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Corporate M&A

Kenya
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Law and Practice

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1. TRENDS

1.1 M&A Market

The mergers and acquisitions (M&A) market has been affected by the outbreak of the COVID-19 pandemic, which has had negative economic ramifications that have resulted in a significant reduction in projected investment, as well as reinvestment of earnings as depicted in the Central Bank of Kenya First Quarterly Review of 2020. According to the Review, although the economy staggered through the first quarter and recorded a decline of almost 5.7%, some sectors – such as banking and services – recorded an increase in growth despite the risks posed by the pandemic. The Third Quarter Report, however, indicated a recovery in economic activity, hence, recording an improvement from -5.5% to -1.1%.

East Africa reported about 30 M&A deals in 2019, with Kenya recording the highest number of deals (I&M Burbidge Capital, Annual East Africa Financial Review 2020). In the past 12 months, there has been a noticeable reduction in M&A deals in East Africa largely due to COVID-19 and the political environment, with about 25 M&A deals reported. However, with limited data published on the same, it is too early to fully ascertain the unprecedented effects of COVID-19 on the Kenyan M&A market, especially given that some deals are currently pending completion.

1.2 Key Trends

Kenya has experienced reduced M&A activity because of the pandemic. Some businesses that were unable to merge have resorted to joint ventures. Even with this arrangement, some joint ventures have experienced commercial setbacks due to supply chain disruption and suppressed economic activity, given the general global business outlook.

As in many other jurisdictions, there have been efforts to enhance the use of technology to ensure business continuity. The High Court, through a case filed by the Kenya Private Sector Alliance Limited, issued orders allowing all companies to conduct virtual annual general meetings if they found it impossible to conduct physical meetings in the manner required under their articles of association and the Companies Act. This was as a result of restrictions on physical gatherings imposed as a result of the pandemic. The court extended the opportunity for virtual meetings to all companies. It had initially limited the order to public listed companies through a case filed by WPP Scangroup Plc.

The fintech and e-commerce sectors experienced increased activity as COVID-19 forced individuals and businesses to turn to technological solutions to comply with government directives restricting movement and encouraging social distancing. Online marketplace providers like Masoko, Jumia, Glovo and Kilimall saw increased online activity during the pandemic. Fintech companies, most notably Safaricom Plc, experienced a boost in the use of their M-Pesa product (a mobile phone-based banking service), while banks turned to mobile banking to meet the demand for contactless financial solutions.

The Companies (Beneficial Ownership Information) Regulations, 2020 came into force in February 2020. The Regulations require all companies incorporated or registered in Kenya to keep a register of beneficial owners with the relevant information relating to the said beneficial owners.

Notably, the COVID-19 pandemic has resulted in increased participation in the affairs of the company by shareholders in the form of shareholder activism. This has more or less been achieved through constant examining of books of accounts, financial statements and participation in the development of strategies to avoid the collapse of the business.

1.3 Key Industries

The banking, beverages and telecommunication sectors have maintained their positions as the preferred sectors for M&A deals in 2020. Major highlights include the following.

- The acquisition of Mayfair Bank by the Commercial International Bank (CIB), the acquisition of Transnational Bank plc by Access Bank plc, the acquisition of Jamii Bora Limited by Co-operative Bank Kenya Limited and the acquisition of certain assets of Imperial Bank Limited (In Receivership) by KCB Bank Kenya Limited.
- The National Treasury increased its stake in Consolidated Bank to 93.4% following a debt-to-share swap deal that saw the conversion of about KES1.6 billion debt into shares.
- The merger approvals of the deal between Telkom Kenya Limited and Airtel may come through after a judgment was entered in favour of Telkom Kenya Limited against the Ethics and Anti-Corruption Commission (EACC); however, the deal appears to have collapsed due to “challenges experienced in getting all the approvals required to complete the transaction.”
- Several notable cross-border deals including the impending increase in East African Breweries Limited’s ownership in Serengeti Breweries Limited to 85% to tame competition from AB InBev’s Tanzania Breweries in Tanzania.

Industries Particularly Affected by the COVID-19 Pandemic

According to the Central Bank of Kenya Third Quarter Report, the economy contracted by 1.1% as a result of the shuttering impacts of COVID-19. The pandemic has affected various industries differently, for instance, the financial sector has witnessed a reduction of lending to corporate entities while lending to key sectors such as transport, manufacturing, and communication has risen due to the strong governmental measures implemented to curb the spread of the virus.

According to a survey carried out by the Kenya Private Sector Alliance (KEPSA), the tourism, education and entertainment sectors were the most affected industries following the lockdown measures and bans on international passenger flights, the temporary closure of schools, and the shutting down of bars and restaurants save for deliveries and takeaway services. Notwithstanding the impacts on the above-noted industries, sectors such as e-commerce, telecommunication, online banking and online entertainment reported a significant rise in demand as a result of the sedentary life triggered by lockdowns, social distancing and curfew measures.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

The primary techniques for acquiring a company in Kenya are (i) purchasing shares of a targeted business, or (ii) the transfer of assets and liabilities from a target to the acquirer company. Acquisition of shares may be effected through a debt-equity swap wherein the investor forgoes a debt in exchange for equity in the target business. For instance, the National Treasury has recently converted its KES1.6 billion debt holding in Consolidated Bank into equity, thus extending its shareholding to over 93%.

Regardless of the methodology used, the underlying objectives of acquiring a company generally include, among others, improving the performance of the target business, acquiring economies of scale, entry into new markets and revamping the competitive outlook of the target business.

2.2 Primary Regulators

The main regulator for M&A in Kenya is the Competition Authority of Kenya (CAK), established under Section 7 of the Competition Act (No 12 of 2010). The CAK is responsible for, inter alia, promoting and enforcing compliance with the Competition Act, and investigating complaints and impediments to a merger. M&A deals of regional nature attract oversight by the COMESA Competition Commission (CCC) and East Africa Community Competition Authority (EAC Competition Authority).

Notably, the acquisition of a company whose shares are listed on the Nairobi Securities Exchange (NSE) attracts the scrutiny and approval of the Capital Markets Authority (CMA) in the manner set out in the Capital Markets (Takeovers and Merger) Regulations, 2002 unless exempted by the CMA. Essentially, the Capital Markets (Takeovers and Merger) Regulations, 2002 provide the guidelines and rules on takeovers and mergers while the CMA is mandated to regulate and develop the Kenyan capital markets through the Capital Markets Act (Chapter 485A) and its Regulations, the Central Depositories Act and the relevant Guidelines.

There may also be sector-specific regulators involved depending on the companies involved in the M&A deal. For instance, the proposed merger between Telkom Limited and Airtel Limited in the telecommunication sector attracted the approval of the Communication Authority (CA). Other sector-specific regulators include the Insurance Regulatory Authority, the Central Bank of Kenya and the Energy and Petroleum Regulatory Authority.

2.3 Restrictions on Foreign Investments

The foreign investment climate in Kenya is very attractive due to the continued simplification of the regulatory framework and procedures, and general improvement of the business environment for investors. Foreign investors receive relatively equal treatment to locals, as evidenced through policies such as the establishment of the Kenya Investment Authority (KenInvest) and the enactment of the Foreign Investment Protection Act (Chapter 518). The procedures for establishing a business in Kenya have also been simplified by embracing technology and eliminating setbacks to attract foreign investments.

While there are no all-encompassing restrictions on foreign investments, there are limited sector-specific restrictions on foreign investments, including the following.

- The Insurance Act (Chapter 487) requires those undertaking insurance businesses to be registered under the Insurance Act, which restricts:
  - (a) foreign ownership in an insurer to two-third of the paid-out capital; and
  - (b) the number of foreigners on the board of directors to two thirds of the board members.
- The National Information Communication and Technology (ICT) Policy Guidelines 2020 restrict foreign ownership in companies providing ICT services to a maximum of 70%; otherwise, a licence to provide ICT services will be denied.
- The National Construction Authority Act (No 41 of 2011) provides that any foreigner entering into a joint venture or subcontract with a local shall ensure it retains not more than 70%.
- Private Security Regulation Act (No13 of 2016) provides that a foreign company shall only be licensed if at least 25% of the shareholding is local.

- The Banking Act (Chapter 488) provides that only banks, financial institutions, the government of Kenya, foreign governments, state corporations, foreign companies licensed to operate as financial institutions in the relevant country and non-operating holding companies approved by the Central Bank of Kenya, may hold more than 25% of the share capital of a financial institution.
- The Civil Aviation (Licensing of Air Services) Regulations, 2018 provide that an air service licence may only be issued to a Kenyan citizen or in the case of a body corporate or a partnership, where at least 51% of the voting rights in the body corporate or partnership are ultimately held by the government of Kenya, a citizen of Kenya or both.

2.4 Antitrust Regulations

Anti-competitive trade practices in M&A are primarily regulated by the CAK through the Competition Act, regulations and several guidelines. Other regulations, typically applicable in M&A deals of a regional nature, include the CCC and EAC Competition Authority.

2.5 Labour Law Regulations

Kenyan laws are silent on the effect of M&A transactions on employees. In practice, the contracts of employment are terminated on account of redundancy subject to compliance with the conditions set out in the Employment Act (No 11 of 2007). However, parties to an M&A transaction may agree to continue the employment contracts subject to consultation with and the consent of the targeted employees.

The CAK has in the recent past considered the effect of M&A on employees before issuing approvals for M&A transactions. For instance, the CAK approved the merger between Commercial Bank of Africa and National Industrial Credit on condition that the new entity retained all the employees for at least a year. On the other hand, the acquisition of National Bank of Kenya Limited by KCB Bank PLC was on condition that KCB Bank PLC retained 90% of target employees for at least 18 months.

The Second Schedule of the Capital Markets (Take-Overs and Merger) Regulations, 2002 provides that an offeror should submit to the CMA the takeover offer document, which shall include information on the offeror's intentions concerning the continued employment of the employees of the offeree and its subsidiaries.

2.6 National Security Review

M&A transactions in Kenya do not undergo a distinct national security review. However, the CAK, in considering and granting approvals, takes into consideration sound public policy issues such as the effect of the transaction on the national security, health and safety, and market stability. Furthermore, the CAK is permitted under the merger regulations to consult other government agencies in its review of any merger application.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

Recent Court Decisions

It was apparent from the High Court's decision in Evans Aseto & another v National Bank of Kenya (NBK) & another; Central Bank of Kenya & another (Interested Parties) [2019] eKLR that although the employment and labour laws do not expressly provide for the treatment of employees in M&A transactions, the court may consider a claim on the impact of the transaction on employees and award appropriate remedies, only if the particulars of how the individual employees will be affected by the transaction are set out in the claim. The Competition Tribunal in the case of Telkom Kenya Limited & another v Competition Authority of Kenya [2020] eKLR held that public interest should be considered in the treatment of employees to ensure employees who lose their jobs in a merger can be absorbed in the market.

Legal Developments

Competition (General) Rules, 2019

Through Legal Notice No 176 of 2019, Kenya enacted the new Competition (General) Rules, 2019 which introduced several changes to M&A transactions such as the scope of M&A transactions, merger fees, categories and notification of mergers, restrictive trade practices and merger control. The Rules came into force on 6 December 2019 and are summarised below.

Scope of merger transactions

The Rules exclude several transactions as not qualifying as M&A transactions, eg, joint ventures (except full function joint ventures), any arrangement with creditors that does not result in a change of control, acquisition of assets in the ordinary course of business and any acquisition wherein the acquirer holds less than 20% of the total shares or voting rights.

Categories of mergers

The Rules introduce three categories of merger transactions: (i) notifiable mergers, (ii) mergers excluded from notification, and (iii) mergers requiring exclusion application.

Mergers requiring notification

The Rules provide that the following merger transactions shall require notification to the CAK:

- mergers resulting in a minimum combined turnover or assets of KES1 billion and turnover or assets of above KES500 million;
- mergers where the turnover or assets of the acquirer is above KES10 billion and the merging parties are in the same market;
- mergers in the carbon-based mineral sector where the value of the reserve, rights and associated assets exceeds KES10 billion; and
- mergers meeting the requirements of the COMESA Competition Commission Merger Notification Thresholds and two thirds or more of turnover or assets is generated or located in Kenya.

Mergers not requiring notification/approval of the Authority

The following merger transactions shall not require notification or approval of the CAK:

- where the combined turnover or assets of the merging parties does not exceed KES500 million;
- the merger meets the COMESA Competition Commission Merger Notification Threshold and at least two thirds of the turnover or assets are not generated or located in Kenya; and
- mergers taking place entirely outside of Kenya and without any local connection.

Mergers requiring exclusion application

For mergers resulting in a combined turnover or assets of between KES500 million and KES1 billion, an exclusion application must be submitted to the CAK. Similarly, an application for exclusion must be made where the firms are engaged in the carbon-based mineral sectors, regardless of asset value.

Merger fees

The Rules introduced new filing fees depending on the merger threshold as follows.

- Where the combined value of assets is between KES0 and KES500 million, there is no filing fee.
- Where the combined value of assets is between KES500 million and KES1 billion, there is no filing fee.

- Where the combined value of assets is between KES1 billion and KES10 billion, the filing fee is KES1 million.
- Where the combined value of assets is between KES10 billion and KES50 billion, the filing fee is KES2 million.
- Where the combined value of assets is above KES50 billion, the filing fee is KES4 million.

Other significant recent legislation

The Companies Act (No 17 of 2015) was amended by the Business Laws (Amendments) Act, 2020 which introduced significant changes regarding M&A transactions. Some of the changes included the reinstatement of the 90% threshold required for squeeze-out, up from the 50% threshold previously introduced by the Statute Law (Miscellaneous Amendments).

In 2019, the Statute Law (Miscellaneous Amendments) Act introduced a requirement for consent of all existing shareholders when transferring shares in a private company to a new shareholder. Private companies are therefore required to effectively amend their articles of association to reflect pre-emption rights of all existing shareholders.

The Competition (Amendment) Act 2019 also sought to clarify the concept of abuse of buyer power. The CAK has also formulated draft guidelines on buyer power and is seeking to introduce The Competition (Abuse of Buyer Power) Rules to deal with issues of buyer power.

The Kenya Law Reform Commission, through the Draft Employment Amendment Bill, 2019, proposed an amendment of the Employment Act by seeking to introduce Section 15A, which provides that M&A transactions shall not operate to terminate the employment contracts of the employees in the target business but instead shall continue the contracts as if originally made between the acquirer and the employees under the same terms and conditions.

3.2 Significant Changes to Takeover Law

See **3.1 Significant Court Decisions or Legal Developments** for discussion of the restoration of the 90% squeeze-out threshold.

Furthermore, companies incorporated or registered in Kenya are now required to keep a register of beneficial owners with the relevant information relating to the said beneficial owners as prescribed by the Companies (Beneficial Ownership Information) Regulations, 2020 made under the Companies Act. The Regulations define a beneficial owner as "the natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement."

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

A shareholder may desire to build its stake in a company either to block an impending takeover by raising its shareholding to above 10%, or beyond 90% in order to improve the chances of an impending takeover offer. However, due to legal restrictions – such as the prohibition against insider trading, the requirement for shareholding and beneficial-owner disclosure and the requirement of the consent of all shareholders in the transfer of shares – stakebuilding in a target entity is a strictly controlled exercise.

4.2 Material Shareholding Disclosure Threshold

All companies in Kenya are mandated to disclose members' shareholding when filing annual returns. In addition, following amendment to the

Companies Act and the introduction of the Companies (Beneficial Ownership Information) Regulations 2020, companies incorporated in Kenya are now obliged to keep (and submit/lodge with the Registrar of Companies) a register of beneficial owners. This requirement only applies to a natural person who:

- owns at least 10% of the issued shares of the company;
- exercises at least 10% of the voting rights in the company;
- holds a right, directly or indirectly, to appoint or remove a director of the company; or
- exercises significant influence or control, directly or indirectly, over the company.

The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 prescribe several disclosure requirements under the First Schedule which include:

- the issuer in a public share offering ensuring that the existing shareholders give an undertaking (and disclose in the Information Memorandum) not to sell their shareholding before the expiry of the period of 24 months following listing;
- disclosure of any transfer of shares from or to any market segment of a securities exchange;
- continuing obligation by any issuer whose security is offered to the public to immediately disclose to the public any information likely to have a material effect on the market activity within 24 hours of listing the issuer's securities; and
- disclosure in the annual report by any issuer of any substantial sale of assets involving 25% or more of the value of the total assets of the issuer.

The Capital Markets (Licensing Requirements) (General) Regulations, 2002 require that any person with a 3% shareholding in a listed company and who ceases to be interested in such shares is under obligation to notify the listed company of such interest. The Regulations further provide that a listed company must, monthly, report on the shareholders who cease to have interest in their shareholding, all directors holding 1% or more of the share capital, and cumulative shareholding of the directors.

The Capital Markets (Take-Overs and Mergers) Regulations, 2002 provide that an offeror shall not sell any voting shares to which the takeover offer relates during an offer period. It further provides that an offeror, chief executive, and director must disclose the total number and price of all voting shares of the offeror within 24 hours of listing the transaction.

4.3 Hurdles to Stakebuilding

Articles of Incorporation and Company By-laws

Companies in Kenya are at liberty to introduce new rules by amending their articles of association or by-laws. This may include introducing new rules depending on the preference of the shareholders and trending markets strategies. Although the laws permit some flexibility to introduce a higher reporting standard, the articles of association or by-laws are subordinate to company laws and regulations so should not contain provisions that are contra statute.

Other Hurdles to Stakebuilding

One of the hurdles to stakebuilding are the regulations prohibiting insider trading. The Capital Markets Act declares insider trading an offence and prohibits the buying and selling of securities by relying on information not available to the general public.

The Companies Act provides for pre-emption rights by requiring the consent of all existing shareholders when transferring shares in a private company to a new shareholder; this is an impediment to stakebuilding.

The Capital Markets (Takeovers and Mergers) Regulations 2002 prohibit the issuance of 25% or more of the share capital of a subsidiary of a listed company, or 10% or more of the share capital of the subsidiary that has contributed to 25% or more of the average turnover in the latest three financial years of the listed company, without full disclosure. Furthermore, the Regulations provide that a company that is in control of 25% of the voting share of a listed company can only acquire up to five% in any one year in such a listed company up to a maximum of 50%.

Different sectors also have provisions that may be deemed to be hurdles to stakebuilding. An example is the Central Bank of Kenya's limit on ownership of more than 5% of the share capital in a banking or financial institution, unless exempted under the Banking Act.

4.4 Dealings in Derivatives

The Capital Markets (Derivatives Markets) Regulations, 2015, permit and regulate dealing in derivative markets in Kenya. The Regulations provides for, inter alia, licensing requirements and duties of a derivatives exchange, approval of derivatives contracts, rules of exchange, trading systems, the net worth of a derivatives exchange, ownership of derivatives exchanges and disclosure of shareholding. Trading of futures contracts in the Kenyan market is facilitated through NEXT (a Nairobi Securities Exchange derivative market regulated by the Capital Markets Authority) and several rules have been formulated to regulate derivate markets, namely, NSE Derivative Rules, NSE Derivatives Investor Protection Fund Rules and NSE Derivatives Settlement Guarantee Fund Rules.

4.5 Filing/Reporting Obligations

The Capital Markets (Derivatives Markets) Regulations, 2015 provides that a derivatives exchange shall disclose the shareholding pattern of the exchange every quarter within 15 days from the end of each quarter to the CMA. The disclosure should include the names of the ten largest shareholders and the number and percentage of shares held by each, the names of the Kenyan shareholders holding at least 15% of the paid-up equity share capital, the names of the individual or corporate person controlling not more than 25% of the issued share capital or entitled to appoint more than 25% of the board or receive 25% of the aggregate dividends to be paid.

Beyond making the disclosure, the Regulations provide that the derivatives exchange must retain and preserve all books, registers, minutes of the board and other documents for not less than seven years.

4.6 Transparency

The Capital Markets (Takeovers and Merger) Regulation, 2002 provides that within fourteen days from the date of serving the offeror's statement, the offeror must submit to the CMA the takeover offer document which shall include information on the offeror's intentions regarding the continuation of the business of the offeree and, if so, stating those intention. The offeror is further required to state intentions regarding major changes to be introduced in the business, intentions regarding strengthening the financial position of the offeree, if such plans include merger, liquidation, selling assets or redeploying fixed assets or any major changes in the structure of the offeree or its subsidiaries.

Regulation 4 of the Capital Markets (Take-Overs and Merger) Regulation, 2002 provides that a shareholder who has acquired effective control in a listed company but has no intention of making a takeover offer is required to make a public announcement immediately after having served the notice in writing to the target company, NSE and CMA.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

Generally, the obligation to disclose a deal begins with the offeror. Under Regulation 4 of the Capital Markets (Takeovers and Merger) Regulation, 2002, an acquirer is obliged to announce its proposed offer through a press notice and serve a notice of intention to the target company, NSE and CMA, within 24 hours from the resolution of its board to acquire effective control of the target company. Thereafter, the acquirer is to serve the target company within ten days of the date of notice of intention, its statement of the takeover scheme which shall not be amended or withdrawn without the prior written consent of the CMA.

The target's disclosure obligation kicks in after receiving the acquirer's statement of takeover scheme whereupon the target shall inform the relevant NSE and the CMA and announce the proposed takeover within 24 hours of receipt of the acquirer's statement.

Private companies are under no obligation to disclose a deal; hence most bids remain private. However, such transactions ultimately become available to the public following the approval and publication by the CAK in the Kenya Gazette.

5.2 Market Practice on Timing

Market practice in Kenya regarding the timing of disclosure generally follows the legal requirements noted in **5.1 Requirement to Disclose a Deal**.

5.3 Scope of Due Diligence

Scope of Due Diligence

In Kenya, the scope of due diligence (conducted to identify potential defects in a deal or obtain relevant information for valuing a negotiated business combination) generally depends on factors such as whether the deal is cross-border, the type of acquisition (whether public or private) and the structure of the deal. Notwithstanding this, most negotiated business combinations undergo proper due diligence with most target companies willing to deposit all the relevant information requested by the buyer in the data room in order to escape the many indemnities and warranties normally requested as a result of non-disclosure.

Impact of the Pandemic

Following the outbreak of the pandemic, most investors extended due diligence to investigate the impact of the pandemic on the target business supply chain, employees, existing insurance, ability of the target business to perform and the target's continuity plan.

Investors have also experienced challenges with review of physical documents or visits to the target business to ascertain the information provided by the target business since the pandemic has inhibited movement and physical contact.

5.4 Standstills or Exclusivity

Standstill and exclusivity agreement between parties must be demanded or concluded within the legal frameworks. Any violation may, at the very least, render a transaction void if not attracting penal sanctions. For instance, the Companies Act provides for an opt-in resolution whose consequence is to render void any agreement which places a restriction on the transfer to the acquirer of shares in the target during the offer period or restricting the transfer to any person of shares in the target at any time during the offer period when the acquirer holds more than 75% percent of the voting shares.

Regulation 32 of the Capital Markets (Take-Overs and Merger) Regulations, 2002 prohibit the suspension of trading of shares during a takeover unless the suspension is necessary to enable the target to disclose information regarding the takeover offer or as directed by the CAK to obtain material information on the offer.

5.5 Definitive Agreements

The Capital Markets (Take-Overs and Merger) Regulations, 2002 require the terms and conditions of a tender offer for a public listed company to be in writing. Furthermore, the takeover notice should stipulate the conditions of the takeover offer, including conditions relating to acceptances, listing and increase of capital.

While private companies may enter into definitive agreements specifying the terms and conditions of the tender offer, the Competition Act allows for both verbal and written offer for sale. However, most investors prefer to have a definitive written agreement documenting the terms and conditions.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

Within 14 days of serving the statement, the offeror should submit to the CMA the takeover document for approval. Subsequently, the CMA is required to approve the document within 30 days or any other time as determined by it subject to advising the acquirer. Within five days of approval, the acquirer should serve the takeover document on the target business following which the target business shall circulate the document to its shareholders within 14 days. The offer shall remain open for acceptance for a period of 30 days and the acquirer is required to inform the CMA and the NSE and make an announcement by way of a press notice of the acceptance and consequent change in structure within ten days after the closure of the offer period.

The CAK has a period of up to 60 days to decide on an application for approval, although in practice they take one to two months. On the other hand, an application for exclusion takes approximately 14 days. On the other hand, the CCC has a period of up to 120 days to make a decision on application for approval upon receipt of a merger notification from the merging parties.

There are no applicable timelines regarding private offers. The exact duration will depend on the complexity of the transaction, scope of due diligence and the time taken to obtain the relevant statutory approval.

Effect of Measures Taken to Address the Pan on the Deal-Closing Process

In response to the COVID-19 pandemic, the government of Kenya imposed measures such as lockdowns, curfews, restrictions on gathering and social distancing requirements. The remote working and shift patterns caused by these anti-pandemic measures have caused delays in getting approvals from the relevant authorities. Regulators have transitioned to online filings for efficiency and to ease delays. However, this initiative has also experienced teething problems, which has caused further delays in deal-closing.

Gathering restrictions and social distancing measures have prevented physical shareholder and board meetings, therefore forcing companies to seek permission from the courts to hold virtual or hybrid meetings. Companies have also been forced to amend their articles of association to accommodate virtual and hybrid meetings.

6.2 Mandatory Offer Threshold

As noted in **3.1 Significant Court Decisions or Legal Developments**, the Companies Act allows an investor to compulsorily acquire the remaining minority shareholding only if it has already acquired or has contracted to acquire 90% in value of the shares of the takeover target.

The Capital Markets (Takeovers and Mergers) Regulations, 2002 outline occasions where a person is assumed to have a firm intention to make a bid for a takeover. Such occasions are where they:

- hold more than 25% of the shares, though less than 50% of the voting rights, and acquires more than 5% of the voting rights in the company;
- hold at least 50% of the voting shares and acquires additional voting shares;
- acquire a company having effective control of a listed company, whether directly or indirectly (which should be considered conjunctively); or
- acquire at least 25% of a subsidiary that has contributed at least 50% of the general turnover, in the previous three financial years, of the company.

6.3 Consideration

In Kenya, cash, shares or a combination of the two are permitted as a means of payment. The Capital Markets (Take-overs and Mergers) Regulations, 2002 require the offeree to issue a statement indicating whether the shares are to be acquired for a consideration wholly or partly in cash, the timelines and method of payment.

6.4 Common Conditions for a Takeover Offer

Regulation 15 of the Capital Markets (Takeovers and Mergers) Regulations, 2002 provides that where the offer is conditional upon acceptances in respect of a minimum percentage of shares being received, the offer shall specify a date not later than 30 days from the date of service of the takeover offer or such later date as the CMA may in a competitive situation or in special circumstances allow as the latest date on which the offeror can declare the offer to have become free from that condition.

The CMA, through the Capital Markets (Takeovers and Mergers) Regulations, 2002, has sought to restrict the use of offer conditions by providing that the offer shall not be conditional upon the offeree approving or consenting to any payment or other benefit being made or being given to any director of the offeree or to any other person that is deemed to be related to the offeree, as compensation for loss of office or as consideration for, or in connection with, their retirement from the office.

6.5 Minimum Acceptance Conditions

Regulation 8(3) of the Capital Markets (Takeovers and Mergers) Regulations, 2002 provides that an offer may be conditional upon the offeror receiving acceptances for a minimum percentage of shares. An investor may prefer 90% acceptance to allow them to exercise the compulsory acquisition rights under the Companies Act. Or at least 75% to allow them to pass any special resolutions relating to the company.

6.6 Requirement to Obtain Financing

Regulation 22 of the Capital Markets (Takeovers and Mergers) Regulations, 2002 provides that the acquirer is under an obligation to demonstrate and satisfy its financial adviser that the takeover offer will not fail due to insufficient financial capability. Furthermore, when providing an offer document, the acquirer is mandated to include therein a statement satisfying all shareholders who wish to accept the offer and showing that the offer will not fail due to the acquirer's insufficient financial capability.

6.7 Types of Deal Security Measures

In Kenya, the law does not prohibit deal security measures such as break fees, non-solicitation provisions and match rights if such measures are disclosed in the takeover document as well as the notice of intent. Other than the aforementioned security measures, there are no new contractual considerations as well as changes that have impacted the length of interim periods during the pandemic.

6.8 Additional Governance Rights

In the event that a bidder does not seek complete ownership, other additional governance rights include rights to pass ordinary and written resolutions in shareholder-reserved matters, to nominate board members and to exercise powers in key decisions such as appointment of senior management. Additionally, CMA's Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 requires the boards of a company to ensure that all shareholders are treated equitably, whether minority shareholders or foreigners.

6.9 Voting by Proxy

The Companies Act, under Section 114, permits a shareholder to appoint a proxy to attend a meeting on behalf of the shareholder, speak and even vote. The relevant shareholder must give notice of appointment of the proxy before the meeting is held.

6.10 Squeeze-Out Mechanisms

In Kenya, a squeeze-out mechanism is provided for under Section 611 of the Companies Act. Details of this mechanism can be found in **3.1 Significant Court Decisions or Legal Developments**.

Pursuant to Section 612, such notices may only be given for three months from, and including, the day after the last day of the offer period or a period of six months from, and including, the date of the offer.

The Capital Markets (Takeovers and Mergers) Regulations, 2002 also provide that an offeror who has acquired 90% of the target's voting shares pursuant to the offer is required to make an offer to the remaining shareholders to acquire their shares at a purchase price that is the higher of the prevailing market price or the price offered to other shareholders.

6.11 Irrevocable Commitments

It is common practice to require the members of the target business to give an undertaking. For instance, an issuer will normally ensure that the existing shareholders give an undertaking (and disclose this in the information memorandum) not to sell their shareholding before the expiry of the period of 24 months following listing.

7. DISCLOSURE

7.1 Making a Bid Public

Generally, for a takeover of public company, an acquirer is obliged to announce its proposed offer by press notice and serve a notice of intention to the target company, NSE, CMA and Monopolies and Prices Commission, within 24 hours from the resolution of its board to acquire effective control in the target company. Furthermore, the target is under a continuous reporting obligation to announce or publish by way of a cautionary announcement, any information which could lead to material movements in the price of shares if at any time the necessary degree of confidentially has been breached or cannot be maintained.

In relation to a private deal, private companies are under no obligation to announce, hence most bids remain private. However, such transactions ultimately become available to the public following the approval and publication by the CAK in the Kenya Gazette.

7.2 Type of Disclosure Required

Takeovers and mergers of public entities typically call for disclosure of material information, inter alia:

- the identity of the target business and the acquirer;
- type and the total number of voting shares of the target business;
- details of the existing or proposed agreement; and
- conditions of the offer including acceptances, listing and increase of capital.

There is also disclosure of financial statements wherein the acquirer must disclose the balance sheet, income statement, statement of changes in equity, cash flow statement and earnings per share, details of arrangements made to secure payment or transfer of shares, and proportion of shares being swapped where necessary.

Pursuant to the Companies Act, a private company cannot transfer shares to a new shareholder without the consent of the existing shareholders allowing the existing shareholders to exercise their pre-emption rights. Hence, the company must disclose details of a transaction before transfers are made to a third party.

Regulatory bodies like the CAK also require parties making an application for approval of a transaction to provide basic and other related information on the transaction. This includes copies of a signed sale and purchase agreement, audited financial statements for the last three years duly signed by the board of directors and certified public accountant, latest annual reports and board resolutions.

7.3 Producing Financial Statements

The Capital Markets (Takeovers and Mergers) Regulations, 2002 require bidders to submit a takeover statement to the target business indicating a summary of the latest audited financial statement including the balance sheet, cash flow statement, income statement, statement of the changes in equity, earnings per share before and after the takeover.

The CAK also requires parties to a merger (when filling a merger notification form) to provide their audited financial statements for the last three years.

Sector regulators like the Central Bank of Kenya may also require parties to a merger to provide their audited financial statements for the regulators' review.

The Capital Markets Authority Rules, 1992 provide that accounts, pro-forma and financial statements must be prepared in accordance with International Financial Reporting Standards (IFRS) and a statement should be provided that the accounts and the balance sheet were prepared as per the IFRS. Part XXV of the Companies Act, 2015 also makes provision on how a company's financial statements and director's reports should be prepared.

The Institute of Certified Public Accountants of Kenya (ICPAK) requires that all financial statements must be prepared in accordance with IFRS.

7.4 Transaction Documents

An applicant seeking approval of a takeover must meet the threshold for disclosure required by various regulators such as providing details of any agreement entered, or proposed to be entered into, and the cost, as well as details of the proposed merger and the relevant shareholding and identity of the acquirer.

The CAK requires parties to a merger (when filling a merger notification form) to provide basic and other related information such as hard copies of a signed sale and purchase agreement, audited financial statements for the last three years duly signed by the board of directors and certified public accountant, latest annual reports and board resolutions. Nevertheless, an applicant (pursuant to Section 20 of the Competition Act) may make a claim of confidentiality on the basis that disclosure will adversely affect its competitive position or that the disclosed information is commercially sensitive.

The COMESA Competition Commission requires parties applying for approval to provide certain information including, inter alia, the agreement between the parties, annual reports, financial statements, board and shareholder resolutions and list of shareholders and directors of each party.

The Capital Markets (Takeovers and Mergers) Regulations, 2002 prescribe the information to be disclosed in transaction documents which includes, inter alia, the offeror's identity, terms of the offer and all information required by the shareholders and their directors.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

The general duties of directors are provided under the Companies Act, common law and principles of equity and include, inter alia, the duty to (i) avoid conflict of interest; (ii) act in good faith; (iii) not to accept benefits from third parties; (iv) exercise independent judgement; (v) exercise reasonable care, skill and diligence; and (vi) declare any interest in a transaction.

Nonetheless, during a takeover, directors of the target entity are expressly required (under Regulation 9 of the Capital Markets (Takeovers and Mergers) Regulations, 2002) to exercise their independent judgement and issue a circular to shareholders indicating whether or not they recommend the acceptance of the takeover offer. Furthermore, Regulation 7(5) requires directors to circulate to their shareholders (within 14 days from the date of receipt of the approved takeover document) the approved document together with the independent adviser's circular. In addition, directors are under the duty to appoint an independent adviser who shall be responsible for providing independent advice necessary for making an assessment as to the merits of accepting or rejecting the takeover offer.

Generally, directors' duties are owed to the company and only the company can enforce them unless a shareholder pursues such enforcement on behalf of the company through a derivative action. Any fiduciary duty that a director may owe to a shareholder, or all stakeholders, will arise from statute as seen above or material representations between them wherein the director undertakes the responsibility to act on behalf of the shareholder in a transaction such as disposal of shares.

8.2 Special or Ad Hoc Committees

Whether or not a private company should establish special or ad hoc committees in a business combination is a matter generally dealt with in the company's articles of association. It is not mandatory under Kenyan law for a private company to establish special or ad hoc committees. However, it is considered good corporate practice for the board of directors in public companies to establish relevant committees and delegate specific mandates as may be necessary in order to avoid an instance of conflict of interest and ensure fairness.

Where some directors have a conflict of interest, Regulation 10 of the Capital Markets (Takeovers and Mergers) Regulations, 2002 permits the board of directors to appoint an independent adviser.

8.3 Business Judgement Rule

Courts have generally upheld the business judgement rule to shield directors from scrutiny and or liability by presuming that the said directors have acted within their powers, honestly, in the interest of the company and on an informed basis. The rationale in upholding this principle has been to prevent interference with the management of companies as well as avoiding the risk of needlessly diverting the attention and energies of corporate officers and directors as was so held in Isaiah Waweru Ngumi and 2 others v Muturi Ndungu [2016] eKLR. Since the Companies Act, Capital Markets Authority Rules, 1992 and the relevant regulations and governance codes mandate directors to undertake takeover situations in good faith, in the interest of the company and by exercising independent judgement, courts will ignore the principle of the business judgement rule only if the derivative claim brought against the directors sufficiently particularises the duty breached so as to create reasonable doubt as to whether the directors deserve protection under the rule.

8.4 Independent Outside Advice

The Capital Markets (Takeovers and Mergers) Regulations, 2002 permit the directors to appoint an independent adviser, who may be an investment bank or a stockbroker licensed by the CMA, in order to avoid conflict of interest by the directors or provide advice which shall form the basis of an informed assessment regarding offers. The independent advisor is mandated to clarify in its advice (a circular to the directors), inter alia:

- the acquirer's intentions regarding the continuation of the target's business;
- acquirer's justification for the proposed offer;
- outlook of the industry in the next 12 months;
- whether the acquirer holds any voting shares in the target business; and
- details of any transfer of voting rights dealt with within six months before the start of the offer period.

8.5 Conflicts of Interest

Kenyan courts have considered and ruled on cases concerning directors' and managers' conflicts of interest. For instance, the High Court in Ruth Ruguru Nyagah v Kariuki Chege & another [2020] eKLR, where the director privately submitted a bid which was evaluated alongside a bid of the company to which she was a director, held that "the two companies were competing for award of the same tender which definitely created a situation where the company's business interests conflicted with those of the plaintiff's private company at a time when the plaintiff was still a director of the company."

The duty to avoid conflict of interest in any transaction conducted by the director or manager is extensively provided for under, inter alia, the Companies Act, Capital Markets (Takeovers and Mergers) Regulations, 2002 and the CMA Guidelines on Corporate Practice by Public Listed Companies, 2015.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

Hostile takeovers are permitted in Kenya. They are not, however, common.

9.2 Directors' Use of Defensive Measures

Under Kenyan law, directors are prohibited from frustrating takeover offers after contact with the offeror or receiving the notice of intention of takeover. Regulation 27 of the Capital Markets

(Takeovers and Mergers) Regulations, 2002 precludes the directors of the target business from:

- issuing any authorised but unissued shares;
- issuing or granting options on any unissued shares;
- creating/issuing or permitting the creation or subscription of any shares;
- selling, disposing of, acquiring or agreeing to sell the assets; and
- entering into or allowing contracts that are not in the ordinary course of business.

However, the Companies Act allows companies to pass opt-in resolutions which render void any agreement which restricts the transfer to the acquirer of shares in the target business during the offer period or restricts the transfer to any person of shares in the target business at any time during the offer period.

9.3 Common Defensive Measures

Besides the actions detailed in **9.2 Directors' Use of Defensive Measures**, the directors may resort to advising shareholders to reject a takeover offer irrespective of the circular provided by the independent adviser. The directors may also resort to unnecessary litigation battles to frustrate the offer or increase costs. However, such advice must be in the interest of the company otherwise the directors will not be shielded by the business judgement rule.

We note that since the pandemic, most companies have generally resorted to legal advice as a defensive measure by seeking a professional legal opinion on the existing vulnerabilities that should be dealt with. Other measures taken include increased engagement of shareholders in developing the company's strategic plan and conducting due diligence in the preparation of any impending takeover.

9.4 Directors' Duties

Any defensive measures adopted by the directors must be exercised in good faith and in the interest of the company to promote the success of the company and ultimately benefit shareholders. However, care must be exercised to ensure that these duties do not conflict with the restrictions imposed under the various laws with respect to frustrating a takeover offer that has been communicated and received by the target business.

9.5 Directors' Ability to "Just Say No"

While directors may advise shareholders to reject an offer, they are obliged (pursuant to their duty to act in good faith and exercise independent judgement) to consider, assess and give the reasons informing their advice or opinion to the shareholders. Thus, directors cannot "just say no".

10. LITIGATION

10.1 Frequency of Litigation

Generally, litigation in connection with M&A deals in Kenya is not common. Nevertheless, we note that there are instances where stakeholders, such as employees of a target business, have sought injunctive relief against a proposed merger pending a court determination on the effect of a proposed merger on their terms and condition of service. Parties to a merger may also challenge the conditions imposed by the CAK by filing a claim before the Competition Tribunal. For instance, in Telkom Kenya Limited & another v Competition Authority of Kenya [2020] eKLR (the first case to be heard before the Competition Tribunal) the parties to a proposed merger (Telkom and Airtel) successfully challenged the conditions imposed by the CAK.

10.2 Stage of Deal
Litigation may arise at any stage depending on the parties. For instance, litigation involving private companies typically arises once the information regarding the deal is published or made known to the public. An example is the case of Evans Aseto & another v National Bank of Kenya (NBK) & Kenya Commercial Bank (KCB); Central Bank of Kenya & another (Interested Parties) [2019] eKLR, in which the petitioners instituted the case following a publication of the offer made by KCB on 18 April 2019 to acquire all the shares of NBK by way of a share swap.

10.3 "Broken-Deal" Disputes
In the pending merger between Telkom and Airtel, the Competition Tribunal, in Telkom Kenya Limited & another v Competition Authority of Kenya [2020] eKLR, held that any conditions imposed by the CAK should be reviewed and or assessed by establishing whether the conditions imposed are aimed at (i) enhancing the welfare of the Kenyan people, (ii) preventing unfair and misleading conduct, and (iii) promoting and protecting effective competition in the market.

The Tribunal observed that where the CAK imposes conditions on a merger, the burden shifts to the CAK to demonstrate with cogent evidence that the conditions are justified otherwise the Tribunal will not review the condition on appeal.

Finally, the decision clarified that the "failing firm doctrine" established under the Merger Guidelines applies strictly as a defence to an otherwise anti-competitive merger, hence should not be applied post-merger as was done by the CAK.

11. ACTIVISM

11.1 Shareholder Activism
Shareholder activism is not firmly established in Kenya. However, Kenyan law encourages shareholder activism by allowing shareholders to scrutinise books of account and contracts, participate in voting and inspection and institute derivative actions on behalf of the company.

11.2 Aims of Activists
Shareholder activism is yet to be firmly established in Kenya. It is, however, not uncommon for a shareholder to pressure a target business into entering into an M&A transaction. At the very least, shareholders are generally willing to accept a transaction likely to increase their revenues.

11.3 Interference with Completion
Shareholders may interfere with the completion of transactions by seeking redress through their minority voting rights and the relevant institution, such as the CAK, Competition Tribunal and courts. However, any claim brought on behalf of the company must be introduced as a derivative action. Some examples include the failed takeovers of Express Kenya and Unga Group Plc, in which the minority shareholders of both public listed companies rejected the deals due to poor pricing.

A notable example of interference by activists is the merger between CBA Group and NIC Group (to form NCBA) in which activist Okiya Omtatah filed a suit in 2019 blocking the merger citing the National Treasury's secretive decision to exempt the merger from tax. However, the case was not successful and the two banks merged to form NCBA Bank Kenya Plc.

Oraro & Company Advocates is a full-service, market-leading African law firm established in 1977 with a strong focus on dispute resolution and corporate and commercial law. The firm's corporate and commercial practice deals with both private and public corporations on substantive transactions. It is well positioned to provide strategic, business-oriented legal advice on complex, domestic, cross-border and multi-jurisdictional transactions in emerging and developed markets. The corporate and commercial practice comprises lawyers who have proven experience in bringing commercial awareness to every transaction. It cuts across several sectors, with extensive involvement in buyouts, corporate restructuring, incorporation and company registration, joint ventures, preparing and reviewing commercial agreements, private equity and M&A. The team has been involved in some of Kenya's most complex M&A in the financial services sector, including acting for National Bank of Kenya Limited in the takeover of 100% of the company's shares by Kenya Commercial Bank Group PLC.

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