What's Shaping the Kenyan Markets Right Now

Key trends, policy shifts and investor sentiments to watch this quarter

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What Constitutes a Merger or Acquisition under Kenyan Law?

Picture two neighbouring farms. One grows maize, the other keeps dairy cattle, and for years they've operated side by side, each minding its own fences. Now imagine the maize farmer decides to buy the dairy farm outright, or perhaps just buys enough of a stake to start calling the shots on how the herd is managed and where the milk is sold. Either way, something has fundamentally changed: two operations that used to compete or operate independently in the local market now answer to one decision-maker.

This is essentially the difference between a merger and an acquisition, and the two terms are often used together, even though they describe slightly different routes to the same outcome. An **acquisition** happens when one company takes over another by purchasing a controlling interest, in our example, this is the maize farmer buying enough of the dairy farm to control it. What happens next can go one of two ways: the dairy farm might keep its own name, its own gate, and its own way of doing things, simply reporting to its new owner, or it might be fully absorbed, its cattle and land folded entirely into the maize farmer's existing operation until there's no trace of the original dairy farm left.

A **merger**, by contrast, is the broader legal concept: it occurs when one or more businesses (also known as **undertakings** or **persons**) acquire, or establish direct or indirect control over, the whole or part of another business's operations. Just as the maize farmer did not need to buy every cow, every acre, and the farmhouse to change how the dairy farm is run, a merger need not involve a full acquisition. Gaining a controlling interest, or control over even a specific part of a business, is enough to bring the transaction within the definition.

Mergers and acquisitions in Kenya are governed by the Competition Act (Cap. 504 Laws of Kenya) and regulated by the Competition Authority of Kenya (CAK). Think of the CAK as the agricultural board that keeps an eye on the wider farming valley, not just the two farms in question. Under the Competition Act, CAK reviews qualifying transactions to assess their impact on competition and public interest. Depending on its assessment, the Authority may approve a transaction, approve it subject to conditions, or decline approval.

Recent mergers and acquisitions in Kenya include the proposed acquisition of 66% of NCBA Group PLC by South Africa's Nedbank Group Limited, and the total acquisition of Paramount Bank by Zenith Bank. There have also been several mergers and acquisitions across Africa, including the acquisition of a majority stake in 10X Investments by Old Mutual in South Africa. On the global front, there is a proposed combination of McCormick & Company with Unilever's Foods business, with the transaction expected to be completed by mid-2027.

Parties to a Merger or Acquisition

Whether it's the broader merger or the more specific acquisition, the roles on the ground stay the same. Back on our two farms: the maize farmer, having initiated the deal, is the **buyer**, and in legal terms, the **acquiring undertaking**. The dairy farm being taken over is the **target undertaking**. Where the transaction requires CAK approval, the parties must obtain the relevant approval before implementation. Following completion, the acquirer obtains the agreed level of control over the target. The target may remain a separate legal entity and retain its existing brand and operations, or it may subsequently be integrated into the acquirer's business, depending on the transaction structure.

Forms of Mergers

A merger can take several forms, including:

1. buying or leasing shares, acquiring an interest, or purchasing assets belonging to another business;
2. gaining a controlling interest in a distinct part of a business that could operate on its own, regardless of whether that business is run through a company;
3. one business, whether based in Kenya or abroad, taking over another business that is under receivership;
4. gaining a controlling interest, by any method, in a foreign business that itself controls a Kenyan subsidiary;
5. where the acquiring business is a conglomerate (a large company made up of several smaller, unrelated independent companies/subsidiaries operating across different industries under one parent company), gaining a controlling interest in another business, or in a self-contained part of it;
6. vertical integration between businesses at different points in the same supply chain;
7. a share exchange between businesses that substantially changes ownership structure, however that exchange is carried out; or
8. an amalgamation, takeover, or any other form of combination between the businesses involved.

Control of an Undertaking

A company gains a controlling interest in a business if that company:

1. owns, as the true (beneficial) owner, more than half of the business's issued share capital, or more than half of its business or assets;
2. can cast, or control the casting of, a majority of votes at the business's general meetings, whether directly or through another entity they control;
3. can appoint a majority of the business's directors, or veto such appointments;
4. is a holding company of which the business is a subsidiary, as defined under the Companies Act (Cap. 486);
5. where the business is a trust, can control how the majority of trustees vote, appoint the majority of trustees, or appoint or change the majority of the trust's beneficiaries;
6. where the business is a nominee undertaking, owns the majority interest of its members, or directly controls (or has the right to control) the majority of members' votes; or
7. can materially influence the business's policy in a way comparable to the forms of control described above.

Conclusion

For businesses contemplating an acquisition, restructuring or change of control, the key is to consider the competition law implications early in the transaction process. Determining whether a transaction constitutes a merger, whether notification thresholds are met and which regulatory approvals are required can materially affect transaction structure and timing. Early legal, regulatory and transaction advice can therefore help parties anticipate these requirements and execute with greater certainty.v

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