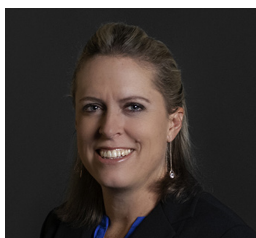
African Private Equity and Venture Capital Association

AVCA L&R LEGAL & REGULATORY BULLETIN

MERGER CONTROL ISSUE

ISSUE #6 | OCTOBER 2020

LETTER FROM THE CO-CHAIRS



Dear AVCA members

We have taken this opportunity to release a special bulletin on merger control in Africa. Competition law measures in Africa have become a regional and country focus in recent years, with over 25 jurisdictions now having operational regimes. These measures seek to ensure an open, competitive market and prevent the abuse of power by companies with a dominant market position, including preventing mergers that would cause a market to become less competitive. As merger activity has steadily increased, the need for local and regional regimes, and more sophisticated and efficient regimes, has become prevalent. The comprehensive Angolan Competition Law regime became active in 2019, as did the new standalone Nigerian competition law regime. South Africa has had a substantive regime in place for many years, however 2018 saw some material developments with a number of amendments to the legislation.

In addition to individual country regimes, regional authorities have been established and mandated to facilitate regional enforcement and economic unity. COMESA was established to protect a common market area comprising 19 member states from anti-competitive practices, and has established cross border merger protocols between member states. The East African Community Competition Authority was mandated with six partner states to promote and protect fair competition its region.

This publication seeks to provide you with detail on the competition law arrangements in key countries across Africa (mandatory and non-mandatory) and highlights the differences and commonalities between them, including notification requirements, filing fees, enforcement actions and probability of enforcement, remedies, political considerations, recent interesting cases, and prospective changes to legislation in the area.

We hope you find this bulletin useful and informative and wish you a promising end to the year.

Best
Geoff and Cindy

ABOUT AVCA

The African Private Equity and Venture Capital Association is the pan-African industry body which promotes and enables private investment in Africa.

AVCA plays a significant role as a champion and effective change agent for the industry, educating, equipping and connecting members and stakeholders with independent industry research, best practice training programmes, and exceptional networking opportunities.

With a global and growing member base, AVCA members span private equity and venture capital firms, institutional investors, foundations and endowments, pension funds, international development finance institutions, professional service firms, academia, and other associations.

This diverse membership is united by a common purpose: to be part of the Africa growth story.

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KEY TRENDS IN MERGER CONTROL ACROSS AFRICA

Joel Pandaro, Angeli Arora & Shahid Sulaiman
Dentons South Africa

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Introduction

The number and extent of country and regional merger control regimes that seek to prevent mergers from obstructing effective competition between businesses and to prevent monopolies being placed into dominant positions have increased extensively across Africa in recent years. Since 2010, the number of African countries with merger control regimes has almost doubled – there are now over 25 jurisdictions with operational regimes. Countries have also been securing membership to regional merger control regimes, as well as more actively enforcing suspected violations of competition laws.

Uganda, Ghana and Mauritius are amongst the jurisdictions that have not yet implemented mandatory merger control regimes. Some of these jurisdictions are currently working on implementing competition legislation - Mauritius, for example, has a voluntary regime but this only produces a small number of notifications on an annual basis and, therefore, a mandatory regime is currently being contemplated. By comparison, South Africa has one of the most established merger control regimes on the continent with a larger complement of staff and budget than other African jurisdictions.

COMESA and the EAC

In addition to jurisdiction-specific regulation, Africa also has a number of regional competition regulators, including the Common Market for Eastern and Southern Africa **("COMESA")**, the West African Economic Monetary Union, the Economic Community of West African States, the East African Community **(the "EAC")** and the Economic Community of West African States. COMESA is a free-trade area that is comprised of Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Somalia, Tunisia, Uganda, Zambia and Zimbabwe. COMESA came together with the aim of promoting regional integration through trade and the development of natural and human resources.

In 2004, the COMESA Competition Regulations and Competition Rules were adopted to prohibit anti-competitive practices within the COMESA Common Market and to establish a merger control regime for cross-border cases, as well as to address other competition law and consumer protection matters.

The EAC is a regional intergovernmental organisation of six Partner States: Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda, with its headquarters in Arusha, Tanzania. The East African Community Competition Authority is mandated to promote and protect fair competition in the EAC and to provide for consumer welfare. The EAC Competition Act prohibits, amongst other things, anti-competitive trade practices and the abuse of market dominance. It provides for notification of mergers and acquisitions, notification of subsidies granted by Partner States and regulates public procurement.

In principle, the regional regulations are supposed to simplify the merger control process for multi-jurisdictional transactions, but, in some cases, they have created uncertainty where there is dual application of local laws and regional regulations, which has resulted in parallel notifications (with different tests being applied, particularly if jurisdictions have not yet harmonised their domestic competition laws with that of the regional competition regimes).

> "Since 2010, the number of African countries with merger control regimes has almost doubled – there are now over 25 jurisdictions with operational regimes."

For example, in countries that are governed by their own merger control regimes, as well as the COMESA regime, there is dual regulation in effect – domestic laws apply within the country's borders and the COMESA Competition Regulations and the COMESA Competition Rules regulate mergers and acquisitions with cross-border effect in COMESA. For some jurisdictions, transactions with cross-border effects may even end up involving multiple authorities – for example, a merger transaction in Kenya may fall within the ambit of three separate regimes, and in theory would need to be notified to the EAC Competition Authority, the Competition Authority of Kenya (the "CAK") and the CCC depending upon its cross-border effect. This multiplicity of notifications can result in increased complexity and transaction costs in terms of merger clearances.

What triggers merger filings?

Generally, in jurisdictions across Africa, a merger filing is triggered when there is a direct or an indirect acquisition of the whole or part of a business of another entity, which gives rise to a change of control in that business, and the merger notification thresholds for the particular jurisdiction are met. If the merger meets these requirements, prior approval from the relevant jurisdiction's competition authority would then be required to proceed with the merger; otherwise the competition authority may impose penalties on the merging parties.

The thresholds, as well as the notification requirements, do differ across jurisdictions. The thresholds may be based on the parties' size and, in some jurisdictions, can be very low in terms of value. Filing fees can also be very high, especially where they are calculated as a percentage of the merging parties' global turnover or assets.

Role of the public interest in merger control

Merger control authorities across Africa are taking into account public interest concerns more than ever in evaluating mergers and determining the conditions that they will impose when approving mergers.

These considerations include the impact of mergers on employees, specific industries or sectors, the continuation of supplier arrangements, the continuation of certain business lines, especially where horizontal mergers are contemplated, the ability of small and medium scale enterprises to become competitive and barriers to entry.

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In the South African merger control context, the public interest assessment now plays a more pivotal role due to recent amendments to the competition legislation. Some jurisdictions (such as South Africa and Nigeria) also make provision for ministerial participation in competition authorities' proceedings in public interest matters.

Enforcement and Remedies

Merger control authorities are also increasing their use of enforcement action in connection with mergers implemented without approval. Competition authorities in various jurisdictions have a wide range of powers that can be utilised where the merging parties fail to follow the rules. For example, some competition authorities have the power to impose fines calculated on the annual turnover of the merging parties, hold corporates and directors personally liable for committing offenses and order that transactions are declared void and that mergers be unwound.

The preference for African merger control authorities generally seems to lean towards behavioural remedies as opposed to structural remedies. Structural remedies are measures adopted by a competition authority which require some form of structural change on the part of the party or parties to whom the measures are directed, such as the divestment of assets. Behavioural remedies are designed to regulate the future conduct of the relevant party or parties (for example, regulating the prices which a party may charge, requiring merging parties to maintain certain competing business lines or products for a specified period).

Kenya is an example of a jurisdiction that has greatly amplified its intention to detect and prosecute competition contraventions in recent years – the CAK is increasing its capacity and in doing so has become much more active in its enforcement of compliance failings.

COVID-19 and Merger Control

As many countries in Africa went into full or partial lockdowns in March and April 2020 as a result of COVID-19, there have been some changes in terms of how merger control notifications/approvals are handled. Generally, competition authorities in Africa (particularly the regional competition authorities) have tried to maintain some level of operation (on the basis that a complete halt to merger control may be extremely detrimental to an already beleaguered economy). For example, in Kenya, the CAK facilitated remote working and encouraged parties to submit filings electronically. The Nigerian Competition Authority (the Federal Competition and Consumer Protection Commission) issued guidelines advising that it will prioritise the review of merger notifications in certain situations for example:

> "Competition authorities in various jurisdictions have a wide range of powers that can be utilised where the merging parties fail to follow the rules."

- where there is a possibility of imminent failure of the business of a merging party if the transaction is not urgently considered;
- where there are time limitations in a host jurisdiction (other than Nigeria); or
- where the application is otherwise time-sensitive (where regulatory approvals may lapse, for example).

> "The preference for African merger control authorities generally seems to lean towards behavioural remedies as opposed to structural remedies."

In practical terms, the changes to how merger control notifications/approvals are handled have resulted in operational delays and longer waiting periods for responses. This has had a knock on effect on deals – which have not been able to complete until the condition precedent relating to competition approval is met.

Key trends we are seeing in the foreseeable future

In terms of numbers which perhaps indicate how "active" the various African merger control regimes are, we note the following:

- the COMESA Competition Commission handled 46 mergers in 2019, granting 37 unconditionally and 6 conditionally.
- In 2019, the South African Competition Commission, a particularly busy African competition authority, considered 348 merger notifications, of which 333 were finalised, around 286 were approved without conditions and 40 were approved with competition or public interest conditions.

By comparison, in 2019 the European Commission (the **"EC"**) received 382 notifications. In that period, the EC cleared 343 of the notified transactions after a phase I review, six after a phase II review (an in-depth analysis of the merger's effects on competition) and prohibited three concentrations on the basis of horizontal conflicts.

The above figures appear to show a promising trend in some jurisdictions in Africa towards actively developing and improving their merger control regimes and we see this trend continuing in the future (although COVID-19 may have slowed that progress in the short-term). Countries like Ethiopia, Morocco,

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> "number of regional networks and links the regulators have established with one another across Africa has furthered cooperation and transparency across jurisdictions and in turn allowed them to become more sophisticated in their analysis of mergers."

Mozambique, Nigeria, South Africa, Zambia and Zimbabwe, have been looking to introduce changes to competition legislation aimed to increase the efficiency of monitoring and supervision by competition authorities, harmonise competition legislation with other local laws and generally improve competition in various economic sectors.

To expand, earlier this year, Nigeria's Federal Competition and Consumer Protection Commission published draft Merger Review Regulations 2020 and revised the draft Merger Review Guidelines 2020, which will provide further clarity on the merger control review process and procedure. There is also a significant overhaul of merger control regulations taking place Zimbabwe – the reform aims to (i) address a lack of clarity on the definition of the abuse of dominance, (ii) provide specifics with regard to monopoly situations being declared unlawful on public interest grounds, (iii) provide an improved leniency programme, and (iv) shorten timeframes for the review of mergers. In South Africa, the competition authorities have become more assertive in imposing conditions to address public interest considerations.
In terms of influences on the competition regimes developed in Africa, we generally see the well-established EU model of substantive merger review influencing the framework used in Africa (as opposed to the U.S. model). In South Africa, for example, the approach adopted by the EU often finds traction in the analysis and approach adopted by the competition authority and competition practitioners.

Moreover, the number of regional networks and links the regulators have established with one another across Africa has furthered cooperation and transparency across jurisdictions and in turn allowed them to become more sophisticated in their analysis of mergers. However, the countries in the African region will need to continue to evaluate the inter-play between regional and national merger control regimes, to ensure that the various regimes work effectively together and do not become a burden for deals on the continent.

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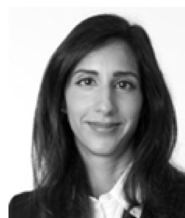

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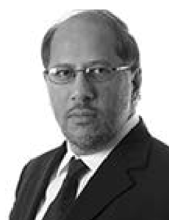

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The East African Community (the "EAC") was established in 2000 pursuant to the Treaty for the Establishment of the East African Community 2000, (amended in 2006 & 2007). It is comprised of six member states: Uganda, Burundi, Kenya, Rwanda, South Sudan and Tanzania.

Regulation of competition in the **EAC** is based on the East African Community Competition Act, 2006 and the East African Community Competition Regulations, 2010. The EAC Competition Act establishes the EAC Competition Authority[1] (the **"Authority"**), which is tasked with enforcing the provisions of the COMESA competition laws.

This section answers some of the frequently asked questions on competition regulation by the EAC, and more specifically, the Authority.

Are there any recent enforcement actions of particular note or interest?
There are no recent enforcement actions that have been taken by the Authority, as the Authority is yet to operationalise its activities.

Since its constitution, some of the major milestones made by the Authority include:

- preparing proposals to amend the EAC Competition Act;
- the preparation of the Authority's first Strategic Plan 2019/2020 – 2023/2024; and
- the implementation of the some of the activities in the strategic plan.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
A merger or acquisition that has a cross-border effect in the EAC will have to be notified to the Authority before it is implemented. However, the EAC competition regime does not provide the criteria that will be applied in determining whether there is a cross-border effect.

It is expected that once merger control by the Authority is operationalised, guidelines will be provided to address foreign-to-foreign mergers, including criteria to determine whether there is a cross-border effect.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
A notification to the Authority should be accompanied by the prescribed filing fee, which will be set by the Authority.[2] It is expected that the Authority will provide details on the filings fees at the same as it operationalises merger control.[3]

The notification referred to in Question 2 above will need to be made by the undertaking acquiring control. This implies that it is the acquirer who will also be responsible for the notification fees.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
Any transaction carried out in contravention of the requirements will be void. It is also an offence to consummate a merger without approval.

However, the extent of enforcement and potential actions that the Authority may take are not known, as no enforcement measures have been taken so far.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?
The regime provides no clear guidelines on the merger notification thresholds and transactions that are exempt. The Authority is expected to provide clarity on merger thresholds for notifiable mergers once operationalised.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
The merging parties should submit a duly filled Form EACCA 1 and the originals or certified copies of the accompanying documents of each party, which include:

- the memorandum and articles of association;
- audited annual financial statements for the last 3 fiscal years;
- strategic business plans;
- the certificates of incorporation/registration;
- a list of shareholders with greater than five per cent shareholding;
- the acquisition / merger agreement; and
- any other relevant documents.

If the Authority is of the opinion that the documents submitted are inadequate, it may request additional information, in the format provided in Form EACCA 2.[4]

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
The considerations allowed under the East African Community Competition Act, 2006 do not factor in political considerations. However, a member state may grant a subsidy to an undertaking based on public interest.[5] A member state granting such subsidy would need to notify the Authority.[6]

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
No trends are apparent as yet as merger control has not been operationalised by the Authority.

"A merger or acquisition that has a cross-border effect in the EAC will have to be notified to the Authority before it is implemented."

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
The Authority has not published any decision yet, therefore it is

difficult to identify any sector of focus. However, sector studies carried out by the Authority to understand competition in EAC focussed on the retail sector.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
The constitution of the Authority reflects a mix of personnel who are highly experienced in merger control. This may demonstrate the Authority's interest in merger control as the first component of its mandate when it is operationalised.

[1] East African Community Competition Act, 2016, s. 37
[2] East African Community Competition Regulations, 2010, reg. 3.
[3] East African Community Competition Act, 2016, s. 11(3)
[4] East African Community Competition Regulations, 2010, regs. 5 and 35.
[5] East African Community Competition Act, 2016, s. 14.
[6] East African Community Competition Act, 2016, s. 15.

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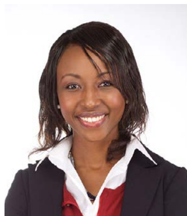

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COMESA

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Introduction

The Common Market for Eastern and Southern Africa ("COMESA") competition law regime is based on the COMESA Treaty, the COMESA Competition Regulations (the "Regulations") and the COMESA Competition Rules. The COMESA Competition Regulations establish the COMESA Competition Commission (the "CCC"), which is tasked with enforcing the provisions of the COMESA competition laws.

The CCC has also published the COMESA Merger Assessment Guidelines (the **"COMESA Merger Guidelines"**), which set out mechanisms for determining whether a transaction is a notifiable merger under the Regulations, the procedural obligations of parties to such a merger, and the substantive and procedural elements of a merger assessment.

The COMESA merger control regime is non-suspensory and parties may implement their merger before approval is granted. Notification must however be made within thirty days of the decision to merge. However, completing prior to receiving approval may expose parties to the risk that the CCC may subsequently find the transaction to be anti-competitive, impose remedies and/or conditions.

Are there any recent enforcement actions of particular note or interest?

Despite having an active merger control regime, the CCC has undertaken minimal enforcement action with respect to merger control. The majority of the CCC's enforcement action has been focused on restrictive trade practices involving parties in a vertical relationship and consumer protection issues. In particular, the CCC has investigated distribution agreements entered into by parties operating in various sectors, such as the distribution of milk and dairy products, bleaching and non-alcoholic beverages. We are not aware of any recent enforcement actions relating to merger control.

> "The COMESA Merger Guidelines provide that an undertaking "operates" in a member state if its annual turnover or value of assets in that member state exceeds USD 10 million."

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?

Foreign-to-foreign mergers have to be notified to the CCC if all the following conditions are met:

- both or either of the acquiring firm and the target firm, operates in two or more COMESA member states;
- the merger notification thresholds are met (i.e., the merging parties' combined annual turnover or value of assets exceeds USD 50 million);
- the higher of (i) the annual turnover or (ii) the value of assets in the COMESA member states of at least two of the merging parties is equal to or exceeds USD 10 million; and
- it is not the case that more than 2/3 of the annual turnover or value of assets in COMESA members states of each of the merging parties is achieved or held within one and the same COMESA member state.

For a party to be deemed to "operate" in a COMESA member state, it need not be domiciled in a member state or have a subsidiary in a member state. The COMESA Merger Guidelines provide that an undertaking "operates" in a member state if its annual turnover or value of assets in that member state exceeds USD 10 million. As such, the operation test may be satisfied through exports, imports, representative offices or establishment of subsidiaries in a COMESA member state.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?

The merger notification fee is calculated as the higher of:

- 0.1% of the merging parties' combined annual turnover; or
- value of assets in the Common Market with a cap of USD 200,000.

The relevant turnover and value of assets of an acquirer is calculated by adding together, the annual turnover and value of assets in the COMESA member states of the following:

- the entity concerned;
- its subsidiaries, the subsidiaries of those subsidiaries, and so on;
- its parents, the parents of those parents, and so on; and
- other subsidiaries of its parents not included above.

The relevant turnover and value of assets of a target is calculated by adding together the annual turnover and value of assets in the COMESA member states of the following:

- the entity concerned; and
- its subsidiaries, the subsidiaries of those subsidiaries, and so on.

An undertaking is considered to be a parent of another undertaking where it:

- has the ability to determine a majority of the votes that may be cast at a general meeting of the undertaking;
- is able to appoint or to veto the appointment of a majority of the directors of the undertaking; or
- has the ability to determine the appointment of senior management, strategic commercial policy, the budget or the business plan of the undertaking.

A subsidiary is an undertaking in respect of which a parent can exercise the rights set out above.

The parties to a notifiable merger are responsible for paying the filing fees. However, the parties may agree how the filing fees are to paid (i.e., whether to split the filing fees between themselves or for one of them to pay the filing fees).

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?

While the Regulations and the COMESA Competition Rules have set out the rules to be followed by parties to notifiable mergers,

we are not aware of any case in which the CCC has imposed fines or taken any enforcement action relating to the implementation of a merger without notifying the CCC of the same.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?

Under the Regulations, a merger is defined as the *"direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person…"*.[1]

The Regulations define "controlling interest" in relation to any undertaking or an asset as *"any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking"*.[2]

The CCC considers "control" as such rights or other means that confer on the holder the possibility of exercising decisive influence on an undertaking or its assets. The factors that the CCC may consider in making this determination include:[3]

- the ability to determine the majority of the votes that may be cast at a general meeting of the undertaking;
- the ability to appoint or to veto the appointment of a majority of the directors of an undertaking;
- the ability to determine the appointment of senior management, strategic commercial policy, the budget or the business plan of the undertaking; or
- having a controlling interest in an intermediary undertaking that in turn has a controlling interest in the undertaking.

Therefore, investments that do not result in a change of control or do not confer any manner of control do not constitute a merger and, therefore, they would not be caught under the COMESA merger regime. On this basis, there is no separate/ special review in place for such investments.

Where parties to a transaction are uncertain as to whether an investment confers any control rights or interests, they can seek a letter of comfort or advisory opinion from the CCC.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?

Parties to a notifiable merger are each required to submit certified copies of the following documents to the CCC:

- annual reports for the last three years;
- financial statements for the last three fiscal years;
- list of current shareholders and their nationalities;
- list of current directors and their nationalities;
- the merger agreement;
- internal memoranda analysing the proposed merger;
- the board resolution appointing the company representatives in respect of the proposed merger and a letter appointing their legal representative; and
- any other document prepared in relation to the proposed merger.

The COMESA Merger Guidelines indicate that the CCC would seek to understand the commercial rationale for a merger from the perspective of each of the parties by reviewing the background documentary evidence from each of the parties.[4] The CCC will seek to understand how the merger transaction fits within each party's wider commercial strategies and, in particular, within the future strategy of the merged undertaking by reviewing documents such as a the board papers and planning documents.

The CCC therefore places significant importance on the internal documents submitted as part of a merger filing when it conducts its analysis.

However, where there are confidentiality concerns relating to the internal documents, the party may request that any documents or information submitted be treated as confidential by submitting a request for confidentiality to the CCC.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?

The merger control decisions of the CCC are governed by the Regulations. Whenever called upon to consider a merger, the CCC initially determines whether or not the merger is likely to substantially prevent or lessen competition. If it appears that the merger is likely to substantially prevent or lessen competition, the CCC then determines:

- whether the merger is likely to result in any technological efficiency or other pro-competitive gain that will be greater than and offset the effects of any prevention or lessening of competition that may result or is likely to result from the merger and would not likely be obtained if the merger is prevented; and
- whether the merger can be justified on substantial public interest grounds.

Public interest grounds include:

- maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;
- promoting the interests of consumers, purchasers, and other users in the region, in regard to the prices, quality and variety of such commodities and services; and
- promoting, through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new customers in the market.

"The Regulations and the COMESA Merger Guidelines do not contemplate political considerations when undertaking merger assessments."

The Regulations and the COMESA Merger Guidelines do not contemplate political considerations when undertaking merger

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assessments.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
Historically the CCC has approved mergers, subject to remedies or conditions as opposed to rejecting a merger.

The COMESA Merger Guidelines indicate that *"in each phase of its merger assessment, the CCC will permit the parties a reasonable opportunity to propose modifications to the merger or any prohibitions, restrictions or other conditions to be placed on the merger to address the Commission's concerns"*.[5]

The kinds of remedies imposed by the CCC are dependent on the competition concerns arising from the merger. Out of the over 230 merger applications reviewed by the CCC, the CCC has issued conditional approvals in over 17 of them. Most conditions imposed have been behavioural as opposed to structural. The majority the of CCC's conditions relate to the preservation of employment for specified periods of time and the preservation of the obligations of merging parties to third party local businesses and in general will track advice from relevant domestic competition regulators.

However, in a recent decision relating to the merger between Marinvest S.r.l. ("Marinvest", the Acquirer) Ignazio Messina & C. ("Ignazio", the target) and Roro Italia S.r.l, published on 22 December 2019, the CCC imposed a structural remedy that required Ignazio's East Africa business to be kept separate from the Marinvest's East Africa business, on the basis that the merger would result in market share accretion in the parties' South Africa and East Africa routes in which they were the largest players pre-merger. This was in addition to a condition requiring retention of Ignazio's employees engaged in its East Africa business for a period of two years.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
The CCC generally regulates all mergers across the COMESA common market. However, there are sectors that have reported more filings than others. For instance, the energy sector has recorded the highest number of filings in the first quarter of 2020, followed by the banking and retail sectors.

Mergers are also generally subjected to the same rules throughout the notification and analysis stage.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
Given the current circumstances created by the COVID-19 pandemic, the CCC has announced a series of amendments to its approach of accepting and reviewing merger filings.

Manner of submitting merger filings
The CCC announced in Notice 4 of 2020 (the "CCC Notice") that it is encouraging parties to submit notifications and filings of mergers (including certified copies of the supporting documentation) electronically. This means that parties are not be expected to submit hard copies of documents as required under the COMESA Merger Guidelines. The hard copies should be submitted by the parties at a later date when the health circumstances make it is possible.

Merger Notification Timelines
The Regulations require merger notifications to be filed with the CCC within 30 days of the party's decision to merge, which is generally the date of signature of the merger agreement. The CCC, in appreciation of the restrictions in movement and difficulties in gathering information and documents brought about by the COVID-19 pandemic, has announced that, provided that parties have engaged the CCC on the notification process, they will not be penalised for a failure to submit complete information within 30 days as required. However, a merger filing will only be considered complete once all the required information is submitted to the CCC.

Consultations and Meetings
The CCC has suspended on-site investigations and face-to-face meetings in relation to merger investigations for the duration of the COVID-19 pandemic. In place of physical meetings, the CCC is holding consultations and meetings through teleconferencing facilities until the situation normalises.

Investigation period
The CCC Notice also indicates that the CCC may not be able to complete its assessment of notified mergers within 120 days as required under the Regulations,[6] owing to the travel bans and lockdowns imposed in most COMESA member states, which the CCC usually engages with before making determinations on applications. As a result the 120 day period may be extended to allow more time for assessment in compliance with the Regulations.[7]

[1] COMESA Competition Regulations, Art. 23(1).
[2] COMESA Competition Regulations, Art. 23(1).
[3] COMESA Merger Assessment Guidelines, paras. 2.5 and 2.6.
[4] COMESA Merger Assessment Guidelines, para. 7.6.
[5] COMESA Merger Assessment Guidelines, para. 6.7.
[6] COMESA Competition Regulations, Art. 25 (1).
[7] COMESA Competition Regulations, Art. 25 (2).

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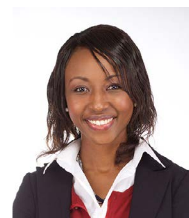

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Ordinance 03-03, dated 19 July 2003 relating to competition (as amended and completed) ("Ordinance 03-03") governs merger control in Algeria. Ordinance 03-03 has been amended by Law 08-12, dated 25 June 2008 and Law 10-05, dated 15 August 2010. An administrative opinion n°04/2016 (Avis n°04/2016) has suggested guidelines to amend Ordinance 03-03 ("Opinion 04/2016"). To the best of our knowledge, Ordinance 03-03 has not yet been amended since Opinion 04/2016.

The Algerian Competition Council (Conseil de la Concurrence) **(the "ACC")** is empowered to control mergers. The main role of the ACC in connection with merger control is to control and rationalise merger (concentration) and monopoly operations occurring in Algeria.

In addition to Ordinance 03-03, the Executive Decree 05-219, dated **12 May 2005** sets out the procedure governing the notification of a merger project **("Decree 05-219").**

Please note that the Algerian merger control legislation is in its early stages and that numerous provisions of local competition regulations have not yet been interpreted by the Algerian courts. However, Algeria has committed to improve its competition policy and regulation in its **Association Agreement**[1] with the European Union, dated 1 September 2005 (the "Association Agreement"). Article 41 of the Association Agreement provides in broad terms that both parties should cooperate in the implementation of their competition policies. An Algerian declaration attached to the Association Agreement states that Algeria *"shall be guided by the orientations of the European Union competition policy when applying its own competition regulation"*.

> "Algerian merger control legislation is in its early stages and that numerous provisions of local competition regulations have not yet been interpreted by the Algerian courts."

Are there any recent enforcement actions of particular note or interest?
None

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
Please note that no provision of merger control legislation pertains to the "nationality" of the parties.

Foreign-to-foreign mergers that meet the requirements of merger control under Ordinance 03-03[2] should, however, be notified to the ACC for clearance.[3]

A cooperation mechanism has been set up between the ACC and the European Union in order to control foreign-to-foreign mergers carried out within the European Union, which may have an effect in Algeria.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
There is no filing fee.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
Pursuant to Ordinance 03-03, a merger control review shall be triggered by mergers that are likely:

- to affect competition, and in particular mergers which will lead an entity to have a position of dominance in the market; and
- whenever the merger is sought to reach 40% of sales or purchases in the market (the **"Merger Control Threshold"**)

In such case, mergers must be notified to and authorised by the ACC.[4]

If the parties do not make the required notification, the ACC is empowered to impose a fine that could amount up to 7% of the turnover achieved during the last financial year.[5]

It should be noted that in the event that the activity of the entity does not cover a period of one year, the penalties applying upon failure to notify shall be limited to 7% of the turnover before tax achieved in Algeria during such period.[6]

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?
The Algerian legislation relating to merger control does not specify whether the regime applies to non-controlling minority investments.

Merger control is intended to cover all transactions that lead to a change in the structure of the entity and that influence the structure of the market.

Pursuant to Ordinance 03-03, a merger shall be deemed to arise when:[7]

- two or more separate entities merge;
- persons already holding control of one or more entities, acquire control of all or part of one or more entities, directly or indirectly, whether by the acquisition of:
  1. equity in the capital; or
  2. by the purchase of assets, contracts or any other means; or
- the creation of a joint venture performing all the functions of an autonomous economic entity.

Ordinance 03-03 determines that "control" constitute all rights streaming from contracts or any other means which, confer the possibility of exercising a decisive influence on an entity, including, but not limited to:[8]

- the ownership or the right to use all or part of the assets of the entity; or
- any rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of the entity.

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Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
Pursuant to Decree 05-219, notification of the potential merger (including the submission file) and the request for its execution is made to the ACC. The general secretary of the ACC must acknowledge receipt of the submission file. The submission file shall be made in five copies and includes original documents or legalised copies if original documents cannot be produced.[9]

The submission file should include the following documents:[10]

- a request to authorise the merger operation (the **"Authorisation Request"**);
- an information form relating to the merger operation;
- evidence of the powers conferred to the person(s) involved in the Authorisation Request;
- a certified copy of the articles of association of the entity or entities submitting the Authorisation Request;
- copies of financial statements of the last three financial years, if applicable, otherwise the financial statement of the last financial year is sufficient; and
- a legalised copy of the articles of association of the entity resulting from the merger, if applicable.

The ACC bases its assessment on the aforementioned documents and determines whether the terms of the transaction will result in an impact on competition within the market. These documents should, therefore, be critical to assess and control the mergers.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
Ordinance 03-03 provides that the government may, following a report of the Ministry of Commerce and any other relevant Ministry concerned by the merger, authorise the operation of merger but for the public interest – regardless, as to whether the ACC rejected it or not.[11]

Ordinance 03-03 adds that mergers should not be subject to the Merger Control Threshold in the event the mergers enhance competition, increase employment, or help small businesses to improve their competitiveness. Be that as it may, the contemplated mergers, in these cases, will still need an authorisation from the ACC to be valid.[12]

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
Where competition issues are identified, including mergers, it is possible to negotiate remedies.

An authorisation from the ACC to undertake the merger may be subject, for example, to remedies where the aim is to mitigate the effects of the merger on competition in the market.

In addition, entities involved in the merger can, on their own initiative, also take commitments or suggest remedies to mitigate potential anti-competitive effects of the merger on the relevant market.[13] It is advised that in the notification, the parties to the transaction should specify the measures intended to remedy the anti-competitive effects of the merger.

In our view, the ACC should give a strong preference for structural remedies since they offer better guarantees of efficiency (for example disinvestment measures, the disposal of assets, the sale of shareholdings in a company or the exit from a joint venture). When the parties and the ACC negotiate commitments, it will therefore be essential to define the type of commitment that is appropriate to eliminate the competition concerns, taking into account the respective positions of the parties and the structure of the market. Given the strong preference of the ACC for structural commitments, the notifying parties will also have an interest in favouring such commitments.

Behavioural remedies are also acceptable. Once adopted, remedies are compulsory.

If the agreed remedies are not duly performed, Ordinance 03-03 permits penalties of up to 5% of the turnover achieved in Algeria in the last financial year against each entity that is party to or resulting from the merger.[14]

An authorisation from the ACC to undertake the merger may be subject, for example, to remedies where the aim is to mitigate the effects of the merger on competition in the market.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
The ACC's merger control applies to all sectors. There are no specific rules that are applied by the ACC for specific sectors.

However, some sectors are subject to specific regulations. These provisions may enable authorities other than the ACC to take part in the merger control process.
The main fields in which specific legislation is permits intervention in the merger control process are the following:

- post and telecommunication: Law 18-04, dated 10 May 2018 relating to general rules on post and electronic communications provides that the Post and Telecommunication Regulation Authority shall ensure effective and fair competition within the postal and communication markets by taking all necessary measures in order to promote and/or restore competition in the area.[15]
- banking: Ordinance 03-11, dated 6 August 2000 relating to credit and currency provides that any transfer of shares of a bank or financial institution shall require the prior authorisation of the Governor.[16]
- electricity: Law 02-01, dated 5 February 2002 relating to electricity and gas distribution provides that the Electricity and Gas Regulatory Commission is, as a prerequisite,

expected to consent or not in connection with a contemplated merger if the activity of the entity is related to the electricity industry.[17]
- insurance: Ordinance 95-07, dated 25 January 1995 relating to insurance provides that any merger operation of insurance and/or reinsurance companies must be subject to the approval of the relevant supervisory body authority.[18]

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
The ACC has announced in 2016 that a draft amendment of Ordinance 03-03 is soon expected. The main proposals of Opinion 04/2016 are related to:
- the filing deadline (i.e., when the parties concerned are in a position to submit a project sufficiently advanced to enable the submission file to be examined, in particular where they have reached an in-principle agreement, signed a letter of intent or, announced a take-over bid or public offering of sale);
- the division of the Merger Control Threshold into two separate thresholds:
  1. a threshold based on an extended worldwide turnover (excluding taxes) of all entities involved in the merger;
  2. a threshold in relation to a local turnover (excluding taxes) of at least two entities involved in the merger.

It should be noted that the Opinion 04/2016 has not yet been adopted and we do not have any indication of such enforcement.

[1] Presidential decree 05-159, dated 27 April 2005 ratifying the treaty with the European Union, dated 22 April 2002. J.O.R.A n°31, dated 30 April 2005.
[2] Articles 15 and 16, Ordinance 03-03.
[3] Article 17, Ordinance 03-03. The ACC should take its decision within 3 months following the notification.
[4] (Article 19, Ordinance 03-03).
[5] Article 61, Ordinance 03-03.
[6] Article 62bis, Ordinance 03-03 (as modified and completed by Article 29, Law 08-12, dated 19 July 2003 relating to amendment of Ordinance 03-03 ("Law 08-12")).
[7] Article 15, Ordinance 03-03
[8] Article 16, Ordinance 03-03
[9] Article 7, Decree 05-219.
[10] Article 6, Decree 05-219.
[11] Article 21. Ordinance 03-03.
[12] Article 21bis, Ordinance 03-03 (as modified and completed by Article 8, Law 08-12)
[13] Article 19, Ordinance 03-03.
[14] Article 62, Ordinance 03-03.
[15] Article 13(1), Law 18-04
[16] Article 94, Ordinance 03-11. Supposedly, this article refers to the Governor of the Bank of Algeria
[17] Article 115(13), Law 02-01.
[18] Article 230, Ordinance 95-07.

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ETHIOPIA

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Although regulation of unfair competition has existed in Ethiopia since the 1960's the law on regulation of mergers was enacted in 2010. Currently, mergers and acquisitions in Ethiopia are regulated by both the domestic competition regime and the COMESA competition regime, since Ethiopia is a member of COMESA. This article will cover only the domestic competition regime. Please see the separate COMESA article in this bulletin for further details.

In Ethiopia, a merger is deemed to have taken place when:

- two or more business organizations, which were previously operating independently, amalgamate;
- business organizations pool the whole or part of their resources for the purpose of carrying on a specific commercial activity; or
- the business of a person is taken over by another person or groups of persons through the direct or indirect acquisition of shares, securities or assets or by the taking of control of its management, through purchase or any other means.

Notifiable mergers in Ethiopia are mergers that have effect in Ethiopia and that involve companies whose capital, annual turnover or assets surpass the minimum threshold of ETB 30,000,000 (approximately USD 859,659).

Failure to notify a merger may result in liability for a fine of up to 10% of the annual turnover of the entity. Moreover, individuals may be found liable to a fine of a maximum of ETB 100,000 (approximately USD 3,000). Criminal penalties may also be imposed on individuals or businesses that obstruct an investigation by the Trade Competition and Consumers Protection Authority **(the "TCCPA")** and those who do not obey the final decision of the TCCPA and other judicial organs on disputes and appeals.

> "Failure to notify a merger may result in liability for a fine of up to 10% of the annual turnover of the entity."

Are there any recent enforcement actions of particular note or interest?
In 2017, there was a fine levied on Ambo Mineral Water and Coca-Cola over failure to notify a merger. A fine of 5% of the respective entities' turnover was levied on both companies. However, the case has been appealed and a final decision has not yet been reached.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
Foreign-to-foreign mergers (offshore mergers) are notifiable if they have an effect in Ethiopia - there is a local effect or nexus requirement. However, the meaning of 'effect in Ethiopia' is not defined under the law and is left to the discretion of the TCCPA. In practice, if either of the parties to the transaction have a subsidiary in Ethiopia, the transaction is considered as having an effect in Ethiopia.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
There is currently no filling fee payable.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
Procedural rules are heavily enforced by the TCCPA. The list of documents required for a merger filing must be delivered to the TCCPA and must be translated accurately into Amharic. If the documents are from outside Ethiopia, they must be duly authenticated. All of these procedural requirements must be complied with when making an application to the TCCPA or they will not accept it.

There was an alleged failure to notify a merger between Coca-Cola and Ambo Mineral Waters in which the TCCPA levied a fine of 5% of the annual turnover of the parties. This fine is under appeal currently and is to date, the highest fine imposed by the TCCPA.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/special review process?
Non-controlling minority investments are notifiable and there is no special/separate review process. The requirements for the merger notification are two-fold: firstly, the transaction must have an effect in Ethiopia and secondly, the minimum notification threshold of ETB 30,000,000 (approximately USD 860,000) must be met. If these two conditions are fulfilled, any transaction that falls within the definition of merger is notifiable, whether it is a majority or minority investment.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
There is an exhaustive list of documents required when a merger application is made. It includes internal documents of the merger parties such as the memorandum and articles of association, financial audit reports, details on the capital structure and a board/shareholders' resolution approving the transaction. Merger review in Ethiopia has two phases. Normally, a decision is reached during the first phase. The second phase is entered into if the TCCPA requests additional information on the transaction. In practice, the majority of the merger applications are reviewed and a decision is passed during the first phase.

The TCCPA uses the information in the submitted documents to determine the impact of the transaction on competition and checks if the appropriate internal approvals of the parties have been obtained for the transaction.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
The law states that the TCCPA may approve a merger where the merger is likely to result in technological efficiency or other pro-competitive gain that outweighs the significant adverse effects of the merger on competition and such gain may not

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> "The TCCPA has the mandate to conditionally approve mergers by setting certain conditions which would mitigate the likely significant adverse effects of the merger on trade competition."

otherwise be obtained if the merger is prohibited. In reaching such conclusions, the TCCPA will consider if the approval of the merger:

- contributes to accelerating economic development;
- promotes the transfer of technical knowledge; or
- improves the production and distribution of trading goods or provision of service delivery.

The TCCPA states that it may consider:

- if the merger contributes significantly to salvaging a falling business;
- if the approval helps or creates an opportunity that enables small and micro businesses to become capable of being more competitive;
- if the merger creates more employment opportunities; or
- if the sector is one where the participation of foreign investors is important.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
The TCCPA has the mandate to conditionally approve mergers by setting certain conditions which would mitigate the likely significant adverse effects of the merger on trade competition. These conditions may include either behavioural or structural remedies. To date, we are not aware of a merger approval with a condition or a preference for the type of remedies available to the TCCPA.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
There are no specific sectors that the TCCPA focuses on nor are there any special rules that apply to specific sectors.
However, the telecommunications sector (which used to be a government monopoly) is now in the process of being privatized and going forward, mergers in the telecommunications sector will be approved by the telecommunications authority as opposed to the TCCPA.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
The merger law is currently being revised. However, the draft is yet to be released for public consultation.

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GHANA

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The law on merger control in Ghana is governed by the Companies Act, 2019 (Act 992), the Securities Industry Act, 2016 (Act 929) and the Take-Overs and Mergers Code issued by the Securities and Exchange Commission (the "SEC").

Are there any recent enforcement actions of particular note or interest?
Ghana does not have an antitrust law regime. To the best of our knowledge, there have been no recent enforcement actions against parties to a transaction for failure to notify and obtain the approval of the Registrar-General's Department (the **"RGD"**) - for private companies - or the SEC - for listed companies and state-owned companies.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
There are no specific laws that apply to foreign-to-foreign mergers. As such, they do not trigger a notification requirement in Ghana.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
There are filing fees of GHS 120.00 (approximately US$ 20), representing GHS 60 for official fees in respect of issuance of shares, payable by the issuing company, and GHS 60 in respect of increased stated capital to be paid by the company whose capital is increased in connection with the transaction. Where the merger results in the creation of a new company, official fees of GHS 300.00 (approximately US$ 52) is payable by the new company. Where the merger leads to an increase in stated capital, the company is required to notify the RGD of the increase and pay a stamp duty of 0.5% on the increase to the Ghana Revenue Authority.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
There is currently no competition authority or antitrust law in Ghana and there has been no recorded sanctions by the RGD (the entity that issues the merger certificate upon conclusion of the merger) for failure to notify.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?
The Companies Act, 2019 (Act 992) does not provide for notification requirements in respect of non-controlling minority interests. There is no special review process.
However, specific sectors have requirements set by the relevant regulator. In the Petroleum sector, for instance, the Petroleum Commission must be notified of any non-controlling minority investment.[1]

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
Again, specific industries, such as banking and petroleum, are required to provide to the relevant regulators their internal documents for assessment and such regulators have the power to reject the merger or investment proposal during the assessment. For instance, under banking the Bank of Ghana (the **"BOG"**) Mergers and Acquisitions Directive, 2018 and the Banks and Specialised Deposit Taking Institutions Act, 2016 (Act 930) an agreement for a merger requires the BOG's approval.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
Political considerations, such as labour and industrial policy, does shape merger control in Ghana. For instance, in 2018 the BOG sought to, amongst other things, strengthen the liquidity of the banking industry by increasing the minimum capital requirement to GHS 400 million (approximately US$ 69 million). The move saw a number of mergers that were approved by the BOG. One of those was the merger between OMNI Bank and BSIC Bank to form OmniBSIC Bank Ghana Limited.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
In a specialised sector like banking, structural remedies appear to be favoured because the BOG would expect all requirements to be met before giving its one-off approval, in line with the BOG Mergers and Acquisitions Directive, 2018, which mandates that the parties shall not commit to a final agreement for the merger without prior approval by the BOG. The same approach is favoured by the Petroleum Commission.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
The is no competition authority in Ghana and therefore regulators for specific sectors, such as fishing, mining, banking and petroleum implement their own rules.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
The Parliament of Ghana is currently considering a Competition Bill. The law will establish a Competition Commission and will represent the most significant regulatory framework for mergers and acquisitions in Ghana.

[1] Petroleum (Production and Exploration) Act, 2016 (Act 919).

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KENYA

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Merger control in Kenya is fairly new with the applicable competition regimes being less than a decade old. There are currently three competition regimes that apply in Kenya:

(a) Kenya's domestic competition regime;
(b) the East African Community (the **"EAC"**) competition regime; and
(c) the Common Market for Eastern and Southern Africa (**"COMESA"**) competition regime.

The COMESA and EAC regimes apply by virtue of Kenya being a member state in these regional blocs. In this article, we consider Kenya's domestic competition regime.

In Kenya, a merger arises where there is a direct or an indirect acquisition over the whole or part of the business of another entity giving rise to a change of control in that entity. If a transaction meets these criteria and the merger notification thresholds, then a prior approval from the Competition Authority of Kenya (the **"CAK"**) is required before implementation of that transaction.

A merger implemented without approval has no legal effect and the obligations therein cannot be enforced in legal proceedings in Kenyan courts. In addition, the implementation is an offence and on conviction, a person is liable to a fine of up to KES 10,000,000 (approximately USD 100,000) and/or imprisonment for up to five years. The CAK may also impose a financial penalty of up to 10% of the entities' annual turnover in Kenya for the preceding year.

Are there any recent enforcement actions of particular note or interest?

Recently the CAK has carried out investigations into the set-up of what it deems to be "full function" joint ventures (including greenfield joint ventures) to determine whether they ought to have been notified to them before being set up.

Full function joint ventures may be notifiable and the approval of the CAK would then need to be sought before implementing such a joint venture arrangement. The CAK deems a joint venture as fully functional if it is set up for a period of more than ten years and carries on all functions of an autonomous economic activity.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?

Foreign-to-foreign mergers are notifiable in Kenya where they give rise to an indirect change of control of the whole or part of a business in Kenya. There is no settled jurisprudence on what constitutes a business in Kenya and therefore, this has in the past been broadly interpreted to include cases where the target only derives sales from Kenya with no entity incorporated in Kenya. In this regard, it is advisable to seek advice on a case to case basis in relation to foreign-to-foreign mergers.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?

The merger filing fees are dependent on the higher of the combined turnover or asset value of the acquirer(s) and the target in Kenya based on most recent audited accounts, as indicated in the table below:

Merger notification thresholds	Merger filing fee
Between KES 1,000,000,001 (approximately USD 10,000,000) and KES 10,000,000,000 (approximately USD 100,000,000)	KES 1,000,000 (approximately USD 10,000)
Between KES 10,000,000,001 (approximately USD 100,000,000) and KES 50,000,000,000 (approximately USD 500,000,000)	KES 2,000,000 (approximately USD 20,000)
Above KES 50,000,000,000 (approximately USD 500,000,000)	KES 4,000,000 (approximately USD 40,000)

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?

The CAK is increasingly enforcing the merger control provisions, particularly with regard to enforcement actions for the implementation of mergers without approval.

The recently promulgated Competition (General) Rules, 2019 (the "Rules"), elaborate on the factors that the CAK may consider in determining whether a merger has been implemented. These include:

- actual integration, including integration of infrastructure, information systems, employees, corporate identity or marketing efforts;
- placement of the target's employees in the acquirer;
- an attempt by an acquirer to influence or control any competitive aspect of the target's business, including setting prices, limiting discounts and restricting sales; or
- the exchange of strategic information for purposes other than valuation or a need to know basis during due diligence or in ways compromising the strategic independence of each of the merging parties.

In addition to the above, the payment of 20% or more of the consideration is considered to be implementation of a merger. Merging parties are required to disclose previous mergers in their merger applications and this together with the above factors is expected to increase enforcement activity by the CAK.

A merger implemented without approval has no legal effect and the obligations therein cannot be enforced in legal proceedings in Kenyan courts.

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To date, the highest financial penalty in the public domain that has imposed on entities that have implemented a merger without approval was KES 35,000,000 (approximately USD 350,000).

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?

The acquisition of a minority interest without controlling rights is not considered to be a notifiable merger and therefore the regime would not apply.

However, if an acquirer acquires any control rights as a result of an acquisition of a minority interest then a merger approval would need to be obtained. The following are considered as controlling rights by the CAK:

- ability to appoint or veto the appointment of senior management (for example, the CEO and CFO);
- ability to appoint a majority of directors to the board; or
- ability to determine the strategic commercial policy, business plan or budget of an entity.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?

Yes. The merging parties are required to provide the merger agreement, audited financial statements and the resolutions approving the transaction. In addition, merging parties may be required to provide board presentations in respect of the transaction (if any).

The CAK uses the information in the documents to determine the terms of the transaction, the impact on competition and, in part, this may impact on conditions that may be imposed by the CAK.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?

Yes. The CAK is increasingly taking into account public interest concerns in evaluating mergers and determining the conditions that it will impose when approving mergers.

These considerations include, the impact of mergers on:

- employment;
- the continuation of supplier arrangements; and
- the continuation of certain business lines, especially where there are horizontal mergers and the merging parties have similar business lines.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?

The CAK's preference has been behavioural remedies (for example, requiring merging parties to maintain certain competing business lines or products for a specified period). However, this is changing and the CAK appears to be adopting structural remedies, such as requiring divestiture from certain businesses.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?

Enforcement by the CAK applies to all sectors and there are no specific sectors that it focuses on in relation to merger control.

The rules on merger control apply to all mergers, regardless of the sector. There are no specific rules that are applied by the CAK for specific sectors.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?

The CAK has been increasing its enforcement action on mergers implemented without approval. For instance, the CAK has investigated transactions reported in the media to determine whether they qualify as mergers that should have been notified. It is expected that there will be further enforcement action as illustrated by the recently adopted Rules that require the disclosure of previous mergers by the merging parties and provide the factors to be considered by the CAK in determining whether a merger has been implemented.

In addition, based on the Rules, where a merger is notified to the COMESA Competition Commission (the "CCC") and at least two-thirds of the higher of the turnover or value of assets is not derived from Kenya, it is no longer necessary to also make a merger filing with the CAK. Parties are now required to only inform the CAK within fourteen days of submitting the merger filing with the CCC.

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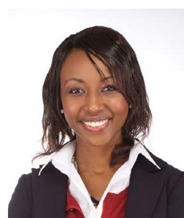

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The Competition Act of 2007 (the "Act") regulates competition in Mauritius and came into effect between October 2008 and December 2009. The Act is enforced by the Competition Commission of Mauritius (the "CCM"), a body corporate whose powers are, amongst others, to determine whether a restrictive business practice has taken place, to conduct hearings, to determine penalties or remedies where the Act has been contravened, to review mergers, and to co-operate with international competition authorities.

The Act covers three main types of restrictive business practices:

(i) Restrictive agreements between enterprises (cartels);
(ii) Abuse of monopoly situations; and
(iii) Merger reviews.

The Act does not currently provide for mandatory notifications in merger situations but allows parties to a proposed merger to apply to the CCM for a merger guidance as to whether the proposed merger is likely to substantially lessen competition in the market.

Whilst Mauritius is a COMESA Member State, it has yet to harmonise its domestic competition laws with that of the COMESA, especially in reslation to merger notification requirements.

Are there any recent enforcement actions of particular note or interest?

On-going Investigation

The CCM is currently investigating into the proposed acquisition of General Construction Company Ltd by IBL Ltd, together with a financial partner, following a joint application by both merging parties. The decision of the CCM is expected to be published quite soon.

Completed investigation

In December 2018, Mauritian Eagle Insurance Co. Ltd (now Eagle Insurance Ltd) **("EIL")**, which operates in all classes of short-term (general) insurance business in Mauritius and Medscheme (Mtius) Ltd **("MML")**, a medical insurance and provident fund administrator engaged in the provision of membership management and claims administration of health insurance policies, applied to the CCM for a guidance on the proposed acquisition by EIL of 30% shares of MML.

"Whilst Mauritius is a COMESA Member State, it has yet to harmonise its domestic competition laws with that of the COMESA, especially in reslation to merger notification requirements."

In June 2019, the CCM issued its decision on the proposed acquisition. Upon investigation, the Executive Director for the CCM found that the combined market share of EIL and MML was above 30% and therefore the market share thresholds for the transaction to be reviewable under the Act was likely to be met. The Executive Director observed that certain competition concerns may arise as a result of the proposed transaction. Both EIL and MML voluntarily offered undertakings. During the investigation, the Executive Director also consulted various stakeholders who expressed an apprehension as to the risk of unauthorised access to confidential information of MML's clients. The CCM accepted the various undertakings given by the parties.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?

The merger situations under the purview of the Act require that at least one of the enterprises carries out its activities in Mauritius or through a company incorporated in Mauritius.

There are no compulsory merger notifications under the Act. Parties to a proposed merger can apply for a voluntary merger guidance or the CCM can initiate an investigation on its own accord. However, it is advisable for the parties to a proposed merger to apply for a merger guidance as they would be more likely to be involved in the process.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?

There are no filing fees for voluntary merger guidance.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?

There is no requirement for mandatory filings. However, parties are encouraged to apply for merger guidance before the proposed merger takes place so that any anti-competitve effects can be addressed through remedies.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?

A merger will be reviewed by the CCM where there is a "controlling interest". A controlling interest is generally deemed to exist where a person holds:

1. ownership of at least 30% or more of the voting rights;
2. Is able to control the composition of the board;
3. is in a position to exercise, or control the exercise of, more than one-half the maximum number of votes that can be exercised at a meeting of the company; or
4. holds 30% or more of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?

When applying for merger guidance, the parties are required to provide certain information to the CCM, including:

- organisation charts, lists of all enterprises belonging to the same group to which each merger party belongs, specifying the nature and means of control for each enterprise;
- copies of the most recent annual report and accounts;
- copies of all analyses, reports, studies, surveys and any comparable documents prepared for the purpose of

assessing or analysing the merger with respect to market shares, competitive conditions etc.; and
- copies of all business plans for each merger party for the current year and the preceding five years.

A short form notification to the CCM is available only with the prior agreement with the CCM and only to merging parties that have engaged with the CCM through pre-merger consultations and the informal requirements have been pre-agreed.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
The Act provides that before any remedial action is to be taken, for a consideration of whether any offsetting public benefits are present and if they should be taken into account. The offsetting public benefits are in respect of:
- the safety of goods and services;
- the efficiency with which goods are produced, supplied or distributed or services are supplied or made available;
- the development and use of new and improved goods and services and in the means of production and distribution; or
- the promotion of technological and economic progress,

and the benefits have been or are likely to be shared by consumers and business in general.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
Remedies proposed during a voluntary merger guidance are more likely accepted as the merger parties are part of the process and will in practice offer undertakings in respect of any concerns raised. The structural or behavioural remedies would depend upon the type of anti-competitve effects the CCM is trying to alleviate and the stage of the merger.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
There is no specific sectors or industries that are particulary emphasised.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
An international consultant was appointed by the CCM to review the Act, the Competition Commission Rules of Procedure 2009 and the guidelines. It is unclear what the current status of the review is.

Further to the COVID-19 crisis, the CCM issued a communiqué, dated 09 April 2020 stating that it will not tolerate commercial conduct on part of dominant suppliers who seek to exploit the crisis to the detriment of consumers.

The CCM also stated that they would not unduly constrain necessary and critical cooperation between enterprises that are in consumers' and public interest and does not go further or last longer than what is necessary.

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Free and fair competition in the framework of business is a constitutional principle under Moroccan law.

Law No. 104-12 relating to freedom of prices and competition, promulgated by *Dahir* No. 1-14-116, its application Decree No. 2-14-652 and Law No. 20-13 relating to the Competition Council promulgated by *Dahir* No. 1-14-117, are today fully in force since the publication of the list of the new members of the Competition Council in the Official Gazette on 13 December 2018, putting an end to the confusion regarding the applicability of the provisions of the new competition legal framework, particularly with regards to merger control.

The new competition legal framework has strengthened the role of the Competition Council by making it a decision-making administrative authority and by giving it a power of sanction, notably with regards merger control.

The Competition Council ensures the compliance of the economic operators with the principle of freedom of competition by monitoring anti-competitive practices and economic mergers.

The new competition legal framework transferred the competence and decision-making powers from the office of the Head of the Government to a currently under-resourced Competition Council who must examine and rule on a huge amount of contemplated mergers due to the drafting of Law No. 104-12.

"The new competition legal framework has strengthened the role of the Competition Council by making it a decision-making administrative authority"

Are there any recent enforcement actions of particular note or interest?
There are no particular recent enforcement actions of particular note or interest (with respect to merger control) since the entry in force of law 104-12 (the "Law") relating to freedom of prices and competition on 7 August 2014.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
Purely foreign-to-foreign transactions are caught under the Moroccan merger control rules only when consistent with article 1 of the Law, that is to say when such transactions have the purpose or may have an effect on competition in the Moroccan market or a substantial part of it, regardless of whether they have a presence in Morocco.

A merger control notification is triggered if one of the following, non-cumulative, thresholds is met:

- the aggregate worldwide pre-tax turnover of all of the parties concerned (whether companies, groups of individuals or legal entities) exceeds MAD 750 million (approximately EUR 68 million);
- the pre-tax turnover achieved in Morocco by at least two of the parties concerned (whether companies, groups of individuals or legal entities) exceeds MAD 250 million (approximately EUR 22 million); or
- the combined market share in Morocco is equal or exceeds 40%.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
There are no administrative filings fees.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
There is no history of fines for gun jumping/failure to notify.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/special review process?
A transaction is considered a merger when two or more previously independent companies merge and/or when:

- one or more individuals already hold control of at least one company; or
- one or more companies, acquire, directly or indirectly, by any means, control of the whole or part of another company or companies.

In these circumstance, "control" should be understood the ability to exercise a decisive influence on the activities of another company (such as veto rights/unanimous votes on important matters in the concerned company's board or general meetings, a right of ownership or use of the concerned company's asset, etc.).

Moreover, the setup of a joint venture can also be considered as a merger within the meaning of the Law.

The regime does not apply to non-controlling minority investments and as such they are not notifiable.

There is no separate/special review process for minority investments transactions.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
Under the Law, internal documents need to be submitted as part of the review, such as drafts of the SPA and shareholders' agreement, copies of the accounts, an organizational chart, copies of the minutes of acquirer's board/shareholders' meetings authorizing the contemplated transaction, etc.

The local competition council may ask for a French translation (mandatory for the SPA). However, in practice, only the main terms are translated.

Their review is important to the local competition council who will refuse to rule or accept the filing if all the documents listed

by the regulations are not filed.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
Yes. Political considerations or similar concerns are referred to, in Article 18 of the Law, as "considerations of general interest", in particular, industrial development, the competitiveness of companies with respect to international competition or the creation or maintaining of employment.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
Remedies (in the meaning of recourses) are provided for by the Law and [are applicable] 30 days' from receipt of local competition council decision.

There is no particular preference for structural (in order to influence the competitive structure of a specific market) or behavioural (to address the identified competition concerns by requiring certain conduct from the company) remedies.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
There is no particular focus with respect to merger control.

Media and telecommunications competition issues are regulated by a specific administrative agency.

Defence is out of scope.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
Not to our knowledge.

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As one of Africa's largest economies, Nigeria attracts a substantial number of mergers and acquisitions transactions in various sectors including financial services, manufacturing, energy, agriculture and healthcare.

The legal framework for merger control in Nigeria is determined by the Federal Competition and Consumer Protection Act ("FCCPA"), which came into force last year, and sectoral legislations and subsidiary instruments such as the Nigeria Communications Act, 2003, Electric Power Sector Reform Act 2005 and the Nigerian Civil Aviation Act, 2006. With the enactment of the **FCCPA** as the overarching competition legislation and the establishment of the Federal Competition and Consumer Protection Commission (the **"FCCPC"** or the **"Commission"**) as the primary competition authority, Nigeria has witnessed increasing predictability in the legal and regulatory landscape for merger control and other competition matters.

The FCCPA defines what constitutes "control" and "market" in merger transactions and classifies transactions into small or large mergers, requiring notification and regulatory approval, based on certain thresholds. It also makes provision for notification procedures, key considerations for approval and remedies available where competition concern arises in a transaction.
The new regime indicates a readiness to promote an enabling environment for innovation, creativity, and efficiency which are hallmarks of a truly competitive market.

Are there any recent enforcement actions of particular note or interest?
As far as we are aware, no enforcement actions have recently been instituted against transacting parties for failing to notify and obtain the approval of the FCCPC for notifiable transactions.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
Under the FCCPA, the approval of the FCCPC is required in relation to a merger involving foreign entities if that merger will result in a direct or indirect change of control of a Nigerian entity. The relevant thresholds for a large merger must also be met in order for the foreign-to-foreign merger to be notifiable. The thresholds for a large merger are as follows:

1. in the financial year preceding the merger, the combined annual turnover in, or from, Nigeria of the parties to the merger was NGN 1 billion or more; or
2. in the financial year preceding the merger, the target entity had an annual turnover in, or from, Nigeria of NGN 500 million or more.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
The process and fees payable for obtaining the FCCPC's approval for a foreign-to-foreign merger are set out in the Guidelines on the Simplified Process for Foreign-to-Foreign Mergers with a Nigerian Component dated 13 November 2019 (the **"Guidelines"**).
The relevant fees are as follows:

1. Filing fee - NGN 50,000
2. Processing fee - calculated as follows:
   (a) NGN 2 million - where the target's turnover is between NGN 500 million and NGN 1 billion; or
   (b) NGN 3 million or 0.1% of combined turnover (whichever is higher) - where the parties have a combined turnover of NGN 1 billion or more.

> "The legal framework for merger control in Nigeria is determined by the Federal Competition and Consumer Protection Act ("FCCPA"), which came into force last year"

Turnover, for these purposes refers to turnover in, into or from Nigeria.

Transacting parties may request an expedited review of the application - 15 business days from the date on which a complete application is submitted to the FCCPC - subject to the payment of an expedited review fee of NGN 5 million.

The Guidelines do not specify the party responsible for paying the relevant fees. In practice, however, these fees are typically paid by the acquirer.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
As the regulation of mergers by the FCCPC is fairly recent, there are yet to be reported cases of enforcement. The FCCPC is also yet to issue regulations and guidelines on merger control, though drafts of these have been published for comment by stakeholders.

On the issues of gun jumping and failure to notify, the FCCPA provides that any action taken by any party to implement a large merger without the approval of the FCCPC is void and the offending party will be liable to a fine not exceeding 10% of the undertaking's turnover in the business year preceding the date of the offence or such other percentage as the court may determine having regard to the circumstances of the case.

What constitutes implementation is not provided in the FCCPA, and given that the current regime is fairly new, it is not yet clear what the FCCPC will regard as gun jumping or what its enforcement position will be.

However, in the previous regime, there were instances of the Securities and Exchange Commission **("SEC")** having imposed fines on companies for failure to notify.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?
The FCCPA does not require the notification of non-controlling minority investments. Unless a minority investment confers the

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investor with material influence over the affairs of the target, such investment will not be considered a change in control and will therefore not be notifiable.

However, in certain regulated sectors, a non-controlling minority investment will trigger a requirement to notify the sector regulator, for example, the banking, telecommunications, power and insurance sectors.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
The FCCPC has the power to request for internal documents as part of the review process. Again, it is not yet clear how much importance the FCCPC will attach to internal documents, given that the merger control regime is still quite new and enforcement trends are still emerging.

However, the FCCPC is unlikely to solely rely on information disclosed in such internal documents and is likely to obtain data and information required for its assessment independently.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
Non-competition considerations can also be taken into account in the decision-making process. The FCCPC may consider whether the merger can or cannot be justified on substantial public interest grounds.

When determining whether a merger or proposed merger can or cannot be justified on grounds of public interest, the Commission shall consider the effect that the merger or proposed merger will have on:

1. a particular industrial sector or region;
2. employment;
3. the ability of national industries to compete in international markets; and
4. the ability of small and medium scale enterprises to become competitive.

In addition, the Minister of Industry, Trade and Investment is entitled to make representations on public interest grounds with respect to any merger being considered by the FCCPC. The FCCPC may also hear from persons, other than those involved in the merger, in making its determination.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
The provisions of the draft Merger Regulations recently published by the FCCPC (the **"Draft Regulations"**) indicate a willingness to accept remedies. Under the Draft Regulations, remedies can be offered by the parties or imposed by the FCCPC where there are competition concerns in a transaction.

The major influence determining the remedy to be adopted is the impact of the competition concerns. The parties are often advised or directed (typically after a Phase 1 Review) to restructure the transaction in a manner that restores competition. The remedy proffered may be accepted at the discretion of the FCCPC. Where the parties do not agree to a remedy proposed by a party or a remedy proposed by the FCCPC, such remedy may be imposed by order.

The FCCPC will typically request parties to propose a structural remedy which will be enforced by the Commission. However, where a behavioural remedy will resolve the competition concerns, the Commission will enforce a behavioural remedy or a hybrid of remedies.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
Apart from the FCCPC, there are sector specific regulators who are empowered by their enabling legislation to perform the functions of merger control in their sectors. These include the Central Bank of Nigeria for the banking sector, the Nigerian Civil Aviation Authority for the aviation sector, the Nigerian Electricity Regulatory Commission for the electricity sector, the Nigerian Communications Commission for the telecommunications sector and the National Insurance Commission for the insurance sector.

"Apart from the FCCPC, there are sector specific regulators who are empowered by their enabling legislation to perform the functions of merger control in their sectors."

The FCCPC recognises the peculiarity of each sector and applies the pre-existing sectoral framework for competition regulation in sectors like Aviation, Telecommunications and others, subject to the provisions of the FCCPA.

The FCCPA allows the FCCPC to maintain co-ordinate jurisdiction and collaborate with sectoral regulators to review practices or apply special rules to each sector. However, where the impact of the anti-competitive behaviour is significant on the market or a gap exists in the existing sectoral regulation, the FCCPC will apply the provisions of the FCCPA.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
The regulatory landscape on merger control is emerging as the FCCPC continues to introduce clear rules, specific regulations and guidelines in response to trends and developments in the market. The FCCPC recently published the Draft Regulations and Merger Review Guidelines which provide for a substantive and procedural framework for merger control in Nigeria. The Draft Regulations also provide guidance on the merger review procedures of the FCCPC, as well as the parameters for determining the existence of control by an acquirer. It is expected that the issuance of the regulations will provide further

It is expected that the issuance of the regulations will provide further clarity on the merger control review process and procedure.

clarity on the merger control review process and procedure.

The Commission also engages in periodic enlightenment campaigns, inspection, investigative and enforcement activities to curtail and control anti-competitive activities.

The COVID-19 pandemic presents unique opportunities with the FCCPC introducing special conditions and procedures for Extenuating Circumstantial Notifications occasioned by the pandemic. Also, in response to the pandemic the FCCPC has indicated that it will consider current national priorities in the application of its rules.

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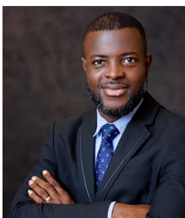

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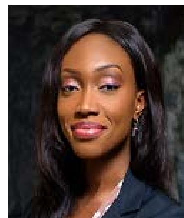

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Are there any recent enforcement actions of particular note or interest?
One of the key changes made to the legislation last year was to place the public interest assessment that the competition authorities are required to undertake on an equal footing with the competition assessment. The public interest considerations have also been expanded. Please refer to question 7 below for further details.

As such, public interest considerations are very important in the South African merger control context and mergers are frequently approved subject to public interest conditions.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?

The Competition Act, No. 89 of 1998 (as amended) (the "Act") applies to "all economic activity within, or having an effect within," South Africa. Foreign-to-foreign mergers are notifiable if they meet the thresholds for mandatory notification. The thresholds are calculated in relation to assets in South Africa and/or turnover generated in, into or from South Africa. The approach of the competition authorities is that neither party needs to have a presence in South Africa in order for filing obligations to be triggered. It will suffice if the target alone generates turnover in, into or from South Africa which meets the thresholds for mandatory notification.

> "One of the key changes made to the legislation last year was to place the public interest assessment that the competition authorities are required to undertake on an equal footing with the competition assessment."

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
The filing fees for a merger notification are:
1. R 165,000 for an intermediate merger; and
2. R 550,000 for a large merger.

No filing fees are payable for small merger notifications.

Merging parties are required to submit a joint notification. The Act does not specify which party is responsible for paying for the filing fees. This is a matter of commercial negotiation between the parties.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
In terms of the Act, administrative penalties may be imposed by the Competition Tribunal (the **"Tribunal"**) where firms fail to notify a merger or implement a merger prior to the approval of the Competition Commission (the **"Commission"**) or the Tribunal. In terms of the Act, administrative penalties may not exceed 10% of the firm's annual turnover in South Africa during the previous financial year.

However, the Commission has published Guidelines for the Determination of Administrative Penalties for Failure to Notify Mergers and Prior Implementation of Mergers (the **"Guidelines"**). The Guidelines recognise that merger contraventions merit different treatment to other contraventions of the Act.

The following general approach (as set out in Section 4 of the Guidelines) will be followed by the Commission in determining administrative penalties in cases of failure to notify and/or prior implementation:

- Step 1: Determination of the nature or type of contravention - i.e., the conduct is non-notification, prior-implementation or both.
- Step 2: Determination of the base amount – the base amount is equal to double the applicable filing fee.
- Step 3: Duration of the contravention – the Guidelines provide an additional amount calculated based on whether the contravention has subsisted for less than year, more than a year but less than two years, and more than two years.
- Step 4: Consideration of factors that might mitigate and/or aggravate the amount reached in step 3 – when determining an appropriate penalty, the Commission will consider, amongst other things:
    1. the nature, duration, gravity and extent of the contravention;
    2. any loss or damage suffered as a result of the contravention;
    3. the behaviour of the parties;
    4. the market circumstances in which the contravention took place;
    5. the level of profit derived from the contravention;
    6. the degree with which the parties have cooperated with the Commission and Tribunal; and
    7. whether the parties have previously contravened the Act.
- Step 5: Rounding off the amount arrived at based on steps 1 to 4, if it exceeds the cap provided for in section 59(2) of the Act – an administrative penalty cannot exceed 10% of the firm's annual turnover in South Africa and its export from South Africa during the firm's preceding financial year.

The obligation to notify rests with "the parties to a merger." Therefore, while penalties have largely been imposed on the acquirer, the Act allows for the imposition of a penalty on a seller too.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?
Minority acquisitions that confer control are notifiable but merger notification obligations are not triggered in respect of non-controlling minority interests. There are not separate/special review processes for non-controlling minority investments.

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Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?

Documents that must be submitted as part of the merger notification are:

1. the merger agreement/s;
2. any document (including minutes, reports, presentations and summaries prepared for or by the board of directors) of the parties relating to the transaction;
3. audited financial statements; and
4. the parties' most recent business plans and, where applicable, the most recent report provided to the Securities Regulation Panel.

These documents are typically reviewed carefully by the Commission and can be important in terms of the Commission's substantive assessment.

The Commission is empowered to call for any other documents to further its investigation.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?

The Act provides that the Commission or the Tribunal must initially determine whether or not a merger is likely to substantially prevent or lessen competition, by assessing specific factors. The Act also provides that "despite its determination [in respect of whether the merger is likely to substantially prevent or lessen competition]," the Commission or Tribunal "must also determine whether the merger can or cannot be justified on substantial public interest grounds" by assessing the effect that the merger will have on:

- a particular industrial sector or region;
- employment;
- the ability of small businesses and medium businesses, or firms controlled by historically disadvantaged persons, to become competitive, effectively enter into, participate in or expand within the market;
- the ability of national industries to compete in international markets; and
- the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

Employment remains a key public interest consideration and more recently the Commission requires certainty as to whether any merger-related job losses will arise in South Africa. If a definitive answer cannot be provided, the Commission will typically impose a moratorium on merger-related retrenchments for a number of years as a condition to approval.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?

Remedies are fairly common and both structural and behavioural remedies may be offered or imposed. In light of the obligation on the Commission and the Tribunal to assess the effect of a merger on competition, as well as on the public interest, mergers are frequently approved subject to behavioural public interest conditions.

According to the Commission's report in celebration of 20 years of competition enforcement, the Commission and Tribunal have "crafted more creative behavioural remedies in the past ten years" than in the first ten years of competition enforcement.

"Employment remains a key public interest consideration and more recently the Commission requires certainty as to whether any merger-related job losses will arise in South Africa."

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?

The Commission's priority sectors are:

1. food and agro-processing;
2. healthcare;
3. intermediate industrial inputs;
4. construction and infrastructure;
5. banking and financial services;
6. information and communication technology and
7. energy.

According to the Commission, these sectors were selected taking into account South Africa's economic policies, the volume of complaints received in the sector and market failures that the Commission has identified through past investigations and scoping exercises. Both mergers and prohibited practices in these sectors attract close scrutiny. Another area of concern for the Commission is the private healthcare sector, in which the Commission conducted its first formal market inquiry to determine the factors that restrict competition and underlie increases in private healthcare expenditure in South Africa.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?

Various provisions of the Competition Amendment Act, No. 18 of 2018, have been brought into effect.

Some key amendments from a merger control perspective include:

- By the addition of section 12A to the Act, the considerations that the Commission must take into account when assessing the strength of competition in the relevant market, and the probability that firms in the market will behave competitively or co-operatively after the merger, have been expanded to include the following factors:

  - the extent of ownership by a party to a merger in another firm or other firms in related markets;
  - the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and
  - any other mergers engaged in by a party to a merger for

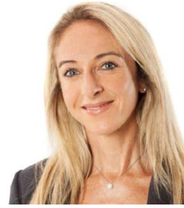
such period as may be stipulated by the Commission.

- Placing the public interest assessment on an equal footing with the competition assessment that the competition authorities are required to make and expanding the public interest consideration. Please see the responses to questions 1 and 7 above. As such, public interest will continue to play a pivotal role in South African merger control.
- Where the Tribunal makes a decision in respect of a merger, an appeal from the Tribunal's decision may be made by, among others, (i) the Commission or (ii) the Minister of Trade, Industry and Competition (the **"Minister"**) in public interest matters, where the Minister participated in the Commission's or Tribunal's proceedings as an intervening party or on application for leave to appeal to the Competition Appeal Court.

Following the amendments made to the Act in 2019, provisions that have been passed into law but not yet been brought into effect include:

- Section 18A: where a South African firm will be acquired by a foreign acquiring firm, the acquisition must be notified simultaneously to the Commission and to a Committee convened by the President if the merger relates to, inter alia, markets, industries, goods or services, sectors or regions of national security interests to be published by the President.
- The Committee will consider whether the merger "may have an adverse effect on the national security interests of the Republic".
- Should there be a failure to notify such a merger to the Committee, the Commission or Tribunal cannot consider the merger notified to them. If the decision has been taken by the competition authority, that decision will be deemed to be revoked, unless the decision is ratified by the Committee.
- In the event that the Committee prohibits a transaction, the Commission and Tribunal may not take a decision on the merger.

CONTRIBUTORS



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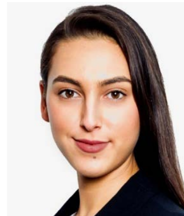

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The competition regime in Tanzania is primarily governed by the Fair Competition Act of 2003 (the **"FCA"**) and the Fair Competition Rules of 2018 (the **"Rules"**). The FCA established the Fair Competition Commission (the **"FCC"**)[1] for the purposes of administering the FCA and to develop and promote policies for enhancing competition and consumer welfare in Tanzania[2]. Merger control is among the activities governed by the FCC. In Tanzania, a merger is prohibited if it creates or strengthens a position of dominance in the market.[3] The FCA requires a merger to be notified to the FCC where the combined market value of the assets or turnover of the merging firms is at or above Tanzania Shillings (**"TZS"**) 3.5 billion (approximately USD 1.6 million) and if such acquisition would result in a change of control of a business, part of a business or an asset of a business in Tanzania.

The definition of "change of control" is not provided under the Tanzanian competition laws. However, various FCC findings define change of control to mean a situation where one party acquires the possibility of exercising significant or decisive influence over the company.[4] Such influence may arise by the ownership of all or part of the company's assets, shares or rights, which confer decisive influence on the decision-making process of the company. This implies that control may be acquired on a de facto or contractual basis, regardless of the size of shareholding concerned.

Are there any recent enforcement actions of particular note or interest?
Based on the recent report published by the FCC, in the financial year 2017/2018 the FCC enforced penalties on six non-notified mergers.[5]

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
All mergers and acquisitions involving a combined turnover or assets above a prescribed threshold (currently TZS3.5 billion (approximately USD1.6 million) and resulting in the change of control of business or part of a business or an asset in Tanzania must be notified to and may be examined by the FCC.

The term "merger" is defined under the FCA to mean an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania. Please note that the provisions of the FCA apply extraterritorially to conduct outside Tanzania.[6]

> "In Tanzania, a merger is prohibited if it creates or strengthens a position of dominance in the market."

Therefore, provided that the relevant notification thresholds are met, foreign-to-foreign mergers have to be notified to the FCC.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
Merger application fees are calculated based on combined total annual turnover or assets contained in the last audited accounts of the merging firms whichever is higher as follows:[7]

- firms with annual turnover or assets between TZS800 million (approximately USD380,000) and TZS25 billion (approximately USD 12 million): TZS 25 million (approximately USD 12,000);
- between TZS25 billion (approximately USD12 million) and TZS 100 billion (approximately USD 45 million): TZS 50 million (approximately USD 22,000); and
- TZS100 billion (approx. USD 45 million) or more: TZS 100 million (approx. USD45,000).

The FCC Rules provide that any person who intends to acquire, control or to be acquired or controlled through a merger must notify the FCC of that intended merger.[8] Therefore, in practice, all the parties to a merger are responsible for paying the merger application fees. The parties may therefore decide if they will share the cost or who will be responsible for paying the fees. Previously, the responsibility to pay the merger application fees was on the acquirer since the Fair Competition Procedural Rules, 2003 (the "2003 FCC Rules") placed the obligation to notify a merger on the acquirer. The 2003 FCC Rules were however repealed and replaced by the FCC Rules in 2018.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
The FCC is known for its strict enforcement of the FCA and the FCC Rules and some of the penalties that have been imposed under the FCA and the FCC Rules are hefty including the fines for failure to file merger notifications to the FCC and for the entry into of anti-competitive agreements.

An intentional or negligent failure to give notice of a notifiable merger is an offence. At any time within the period of six years after the commission of the offence the FCC may:

- impose a penalty of not less than 5% but not exceeding 10% of the annual turnover of the parties derived from Mainland Tanzania[9] (that is, the acquirer and the target even if they are not in Tanzania);
- charge the body corporate and any director, manager or officer of the body corporate who was serving as such at the time with the offence; and
- in the case of a prohibited merger in respect of which the parties have not obtained an exemption, the FCC may at any time within three years after the transaction has been consummated make an order declaring the transaction void and requiring total or partial restoration of the *status quo ante*.

In the year 2017/2018,[10] the FCC investigated eight merger transactions, which were effected without notification to the FCC for clearance.[11] Most of these cases were concluded by way of a settlement agreement, however, some are awaiting Court of Appeal decisions.

One of the large entities fined by the FCC was Tanzania Breweries Limited, which was required to pay TZS 3.9 billion (approximately USD 1.8 million) for transferring its shares without the approval

of the FCC and incurred a penalty of 5% of its turnover (about TZS 27 billion (approximately USD 13 million)) for misuse of its market power.[12]

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/special review process?
Yes, the regime applies to non-controlling minority investments. The FCC treats all investments equally. As such, the notification requirements discussed above apply to all businesses and there are no separate or special review process for minority investments.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
The FCC primarily requires the following documents in relation to a merger application:

- copies of certificates of registration for companies or copies of national identity cards for individuals;
- copies of the constitutional documents of the merging firms;
- original (signed) sale/transfer agreements (including any ancillary documents);
- certified copies of recent audited accounts/financial statement (for the past three years);
- business plans or merger plans; and
- links to market reports and others and actual reports where these links cannot be accessed by other parties than the merging parties.

The merger notification is done through a prescribed form, which is extremely detailed and requires parties to provide information that would normally be found in the parties internal documents (such as business information, customers' details and market concentration etc.).

Every document submitted to the FCC is treated as important and if it is not provided, the FCC will stop the review process until such document is submitted (therefore the documents are critical for a substantive assessment to be undertaken).

The FCC has the mandate to request additional documents from a merging party at any time during a merger investigation/review, by serving on the party a request for additional information setting out the specific information that the FCC may require.

Merging parties will share confidential information with the FCC and to mitigate confidentiality risks, FCC has in place a confidentiality claim form (FCC 2), which the applicants may utilise to request the FCC to treat the information submitted as confidential where it is not in the public domain. The FCC 2 requires applicants to list all the information or documents that are confidential and provide the reason why they should be treated as such by the FCC.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
In making a decision as to whether to approve the merger or not, the FCC takes into consideration various factors for the purposes of ascertaining if the transaction is likely to have an adverse effect on competition in Tanzania, including the benefits to the public, such as:

- contribution to greater efficiency in production or distribution;
- promotion of technical or economic progress (education and employment);
- contribution to greater efficiency in the allocation of resources; or
- protection of the environment etc.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
There are various measures taken by the FCC in the event of a breach. The remedies may be either structural or behavioural, however, the FCC determines this on case by case basis and there is no apparent preference.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
No. The FCC does not appear to target specific sectors or market and there are no special rules applicable to specific sectors in Tanzania.

As highlighted above, the FCC is established to promote and protect effective competition in trade and commerce as whole, as well as to protect consumers from unfair and misleading market conduct in all industries in Tanzania. As such, all rules on mergers apply equally to all sectors.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
Yes. Early this year, the Ministry of Industry and Trade proposed the amendment of various provisions of the FCA in order to:

- increase efficiency in monitoring, supervision and implementation of the FCA;
- harmonise the FCA with other laws;
- improve competition in various economic sectors in Tanzania; and
- bring harmonisation between the FCA and the East Africa Competition Act.

The proposed changes focus on increasing efficiency on administration of the FCC and the Fair Competition Tribunal.

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TUNISIA

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The law on merger control in Tunisia is governed by Law 36-2015. Tunisia is also a member of the Common Market for Eastern and Southern Africa **("COMESA")** and has ratified the COMESA Treaty.

Are there any recent enforcement actions of particular note or interest?
None, as far as we are aware.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
We note that Law 36-2015 relating to the reorganisation of competition and prices expressly states that its provisions (including the merger control provisions) apply to cross border transactions and concentrations that may have an impact on the local market. Indeed, under Tunisian merger control law, a concentration must be submitted for the Ministry of Trade's approval if it is likely to create a dominant position in the local market or in a substantial part thereof irrespective of the location of the companies involved in the relevant transaction.

Cross-border transactions occurring overseas between entities that are not established in Tunisia but that have assets generating revenues in the local market or have local distributors operating in the local market are deemed to have a direct impact on the local market, provided, at least one of the following legal criteria are met:

- turnover of the last year amount to TND 100 million (approximately USD 36.66 million) or more; or
- the average of the market share during the last three years amounts to 30% or more.

A concentration is notifiable whenever one of the criteria above is met.

The Tunisian competition authorities consider that it is their responsibility to determine whether the proposed transaction has a local effect or not.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
There are no filing fees payable to the Tunisian authorities.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
Pursuant to Article 43 of Law 36-2015, any person who breaches the provisions of Articles 7, 8, 9 and 10 of the same law will be exposed to a penalty fine of up to 10% of the turnover achieved in Tunisia by the parties concerned during the last financial year. The abovementioned fine may be added to any sanctions imposed by the Tunisian courts regarding the same facts.

Furthermore, Article 64 of Law 36-2015 provides that administrative services or regulation authorities, who are aware of any concentration (see below), shall inform the Minister of Trade and the Competition Council.

We are not aware of any precedent of the Tunisian competition authorities imposing a sanction for failure to notify.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?
According to Article 7 of Law 36-2015, a *"concentration" is any "transaction in any form whatsoever, which may result in a transfer of ownership or use of part or all of assets, rights and obligations of a company, where the effect of such transfer is to allow a company or a group of companies to exercise directly or indirectly over another or several other companies a decisive influence (influence déterminante)".*

A transaction that does not qualify as a concentration should not trigger the obligation to make a notification to the Ministry of Trade in order to seek its approval.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
Article 9 of Law 36-2015 provides that the following documents shall be submitted with the notification letter (along with a certified French translation):

- the transaction agreement;
- the parties' list of main executives and shareholders;
- annual reports, financial statements and auditors' reports for the three last financial years;
- for the parties' subsidiary in Tunisia: bylaws, extract of the Trade Registry, Financial statements, management report and auditors report;
- the parties' market shares in the relevant market;
- the parties' lists of subsidiaries in the relevant market;
- the economic rational of the transaction;
- a summary of the competition analysis of the transaction.

The authorities can request additional documents and information from the parties and also from third parties.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
Political considerations could be taken into account when it relates to a sensitive economic sector (for example).
In addition, employment issues are one of the criteria taken into account by the authorities.
However, the main issue remains the impact of the proposed transaction on the local market and on competition in that market.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
Remedies in mergers are not common practice in Tunisia. Parties can validly undertake and make remedies in the notification but the decision belongs to the Minister of Trade who makes its decision based on the information and documents provided to it.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
None specifically.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
Tunisia is a member of the COMESA since July 2018 and has ratified the COMESA Treaty. As a result, the COMESA Treaty is considered part of Tunisian legislation. However, we understand

from our contacts at the Ministry of Trade that a separate notification should still be filed in Tunisia where the thresholds applicable in Tunisia are met.

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Uganda does not presently have a competition law regime, although certain sector-specific legislation in Uganda contains provisions that prohibit anti-competitive conduct. Accordingly, the responses below are based on the Competition Bill (the "Bill"), which was published in 2004.

Are there any recent enforcement actions of particular note or interest?
This is not applicable as the competition statute has not been enacted.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?
Foreign-to-foreign mergers would fall within the scope of Ugandan competition law to the extent that the merger would have or would be likely to have an appreciable adverse effect on competition in Uganda.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?
The Bill does not provide for the payment of filing fees.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?
This is not applicable as the statute governing competition law has not been enacted.

The penalty for failure to notify the national competition authority of a merger is fifty (50) currency points (approximately USD 265) for each day during which such failure is continuing, subject to a maximum of one hundred days. In addition, the the Uganda Competition Commission (the "UCC"), which is established under the Bill, has power to make an order that the merger is deemed void as on that day and direct the parties to de-merge.

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/ special review process?
The Bill only requires the UCC to be notified of certain combinations, acquisitions and joint ventures that result in the acquisition of control and that meet the thresholds set out in section 45(2) of the Bill.
In the Bill:

- *combination means "the acquisition by a person directly or indirectly of shares in the capital or an enterprise or voting rights or, any assets of an enterprise, so as to acquire direct or indirect control thereof; acquisition of control by a person or entity over an enterprise when such person or entity already has direct or indirect control over another enterprise engaged in production, distribution and trading of the same or substitutable goods or provision of the same or substitutable service; merger or amalgamation of two or more enterprises";*
- *acquisition means "directly or indirectly acquiring or agreeing to acquire shares, voting rights, management control or control over assets in any enterprise"; and*
- *joint venture means "an enterprise subject to joint control by two or more undertakings which are economically independent of each other".*

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
The Bill requires that a notification to the UCC is made in a prescribed form specifying the details of the proposed combination. However, the Bill does not contain provisions that relate to the type of documents that are to be submitted for review as part of the merger notification process.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision making process?
No specific political consideration must be taken into account but, in order to assess whether a combination is likely to have an adverse effect on competition in a market, the UCC may take into account a number of factors including:

- the extent of barriers to entry;
- the likelihood that the merger will result in a significant increase of prices;
- the actual and potential level of competition in the market; and
- the extent to which substitutes are available in the market.

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
This is not applicable as the competition statute has not been enacted.

The UCC is empowered to approve a merger conditionally or unconditionally or to decline to approve the merger.
Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
This is not applicable as the competition statute has not been enacted.

Nevertheless, there are sector-specific statutes that prohibit anti-competitive conduct in the relevant sectors. These include:

- the Electricity Act, 1999, which governs the production and distribution of electricity;
- the Insurance Act, 2017, which governs the insurance industry; and
- the Uganda Communications Act, 2013, which governs the telecommunications industry.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?
This is not applicable as the competition statute has not been enacted.

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Zimbabwe's anti-trust or competition framework has been a thirty-year journey. The Competition Act of Zimbabwe (the **"Competition Act"),**[1] came into force in 1996 and established the Competition and Tariff's Commission (**"CTC"** or the **"Commission"**) in 1999. Its first amendment, the Competition Amendment Act No. 29 of 2001, then introduced pre-merger notification for mergers over a certain threshold. It also strengthened the Commission's handling of mergers and acquisitions, whilst expanding the list of restrictive and unfair business practices.

Furthermore, as a member state to the Common Market for East and Southern Africa (**"COMESA"** or the **"Common Market"**), Zimbabwe acceded to the COMESA Competition Regulations in 2004 (the **"COMESA Regulations"**). This means that there is dual regulation in effect - domestic and regional rules apply in connection with transactions with a cross-border effect.

It is important to note that the Competition Act is going through tremendous reform for the second time. The Zimbabwean government produced a National Competition Law Policy document as a precursor to the amendments. It is expected that the reforms, will, amongst other things, reduce CTC time for review of mergers and acquisitions from ninety (90) to sixty (60) days to encourage "brownfield" investments.

Are there any recent enforcement actions of particular note or interest?

Innscor Africa Limited's acquisition of Profeeds & Podutrade

A recent notable matter involves a giant COMESA conglomerate called Innscor Africa Limited ("Innscor"). The CTC ordered a controversial reversal of two major transactions that have been in existence for the past six (6) years, a move which may attract litigation.

Innscor is a large Zimbabwean Fast-Moving Consumer Goods (**"FMCG"**) and retail company with vast interests in grain processing, stock feeds, light manufacturing, appliances, crocodile farming, stationery, as well as confectionaries. It also runs fast food restaurants under franchise in several COMESA markets including Kenya, Lesotho, Zambia, Zimbabwe and Mauritius. It is a local partnership between Michael Fowler and Zed Koudounaris.

On 21st May 2020, the CTC ordered a divestment of Innscor's 49% interest in both Profeeds and Podutrade. These companies are major stock feed and agro-processing businesses, respectively. The Commission has been investigating the transactions for the past six (6) years for anti-competitive practices. The decision has been viewed as controversial and anti-business considering the success of both entities since Innscor's investment in the face of relatively low FDI.

Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus requirement?

The Competition Act generally applies to transactions within Zimbabwe between parties resident within Zimbabwe. However, if a foreign transaction has an effect within Zimbabwe (e.g. change in control of an asset/entity in Zimbabwe), the transaction will be subject to merger control legislation in Zimbabwe. The rationale behind this is that:

> "The Competition Act generally applies to transactions within Zimbabwe between parties resident within Zimbabwe. However, if a foreign transaction has an effect within Zimbabwe, the transaction will be subject to merger control legislation in Zimbabwe."

- such change in control is the primary element of the merger definition in the Competition Act; and
- merger regulation is concerned not necessarily with the transaction but with the extent to which it alters the control of an entity since this has the effect of influencing the market behaviour.

What are the filings fees, what is their basis for calculation and which party is responsible for paying them?

Currently, the notification filing fee is 0.5% of the combined annual turnover or combined value of assets in Zimbabwe of the merging parties, whichever is higher. The filing fees are now capped at a maximum of ZWD 800,000 (approximately USD 10,000) with a minimum filing fee of ZWD 100,000 (approximately USD 1,250).[2] Previously, the minimum payable was USD 10,000 and the maximum payable was USD 50,000. The annual turnover of a firm at any given time is based on the income statement for the immediate previous financial year. However, if the value exceeds USD10 million then the COMESA monetary jurisdiction applies.

The asset value of a firm at any time is based on the gross value of the firm's assets as recorded on the firm's balance sheet as at the end of the immediate previous financial year. Where the acquiring firm is a subsidiary company, the combined turnover of the group of companies in which the acquiring firm is a subsidiary shall be included. Where the target firm controls any other firm or business, the combined turnover of such firm shall be included.

The COMESA Regulations are silent on the party responsible for paying the fees, but in practice either party may be responsible for the fees subject to the agreement between them.

To which extent are any procedural rules enforced and what is the history of fines for gun jumping/failure to notify?

A merger transaction is supposed to be notified to the CTC within thirty (30) days of the conclusion of the merger agreement or acquisition.[3] The CTC investigates and then summons the

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parties to make an enquiry into allegations of failure to file a notification within the stipulated thirty (30) day period. Parties are at liberty to make their representations before the Commission.

Failure to notify attracts a fine, therefore a merger transaction in Zimbabwe is only legally valid after the CTC has certified it.

The CTC is empowered by the Competition Act to terminate a transaction that "jumps the gun". Furthermore, the CTC may impose a penalty of up to 10% of either or both merging parties' annual turnovers in Zimbabwe. When determining penalties, the CTC exercises the following criteria:[4]

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the parties concerned;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the parties have co-operated with the Commission; and
- previous contraventions.

Enforcement Case Study: Innscor Africa Limited
Innscor (introduced in Question 1) has a history of 'gun-jumping'. In 2015, the CTC made an investigation after it was alleged that its intended 49.9% (later reduced to 37.82%) acquisition of National Foods Limited ("Natfoods"), a major agro-processor, was filed seven (7) years late.

The CTC issued an order for a penalty of 0.5% of Innscor's annual turnover in Zimbabwe as reflected in its audited accounts for 2014 (USD 2.5 million). Innscor successfully challenged the fine at the Administrative Court on the basis that:

- the CTC had already accepted a belated notification and therefore could not back track to impose a sanction; and
- the CTC had used the wrong procedure by issuing an 'order', under section 31(1) of the Competition Act, by which it is not empowered to do so for the purposes of fines.

On this basis, it was found that the CTC failed to exercise its statutory enforcement powers due to incompetence.

In 2020, however, the CTC had learnt from its mistakes. Innscor acquired 49% shareholding in Profeeds, a large stock food manufacturing company. On 21 May 2020, the CTC penalised Innscor US$1.6 million for its failure to notify in connection with the transaction and further reversed the intended transaction. In accordance with section 34A(5) of the Competition Act, the CTC probably considered Innscor's past conduct in making its determinations.

"The CTC is empowered by the Competition Act to terminate a transaction that "jumps the gun"."

Does the regime apply to non-controlling minority investments? Are they notifiable and is there a separate/special review process?
The merger control provisions do not apply to non-controlling minority investments. The definition of a merger in the Competition Act characterises the exercise of control. A "controlling interest" in terms of the Competition Act is determined in relation to an "undertaking" or an "asset" as follows:

- any undertaking – which means any interest that enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking; and
- any asset – which means any interest that enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.

The acquisition of a minority shareholding does not establish or confer a controlling interest according to the Competition Act, and therefore cannot be considered a merger.

Do internal documents need to be submitted as part of the review and how much importance does the authority attach to those in terms of its substantive assessment?
The CTC requires all relevant documentation, which includes the merger agreement and financial statements and is treated as strictly private and confidential, such that it may not be published anywhere without the parties' consent. The notification process requires standard Merger Application Forms to be completed and submitted to the CTC by the merging parties.

The forms request information on all aspects of the merger transaction. Additional information is obtained from submissions and interviews with the relevant stakeholders. The CTC places great importance on these documents and representations in making its decision.

Are political considerations or similar concerns (e.g. industrial policy, securing local employment) taken into account in the decision-making process?
None

Remedies in mergers: how often are remedies accepted and is there a preference for structural or behavioural remedies?
Remedies are accepted in merger transactions. Parties may begin negotiations for remedies at any stage where concerns are raised by the case officer of the CTC. Complainants and respondents are called for a round-table discussion of the concerns raised. In the event of failure to reach an amicable position, the CTC will give its determination regarding the matter.

Where foreign-to-foreign parties have a local entity/subsidiary, remedies are imposed on the local party. Timeframes for implementation of remedies are agreed with the parties involved. The Commission's Legal Division then follows-up with the parties to ensure implementation is taking place.

There is no preference for structural or behavioural remedies.

Does the authority focus more on specific sectors or industries (e.g. defence, telecoms, media) and are there any special rules that apply?
In practice, the CTC does not necessarily focus on specific

sectors. The recent list of approved merger transactions includes health and pharmaceuticals, financial services, manufacturing, FMCG, as well as travel and tourism (hospitality) sectors.

Certain sectors do regulate merger transactions, however, the merger control provisions of the Competition Act override any powers given to any sector regulator in considering and approving mergers and acquisitions. Sector regulators usually have the most accurate data concerning market share and conduct of participants in that sector. This data is provided by industry players on a quarterly basis as part of their regulatory obligations. To that end, the CTC relies on the cooperation of sector regulators for data gathering.

Zimbabwe does have special provisions for certain sectors like telecommunications. Section 45 (2) of the Postal and Telecommunications Act[5] for instance, includes a requirement for a local internet service provider licensee in Zimbabwe to notify the Postal and Telecommunication Regulatory Authority of Zimbabwe (**"POTRAZ"**) of any transfer to or by any single person of more than 10% of the shares of the local licensee.

Further, the Internet Access Provider Service Specifications[6] require POTRAZ's approval for a change in any threshold in shareholding. However, these provisions do not extinguish the need for compliance with a merger notification under the Competition Act.

Are there any upcoming changes and (enforcement) trends in your jurisdiction?

The Competition Act is undergoing its second major reform since 2001. The government launched a new national Competition Law Policy document in December 2017 following extensive stakeholder engagements since 2015. The Competition Amendment Bill, which includes recommendations from that policy document, is currently before Parliament where it has to pass through both the Lower and Upper House before presidential assent. The proposed amendments are yet to be passed into law.

The current Zimbabwean competition legal framework lacks a comprehensive definition of dominance and does not contain a general prohibition of the abuse of dominance. Currently, a monopoly situation can be declared unlawful if the CTC is satisfied that it is contrary to the public interest on a case by case or ad-hoc basis. However, the framework lacks specifics. For instance, it does not provide for a level of market share that a person must attain to be considered dominant.

Other expected changes include a better leniency programme and shortening timeframes for review of mergers and acquisitions from 90 days to 60 days. It is expected that the COVID-19 pandemic presents unique opportunities for further reforms due to the unique challenges brought about by the pandemic.

The only substantive change in enforcement relates to the financial aspects of merger notifications. The Government recently gazetted Statutory Instrument 126 of 2020 Competition (Notification of Merger) Regulations, 2020 (the "Regulations"), to amend financial thresholds for notification of mergers:

Previous thresholds	New thresholds
A merger is notifiable where: (a) The combined annual revenue in or from Zimbabwe of the acquiring group and the target group is equal to or exceeds USD 1.2 million; or (b) The combined gross asset value in Zimbabwe of the acquiring group and the target group is equal to or exceeds USD 1.2 million.	A merger is notifiable where: (a) The combined annual revenue in or from Zimbabwe of the acquiring group and the target group is equal to or exceeds ZWD 10 million; or (b) The combined gross asset value in Zimbabwe of the acquiring group and the target group is equal to or exceeds ZWD 10 million.

Given that the value of ZWD 10 million is the equivalent of some USD 125,000, the Regulations appear to significantly lower the threshold for mandatory merger notification thereby extending the ambit of transactions subject to review. It seems an unusual situation and not clear whether the full impact of the conversion from USD to ZWD has been considered by CTC.

The merger filing fee payable is still 0.5% of the combined annual revenue or the combined gross value of assets in Zimbabwe of the merging parties' (whichever is higher). Notably however, the filing fee is now capped at a maximum of ZWD 800,000 (approximately USD 10,000) with a minimum filing fee of ZWD 100,000 (approximately USD 1,250). Previously, the minimum payable was USD 10,000 and the maximum payable was USD 50,000. This may have a significant impact on the number of transactions subject to notification.

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