
CHAMBERS GLOBAL PRACTICE GUIDES

Corporate M&A 2025

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Kenya: Law and Practice

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KENYA



Law and Practice

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KENYA LAW AND PRACTICE

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Cliffe Dekker Hofmeyr (Kieti Law LLP) is a leading Kenyan law firm that provides quality, specialised and personalised legal services in key specialist areas of practice. The firm's lawyers are recognised for their depth of expertise in advising on mergers within highly regulated and rapidly evolving sectors in Kenya, including healthcare, financial services, insurance,

banking and energy. It handles a wide range of cross-border transactions spanning East Africa and other countries such as Mauritius, Nigeria, Ghana, the UK and Norway, among others. It has recently advised on transactions involving acquisitions of some of the largest power producers in Kenya and Sub-Saharan Africa.

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1. Trends

1.1 M&A Market

Over the past year, Kenya experienced a slow-down in economic growth prompting the [World Bank](#) to revise its 2024 economic growth forecast downward from 5% to 4.7%, compared to 5.6% achieved in 2023. Despite governmental fiscal interventions aimed at curbing inflation and stabilising the Kenyan shilling, business activity remained subdued due to significant disruptions from anti-Finance Bill protests, anti-government demonstrations, and broader global economic headwinds. Consequently, this economic climate had a direct impact on M&A activities within Kenya, evidenced by a reduction in the number of transactions. According to the [I&M Burbidge 2024 Annual East Africa Financial Review](#), Kenya recorded 79 deals, down from 91 in 2023. This aligns with broader continental trends reported by the African Private Equity and Venture Capital Association (AVCA), which indicated a [general slowdown in Africa's private capital sector in its Q3 2024 Issue](#).

Despite the reduced number of deals, the value of the disclosed M&A deals increased, with [DealMakers reporting a deal value of USD523.84 million at the end of Q3 2024](#) compared to [USD407.68 million over a similar period in 2023](#).

1.2 Key Trends

Reports from [DealMakers](#) and [AVCA](#) highlight a notable decline in private equity investments in 2024 compared to 2023. Investor dynamics have also shifted significantly. According to [I&M Burbidge](#), local and regional buyers increased their market share substantially to 52%, compared to 33% the previous year. Conversely, pan-African investor participation dropped from 26% in 2023 to 20% in 2024, and global buyers' involvement

also decreased markedly from 41% in 2023 to 28% in 2024.

1.3 Key Industries

According to [DealMakers](#) and [I&M Burbidge](#), the agribusiness sector saw the highest volume of M&A activity in the past year, followed closely by financial services and manufacturing sectors. Fintech start-ups have particularly attracted significant investor interest, capitalising on the rapid expansion of digital payment platforms and mobile banking services. Infrastructure and energy sectors have also emerged prominently, driven largely by increased investment in renewable energy initiatives aimed at fostering sustainable economic growth.

The Competition Authority of Kenya's (CAK) Annual Report for the fiscal year 2023/2024 further highlights manufacturing as the most active sector, accounting for 34% of approved mergers. Distribution and financial services sectors were also significant, constituting 12% and 10% respectively. Other notable sectors, each representing approximately 5% of merger approvals, included mining, information and communications technology (ICT), education, and health-care.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Private

The common means of acquiring private companies is usually through a share purchase or a share subscription. Parties may also opt to carry out an asset purchase transaction which does not involve acquisition or allotment of shares.

- Share purchase – in a share purchase, the acquirer purchases some or all of the compa-

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ny's shares directly from its shareholders pursuant to a share purchase agreement, which records the terms on which the shareholders of the company agree to sell and the acquirer agrees to purchase the company's shares. Acquirers will typically carry out due diligence over the target company prior to entry into the share purchase agreement.

- Share subscription – a share subscription involves the issuance of new shares in the company to the acquirer, potentially leading to the dilution of the shares already held by other shareholders. This type of acquisition is completed through a share subscription agreement.
- Asset purchase – in an asset purchase, the acquirer purchases specific assets and may also assume some of the company's liabilities. This type of acquisition is typically completed through an asset purchase agreement, in which the parties agree on the assets and liabilities to be sold and retained by the company.

Public

An acquisition of a company listed on the Nairobi Securities Exchange (NSE) will typically be undertaken through the purchase of all or a substantial part of its direct or indirect shareholding. There are a few different ways that this transaction can be carried out, such as through an agreement to subscribe to shares, a takeover bid that has been negotiated, or a swap of shares that has been approved by the shareholders. The process for carrying out such transactions is governed by the Capital Markets (Takeover and Mergers) Regulations, 2002 (Takeover Regulations) and the Companies Act, No 17 of 2015 (Companies Act).

2.2 Primary Regulators

There are various regulators of M&A activity in Kenya.

Capital Markets

The Capital Markets Authority (CMA) oversees the acquisition of companies listed on the NSE as well as the acquisition of entities licensed by it such as investment banks, stockbrokers, securities exchanges, fund managers, dealers and depositories.

Competition

The Competition Authority of Kenya (CAK) is responsible for ensuring compliance with competition laws. In this regard, the CAK analyses and approves transactions resulting in the change of control of a business, part of a business or an asset of a business in Kenya and that meet the merger thresholds prescribed by CAK.

Mergers and acquisitions that have a regional aspect may need approval from other regional authorities. If a transaction involves a party that operates in multiple member states of the Common Market for Eastern and Southern Africa (COMESA), and the merging companies' turnover/asset value meets COMESA's set thresholds, then the transaction may require approval from the COMESA Competition Commission (CCC).

Similarly, transactions that involve parties operating in multiple member states of the East African Community (EAC) may require approval from the EAC Competition Authority. Presently, notifications for merger transactions within the EAC member states are not required, even though the EAC Competition Act, 2006 and the EAC Competition Regulations, 2010 are in operation. The EAC Competition Authority has stated that it will inform stakeholders of the starting date for merger notifications and set up the

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necessary framework to review mergers. In this regard, the EAC Competition Authority and the CAK entered into a bilateral agreement in May 2023 aimed at streamlining their merger notification guidelines and implementing an information sharing framework for cross-border infractions. The EAC Competition Authority has also entered into a memorandum of understanding with the Fair Competition Commission of Tanzania and the Rwanda Inspectorate, Competition and Consumer Protection Authority to facilitate co-operation and co-ordination in the application and enforcement of their competition laws.

Sector-Specific Regulators

In addition, M&A transactions will be subject to additional regulation from sector specific regulators, especially if the sector specific laws have provisions regarding ownership and control changes. For example, the purchase of a bank, digital credit provider, microfinance bank, and other regulated financial institutions will need approval from the Central Bank of Kenya (CBK), while buying significant rights in an aviation company will require clearance from the Kenya Civil Aviation Authority.

Similarly, M&A transactions in the communication, insurance and energy sectors would require the approval of the Communications Authority of Kenya (CA), the Insurance Regulatory Authority (IRA) and the Energy and Petroleum Regulatory Authority respectively. In addition, sectors such as betting and gaming, export processing zone business services, and tourism require notification to their respective regulators.

It is useful to note that the approvals from the regulators are not exclusive of each other and that an acquirer may be required to obtain multiple approvals for an M&A transaction.

2.3 Restrictions on Foreign Investments

Restrictions on foreign investments tend to be sector specific. Examples include the following.

- In the banking industry, no individual or entity other than licensed financial institutions, the Kenyan government, foreign governments, state corporations, foreign companies licensed as financial institutions in their respective countries, or non-operating holding companies approved by the CBK, may hold more than 25% of the share capital of a Kenyan bank. As a result, no investor (including foreign investors) can acquire more than 25% of the share capital of a Kenyan bank unless they are exempt from the above restrictions.
- In the insurance industry, at least 33.33% of the controlling interest (whether in terms of shares, paid up share capital or voting rights) in an insurer must be owned by citizens of a partner state of the EAC, a partnership whose partners are all citizens of an EAC partner state, or a corporation whose shares are wholly owned by citizens of an EAC partner state.
- In the aviation industry, companies licensed to provide air services must have at least 51% of the voting rights ultimately held by Kenyan citizens, the government of Kenya or both. The Kenya Civil Aviation Authority may exempt a person from this requirement where the air services are of special nature including services in the interest of social welfare, charity, humanitarian services or assistance in saving life or in the public interest.
- In the pensions industry, at least 33% of the paid-up capital of a pension scheme administrator must be owned by Kenyan citizens, unless the administrator is a bank or insurance company registered in Kenya.

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- In the mining sector, companies dealing with minerals or small-scale mining operations may have a maximum of 40% foreign ownership. For large-scale operations, companies must list at least 20% of their equity on a local securities exchange within three years of beginning operations.
 - In the private security sector, private security service providers are required to have at least 25% of their shares held by Kenyans.
 - In relation to agriculture, a non-Kenyan or a private company with foreign ownership cannot own freehold land; it can only hold land on leasehold basis only for a period not exceeding 99 years. Non-citizens or private companies with foreign ownership are restricted from holding agricultural land unless exempted by the President.
- employees, corporate identity or marketing efforts.
 - Whether there has been placement of employees from the target undertaking to the acquiring undertaking.
 - Whether there has been an effort by the acquiring undertaking to influence or control any competitive aspect of the target undertaking's business.
 - Whether there has been an exchange of strategic information between the merging parties for purposes other than valuation or due diligence or in ways compromising the strategic independence of each of the parties to the merger.

2.4 Antitrust Regulations

The Competition Act, 2010 (Competition Act) is the main legislation governing antitrust matters in Kenya. Under the Competition Act, a transaction would be considered a merger if it involves 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.

It is unlawful for anyone to implement a merger without first obtaining approval from the CAK. Implementation of a merger will be deemed to occur where more than 20% of the agreed purchase price has been paid. The CAK will also consider the following when determining whether a merger has been implemented.

- Whether there has been an actual integration of any aspect of the merging parties including their infrastructure, information systems,
- The CAK has set specific criteria for when mergers must be reported to it. These criteria are based on the combined revenue or assets of the acquiring and target companies in Kenya, as indicated in their most recent audited financial statements.
- This has resulted in three distinct categories of mergers:
- notifiable mergers;
 - excluded transactions requiring approval of the CAK; and
 - excluded transactions not requiring approval of the CAK.

Notifiable Mergers

- (a) a minimum combined turnover or assets (whichever is higher) in Kenya of KES1 billion and the turnover or assets (whichever is higher) of the target firm is above KES500 million;
- (b) the turnover or assets (whichever is higher) of the acquiring firm is above KES10 billion and the merging parties are in the same market or can be vertically integrated, unless the

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transaction meets the CCC merger notification thresholds;

- (c) in the carbon-based mineral sector, if the value of the reserves, the rights and the associated assets to be held as result of the merger exceeds KES10 billion; or
- (d) where the firms operate in the COMESA, meet the threshold in point (a) above, and two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya.

Excluded Transactions Requiring Approval of the CAK

- (a) where the combined turnover or assets (whichever is higher) is between KES500 million and KES1 billion; or
- (b) if, irrespective of asset value, the firms are engaged in prospecting in the carbon-based mineral sector.

Excluded Transactions Not Requiring Approval of the CAK

- (a) the combined turnover or assets (whichever is higher) does not exceed KES500 million;
- (b) the merger meets the CCC merger notification thresholds and at least two-thirds of the turnover or assets (whichever is higher) is generated or located outside of Kenya;
- (c) the merger takes place wholly or entirely outside of Kenya and has no local nexus; or
- (d) the merger involves a holding company and its subsidiary wholly owned by undertakings belonging to the same group or amalgamations involving subsidiaries wholly owned by undertakings belonging to the same group.

It is useful to note that there is no need to seek an approval from the CAK for transactions that meet the notification thresholds of the CCC (unless two-thirds or more of the firms' turnover or assets (whichever is higher) is generated or

located in Kenya). The parties in this regard are required to notify the CAK of the CCC merger filing within 14 days of the CCC filing.

When assessing the merger notification, the CAK, applies a two-fold test as follows:

- competition assessment – the effect of the proposed merger on competition; and
- public interest assessment – the proposed merger's effect on public interest concerns such as opportunities for small businesses and loss of employment.

2.5 Labour Law Regulations

There are currently no laws in Kenya that regulate the process of transferring employees during an M&A transaction. In 2019, a draft Employment (Amendment) Bill was introduced in parliament to provide for mandatory transfer of employees in the event of a merger. However, the Bill did not progress.

Presently, the CAK requires the acquiring party to disclose its plans for the target company's employees. Depending on the merging entities' track record on labour-related matters, public interest, and anticipated efficiencies, the CAK may impose conditions on the acquirer to assume all employment contracts entered into by the target. An illustrative case of this was the proposed sale and purchase of assets of Mombasa Apparel (EPZ) Limited by Nava Apparels L.L.C-FZ where the CAK approved the acquisition on condition that Nava Apparels retain all 4,478 employees of the target company under terms that are at least as favourable as their existing contracts, contingent upon each employee's acceptance of continued employment under the acquirer's management.

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In some newsworthy instances, employees affected by M&A transactions have sought legal action when transactions have had significant effects on their employment. In 2020, the Competition Tribunal in *Telkom Kenya Limited v Competition Authority of Kenya* stated that public interest should be a significant consideration to ensure that employees who lose their jobs as a result of an M&A transaction are reabsorbed in the market. In addition, the High Court in *Evans Aseto and Another v National Bank of Kenya and Another* was of a similar persuasion.

2.6 National Security Review

There is no definite rule mandating security reviews for M&A transactions. Nevertheless, the CAK Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act have created the public interest assessment to evaluate mergers, which promotes transparency and predictability in the process. Moreover, the CAK assesses the impact of mergers on public policy in specific sectors and collaborates with other government bodies when reviewing merger proposals.

Furthermore, the authors have observed the National Security Council's participation in mergers that concern entities deemed vital to the security of the nation. In 2023, the National Security Council was involved in the purchase of a 60% stake in a telecommunications firm by the National Treasury. This action was taken because the company offered crucial services to multiple government departments.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

There have been several developments related to M&A in the last three years.

Regularisation of Unapproved Mergers

In 2024, the CAK approved the regularisation of a merger between LSF11 Skyscraper Holdco S.a.r.l and SIKA International AG, a global merger which had a local connection. LSF11 Skyscraper Holdco S.a.r.l is a holding company incorporated in Mauritius with a controlling interest in Master Builders Solutions Kenya Limited while SIKA International AG is a company incorporated in Switzerland and controls SIKA Kenya Limited. Whilst the acquisition was at a global level, it had the effect of SIKA International AG acquiring indirect control of Master Builders Solutions Kenya Limited therefore qualifying as a merger within the Competition Act for which CAK notification was required. The parties to the acquisition notified the CAK of the acquisition and its implementation in Kenya and requested to regularise the transaction.

The CAK ordered the merged entity to pay a penalty of KES 17,492,795.23 for contravening the Competition Act and implementing the merger without CAK approval. The CAK also ordered the parties to file the merger notification which CAK considered and approved.

This case highlights an instance of the enforcement mechanisms under the Competition Act which allows CAK to impose a financial penalty not exceeding 10% of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question for violation of the Competition Act.

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Draft COMESA Competition and Consumer Regulations

In 2024, the CCC published the draft COMESA Competition and Consumer Protections Regulations (Draft Regulations) for comments. The Draft Regulations, if adopted, will repeal and replace the current COMESA Competition Regulations, 2004. They introduce a myriad of changes including, in relation to M&A:

- Notification threshold for joint ventures – a proposed joint venture shall be notifiable if the joint venture is intended to operate in two or more member states, at least one of the parents to the joint venture operates in one or more member states and the combined annual turnover or value of assets (whichever is higher) in COMESA of all parties to the joint venture meets the prescribed thresholds.
- Mergers involving digital markets – mergers involving digital platforms or markets shall be notifiable where at least one of the parties to the merger has operations in at least two member states and the merger meets the prescribed transaction value.

The Competition Amendment Bill, 2024

This bill was published in May 2024 and seeks to include privatisation in the definition of the term “mergers” and introduces a framework for the public to give information to CAK on a proposed merger. The bill also seeks to regulate digital activities such as online marketplaces, social networks and cloud services, recognising their impact on competition in the market. This bill has undergone public participation but is yet to be discussed in parliament.

ICT Sector Changes

In 2023, the Ministry of Information Communication and Technology (ICT) removed the 30% local ownership requirement for ICT service pro-

viders. This change opens the door for increased foreign direct investment and potential M&A activity within Kenya’s ICT sector.

African Competition Protocol

The African Union Assembly adopted the African Continental Free Trade Area (AfCFTA) Protocol on Competition Policy in February 2023. This protocol establishes a continental competition regime for Africa with a focus on mergers and acquisitions that have a significant impact on the AfCFTA market. While details like thresholds are still being determined, the protocol signals a move towards greater scrutiny of large-scale M&A deals across the continent. It is worth noting that this protocol does not replace the authority of national competition regulators.

Appointment of Contact Person by Private Companies

Changes to the Companies Act in 2023 introduced a requirement for Kenyan private companies to appoint a local contact person if they do not have a company secretary or a Kenya-based director. The contact person maintains company records and must make them available to authorities when requested.

Taxation

The Finance Act, No 4 of 2023 included amendments with direct implications for M&A in Kenya. Firstly, a 15% capital gains tax (CGT) now applies to indirect sales of shares in Kenyan companies (where the seller held at least a 20% stake). This impacts the returns on exiting investments. Secondly, the sale of at least 20% of a Kenyan company’s shares must be reported to the Kenya Revenue Authority, adding an administrative step for both buyers and sellers in M&A deals.

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3.2 Significant Changes to Takeover Law

The Business Laws (Amendment) Act 2020 amended the Takeover Regulations to allow the purchaser to squeeze out dissenting shareholders where the purchaser acquires 90% of the share capital of the target. The threshold for squeeze-out had momentarily been reduced to 50% in 2019 but this has been reinstated to 90%. There has not been any subsequent change to the takeover laws since.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

The public takeover market is not very active. An offer made to acquire additional shares will typically be made by a shareholder already having a significant shareholding which they had since listing or which they have increased over time.

However, there are restrictions on how much shareholding can change in a year. In this regard, the Takeover Regulations provide that a company holding 25% but less than 50% of the voting shares of a listed company can acquire up to 5% additional shares in a calendar year in such listed company up to a maximum of 50%. In addition, certain actions may trigger mandatory takeover obligations. Such actions include:

- an existing shareholder holding more than 25% but less than 50% of the voting shares of a listed company acquiring in any one year more than 5% of the voting shares of such company;
- an existing shareholder holding 50% or more of the voting shares of a listed company acquiring any additional voting shares;
- a person acquiring a company that holds effective control in a listed company; and

- a person acquiring 25% or more of the shares in a subsidiary of a listed company that has contributed 50% or more to the average annual turnover of the listed company in the last three years preceding the acquisition.

4.2 Material Shareholding Disclosure Threshold

Every year, companies are required to submit returns with information about their shareholders.

In addition, the Companies (Beneficial Ownership Information) Regulations, 2020 (“*BO Regulations*”) introduced a requirement for companies incorporated in Kenya to file a register of beneficial owners. A beneficial owner is a natural person who either directly or indirectly (i) holds at least 10% of the shares or voting rights, (ii) has the power to change directorship or (iii) has a significant influence over the company. The BO Regulations do not provide clear instructions on how to show the beneficial interest of companies with multiple shareholders, such as public companies, where no shareholder beneficially owns 10% of the shares. This has caused practical difficulties for such companies in meeting compliance requirements.

Furthermore, the Companies Act requires companies to maintain details and records of all nominee directors. A nominee director is an individual or legal entity that routinely exercises the functions of the director in the company on behalf of and subject to the direct or indirect instructions of a director. A company is required to maintain a register of nominee directors and disclose details of the register to the Companies Registry. Companies are also required to maintain a register of members with details of the nominee shareholders. These are shareholders who exercise the associated voting rights

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according to the instructions of the nominator or receive dividends on behalf of the nominator. It should be noted that these registers are not open to inspection by members of the public.

The Capital Markets (Licensing Requirements) (General) Regulations, 2002 (“*Licensing Regulations*”) specify that any person who acquires “*notifiable interest*” (ie, 3% or more) in shares of a listed company or who ceases to be interested in such shares, must notify the listed company of the acquisition or cessation of interest in the shares. The Licensing Regulations also require that listed companies report to the NSE on a monthly basis:

- all persons who have acquired or cease to have a notifiable interest in its shares;
- all directors holding 1% or more in the relevant share capital; and
- cumulative holding of the relevant share capital by directors.

The Capital Markets (Public Offers, Listings and Disclosures) Regulations, 2023 require several types of disclosures, including:

- monthly disclosure to the NSE of every person who holds or acquires 3% or more of the listed company’s ordinary shares in the case of a company listed on the Main Investment Market Segment or 5% or more of the company’s ordinary shares in case of a company listed on the Small and Medium Enterprises Market Segment;
- publication by a listed company, in its annual report of:
 - (a) distribution of shareholders; and
 - (b) names of the ten largest shareholders and the number of shares in which they have an interest as shown in the issuer’s register of members;

- immediate disclosure by an issuer of any information likely to have a material effect on market activity; and
- disclosure in a public announcement any substantial sale of assets involving 25% or more of the total assets.

4.3 Hurdles to Stakebuilding

It is possible for a company to introduce higher reporting thresholds in its articles of association; however, it is not possible to introduce reporting thresholds that are lower than are prescribed in the existing legislation.

There are certain hurdles that would limit stakebuilding in Kenya. Typically, shareholders are entitled to pre-emption rights under the company’s articles of association and as such a shareholder wishing to build up its stake in a company would require the consent of the board of directors and existing shareholders.

There are also a number of statutory hurdles to stakebuilding. Under the Takeover Regulations, a person can be assumed to have a strong intention to take over a listed company if they meet certain criteria. These criteria include:

- holding more than 25% of the shares but less than 50% of the voting rights and acquiring more than 5% of the voting rights in any year;
- holding at least 50% of the voting shares and acquiring more voting shares;
- directly or indirectly acquiring a company that has effective control of a listed company; and
- obtaining at least 25% of a subsidiary that has contributed at least 50% of the overall turnover of the company in the previous three fiscal years.

In addition, the Takeover Regulations impose restrictions that prohibit the issuance of 25%

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or more of the share capital of a subsidiary of a listed company or 10% or more of the share capital of a subsidiary that has contributed to 25% or more of the average turnover in the last three financial years of a listed company without full disclosure to the shareholders of the listed company.

In addition, certain sectors have specific limitations, such as the CBK, which prohibits the acquisition of more than 5% of the share capital in a banking or financial institution without its prior approval. Similarly, the CA requires prior approval for any changes in ownership, control, or proportion of shares held in a company. Any change in shareholding of a CA licensee exceeding 15% of the issued share capital or the acquisition of at least 5% additional shares by an existing shareholder must be notified to the CA for its approval. In insurance, the acquisition, transfer or disposal of more than 10% of the paid-up share capital or voting rights of an insurer requires the prior written approval of the Commissioner of Insurance.

4.4 Dealings in Derivatives

Transactions involving derivatives are allowed, and such activities are governed by the Capital Markets (Derivatives Markets) Regulations, 2015. These regulations establish guidelines for participants in order to promote transparency and stability within the market. The trading of derivatives is also made easier through NEXT, which is a derivative market on the NSE, regulated by the CMA. To regulate derivative markets, a number of rules have been developed, including the 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 require derivatives exchanges to retain and preserve all books, registers, minutes of the board and other documents for not less than seven years.

In addition, derivative exchanges must disclose the shareholding pattern of the exchange every quarter within 15 days from the end of each quarter to the CMA, which should outline the names of the ten largest shareholders together with the percentage of shares held, the names of the Kenyan shareholders holding at least 15% of the paid-up equity share capital, and 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.

4.6 Transparency

The Takeover Regulations provide that an acquirer who wishes to take over a listed company must submit to the CMA the takeover offer document, which shall contain information on the acquirer's intentions regarding the continuation of the business of the listed company. The acquirer is further required to state intentions regarding major changes to be introduced in the business, intentions regarding strengthening the financial position of the listed company, if such plans include merger, liquidation, selling assets or redeploying fixed assets or any major changes in the structure of the listed company or its subsidiaries. Where there are long term commercial justifications for the proposed take-over offer, these should be disclosed together with any intentions regarding the continued employment of the employees of the listed company.

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In the case where a shareholder has acquired effective control in a listed company but has no intention of making a takeover offer, it is required to seek an exemption from the conditions imposed by the CMA.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Private companies are under no obligation to disclose a deal; hence, most bids remain private.

On the other hand, for listed companies, an acquirer is under a duty to announce its proposed offer through a press notice and serve a written notice of intention to the listed company, NSE and CMA within 24 hours from the resolution of its board to acquire effective control of the listed company. Where the acquirer is engaged in the same business as the listed company, it will be required to service the notice of intention to the CAK. Subsequently, the acquirer is to serve the listed company within ten days of the date of notice of intention with its statement of the takeover scheme, which cannot be amended or withdrawn without the prior written consent of the CMA.

The listed company's disclosure obligation kicks in after receiving the acquirer's statement of the takeover plan. The listed company is obliged to inform the NSE and the CMA and announce the proposed takeover within 24 hours of receipt of the acquirer's statement.

5.2 Market Practice on Timing

The timing of deal disclosure is prescribed by law and is set out in **5.1 Requirement to Disclose a Deal**.

5.3 Scope of Due Diligence

An acquirer typically carries out due diligence on the target before the acquisition. This is based on all publicly available information and information supplied by the target and/or its shareholders. The scope varies depending on factors such as the structure of the acquisition, whether it is a public takeover, and whether it is a cross-border transaction. It is common for acquirers to conduct due diligence on the following areas: general corporate, material contracts, regulatory compliance and licensing, financial arrangements and borrowings, real estate, material assets, employment, litigation, information technology and intellectual property rights, and insurance. Increasingly, investors are concerned with sustainable and responsible business practices and therefore the scope of due diligence has been extended to encompass Environmental Social and Governance (ESG) considerations and compliance with anti-money laundering regulations.

5.4 Standstills or Exclusivity

It is typical for M&A transactions to involve exclusive arrangements, but it is important for parties to ensure that standstill and exclusivity agreements fall within the bounds of Kenyan law as failure to do so could invalidate the transaction and result in a penalty:

- the Companies Act permits opt-in resolutions that nullify any agreement that limits the transfer of shares in the target to the acquirer during the offer period, or restricts the transfer of shares to anyone while the acquirer holds more than 75% of the voting shares; and
- the Takeover Regulations prohibit the suspension of trading of shares of a listed company during a takeover unless the suspension is necessary to enable the target to disclose information regarding the takeover offer or as

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directed by the CMA to obtain material information on the offer.

5.5 Definitive Agreements

Tender offers for publicly traded companies must be in writing. Furthermore, the takeover notice should specify the terms of the takeover offer, including acceptance, listing, and capital increase conditions in accordance with the Takeover Regulations.

Private companies, on the other hand, are not required to have a definitive agreement in writing, and it can be either oral or written. It is uncommon in most transactions to not have definitive agreements in place.

6. Structuring

6.1 Length of Process for Acquisition/Sale

There are no set timelines for private M&A transactions, and much depends on the parties involved.

With respect to public M&A transactions, specific timelines are set out in the Takeover Regulations.

- Within ten days of serving the notice of intention on the listed company, NSE, CMA and the CAK (where applicable), the party making an offer must provide the listed company with a takeover plan that has been approved by the CMA.
- Then, within 14 days of that, it must submit a takeover offer document to the CMA for approval.
- The CMA has up to 30 days to approve the takeover offer document, but it can take longer if necessary.

- Once the document is approved, the acquirer has five days to provide the target with the approved takeover offer document to distribute to its shareholders. The offer must be available for acceptance for 30 days after it is delivered.
- The target shall within 14 days from the date of receipt of the approved takeover offer circulate it to its shareholders together with an independent adviser's circular.
- Within ten days of the end of the offer period, the acquirer must notify the CMA and the NSE and issue a press release announcing the acceptance and the resulting change in structure.

If an M&A transaction requires competition approval, the CAK must make a decision on transactions within 60 days of receiving a notification or if any additional information is requested, within 60 days of receipt of the additional information. Where a hearing conference is convened, the decision should be made within 30 days of concluding the hearing conference. CAK may extend the approval period, but it must not be longer than 60 days.

For regional M&A transactions requiring CCC approval, the CCC is required to investigate a merger as soon as the notification (which must be complete) is received and to make a decision on the notification within 120 days, subject to any extensions approved by the CCC's board. Furthermore, it is mandatory for the parties involved in the regional M&A transaction to inform the CAK about the submission of the merger filing to the CCC within 14 days from the date of submission.

6.2 Mandatory Offer Threshold

The Takeover Regulations prescribe that a person is presumed to have a firm intention to take

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over a listed company if the person acquires a company that holds “*effective control*” in a listed company or together with the shares already held by associated persons or related companies or persons acting in concert, will result in “*acquiring effective control*” of the listed company. The threshold of “*effective control*” is control of 25% of the shares of a listed company.

The Takeover Regulations also prescribe other circumstances under which a person is presumed to have a firm intention to make a takeover bid. These are:

- the acquirer holds more than 25% of the shares, but less than 50% of the voting rights, and acquires more than 5% of the voting rights in the company in any one year;
- the acquirer holds at least 50% of the voting shares and acquires additional voting shares; and
- the acquirer obtains at least 25% of a subsidiary that has contributed at least 50% of the general turnover of the company in the previous three financial years.

6.3 Consideration

Both payment in cash and by way of share swap is acceptable in Kenya. With respect to public M&A, the Takeover Regulations provide that the mode of payment would need to be set out in the takeover offer document. The acquirer may vary the terms of the takeover offer including increasing the consideration offered at least five days before the closure of the offer period.

In private M&A, parties may negotiate an earnout mechanism where the sellers will get additional payment in future upon the target attaining pre-agreed performance targets.

6.4 Common Conditions for a Takeover Offer

Common conditions for a takeover offer include the minimum number of issued voting shares of the listed company, the mode of payment, regulatory approvals, and the maintenance of a minimum percentage of shareholding by the general public to satisfy the continuing eligibility requirements for listing.

6.5 Minimum Acceptance Conditions

According to the Takeover Regulations, the takeover offer must state whether the offer is conditional upon acceptance by a certain number of shareholders, and a deadline for acceptance that is no more than 30 days from the date the offer is made. However, in competitive situations or special circumstances, the CMA may allow for a later deadline. The acquirer must declare that the offer is no longer dependent on that condition by the specified deadline.

Furthermore, the Takeover Regulations forbid any takeover agreements that do not offer the same favourable conditions to all shareholders who are being offered the opportunity to sell their shares. The acquirer must also disclose the identity of the ultimate acquirer and all related entities or persons acting in concert with the acquirer.

6.6 Requirement to Obtain Financing

Under the Takeover Regulations, an acquirer is not allowed to announce an intention to make an offer if there are no reasonable grounds to believe that the acquirer will be able to fulfil its obligations once the offer is accepted. The acquirer is also required to demonstrate to its financial adviser that it has enough funds to ensure the takeover offer will not fail. Additionally, when presenting the offer document, the acquirer must include a statement that assures

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all shareholders who wish to accept the offer that the acquirer has sufficient funds to complete the takeover and that they will be paid in full.

6.7 Types of Deal Security Measures

With respect to listed companies, the Takeover Regulations do not prohibit the implementation of measures to ensure the safety of a deal. However, any such measures must be revealed in both the takeover offer document and the notice of intention. Common deal security measures include exclusivity, break fees, and non-solicitation provisions. These deal security measures are also employable by private companies.

6.8 Additional Governance Rights

Typically, in shareholder agreements related to certain transactions such as private equity or cases where the buyer does not want full ownership, the buyers usually request governance rights, such as the right to have representation on the company's board and the power to veto certain decisions.

When it comes to public M&A transactions, the CMA's Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 (the "CMA Governance Code"), requires companies to treat all shareholders fairly, including minority and foreign shareholders. Listed companies are required to comply with the CMA Governance Code and any non-compliance should be disclosed in the annual report together with a statement of the directors as to the steps being taken to ensure compliance.

6.9 Voting by Proxy

Under the Companies Act, a shareholder is entitled to appoint a proxy to attend a meeting on behalf of the shareholder, speak, and even vote. Such shareholders must give notice of the

appointment of the proxy before the meeting is held.

6.10 Squeeze-Out Mechanisms

Under the Takeover Regulations, if an acquirer purchases 90% of a company's voting shares, they must make an offer to the remaining shareholders to buy their shares at a the current market value or the price offered to the other shareholders, whichever is higher. The sale and purchase process follows the rules outlined in the Companies Act, which explains the procedures for acquiring minority shares including issuing a notice of such intention to the minority shareholders. Such notices must be given within three months starting from the day after the offer period ends or within 6 months from the date of the offer for offers whose timelines are not governed by the Takeover Regulations. Although the acquirer has the right to acquire the remaining shares, minority shareholders can challenge this process by appealing to the court.

6.11 Irrevocable Commitments

Usually, it is standard practice to obtain firm and unchangeable agreement from both major shareholders and all shareholders in general before revealing any plans to make an offer. However, if there are any agreements related to voting, they must be disclosed in the takeover documents. For instance, after a company's initial public offering, the company may require current shareholders to promise not to sell their shares for a period of 24 months.

7. Disclosure

7.1 Making a Bid Public

How and when a bid is made public depends on whether the bid is being made with respect to a private company or a listed company.

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In the case of a private company, there is no obligation to publicly disclose a bid according to the Companies Act. However, if the bid meets certain criteria specified in the Competition Act, the company must notify or apply to the CAK and as part of the approval process, the CAK will issue a notice in the Kenya Gazette. It is possible for applicants to designate certain information as confidential when notifying the CAK, in order to prevent it from being publicly disclosed.

With respect to listed companies, a bid should be made public within 24 hours from the resolution of the acquirer's board to acquire effective control of the listed company. This is done through a press notice and serving the notice of intention to the listed company, NSE and CMA, and where the acquirer and the target are in the same business to the CAK.

7.2 Type of Disclosure Required

Disclosure With Respect to the CMA

The Takeover Regulations specifically provide that the following is required to be disclosed to the CMA:

- identity of the acquirer and all related companies or persons acting in concert or associated with the proposed acquirer;
- the identity of the listed company;
- the exchange at which the shares are listed;
- whether the acquirer intends to make a takeover offer or apply to the CMA for exemption from making a takeover offer;
- the type and total number of voting shares of the listed company:
 - (a) which are held or controlled directly or indirectly by the acquirer or any related companies;
 - (b) in respect of which the acquirer or any related company or any person acting in concert with the acquirer has received an

irrevocable undertaking from other holders of voting shares to which the takeover relates to accept the takeover offer; and (c) in respect of which the acquirer or any related company or any person acting in concert with the proposed offeror has an option to acquire;

- the details of any existing or proposed agreement, arrangement or understanding; and
- the conditions of the takeover offer, including conditions relating to acceptances, listing and increase of capital.

Disclosure With Respect to the CAK

When disclosing a bid to the CAK, the applicants (the acquirer and listed company) will be required to lodge:

- the documents highlighting the agreement/arrangement/understanding pertaining to the bid;
- audited financial statements of both the acquirer and the listed company for the last three years; and
- information on both the applicants' business along with information on the market share held.

The same level of disclosure will be required of a private company if it falls within the threshold of the Competition Act.

7.3 Producing Financial Statements

The Takeover Regulations require bidders to disclose their financial statements when disclosing a bid. The acquirer's statement is required to summarise the latest audited financial statements including:

- balance sheet;
- income statement;
- statement of the changes in equity;

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- cash flow statement; and
- earnings per share (prior to the takeover offer and post takeover).

Further, as stated in **7.2 Type of Disclosure Required**, applicants to the CAK are required to disclose audited financial statements for the last three years.

Financial reporting in Kenya is governed by the International Financial Reporting Standards (IFRS). These standards are mandated by (i) CBK, which published guidelines on the implementations of IFRS on financial statements; and (ii) the Institute of Certified Public Accountants of Kenya (ICPAK), which has stipulated that financial statements must comply with IFRS or IFRS for Small and Medium Enterprises (IFRS for SMEs).

7.4 Transaction Documents

As noted in **7.2 Type of Disclosure Required**, the Takeover Regulations outline that parties must disclose details of any existing or proposed agreement, arrangement or understanding relating to voting shares to which the takeover relates.

Further, the CAK requires transaction documents to be submitted along with the notification/application (as applicable) for purposes of analysing the terms and conditions of the bid to determine whether control is being effectively transferred to the acquirer and the impact of the acquisition on competition.

In addition, if an acquisition is being undertaken in a regulated industry such as the financial industry or insurance industry, the regulators (such as the CBK and the IRA) may require the applicants to lodge the transaction documents for purposes of regulatory approvals.

8. Duties of Directors

8.1 Principal Directors' Duties

The Companies Act codified the duties of a director which were established under common law. The duties are also provided for in the CMA Governance Code, with respect to listed companies. In summary both the Companies Act and the CMA Governance Code require a director to:

- act within their powers;
- promote the success of the company;
- exercise independent judgement;
- exercise reasonable care, skill and diligence;
- avoid conflict of interest; and
- not accept benefits from third parties.

In general, a director's duty is to the company, ie, the company shareholders. However, the duties of a director can be interpreted to apply to other stakeholders of the company such as regulators, employees, suppliers and customers.

Furthermore, other legislation such as the Insolvency Act, 2015 requires directors to act in the interests of other stakeholders of the company such as the creditors, when the company is undergoing an insolvency process.

It is also important to note that the emergence of ESG will force directors to owe their duties both to the stakeholders and company shareholders instead of solely the company's shareholders. In the case of listed companies, the NSE has issued the ESG Disclosures Guidance Manual, which provides listed companies with a guide on how they can collect, analyse, and publicly disclose important ESG information.

8.2 Special or Ad Hoc Committees

The decision to delegate powers held by directors is largely governed by each company's arti-

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cles of association. Shareholders and, in some instances, directors are at liberty to decide which director powers can be delegated to a committee. Ideally special or ad hoc committees are formed to deal with certain operational aspects of the company such as board nominations, remuneration, finance, investment, risk management, audit and governance.

Typically, in Kenya, committees are not formed to deal with conflict of interest. This is ideally because legislation has made provision as to how conflict of interest should be dealt with when it arises. For instance, the Companies Act requires a director with conflicting interest in a transaction or company to give notice of such conflict in writing to the other directors and to the members of the company. If a director in a public company, the notice is required to be given within 72 hours.

Moreover, the Takeover Regulations provide that the board of directors of the acquirer shall appoint an independent adviser where the board of directors of the acquirer is faced with a conflict-of-interest situation.

Nevertheless, a company is permitted to indicate in its articles of association or shareholders' agreement its bespoke processes of dealing with conflict of interest – such a forming an ad hoc committee – as long as the procedure is in compliance with the law.

8.3 Business Judgement Rule

The courts in Kenya have interpreted the business judgement rule in matters where there is need to strike a balance between allowing a derivative action to proceed and protecting the directors in actions done to promote the success of the company. The courts have outlined that directors cannot be liable for actions done to

promote the success of the company but will be liable in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust. This principle was established, most recently, in the matter of *Isaiah Waweru Ngumi and two others v Muturi Ndungu* [2016] eKLR.

With specific reference to takeover situations, the CMA Governance Code requires directors to exercise independent judgement and to promote the success of the company. In this respect the authors opine that the courts in Kenya will rely on the business judgement rule and would only deviate from the rule if the claim arises from an act or omission involving negligence, breach of duty or breach of trust by a director of the company.

8.4 Independent Outside Advice

The Takeover Regulations require the board of directors to appoint an independent adviser on receipt of the acquirer's statement. The independent adviser shall be an investment bank, or a stockbroker licensed by the CMA, and whose advice must be made known to the holders of the class of the voting shares to which the takeover offer relates, in a circular by the listed company to its shareholders.

Further, a director's duty to exercise independent judgement does not prohibit directors from obtaining independent advice which they may rely on when making decisions with respect to the company.

8.5 Conflicts of Interest

Director conflict of interest has been subject to litigation in Kenya. For instance, in the matter of *Exobi (Finance House) Limited v Zahid A A Nanji & 2 others* [2020] eKLR, the High Court determined that the directors breached the duty to

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avoid conflict of interest by failing to inform the excluded members/shareholders/directors of their interest in an existing transaction. Further, they failed to avoid conflict of interest by deciding in the absence of other shareholders to agree on the sale of company shares and acquired the remaining unallotted shares by allocating them to themselves.

With respect to conflict of interest of shareholders, there has not been any recorded litigation on it mainly because it is not stipulated under the law. However, as it is practice to include a non-compete or exclusivity clause in a shareholders' agreement, the breach of such a clause may be litigated from a contractual perspective.

9. Defensive Measures

9.1 Hostile Tender Offers

The Takeover Regulations do not contemplate nor prohibit hostile tender takeovers, ie, there is no process/procedure provided to guide how hostile tender offers should be undertaken. Notwithstanding, hostile tender offers are not common in Kenya.

9.2 Directors' Use of Defensive Measures

Directors of a listed company are restricted by the Takeover Regulations from employing certain tactics to defend against takeovers. These include:

- creating or issuing or permitting the creation or subscription of any shares of the listed company;
- issuing or granting options in respect of any unissued shares of the listed company;

- selling, disposing of or acquiring or agreeing to sell, disposing of or acquiring assets of the offeree or of any of its subsidiaries; or
- entering into or allowing contracts for or on behalf of the listed company to be entered into otherwise than in the ordinary course of business of the listed company.

9.3 Common Defensive Measures

There is no commonly used defence measure in the market, as hostile takeovers are not common in the Kenyan jurisdiction, as noted in **9.1 Hostile Tender Offers**.

9.4 Directors' Duties

The duties as provided in the Companies Act continue during the pendency of the director's tenure. However, in a takeover bid the most relevant duties are as follows.

- The duty to act within a director's powers as the directors must only exercise the powers vested in them by the company's constitution for the purposes for which the powers were conferred. Directors' powers must not be exercised for any other purpose, even if the directors may have honestly believed that they were acting in the company's best interests.
- The duty to avoid a situation in which the director has, or can have, a direct or indirect interest that conflicts, or may conflict, with the interests of the company.
- The duty to promote the success of the company. "Success" in this context will usually mean long-term increase in value, although what constitutes such success is a matter for the directors' good faith judgement.

9.5 Directors' Ability to "Just Say No"

Directors cannot "just say no" and take action that prevents a business combination. Directors have a duty to act in the best interest of the

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company, to exercise independent judgement, and to exercise reasonable care, skill and diligence. Further, they have a duty to promote the success of the company. In essence, directors should have regard to the interests of the company by first considering the bid before deciding on how to proceed.

10. Litigation

10.1 Frequency of Litigation

Although litigation is uncommon in M&A transactions, there has been an increase of arbitration disputes on M&A deals. The disputes commonly revolve around the due diligence process, whereby a party claims that proper disclosure was not made in the due diligence process.

Further, there has also been a rise in disputes in relation to employee grievances. It has become common for employees to apply for injunctive remedies to prevent M&A deals from concluding, pending the determination of employee benefits in instances of redundancy. This was recently seen in the acquisition of Spire Bank by Equity Bank where the High Court of Kenya delayed the transaction in October 2022 until an agreement was reached with the employees.

10.2 Stage of Deal

Most disputes are commonly brought after completion of a deal when the investor is a shareholder in the company and begins to understand the ins and out of the business. With respect to employment grievances, cases are commonly brought once the proposed merger or takeover has been announced or disclosed.

10.3 “Broken-Deal” Disputes

The economic climate in Kenya has become more uncertain, which may prompt parties to

re-evaluate the conditions of a transaction. An instance of this occurred when Centum Investment Co. PLC (Centum) recently withdrew from selling its 83.4% stake in Sidian Bank to Access Bank, Nigeria (Access Bank) as the price agreed upon in 2021 did not match the actual value of Sidian Bank at the time of the transaction’s completion, due to an increase in interest rates in the banking sector that allowed Sidian Bank to earn more profits in the time period.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not common in Kenya, but there have been instances of minority shareholders demanding fair treatment during takeovers of listed companies. The focus of activists has been in the valuation of the listed company and the price payable by an acquirer.

Though uncommon, shareholder activism is typically exercised in two ways:

- firstly, through shareholder protests at general meetings with complaints ranging from low dividend payouts to poor corporate governance; and
- secondly, through the lobbying for the change of management and the governance (including ESG) in an organisation.

11.2 Aims of Activists

Shareholder activism is not common in Kenya.

11.3 Interference With Completion

Affected shareholders will typically approach the courts to delay or prohibit a transaction if they believe their rights as minority shareholders have been ignored.

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