Employment Law

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KENYA

Employment considerations in Kenyan merger control

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Employment considerations in Kenyan merger control

When reviewing mergers, the Competition Authority of Kenya (CAK) doesn't just look at market dominance and consumer protection, it also pays close attention to employment considerations. Under section 46(2) of the Competition Act Cap. 504, the CAK, as the primary regulator, is mandated to assess whether a proposed merger is likely to have adverse effects on employment. The Merger Notification Guidelines (Guidelines) further expand the CAK's mandate by requiring a public interest assessment during merger review to ensure that the merger does not conflict with national government policies, including employment preservation and stability as well as the protection and encouragement of the growth of small businesses. The Guidelines provide for a public interest test (PIT) which explicitly outlines the parameters the CAK considers during merger review. The PIT recognises the need to enhance and sustain employment through supporting measures to ensure no substantial job losses occur as a result of mergers and the salvaging of failing and dormant undertakings. Mergers involving small and medium enterprises (SMEs) are often fast tracked as an initiative of enhancing their capacity to penetrate certain markets in order to offer credible competition and enhance employment.

The Guidelines outline that in assessing mergers with employment considerations, the CAK adopts a balanced yet firm approach. A key consideration is the track record of the acquiring party with respect to labour practices. Where an acquirer has a history of poor labour relations or disregard for employee rights, the CAK is likely to scrutinise employment impacts more rigorously. While some job rationalisation may be accepted where clearly linked to efficiency, such as the elimination of duplicated roles, the parties cannot rely solely on efficiency arguments to justify retrenchments. Instead, they must provide clear, evidence-based justifications showing:

- that the proposed job losses are both proportionate and necessary to realise the claimed efficiencies; and
- that the losses are necessary to achieve tangible public benefits, such as enhanced sector competitiveness, innovation or market stability.

Where the CAK identifies a *prima facie* risk of significant job losses, the burden shifts to the merging parties to prove why those job losses are warranted in the broader public interest considerations. In such instances, the CAK weighs the public interest in preserving jobs against the potential public benefits offered by the merger. To support this assessment, transacting parties will be required to provide the CAK with information on:

- the number of employees pre- and post-merger;
- any planned redundancies or retrenchments; and
- a statement of how the transaction may affect the terms and conditions of employment.

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Further, the CAK requires merging parties to demonstrate that employees or their representatives have been meaningfully consulted and informed in a timely and accurate manner about the potential impact of the merger on their employment. They will also need to provide detailed information on the likely impact (whether positive or negative) of the proposed merger on jobs and SMEs, as well as provide evidence of their engagement with affected parties including employee representatives and SMEs to ensure they have been treated fairly. Entities that fail to comply with the CAK's Guidelines may face penalties, including fines or the reversal of the transaction.

Conditional merger approvals

In transactions where material employment risks are identified, it is not uncommon for the CAK to grant approval with the conditions around commitments to preserve existing employment levels or delay retrenchments for a defined period post-merger. Recent trends show the CAK's increasing willingness to impose employment-related conditions as part of merger approvals. A significant proportion of the CAK's conditions relate to retention of employees, as well as the preservation of remuneration and other employment terms post-merger. The CAK has demonstrated the increasing use of employment-based conditions in the following merger approvals:

Mombasa Apparel (EPZ) Ltd / Nava Apparels LLC-FZ in 2024

Issue:
Large workforce at risk in an export processing zone.

Condition:
The acquiring entity had to retain all 4,478 employees on terms no less favourable than existing contracts, subject to individual acceptance

Acquisition of Gulf Energy Holdings Limited by KenolKobil PLC in 2020

Issue:
Potential redundancies and effects on downstream SME contracts.

Conditions:

- Retention of all 102 Gulf Energy employees for 24 months.
- No reduction in salaries or benefits during the period.
- For the duration of the contract

Acquisition of National Bank of Kenya by KCB Group in 2019

Issue:
Risk of job redundancies due to overlap in banking operations.

Condition:
The CAK approved the merger on the condition that 90% of the National Bank of Kenya employees be retained for at least 18 months post-merger.

These decisions collectively highlight a clear regulatory trajectory that employment considerations are no longer peripheral but are increasingly central to merger assessments in Kenya. The CAK is prepared to impose robust, enforceable conditions to safeguard employment.

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Key employment considerations for M&A transactions

The structure of a transaction, whether a share sale or an asset sale, can have significant implications for employment rights and obligations. Merging parties should carefully consider these legal and practical issues when structuring deals to ensure compliance with employment law and to avoid triggering regulatory scrutiny or conditional approval of transactions by the CAK.

1. Employment law issues must be carefully scrutinised during the due diligence phase of an M&A transaction. This includes assessing existing employee contracts, potential claims of discrimination or wrongful termination, pending litigation and union relationships. A thorough understanding of these matters allows the buyer to anticipate future risks and address them proactively.
2. Firms are encouraged to engage with employees, unions, employee representatives and regulators early to pre-empt challenges and offer proactive solutions.
3. In cross-border deals, particularly those under the jurisdiction of the Common Market for Eastern and Southern Africa, businesses must align public interest commitments across regulators and anticipate variable enforcement mechanisms and considerations.
4. Mergers frequently involve organisational restructuring, which can result in employee redundancies. It's critical to adhere to employment law when managing layoffs or terminations, as non-compliance can lead to significant legal risks. Conducting thorough consultations and following fair redundancy procedures are key to reducing the likelihood of claims from impacted staff.
5. Mergers often bring a sense of uncertainty for employees, potentially leading to lower morale, reduced productivity or increased staff turnover. To manage these challenges effectively, it's essential to have clear communication, employee rights protections and retention strategies to maintain stability and support workforce engagement throughout the transition.

Conclusion

Labour is now a material public interest consideration in merger control. Regulators are using their powers to shape more inclusive economic outcomes, ensuring that the gains from corporate restructuring do not come at the expense of vulnerable workers. For legal and commercial advisors, this means treating employment not as a peripheral risk but as a core part of any M&A strategy. Understanding the expectations of competition authorities, and structuring deals accordingly, is crucial.

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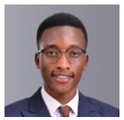

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