, director or major shareholder of the issuer (or a related company of the issuer) has any direct or indirect beneficial interest in the assets to be acquired or the consideration to be paid and, if such interest does exist, it must be described.

If a controlling interest in, or the major part of the business and assets of, another company is being acquired, the listed company is required

to state briefly the history and business of that other company and furnish its financial statements.

If any engineering, geological or appraisal reports, were obtained in connection with the proposed acquisition the listed company must include appropriate excerpts from such reports in the circular to its shareholders.

The Capital Markets (Take-overs and Mergers) Regulations, 2002 govern all transactions involving bids for and acquisitions of listed companies. These regulations require that where a person acquires effective control of the target company there shall be presumed to be a firm intention to make a takeover bid. The threshold is 25 per cent of the voting shares of the listed company. The applicable disclosure requirements can be divided into two parts. The first part is an initial notification and public announcement, which may be followed by an application for exemption from the mandatory bid requirements of the regulations and the second part deals with the disclosure requirements where a full takeover bid is to be carried out.

In the first part if the acquirer has entered into a commitment to acquire 25 per cent or more of the shares it is required to notify the CMA, the NSE and the listed company of its intentions. It is also required to publish a press announcement describing itself, the target, the number of shares acquired, information about any voting agreements or concert party arrangements it has entered into and the conditions of the takeover, for example as to the level of acceptances required. If the acquirer wishes to apply to the CMA for an exemption from having to make the takeover offer it must state that it is applying to the CMA for the exemption and outline the main reasons for the exemption.

The Take-over Regulations contain unwieldy and detailed provisions on the various documents to be prepared by the acquirer and the target company, including as to the contents of the offer document to be sent to the target's shareholders. The offer document must be filed with the CMA and be approved by the CMA before it can be sent to the shareholders. Various press announcements must be prepared and issued during the course of the takeover. The CMA and the NSE must be informed of all developments on an ongoing basis.

Transactions involving private companies do not need to be disclosed to the public, unless it is one where the Take-over Regulations apply. Under the Transfer of Businesses Act the parties to an assets-only transaction may issue a public notice indicating whether or not the acquirer will be taking over responsibility for any liabilities of the seller. Although court sanctioned schemes of arrangements are possible under the Companies Act, in practice this method of business combination is not followed in Kenya.

## 6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The Capital Markets (Licensing Requirements) (General) Regulations 2002 provide that where any person acquires a notifiable interest in shares in a listed company's voting share capital, or ceases to be interested in such shares he or she is under an obligation to notify the listed company of the interest that he or she has, or had, in its shares. A notifiable interest is 3 per cent or more of the voting share capital.

Every listed company is required to include a statement in its annual report of the top 10 largest shareholders in the company.

Disclosure of ultimate beneficial owner is not required and there are no specific provisions dealing with investigation of the beneficial ownership of a company's shares that can then be made public. However, the CMA does have power under section 13 of the CM Act to require a person to reveal the beneficial owner of shares.

The requirements for disclosure by owners of large shareholdings are affected if the company is subject to a regulated takeover under the Take-over Regulations (see above).

## 7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The aspects of Kenyan law and regulation governing duties of directors and managers borrow heavily from English common law rules on governance. Directors must at all times act in the best interests of the company as a whole and must avoid placing themselves in a position of conflict of interest, especially as regards the interests of a major shareholder. Directors must declare their interest (if any) in any contracts to which the company is to be a party and may abstain from voting on resolutions concerning such contracts. The law does offer a minority shareholder protection against being unfairly prejudiced by the actions of the majority shareholder, although actions under the relevant section of the Companies Act are unknown in Kenya. The principles in the English case of *Foss v Harbottle* (1843) also constrain the rights of minority shareholders, although there are certain exceptions to this, such as if the directors act beyond the powers of the company or there is fraud involved.

Company managers do not owe statutory duties to shareholders, creditors or other stakeholders, although the employing company may be vicariously liable for their misfeasance.

However, there is no principle that prohibits a shareholder from voting its shares on a resolution at a company general meeting in which it may have an interest.

## 8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Under The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 a listed company is required to obtain approval of its shareholders for any:

- acquisition of shares of another company or any transaction resulting in such other company becoming a subsidiary or related company of the issuer;
- sale of shares in another company resulting in that company ceasing to be a subsidiary of the issuer; or
- a substantial sale of assets involving 25 per cent or more of the value of the total assets of the issuer.

The company should also make a public announcement of the matter. These provisions do not offer a materiality threshold that results in all business combinations involving listed companies, regardless of size, needing to be sent to shareholders for approval.

If the transaction involves the company issuing new shares beyond what is authorised and what may already have been approved by the company in general meeting the issue must be approved at an extraordinary general meeting.

If the transaction involves a merger of financial institutions licensed under the Banking Act the shareholders are required to approve the terms of the merger transaction as a condition to compliance with section 9 of the Banking Act, which is a comprehensive statutory framework for bank amalgamations and mergers of Kenya's many licensed financial institutions.

In private companies that are not subject to specific statutory control (eg, banks) the requirements for shareholders approval may be prescribed in the articles of association or in a shareholders agreement (if there is one), but there are otherwise no mandatory legal or regulatory requirements.

Shareholders are not given specific appraisal rights by Kenyan law or regulation beyond the points mentioned above (especially question 5 for listed companies).

### Update and trends

The significant Kenyan M&A activity of 2006 to 2008 has given way to a quieter period due in part to the effects of the international credit crisis and partly to the political uncertainties following the establishment of a coalition government after the disputed 2007 national elections.

The government has begun a new phase in its privatisation programme to include the banking, sugar, hotels, manufacturing and agri-business sectors, which is likely to stimulate M&A activity as investors take up these opportunities.

Despite the downturn having a negative effect on M&A activity, since mid-2009 the market has picked up. This is especially so in the telecommunications and broadcasting industries, both within Kenya and in the continent at large. Investment in these sectors will continue

to be a major driver of M&A activity in Kenya, especially with the expansion of broadband capacity and the digitalisation of television broadcasting. Mining, oil and gas opportunities are also on the rise.

In the finance sector, the NSE has agreed to be demutualised very recently and it is hoped that this will foster greater confidence in the trading of securities and thus increase liquidity.

Other moves aimed at countering the downturn and boost growth include legislative reforms within the nation that are currently being worked on. However, the timetable for the introduction of these changes is unknown. The key areas of reform are in capital markets and financial services market regulation, competition law and a new Companies Act.

### 9 Hostile transactions

What are the special considerations for unsolicited transactions?

The Capital Markets (Take-overs and Mergers) Regulations, 2002 anticipate that hostile bids may be made for public listed companies, although such actions are unheard of in the Kenyan market to date. The requirements for a hostile bid are the same as regards disclosures, documentation and approvals as for an agreed transaction, with some modifications to the timetable requirements. The board of the target company is prevented from taking actions that could be calculated to result in a bid being frustrated, such as by issuing new shares, creating options, selling some or all of the assets of the target or otherwise entering into contracts that are outside the ordinary course of business.

In any discussions regarding a takeover offer or which could result in a takeover offer being made the identity of the offeror and all related companies and persons acting in concert or associated with the offeror and also the identity of any ultimate offeror, namely the principal, must be disclosed.

In all takeover situations the offeror company, and all persons related to or acting in concert and all directors and senior employees have to make full disclosure to the NSE and the CMA of all dealings in the shares of the target company during the offer period.

### 10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no Kenyan laws or regulations specially addressing the issue of break-up fees. As a matter of contract the target company could agree to pay a break-up fee if the deal does not go through, and the buyer could agree on a reverse break-up fee.

Section 56 of the Companies Act imposes a complete prohibition on financial assistance being given by a Kenyan company in connection with the purchase or subscription for its shares. Thus any measures in the transaction that could require the company's own funds to be employed, directly or indirectly, for such a purpose are unlawful, and this would extend to the use of company funds to pay the fees of the shareholder vendors or a buyer in a successful business combination. There are no whitewash procedures applicable.

### 11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Kenya's Constitution guarantees the sanctity of private property and stipulates that no property can be confiscated by the government.

Kenya's legal system recognises the principle of freedom of contract as long as the provisions thereof are not contrary to law and are not repugnant to public policy.

### 12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In the context of private company business combinations there are no restrictions on the conditions that may be imposed in an offer. Mandatory legal approvals are required to be obtained in some situations and these are often included in the documentation as conditions – for example from the MPC or the CCK, the Insurance Regulatory Authority or the Central Bank of Kenya (depending on the business of the target).

In public takeovers the Capital Markets (Take-overs and Mergers) Regulations, 2002 state that the preliminary public announcements and offer document must stipulate the conditions applicable to the offer, such as the level of acceptances, whether specific regulatory approvals are required (eg, from the MPC, Central Bank of Kenya, etc).

The regulations require that the bidder and its financial adviser must be reasonably satisfied that the bidder will have the financial capability to complete the offer and satisfy all acceptances that are received. Although not specifically mentioned there is nothing to prevent a cash offer being underwritten.

### 13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents?

The majority of transactions are prepared on the basis of pre-financing, either from the company's own resources, such as cash or shares, or through the use of banking facilities. Transaction agreements that are signed but subject to financing are rare.

It is not lawful for a purchaser to use the target company's assets in order to secure financing for the acquisition. Such financial assistance in all its forms is prohibited and the exceptions to the general rule permitted in most jurisdictions have not been introduced in Kenya.

### 14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Compulsory acquisition of minority shareholders is permitted under the Capital Markets (Take-overs and Mergers) Regulations, 2002 and the Companies Act provided the acquirer has obtained 90 per cent in value of the shares that were the subject of the offer not more than four months after the making of the offer. The acquirer must within two months after achieving the 90 per cent send a notice to

those shareholders who have not accepted the offer advising of its intention to acquire their shares. The dissenting shareholders have a one-month period in which to apply to the court to prevent the acquisition; if they do not the acquirer can compulsorily purchase their shares. It is important to note that where the business combination involves a merger where one of the parties already holds shares in the target there is an additional burden on the acquirer to have obtained not only 90 per cent in value but also three-fourths in number of acceptances from other shareholders before it can exercise the compulsory acquisition procedures.

#### 15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no specific laws and regulations governing cross-border transactions.

#### 16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The Capital Markets (Take-overs and Mergers) Regulations, 2002 prescribes a detailed timetable to be followed in connection with a regulated takeover. Apart from periods within which specific announcements and public documents must be issued or filed the basic time period for keeping an offer open for acceptances is 30 days.

Other Kenyan statutes may prescribe that regulatory approvals are obtained prior to effecting a business combination such as in banking, insurance and telecommunications. The time periods for these are not specified with the exception of where a telecommunications licensee is being taken-over where the CCK usually has 30 days in which to object, failing which the transaction may proceed.

#### 17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes, see question 4.

#### 18 Tax issues

What are the basic tax issues involved in business combinations?

Kenya does not have a capital gains tax regime in place at present. Business combinations do, however, need careful study to ensure that there is no distribution of profit that has not previously borne tax (eg,

through distribution of unrealised capital gains), which may result in a compensating tax charge arising on the company.

For a review of the stamp duty and other tax issues that could arise, see question 4.

#### 19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Employment Act (No. 11 of 2007) and the Labour Relations Act (No. 14 of 2007) may be relevant if there is to be a termination of employment or a redundancy of workers. There is no automatic transfer of employment contracts to an acquirer on a business combination except where the employer company is taken over, in which case there is no change of employer, merely a change in its shareholders. It is common for the terms of the transaction agreements to provide for the acquirer of business assets to undertake to offer to hire all staff of the business on like terms and honouring all past-service obligations on condition the employees waive their rights to receive terminal payments. If the acquirer does not take on the employees or all of them the company would have to terminate and compensate.

The terms of any applicable collective agreements need to be respected when determining rights of employees and obligations of the employer. If there are to be redundancies notifications need to be given to the local Labour Office and to the Ministry of Labour.

If the target company has in place retirement benefit schemes for its work force the Retirement Benefits Act must be complied with in terms of transfers of benefits or assets of the scheme, or the establishment and registration of new retirement schemes.

Under section 9 of the Banking Act the transfer of employment contracts of employees of the institutions involved is implied although some doubts remain about the ability to stipulate statutory succession for such contracts for services.

#### 20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Particular attention will need to be paid to the quality of the assets being acquired to ensure that the receiver or liquidator is in a position to dispose of them free from third-party rights. Also, an act of bankruptcy by the target may have triggered third-party rights under loan covenants, a shareholders' agreement and other contracts.



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