Investing in Kenya: M&A

The increase in appetite for investments in East Africa coupled with the regional expansion initiatives by Kenyan companies has seen a number of cross-border transactions into and out of Kenya. The fact that Kenya's legal system is largely based on the UK and other Commonwealth jurisdictions makes Kenya a familiar playing field for investment.

This briefing introduces M&A and competition law in Kenya.

Legal System

Kenya has a progressive new Constitution which was promulgated in 2010. The legal system is based on Kenyan statutory law, in addition to Kenyan and English common law. Customary and Islamic law is also influential in some areas. The Supreme Court is the highest court of the land, followed by the Court of Appeal. The High Court handles civil, criminal and constitutional matters. There are also various district and provisional courts.

Legal Entities

Business in Kenya can be carried on under the umbrella of several types of legal entity.

These include entities registered under the Companies Act, partnerships, proprietorships, societies and in rare circumstances, unincorporated associations. Some details with respect to companies in particular are set out below.

Statute	The Companies Act, Chapter 486 of the Laws of Kenya
Types of companies	• Private and public • Limited liability • Companies limited by guarantee • Branches (foreign companies having a place of business in Kenya)
Shareholding/nationality requirements	• No restrictions on shareholding under the Companies Act • Restrictions imposed in certain sectors by sector or industry specific legislation e.g. insurance, aviation, agricultural land, telecoms, mining
Remarks	• Share buy-backs not allowed • Financial assistance prohibited, no whitewash procedures • A material revamp of the Act is anticipated; substantial changes are expected on insolvency

It is to be noted that the Companies Act, based on the UK 1948 equivalent, has been the target of a fundamental overhaul for a number of years, with a number of bills being circulated in the past. Most recently, we have seen the publication of the Companies Bill, 2014 and the Insolvency Bill, 2014, which we hope will achieve the desired objective.

M&As, Competition and COMESA

Transaction Documentation: Nothing Unusual

There is little dissimilarity with English law governed share purchase agreements and the contractual aspects of the transaction are within the reasonable expectations of a foreign investor. The Kenyan market is used to and understands the requirement for elaborate warranties and indemnities, disclosures and the due diligence characteristics that go hand in hand with complex M&A deals.

Regulatory Requirements and Conditions Precedent

More important however – and key for investors to note – are regulatory and sector-specific ownership provisions and restrictions which potentially impact heavily on both the timing of completion as well as costs. Sector-specific regulatory requirements are explored further in our article entitled Restrictions on Ownership in Kenya.

The Kenya Competition Act

Competition regulation in Kenya falls under the jurisdiction of the Competition Authority of Kenya (the **CAK**) as well as, in certain circumstances (which are described further below), the COMESA Competition Commission (the **CCC**). The Kenya Competition Act requires that the CAK gives merger approval in connection with the direct or indirect acquisition or establishment of direct or indirect control by one or more undertakings over the whole or part of the business of another undertaking.

The definition of control or deemed control includes (in addition to the simple fact of ownership of more than 50% of the voting rights in that undertaking) if such person (amongst other things) is entitled to vote a majority of the votes that may be cast in a general meeting or has the ability to control the majority of such votes, or is able to appoint, or to veto the appointment of a majority of the directors of the undertaking. Also within the definition of control – and one which prudence would require a negative clearance from the CAK – is a scenario in which an undertaking has the ability to materially influence the policy of an undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise the more obvious types of control.

Notably, the law does not presently prescribe merger thresholds although it is understood that the relevant subsidiary legislation is awaiting enactment. In lieu, the CAK has adopted a position in which mergers that will fall below the relevant thresholds will be considered for exclusion.

Approval fees have hitherto not been charged. However it is expected that the prescription of fees is imminent and is likely to range between K.Shs.500,000 and K.Shs.2,000,000 (approximately USD5,500 and USD22,000), depending on the combined volume of turnover or assets of the merging entities[1].

[1] Update: The Competition Authority of Kenya introduced the approval fees through Kenya Gazette Notice No. 4567, dated 11th June 2014 with effect from 1st August 2014.

COMESA (or not?)

M&A practitioners in Africa are all too aware of the impact of the COMESA Competition Regulations which came into force in 2013. While the Regulations consider a merger in the more obvious and restricted scope, a notifiable merger arises when either the acquirer or the target operates in two or more COMESA member states. The Regulations are conspicuously silent on what might constitute operations, resulting in the publication of a guideline by the CCC to the effect that an entity operates in two or more member states if it derives turnover from them. Actual domicile is stated not to be necessary but that a presence through export, imports and subsidiaries (by way of example) would comprise operations in a member state.

Curiously, the Regulations are stated to apply to merger transactions which have an appreciable effect on trade between Member States and which restrict competition in COMESA. But for the harsh consequences of a breach of the act – the purported invalidity of the transaction and the imposition of significant monetary penalties – it is certainly tempting (considering the costs of an merger application) to conclude that this wording and the notable absence of the express requirement that only the CCC may determine whether a transaction has an appreciable effect on trade or has the effect of restricting competition, invites the relevant parties to make a subjective assessment as to whether their transaction falls within the jurisdiction of the CCC.

Prudence dictates that the CCC should be consulted on the matter. However, the CCC typically requires such consultation to be in the form of a full application, accompanied by the fee prescribed by the COMESA Competition Rules, wherein lies the dilemma of many parties: application fees are levied at the the rather absurd rate of 0.5% of the lower of the combined annual turnover or the combined value of assets of the transacting parties in COMESA, subject to a maximum of USD500,000.

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