Kenya’s Competition Approval

Introduction

Competition in Kenya is governed by the Competition Act, No.12 of 2010 (the Act). The Act establishes an autonomous Competition Authority (the Authority) whose functions are, inter alia, to promote and enforce compliance with the Act.

A merger is defined in the Act to mean “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.”

Further, the Act provides that a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

Extra-territorial effect of Competition Act

The Act makes it clear that it has extraterritorial effect as it also applies to

“conduct outside Kenya by ... any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business or an asset of a business, in Kenya.”

Examples of “mergers”
The Act provides the following non-exclusive list of transactions that may amount to mergers:

1. the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question
2. the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company
3. the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya
4. acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya
5. in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently
6. vertical integration
7. exchange of shares between or among undertakings which results in a substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings, or
8. amalgamation, takeover or any other combination with the other undertaking.

The Act further provides that a person is deemed to control an undertaking if that person:

1. beneficially owns more than one half of the issued share capital of the undertaking
2. is entitled to vote 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
3. is able to appoint, or to veto the appointment, of a majority of the directors of the undertaking
4. is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act
5. 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
6. 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
7. 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 paragraphs (1) to (7).

**Merger notification and approval**

All parties to a proposed merger must notify the Authority of a merger in writing and obtain the Authority’s prior approval before implementing the merger.

The practice is that each party completes the prescribed merger notification form and submits it to the Authority. It is important that the parties cooperate in the process of completing each of their notifications so to ensure that the information provided to the Authority is consistent.

Section 42(2) of the Act provides that no person, either individually or in concert with any other person, may implement a proposed merger unless the proposed merger is approved by the Authority and implemented in accordance with any conditions attached to the approval.

Payment of the full purchase price by the acquiring undertaking shall be deemed to be implementation of the merger in question but payment of a maximum down payment not exceeding 20% of the agreed purchase price shall not constitute implementation.

**Effect and penalties for failure to obtain merger approval**
The Act further provides that no merger carried out in the absence of an authorizing order by the Authority shall have any legal effect and that no obligation imposed on the participating parties in any agreement in respect of the merger shall be enforceable in legal proceedings.

The Act also provides that any person who implements a proposed merger without the approval of the Authority commits an offence and is liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding Kenya Shillings 10 million, or both.

In addition to the penalties mentioned above, the Authority may impose a financial penalty of an amount not exceeding 10% of the preceding year’s gross turnover in Kenya of the undertaking or undertakings in question.

**Determination of application for merger approval**

The Authority is required to consider and make a determination in relation to a proposed merger in respect of which it has received a notification within 60 days of receipt of the notification. However, this time limit may be extended in certain circumstances including:

- if the Authority requests for further information (which must be requested for within 30 days of receipt of the notification), within 60 days after the date of receipt by the Authority of such information,
- if the Authority requires that a hearing conference be convened, within 30 days after the date of conclusion of the conference.

In any of these circumstances, the Authority may extend the time period for determination for a further period of 60 days should the complexity of the issues involved so demand.

**Exclusion from merger control**

Under section 42(1) of the Competition Act, the Competition Authority has discretion to exempt a proposed merger from the requirements of approval. In implementing this provision, the Authority has developed some guidelines that list some transactions that may be excluded from the requirements of approval. These include transactions where (a) the combined turnover of the merging parties is between Kenya Shillings 100 million and Kenya Shillings one billion; or (b) in the healthcare sector, where the combined turnover of the merging parties is between Kenya Shillings 50 million and Kenya Shillings 500 million. The Guidelines make it clear that transactions meeting these minimum thresholds cannot be considered for exclusion from the approval requirements. It is also important to note that the said exemption is not automatic – one must apply to the Authority for the exemption.

**Filing Fees**

Presently no fees are payable on a merger notification. However the Authority has recently indicated that it intends to introduce filing fees for certain categories of mergers and has already published draft regulations to this effect. It is expected that these regulations will become law before the end of 2014.

**COMESA's Competition Approval**

**Introduction**

COMESA is an acronym for the Common Market for Eastern and Southern Africa.
The COMESA Competition Regulations (Regulations) were introduced in January 2013 and have created a great deal of uncertainty in the mergers and acquisitions markets in this region of Africa. There is no COMESA case law interpreting the Regulations. However, COMESA Competition Commission (CCC) has published DRAFT Merger Assessment Guidelines (the Guidelines) which provide some details on the manner in which the CCC would interpret the Regulations and their applicability. The Guidelines are only in draft form and may therefore be subject to change.

This note is based only on Kenyan law and the views expressed here in relation to the Regulations are only from a Kenyan point of view.

Applicability of the COMESA Competition Regulations to the transaction

The Regulations were first adopted in December 2004 by the Council of Ministers which is empowered under Article 55(3) of the COMESA Treaty to make regulations within the COMESA region. The Regulations were eventually gazetted in the COMESA Official Gazette on 20th November 2012. There are no transitional provisions for the application and implementation of the Regulations in the COMESA Common Market and indeed the Regulations entered into effect in mid-January 2013 through a series of notices published by the CCC.

Articles 23 and 24 in Part 4 of the Regulations deal with mergers and acquisitions.

Article 23 sets out when a merger must be notified to the COMESA Competition Commission (CCC). Article 23(3) states that Article 23 will apply where:

- both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States; and
- the prescribed threshold of combined annual turnover or assets is exceeded.

Thresholds

Article 23(4)(b) of the Regulations provides that the Board of Commissioners of the CCC will prescribe a threshold and a method of calculation of annual turnover or assets in the region either in general or in relation to specific industries.

The COMESA Official Gazette of 20th November 2012 sets out the rules on the determination of the merger notification threshold. Rule 4 sets the threshold of annual turnover and assets of all firms to the merger in the Common Market at COM$ Zero (ie US$ Zero).

Article 23(5)(a) defines a “notifiable merger” as a merger or proposed merger with a regional dimension with a value at or above the prescribed threshold. Article 23(5)(b) defines a “non-notifiable merger” as a merger or proposed merger with a value below the prescribed threshold.

The references to notifiable and non-notifiable mergers in Article 23 and 24 of the Regulations are rendered meaningless as there are no mergers that fall below the prescribed threshold. Therefore all mergers and acquisitions where “both the acquiring firm and the target or either the acquiring firm or target firm operate in two or more Member States” fall within the ambit of the CCC.

Filing Fees and Timing, Process

The filing fees apply to any merger transaction having a cross-border dimension and are calculated on a rather vague,
but costly, formula. Essentially the filing fees are the larger of the sum of 0.5% of combined annual turnover or 0.5% of the combined value of assets within the common market. If that amount is greater than USD 500,000 then the filing fee is capped at USD 500,000.

Filing fees are payable at the time of notification. No refunds are due if the CCC decides that a filing was not required or approves the merger promptly.

A merger filing must be made within 30 days of the decision to merge i.e from the date of the sale agreement. The CCC has up to 120 working days from the time of notification to issue its decision.

CCC may also extend the period if it thinks it needs more time.

There is a detailed notification form to be completed by all parties to the transaction.

Appeals on decisions of the CCC lie to the Board of Commissioners of the CCC. From there an appeal to the COMESA Court is possible.

The CCC is lightly staffed and at present questions must remain about its capacity to review and process more than a few applications at a time. There is no pre-notification procedure/conference with CCC allowed for in the Regulations. The administrative burden and costs arising from a merger filing in Lilongwe, Malawi should not be under-estimated.