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Investing In... 2022

Kenya: Law & Practice

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KENYA

Law and Practice

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1. LEGAL SYSTEM AND REGULATORY FRAMEWORK

1.1 Legal System

The Executive, the Legislature and the Judiciary

Kenya is a constitutional democracy, with three arms of government: the executive, the legislature, and the judiciary. In addition, the 2010 Constitution established a number of independent constitutional commissions. There are two levels of government: the national government, and 47 county governments headed by elected governors. Kenya has a bicameral parliament, comprising the National Assembly and the Senate. The judiciary is composed of various courts, with the Supreme Court as the apex court. Below the Supreme Court is the Court of Appeal; the High Court, which includes specialised courts responsible for land and the environment, labour matters, the magistrates' courts, Kadhi's courts, and specialist tribunals such as the tax disputes tribunal. The decisions of the superior courts are binding on subordinate courts and the tribunals established under statute.

Statutes

Kenya's legal system is based on English common law. The constitution provides the general framework within which businesses operating in Kenya are regulated. This is supplemented by acts of parliament, referred to as "statutes". Statutes are passed by the national assembly and, where the proposed statute relates to the counties, it will also be considered by the senate. The statutes in place include laws relating to the formation, operation and reporting obligations of various business vehicles, such as the companies and limited liability partnerships acts; industry-specific laws; those relating to trade and commerce addressing matters such as the promotion of foreign investment and standards of goods and exports; and general commercial statutes such as those relating to taxation of income. There are also statutes that generally apply to all businesses, such as the Employment Act, the Competition Act and the Bribery Act. The extent of application of statutes is dependent on the business activities being undertaken, with businesses operating in the financial services, aviation, mining and telecommunications sectors being the most regulated.

Regulations and Guidelines

Statutes are usually supplemented by subsidiary legislations in the form of regulations and guidelines. Regulations are published by the executive which is organised into various ministries, each headed by a cabinet secretary appointed by the president. The cabinet secretary of the relevant ministry under which that function falls publishes regulations providing for operational matters if empowered by statute. Guidelines are issued by government entities charged with oversight of particular functions. Guidelines provide general direction to the relevant industry, and although they do not have the force of law, they are often complied with in full.

Settlement of Disputes

Disputes arising between private entities or between the state and a private entity are determined by the courts. There are also specific tribunals set up to determine specific disputes for example the National Land Commission (NLC) settles land-related disputes, the Public Procurement Administrative Review Board settles procurement and tender-related disputes, and the Tax Appeals Tribunal settles tax disputes. Appeals from these tribunals usually go to the High Court. To ensure commercial objectives are preserved, tribunals have statutorily set timelines for determining disputes.

ADR Mechanisms

Alternative dispute resolution mechanisms, such as arbitration, are also widely applied. The Kenyan Arbitration Act (1995) as amended in 2010

is anchored on the United Nations Commission on International Trade Law (UNCITRAL) Model Law. The Nairobi Centre for International Arbitration (NCIA) was established as an independent, non-profit international organisation for commercial arbitration. Kenya is a member of the International Centre for Settlement of Investment Disputes, and the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. Since 2018, court-annexed mediation has also been adopted by the courts.

1.2 Regulatory Framework for Foreign Direct Investment (FDI)

Generally, foreign direct investments do not require approval in Kenya. The transfer of funds in and out of the country may however be subjected to scrutiny by the Central Bank of Kenya and supporting documentation may be requested through the transacting bank. The extent of the documentation requested may vary based on the origin and quantum of the funds. This is part of the government's efforts to curb money laundering and financing of terrorism.

Some regulated sectors also have restrictions on foreign shareholding and requirements for incorporation of a local entity (although this is rare and mostly relates to matters considered to touch on national security). In addition, the acquisition of direct or indirect control of a Kenyan business, subject to certain thresholds as set out in the Competition Act, will be subject to the approval of the Competition Authority of Kenya (in addition to the relevant sector regulator, where applicable). Local content requirements also apply in a number of sectors, like Energy and Construction, to ensure knowledge sharing.

Examples of the regulated sectors of the economy are:

- insurance – regulated by the Insurance Regulatory Authority;
- banking – regulated by the Central Bank of Kenya;
- pension – regulated by the Retirement Benefits Authority;
- information, communications and technology – regulated by the Communications Authority of Kenya;
- aviation – regulated by the Kenya Civil Aviation Authority;
- mining – regulated by the Mineral Rights Board;
- merchant shipping – regulated by the Kenya Maritime Authority;
- private security services – regulated by the Private Security Regulatory Authority; and
- construction – regulated by the National Construction Authority.

2. ECONOMIC/POLITICAL/BUSINESS CLIMATE

2.1 Outlook and FDI Developments

Ease of Doing Business

The Big Four Agenda

Kenya's transformative development plan (dubbed the "Big Four Agenda") which is anchored on, among others, the growth of the manufacturing sector, has led to an increase in foreign investment. To spur growth in capital investments, effective January 2020, the government increased the capital allowances for both local and foreign investors in the mining and energy sectors. Kenya also signed an Economic Partnership Agreement with the United Kingdom which will allow it to continue enjoying duty-free and quota-free access to the UK market. Since July 2020, the governments of Kenya and the United States of America have been engaged in

negotiations for a free trade agreement that is set to be first of its kind in sub-Saharan Africa.

Review of the business regulatory framework
The country has reviewed its business regulatory framework in order to eliminate certain compliance requirements for foreign investors as well as enhance the ease of doing business in the country. The most recent legislative enactments include the following.

- Removal of the requirement for certain instruments, such as those relating to land, to be sealed. The Companies Act now allows for electronic execution of documents.
- The threshold for takeover offers has been increased from 50% to 90%.
- The Public Private Partnerships Act has been amended to allow for transparency and ease of implementation of such projects and facilitate foreign investors who wish to invest in projects for provision of public services. County governments are encouraged to take advantage of such arrangements and benefit from the synergies that come with private sector involvement in government projects. The government has entered into several public private partnerships (PPPs) for provision of affordable housing.
- Implementation of the Integrated Customs Management System (ICMS) for cargo clearance, reducing the clearance time for imports and exports.

The telecoms industry
Kenya has also established itself as a regional leader in the telecommunications industry. Various government services are also being offered online, including registration of businesses, application for work permits, and filing and payment of taxes. The government has launched the National Land Information Management System (NLIMS) which will digitise all transactions involving land and provide an online land registry. Additionally, the judiciary has migrated to electronic filing of pleadings, and due to the COVID-19 pandemic, some court proceedings are being conducted virtually.

Negative Aspects
Despite the gains, Kenya has a burdening tax regime with the government keen on increasing its tax base. Effective from 2 January 2021, foreign businesses are subject to digital service tax payable at 1.5% of the gross transaction value. The government has also proposed a minimum tax to be charged at a rate of 1% of the gross transaction value of a company, which will be payable whether a company makes a profit or not. The application of this tax has been suspended by the courts, pending the hearing of an appeal by the Kenya Revenue Authority.

Kenya will be conducting its general elections in August 2022. This could lead to political volatility which may impact businesses. The country's corruption index has deteriorated.

In the Pipeline
Currently, the following items are in the pipeline.

- The National Assembly is considering the Investment Promotion (Amendment) Bill 2021 which, if passed, will enable county governments to participate in the promotion of trade in the country. The Kenya Investment Authority is looking to revise the conditions for getting an investment certificate by lowering the minimum investment for sectors that might not be capital intensive, such as ICT, therefore providing different minimums depending on the sector, and providing timeframes within which immigration permits, including investment permits, can be processed.
- The National Electronic Single Window System Draft Bill 2016, which seeks to promote international and cross-border trade by

providing for a unified payment system for electronic transactions.

Judicial Stability

In terms of the legal environment, Kenya remains relatively stable as to the certainty of law. The Kenyan Supreme Court, in the case of Geo Chem Middle East v Kenya Bureau of Standards (2020) eKLR, reinforced the legal position that arbitral awards are binding and may only be challenged in very limited circumstances.

Government Intervention

There have been instances where the government has sought to intervene in contractual arrangements. For instance, through Gazette Notice No 3076, the president appointed the Taskforce on the Review of Power Purchase Agreements (PPAs) between Kenya Power and Lighting Company Limited (KPLC) and independent power producers. The Taskforce's terms of reference involved the review and analysis of the terms of the PPAs entered into by KPLC to ascertain their compliance with government policies, legislation and regulations, and identify the appropriate corrective actions. Following the recommendations of the Taskforce, all negotiations for new PPAs have been discontinued, although the government has indicated that for existing contracts, legal procedure will be followed in cases where amendments need to be made. Such instances are however limited, which may be attributable to the fact that this relates to a utility company and directly affects the cost of living.

3. MERGERS AND ACQUISITIONS

3.1 Transaction Structures

The most common structure for M&A of both public and private companies in Kenya is through the acquisition of shares from existing shareholders or by acquiring newly created shares. The acquisition of public listed companies is more complex, as the acquirer must comply with the Capital Markets (Takeovers and Mergers) Regulations, 2002.

Other transaction structures include:

- purchase of the target's assets;
- acquisition of a business or part of a business such as a trading division;
- joint ventures, and
- share swaps.

The key legal considerations in determining the type of transaction structure to adopt include ease of implementation, tax efficiency, risk appetite and the needs of the target business. Where an acquirer is taking a minority interest, the usual structure is the purchase of shares from existing shareholders.

The Companies Act also provides for the use of schemes of arrangement as a way of acquiring a target or effecting a merger. These have not been used since the Companies Act, 2015 came into effect. Schemes of arrangement must be approved by at least 75% of the members of the company and creditors present at the meeting, and thereafter approved by the High Court for implementation.

3.2 Regulation of Domestic M&A Transactions

The principal legislation regulating M&A transactions is the Competition Act, No 12 of 2010. However, parties proposing to consummate a transaction must review their situation and determine whether the transaction is subject to other regulatory approval, based on the sector and status of the entities. As an example, M&A transactions involving the financial services sector may be subject to approval by all or some of the following additional regulators: the Cen-

tral Bank of Kenya, the Insurance Regulatory Authority, the Capital Markets Authority, and the Retirement Benefits Authority. Similarly, a telecommunications sector transaction will require the approval of the Communications Authority of Kenya. M&A transactions involving an entity that has operations within East Africa and COMESA markets may also need to be notified to the regional competition authorities.

4. CORPORATE GOVERNANCE AND DISCLOSURE/REPORTING

4.1 Corporate Governance Framework

Corporate entities used for business in Kenya are either companies or limited liability partnerships (LLPs).

Companies

The Companies Act sets the minimum corporate governance standards for companies and requires that a private company must have at least one director while a public company must have at least two directors. The general duties of directors are codified in the Act. Public companies as well as private companies with a share capital of more than KES5 million are also required to have a company secretary. Public companies are required to convene a general meeting every year.

Limited Liability Partnerships

The Limited Liability Partnership Act does not provide for minimum governance requirements. There is no requirement to have a partnership deed, and in the absence of such, provisions of the Act apply. A limited liability partnership must, however, have at least two partners and a manager, who may be one of the partners but who must be a natural person. The manager is responsible for statutory filings and compliance.

Regulations

The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 which takes the "apply or explain" approach, applies to all entities (whether listed or not), which have issued securities to the public. The Code requires issuers to ensure independence between the office of the chief executive officer and the board chairman; it prescribes minimum requirements on board composition in relation to independent and non-executive directors; it requires that board committees must be established, ie, audit and risk and board nominations; and it provides for board training and evaluation as well as reporting obligations to the Capital Markets Authority.

Regulated entities, particularly in the financial services sector have specific corporate governance requirements, applicable whether they are issuers of securities to the public or not. These mirror the above requirements and are customised to the specific industry, such as the Prudential Guidelines for banking institutions.

The Capital Markets Authority has also published a Stewardship Code meant to encourage institutional investors, including foreign investors, to take up stewardship roles in listed companies in which they invest, in order to ensure conflicts of interest are managed, and responsible investment policies are established; public disclosures and reporting are done; and sustainable investments are made.

4.2 Relationship between Companies and Minority Investors

The company laws in Kenya require both private and public companies to treat their shareholders (including minority shareholders) in an equitable manner. In terms of rights, minority investors are entitled to:

- receive notice of general meetings of the company;
- receive information on the company's performance;
- attend and participate at the general meeting and, depending on the rights attached to the class of shares, vote; and
- apply to court for investigation of the affairs of the company.

Minority shareholders may exercise the following additional rights to oversee the affairs of the company:

Members holding at least 10% of the paid-up capital of the company may require the directors of the company to convene a general meeting of members. For private companies, the right is exercisable by members holding at least 5% of the paid-up share capital of the company.

Directors are required to give notice of at least 21 days prior to convening a general meeting. However, a general meeting of public companies may be convened at short notice where approved by 95% of the members entitled to vote. For private companies, the short notice must be approved by at least 90% of the members entitled to vote.

Members of a company may apply to the High Court for orders for protection of members where the company's affairs are being conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or some particular member.

Under the Companies Act, any five members having the right to vote on a resolution or such members representing at least 10% of the total voting rights of all the members having the right to vote on a resolution, may demand a poll.

Where an offer is made for the acquisition or takeover of a company, the offeror must extend the offer to the minority shareholders on the same terms as those agreed with the majority shareholders. The Capital Markets Authority may suspend or cancel the listing of, or trading of any securities or exchange-traded derivatives contracts, for the protection of investors, including minority investors.

4.3 Disclosure and Reporting Obligations

The disclosure and reporting obligations imposed on companies are twofold: general disclosure and reporting requirements set out in the Companies Act, and industry-specific requirements which require additional disclosures and reports to be lodged with the sector specific regulator. These disclosure and reporting requirements are mandatory regardless of the ownership percentage.

Any changes in a company's shareholding or directorship are to be notified to the Registrar of Companies (the "Registrar") within 14 days of such changes being made.

Companies are to prepare and lodge financial statements with the Registrar comprising:

- statement of financial position;
- income statement;
- cash flow statement; and
- statement of changes in equity.

Where a company has subsidiaries, it will prepare consolidated group financial statements detailing the performance of the subsidiaries.

The notices and documents to be lodged with the Registrar are filed at the Business Registration Service through an online platform known as eCitizen, which is accessible to citizens and non-citizens alike.

Both individuals and companies are required to disclose their incomes to the Kenya Revenue Authority and file their tax returns on an annual basis. Effective from 1 January 2022, ultimate parent entities for multinationals will be required to file annual returns with the Kenya Revenue Authority detailing the business activities of the group in the county and in other jurisdictions where the group entities are liable to pay tax.

5. CAPITAL MARKETS

5.1 Capital Markets

The CMA

The capital markets are regulated by the Capital Markets Authority (CMA) which licenses and monitors securities exchanges, market intermediaries and issuers of securities. The Nairobi Securities Exchange (NSE) is the only securities exchange licensed in Kenya and is approved by the CMA as a self-regulatory organisation. It provides oversight and guidance to market supervisors as well as playing a primary approval role for companies looking to list on the Growth Enterprises Market Segment (GEMS).

The CMA has prescribed regulations relating to the issuance of securities to the public, licensing requirements by market intermediaries, conduct requirements, as well as corporate governance and reporting obligations.

The NSE

There are only 62 companies listed on the NSE (as at November 2021) with a number of delistings witnessed in the recent past. There are 26 active bonds on the NSE. The bond markets have been particularly inactive following a number of defaults but market confidence is slowly coming back. In 2021, the two corporate bonds issued to the public have been over-subscribed. The private capital markets also remain active, providing viable funding to SMEs. The CMA has put in a number of initiatives to revive the capital markets, with a review of the Collective Investment Scheme Regulations and the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations ongoing.

Investment opportunities

The capital markets provide opportunities for investment in different asset classes other than the conventional equity and debt securities, as well as collective investment schemes including REITs, exchange traded funds and equity derivatives. Provision has also been made for green bonds with the first green bond having been listed on both the Nairobi and London securities exchange in 2020.

Trading

Trading of listed securities is electronic and conducted via a central depository system maintained by the Central Depository & Settlement Corporation. The NSE has also established an Unquoted Scripts Platform that provides an over-the-counter market for unlisted securities. This has led to an improved flow of information and efficiency in the markets. The CMA also publishes a quarterly market-soundness report that provides the market with crucial information as well as giving insights as to the policy direction it is pursuing. Effective from 2021, investors can now buy and sell shares of a listed company within the same day, ie, day trading.

Sources of funding

The primary sources of funding remain the banking industry with at least 95% of business funding coming from banks and micro-finance institutions. Saving and credit co-operative societies also provide critical funding to micro, small and medium-sized businesses. Private equity and venture capital (both debt and equity) have also gained traction in the recent past by providing funding for companies in the tech and digital space, as well as businesses in the

retail, e-commerce and healthcare sectors, with increased participation from Africa-focused offshore funds. The CMA has rolled out a couple of initiatives to ramp up funding of businesses and recently published draft crowd-funding regulations for public participation.

5.2 Securities Regulation

The primary legislation governing capital markets in Kenya is the Capital Markets Act No 17 of 1989. Subsidiary legislation has been published by the CMA including the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations. Certain securities, such as asset-backed securities, also have specific requirements.

The NSE's Four Investment Market Segments

CMA approval is required for any offer of securities to the public or a section of the public. Approval is premised on the issuer meeting eligibility and disclosure requirements which vary depending on the segment the issuer intends to list in. The NSE has four investment market segments, namely:

- the Main Investment Market Segment (MIMS), for companies with fully paid-up share capital of KES50 million and net assets of KES.100 million;
- the Alternative Investment Market Segment (AIMS), for companies with fully paid-up share capital of KES20 million and net assets of KES20 million;
- the Fixed Income Securities Market Segment (FISMS), for treasury and corporate bonds; and
- the Growth Enterprises Market Segment (GEMS), for companies with fully paid-up share capital of KES10 million.

Restricted Fixed Income Market Segment

Entities that do not meet the eligibility requirements, such as special-purpose vehicles, may also raise funds through the issue of securities, provided the issue is restricted to sophisticated investors. The NSE maintains a Restricted Fixed Income Market Segment for this purpose. A short form prospectus may also be issued where an issue is targeted at sophisticated investors or for existing approved issuers who continuously disclose information.

Raising Funds within the Private Capital Markets

For entities raising funds within the private capital markets, an Information Notice must be submitted to the CMA. Certain requirements also apply to companies which, for example, are listed on the exchange so that the company does not need to be closely held. For instance, to be listed on the main investment market segment, at least 25% of the shares must be held by no less than 1,000 shareholders. Companies that have issued securities to the public or a section of the public, generally have certain periodic reporting requirements to the CMA, NSE and their investors. There are also financial reporting and mandatory event-triggered disclosure requirements, for example, on a significant disposal.

Regulation of Foreign Investors

Under the Capital Markets (Foreign Investors) Regulations, 2002, foreign investors may subscribe to the shares of a listed company without any restrictions as to the level of holdings. However, the cabinet secretary in charge of finance may prescribe a maximum foreign shareholding in an issuer or listed company where:

- in a privatisation transaction, the government or its agency is divesting its shares to the public; or
- some level of local ownership in a strategic industry or sector in the country is to be maintained; or
- it is in the national interest.

5.3 Investment Funds

Foreign investment funds looking to invest in Kenya are not subject to regulatory review except for the purposes of compliance with the Proceeds of Crime and Money Laundering Act. Foreign investment funds continue to play a key role in funding businesses in the private equity and venture capital space, with support from development finance institutions.

However, the Capital Markets Act gives the CMA jurisdiction over investment funds, including foreign-domiciled investment funds seeking to raise funds from Kenyan retirement benefit schemes or other entities that pool funds from the Kenyan public. The CMA has not yet published regulations or guidelines in relation to its mandate.

6. ANTITRUST/COMPETITION

6.1 Applicable Regulator and Process Overview

Kenya has a merger control regime set out in the Competition Act. The Act establishes the Competition Authority of Kenya (CAK), the mandate of which is to enforce compliance with the Act. The CAK has published the Consolidated Guidelines on the Substantive Assessment of Mergers, which sets the threshold for transactions that must be notified to the CAK, and those that are exempt.

Transactions Requiring Notification

- Companies with a minimum combined turnover or assets of KES1 billion, where the turnover of the target company is above KES100 million.
- In the healthcare sector, companies with a minimum combined turnover or assets of KES500 million, where the turnover of the target company is above KES50 million.
- In the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds KES4 billion.
- In the oil sector, where the merger involves pipelines and pipeline systems which receive oil and gas from processing fields belonging to and passing through the meters of the target company, even where the value of the reserves is below KES4 billion.

Transactions Excluded from Notification

- Transactions that do not meet the thresholds set out above.
- Acquisition of voting shares where the acquisition:
  - (a) is less than 25%;
  - (b) is acquired solely for investment purposes or in the ordinary course of business; and
  - (c) does not amount to control.
- Acquisition of further voting securities by an entity which already holds more than 50% of the shares, unless the acquisition is a transfer of joint control to sole control.
- Transactions involving a parent or holding company and its subsidiary.
- Undertakings in the carbon-based mineral exploration and prospecting sectors.

Where either or both the acquiring firm and the target firm operate in two or more member states, the merger must be notified to the Common Market for Eastern and Southern Africa (COMESA) Competition Commission.

A merger proposal will not be implemented unless it is approved by the CAK. A merger implemented without the CAK's approval has no legal effect and obligations imposed on the participating parties in respect of the merger will not be enforceable in legal proceedings.

Procedure for Requesting the CAK's Approval

Each of the companies involved will file a notification on the CAK portal. Parties share the filing credentials, with one party completing its filing and then the second party following, using the same reference number. The CAK then considers and makes a determination within 60 days after the date on which it received the notification. The CAK may extend the period for determination by a further 30 days. It will thereafter make one of the following decisions:

- to approve implementation of the merger;
- to decline to approve the merger; or
- to approve implementation of the merger subject to certain conditions.

6.2 Criteria for Review

Merger proposals are subjected to competition assessment and public interest assessment. Public interest considerations require that mergers should not conflict with government policies, for instance, the protection and encouragement of the growth of small businesses.

In undertaking the competitive assessment, the CAK takes the following factors into consideration:

- the extent to which the proposed merger would prevent or reduce competition, or restrict trade or the provision of any service;
- the extent to which the proposed merger would result in any undertaking acquiring a dominant position in a market or strengthening a dominant position in a market;
- the extent to which the proposed merger would result in a benefit to the public which would outweigh any detriment that might result from any undertaking acquiring a dominant position in a market or strengthening a dominant position in a market;
- the extent to which the proposed merger would affect a particular industrial sector or region;
- the extent to which the proposed merger would affect employment;
- the extent to which the proposed merger would affect the ability of small undertakings to gain access to or be competitive in any market;
- the extent to which the proposed merger would affect the ability of national industries to compete in international markets; and
- any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods, or provision of services and access to markets.

6.3 Remedies and Commitments

Remedies and commitments are determined by the CAK on a case-by-case basis. The following are examples of commitments imposed by the CAK in the past:

- the commitment not to lay off workers;
- the commitment not to subject employees to less favourable employment benefits;
- the commitment to reserve 20% of the space in fridges provided to retailers for use for other products, in order to assist SMEs; and
- the commitment to use locally available raw materials.

The conditions imposed are subject to appeal at the Competition Tribunal, an independent body which may overturn the decisions of the CAK Board.

6.4 Enforcement

Approval from the CAK is required prior to making an investment, if it falls within the threshold of the Competition Act. However, a deposit of not more than 20% of the consideration may be made towards a merger transaction prior to

the approval of the CAK. Failure to obtain the CAK's approval renders the transaction to be of no legal effect, and obligations imposed on the participating parties in respect of the merger will not be enforceable in legal proceedings. The parties may also be subject to monetary penalties from the CAK. The CAK may also, at any time, revoke a decision approving the implementation of a proposed merger if:

- the decision was based on materially incorrect or misleading information occasioned by a party to the merger; or
- a condition attached to the approval of the merger is not complied with.

The CAK's decisions may be appealed to the Competition Tribunal within 30 days of receipt of the decision. The Tribunal will give its verdict within four months after the appeal is lodged. Any party dissatisfied with the decision of the Tribunal may appeal to the High Court within 30 days after notification of the decision. The decision of the High Court will be final.

7. FOREIGN INVESTMENT/ NATIONAL SECURITY

7.1 Applicable Regulator and Process Overview

Kenya does not have an overt foreign investment national security review regime. Merger proposals are, however, subject to public interest considerations which require that mergers should not conflict with government policies. The public interest review is done by the CAK and proposals are determined on a case-by-case basis. If an investor applies for an investment certificate under the Investment Promotion Act No 6 of 2004, further review procedures may be required where an investment raises an environmental, health or security issue. There are currently no guidelines on how the review will be undertaken and the parameters to be used.

7.2 Criteria for Review

This is not applicable in Kenya.

7.3 Remedies and Commitments

This is not applicable in Kenya.

7.4 Enforcement

This is not applicable in Kenya.

8. OTHER REVIEW/ APPROVALS

8.1 Other Regimes

The following laws have an impact on how foreign investments may be undertaken in the country by prescribing restrictions on foreign shareholding.

- The Constitution of Kenya – Non-citizens can only hold land on the basis of leasehold tenure not exceeding 99 years. Body corporates are regarded as citizens only if they are wholly owned by one or more citizens.
- Land Control Act Chapter 302 – The Act restricts the ownership of agricultural land by non-citizens.
- Retirement Benefits Act No 3 of 1997 – For an entity to be approved as an administrator of a retirement benefits scheme, at least 60% of its paid-up share capital must be owned by Kenyan citizens, unless the applicant is a bank or an insurance company.
- National Information Communications and Technology (ICT) Policy Guidelines, 2020 – Only companies with at least 30% substantive Kenyan ownership (either corporate or individual) will be licensed to provide ICT services in Kenya.
- Insurance Act Chapter 487 – At least one third of the controlling interest in an insur-

ance company (whether in terms of shares, paid-up share capital or voting rights) should be wholly under the control of citizens of a partner state of the East African Community. To be registered as an insurance broker, an entity must be registered as a company with a paid-up capital of not less than KES1 million, of which at least 60% should be owned by Kenyan citizens; or a partnership where the partners are all citizens of Kenya; or a corporate body where the shares are wholly owned by Kenyan citizens or which is wholly owned by the government. Licensees under the Act are to ensure that at least one third of their directors are Kenyan citizens.
- The Civil Aviation (Licensing of Air Services) Regulations, 2018 – To be registered as an air service under the Civil Aviation Act, the entity must be registered in Kenya, with a duly registered office and permanent premises in Kenya. At least 51% of the entity's shares should be held by Kenyans.
- Mining Act No 12 of 2016 – To be eligible for mineral rights relating to small-scale operations, a person must be a citizen of Kenya or a body corporate must have at least 60% of its shareholding held by Kenyan citizens. Mineral dealer permits will only be issued to Kenyan citizens or to body corporates where 60% of the shareholding is held by Kenyan citizens. Where a mineral right is for a large-scale mining operation, the state will acquire 10% free interest in the share capital of the entity. The state's 10% free interest in the mining licensee will be held by the National Mining Corporation as provided in the Mining (State Participation) Regulations 2017. Additionally, where the holder of a mining licence's capital expenditure exceeds the amount prescribed by the cabinet secretary, the licensee will be required to list at least 20% of its equity on the securities exchange within three years after commencement of production. The cabinet secretary is yet to publish the prescribed capital expenditure limits.
- Merchant Shipping (Maritime Service Providers) Regulations, 2011 – To be licensed as a maritime service provider, one must be a Kenyan citizen and, in the case of a company, it must be incorporated in Kenya with at least 51% of the share capital held directly by Kenyan citizens.
- Private Security Regulation Act No 13 of 2016 – Under this Act, an entity will be eligible for registration as a private security service provider if that entity is a company incorporated and established in Kenya, or if it is a foreign company, it must be registered in accordance with the laws of Kenya and have at least 25% local shareholding.
- The National Construction Authority Act Chapter 449A and the National Construction Authority Regulations, 2014 – Foreign contractors will only be licensed in the uppermost category with more stringent requirements regarding financial and technical capacity. The lower categories are restricted to local contractors. The NCA also has minimum local content requirements.
- Engineers Act No 43 of 2011 – In order to be registered as an engineering consulting firm in Kenya, at least 51% of the shares in the firm must be held by Kenyan citizens.

Kenya is a liberal market and has no foreign exchange regulations. The High Court recently declared Section 12A of the Land Act, which required non-citizens to obtain the approval of the cabinet secretary prior to owning beach properties, to be unconstitutional.

9. TAX

9.1 Taxation of Business Activities

The taxes levied on companies are categorised into direct taxes comprising income tax, turno-

ver tax, capital gains tax and digital services tax, and indirect taxes which include value-added tax (VAT), withholding tax and excise duty. Locally incorporated companies pay corporation tax at a rate of 30%, while foreign companies are taxed at 37.5%.

Turnover tax is a final tax levied on small companies where the annual income ranges between KES1 million and KES50 million. The tax is charged at a rate of 1% of the annual income. Capital gains tax is charged at a rate of 5% of the net gain realised after the company disposes of investment property. Digital service tax is levied on all services offered through the digital marketplace by companies with no permanent establishments in Kenya. The tax is payable at 1.5% of the gross transaction value.

Companies of which annual taxable supplies are KES5 million or more, are required to register for the VAT obligation.

Partnerships, including limited liability partnerships, are not considered separate legal entities for tax purposes and are therefore tax-transparent vehicles. Instead, profit is taxed at the individual partner level, based on the graduated scale rate set out in the Income Tax Act.

9.2 Withholding Taxes on Dividends, Interest, Etc

Withholding tax is levied on dividends at a rate of 5% for residents and 20% for non-residents. It is levied on interest earned at a rate of 15% for both residents and non-residents. For royalties on usage of patents, copyrights and other intellectual property rights, withholding tax is charged at a rate of 5% for residents and 20% for non-residents.

Currently, Kenya has signed double-taxation treaties with the governments of France, Canada, the People's Republic of China, Denmark, East African Community member states, Germany, Iran, Italy, Kuwait, Mauritius, Korea, the Netherlands, Norway, Qatar, Seychelles, South Africa, Sweden, United Arab Emirates, the United Kingdom and Zambia. The treaties either provide for exemption from or reduction in the rate of Kenyan tax.

The treaty benefits are only applicable to citizens of the contracting parties. In the case of companies, treaty benefits will not be available where 51% or more of the shares are held by persons who are not residents of the contracting states. This rule does not apply for listed companies.

9.3 Tax Mitigation Strategies

Kenyan tax laws do not provide a wide scope for tax planning. There are, however, strategies that can be deployed by companies doing business in Kenya. In some cases, these differ depending on the sector in which the company is doing business. The following avenues can be adopted.

Debt Capital Structures

The Finance Act 2021 made changes to the allowable deductions for gross interest paid to related non-resident persons or third parties. Any amount paid or that is payable which is in excess of 30% of earnings before interest, taxes, depreciation and amortisation (EBITDA) will be disallowed. Previously, the rule was that only interest on debt in excess of thrice the shareholders' equity of a company (not being a bank), controlled by a non-resident, was not tax deductible. The commissioner of income tax has prescribed rules for calculation of deemed interest applicable on interest-free borrowings received by foreign-controlled entities in Kenya.

Leases

Use of lease financing arrangements for the acquisition of assets is common as an alternative to debt where the funds are to be applied

for an asset acquisition. Lease payments made under both capital and operating leases are tax deductible for the lessee.

Capital Investment Allowances

The Tax Laws (Amendment) Act, 2020 made significant changes to capital investment allowances. Previous investment deductions of 100% allowance on industrial buildings used for manufacture, as well as on hotels, were scrapped. The Finance Act 2021 has made additional changes to the Income Tax Act (ITA) on specific capital allowances rates and changed the method of claiming from a reducing balance basis, to a straight-line basis. This means the allowances are now claimable over shorter periods.

Setting up a Business in the Export Processing Zone (EPZ) or the Special Economic Zones (SEZ)

Companies licensed to operate within the EPZ and SEZ are granted certain tax advantages, including reduced tax rates.

Licensing and Transfer Pricing

The Income Tax (Transfer Pricing Rules), 2006 detail the applicable rules that govern transactions between related parties. They borrow heavily from the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines. Methods of charging for services or payment of licences have to conform to the rules on transfer pricing.

Offsetting Losses against Future Business Income

The Finance Act 2021 removed the ten-year limit on offsetting of taxable losses against future profits. There is no limit in place any more. In addition, the minimum tax rules introduced through the Finance Act, 2020 at the rate of 1% of gross turnover were declared unconstitutional by the High Court. The tax authorities have appealed the decision but no orders staying the decision are in place, which effectively means that minimum tax rules are not in force.

Consolidation by Companies and Their Controlled Subsidiaries

Each company in a group is taxed as a separate entity in Kenya. There are no rules on controlled foreign companies. Companies that are managed and controlled in Kenya are considered resident for tax purposes. The ITA sets outs specific rules on permanent establishment status and tax residency. Restrictions do exist on deductibility of interest and foreign exchange losses of companies that are foreign controlled and thinly capitalised. Any dividends paid to non-residents and any overseas holding companies attract 15% withholding tax.

Double-Taxation Treaties

Double-taxation treaties are in place for a few countries (see **9.2 Withholding Taxes on Dividends, Interest, Etc**) which, based on the specific treaty, reduce the overall tax liability for a foreign company doing business in Kenya.

9.4 Tax on Sale or Other Dispositions of FDI

There are generally no specific exemptions available to foreign investors for the sale or disposal of interests. Existing exemptions apply to both local and foreign investors. The most common exemption is that gains on transfer of securities traded on the securities exchange are not subject to capital gains tax.

Blocker corporations are not registrable in Kenya.

9.5 Anti-evasion Regimes

Generally, all expenses incurred in the year of income are deductible from the company's income if they were incurred wholly and exclusively in the production of that income. However,

the following rules have been enacted to prevent tax evasion by companies.

Thin Capitalisation

Effective from 1 January 2022, interest paid on loans in excess of 30% of the earnings before interest, taxes, depreciation and amortisation of a resident company will not be deductible for tax purposes.

Transfer Pricing

Transfer pricing rules are applied in respect of non-resident entities trading with related resident entities or those with permanent establishments in Kenya, for the purposes of determining the arm's length prices of goods and services in such transactions. The Income Tax (Transfer Pricing) Rules, 2006 were enacted to prevent shifting of profits by multinationals. The amount ascertained to be the rightful profit if the transaction is conducted at arm's length will be subject to taxation.

10. EMPLOYMENT AND LABOUR

10.1 Employment and Labour Framework

The main statutes governing employment and labour relations in Kenya are the Employment Act No 11 of 2007, the Labour Relations Act No 14 of 2007, the Labour Institutions Act No 12 of 2007, the Employment and Labour Relations Court Act No 20 of 2011, the Work Injury Benefits Act No 13 of 2007, and the Occupational Safety and Health Act No 15 of 2007. Kenya has also ratified various International Labour Organisation (ILO) treaties on non-discrimination, minimum age of work, forced labour, equal remuneration, the right to organise and collective bargaining.

Employment Act Provisions and Procedures

Employment contracts in Kenya are generally not contracts at will, as the Employment Act sets out minimum provisions that must be provided under contract as well as certain procedural requirements that must be followed during disciplinary proceedings, terminations and redundancies. It is important that these procedures are strictly followed to avoid any legal liability. Employees are also entitled, by law, to certain rights under the Employment Act including: paid annual leave of at least 21 working days, paid maternity leave of at least three months for female employees and 14 days for male employees, and paid sick leave of at least seven days. In addition, employees are entitled to at least one rest day in every period of seven days. The Act has also introduced a one-month pre-adoptive leave for employees who adopt children.

The ELRC

Disputes relating to employment and labour relations are determined by the Employment and Labour Relations Court (ELRC). The law also encourages alternative dispute resolution mechanisms, particularly conciliation, in the resolution of such disputes.

Conditions of employment

The Labour Institutions Act has established the General Wages Council which, from time to time, sets the minimum wage and other conditions of employment in respect of employees in various sectors. The Work Injury Benefits Act No 13 of 2007 provides for compensation to employees for work-related injuries and diseases contracted in the course of their employment. As provided in the constitution, employees have the right to participate in the formation of a trade union, to join a trade union or leave a trade union. The Labour Relations Act requires employers to recognise trade unions for the purposes of collective bargaining.

Collective bargaining

Collective bargaining is common in the public sector and industries that employ large numbers of individuals, such as horticulture and hotels. Trade unions and employers may conclude collective bargaining agreements (CBAs) setting out the terms and conditions of employment of the unionised employees. CBAs are binding on the parties and are enforceable upon registration by the ELRC. Additionally, the terms of a CBA are incorporated into the employment contracts of employees covered by the CBA. Where implemented, CBAs have been able to prevent industrial unrest.

10.2 Employee Compensation

The Employment Act requires employers to pay their employees in Kenyan currency and in cash, or into an account at a bank designated by the employee, or by cheque in favour of the employee. To attract and retain talent, companies, particularly in the private sector, provide an equity compensation package for the purposes of motivating employees and supplementing their monthly cash payments.

Employers are required to make contributions to the National Social Security Fund and the National Hospital Insurance Fund on behalf of their employees. They may provide additional retirement benefits to employees by making contributions to retirement benefit schemes regulated by the Retirement Benefits Authority. These contributions enjoy tax exemption to a capped level.

10.3 Employment Protection

Currently, Kenya does not have any law on the transfer of employees in the event of an acquisition or transfer of business. The CAK may however set conditions for retention of employees when approving a merger proposal.

The current practice is for the target to declare the employees redundant, after which, they sign new employment contracts with the acquiring entity. Accrued rights and benefits are not lost as a result of an acquisition or the change of control of an employer. It is not usual for CBAs to provide for employee rights during a merger transaction. However, certain common clauses, such as those on redundancy, could have an impact on how a merger transaction is implemented. In such cases, the company must comply with the terms of the CBA.

11. INTELLECTUAL PROPERTY AND DATA PROTECTION

11.1 Intellectual Property Considerations for Approval of FDI

Foreign investments are not subject to mandatory screening in Kenya, except for the specific sectors mentioned in **8.1 Other Regimes**, and where the investments involve a merger or acquisition. In exceptional cases where a review is done, intellectual property does not form a material aspect of such reviews. However, the Competition Act prohibits the use of intellectual property rights in a manner that would prevent or distort competition, for instance, through exclusive licensing agreements and territorial restrictions.

11.2 Intellectual Property Protections

Kenya has strong intellectual property protections, provided for in the Copyright Act No 12 of 2001, the Trademarks Act Chapter 506, the Industrial Property Act No 3 of 2001, and the Seeds and Plant Varieties Act Chapter 326. Kenya is also a signatory of the Patent Convention Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). The rights protected under copyright apply automatically and do not need registra-

tion. Trade marks, industrial property rights and plant breeders' rights must be registered for intellectual property protections to apply. Intentional infringement of a patent, a registered utility model, an industrial design, a copyright or a registered trade mark constitutes an offence punishable under the law.

The intellectual property rights of owners may be limited only where public interest considerations such as national security, nutrition, health, environmental conservation, or the development of other vital sectors of the national economy so requires. In such cases, the responsible cabinet secretary may allow the government or authorised third parties to exploit the intellectual property upon payment of adequate compensation to its owner.

11.3 Data Protection and Privacy Considerations

The Data Protection Act No 24 of 2019 sets out the principles for processing of personal data, the rights of data subjects, and the obligations for data controllers and processors regarding the handling of personal data. The Act has extraterritorial application where the data subjects are in Kenya, regardless of where the data is being processed.

Data controllers and data processors, regardless of jurisdiction, must comply with the provisions of the Act when handling personal data. Non-compliance amounts to an offence punishable by a fine not exceeding KES3 million or an imprisonment term not exceeding ten years, or both. The data commissioner may also impose an administrative fine of up to KES5 million or 1% of the entity's annual turnover of the preceding financial year.

The Data Protection (General) Regulations, the Data Protection (Complaints Handling and Enforcement Procedures) Regulations (2021), and the Data Protection (Registration of Data Controllers and Data Processors) Regulations (2021) were published on 14 January 2022. The regulations lay down procedures for the registration of data processors and data controllers, among other provisions for the implementation of the Act. It is noteworthy that the right to privacy is a constitutional safeguard and, prior to the enactment of the Act, enforcements were made pursuant to the constitution.

KN Law LLP is a medium-sized specialist corporate and commercial law firm operating in Nairobi, with a regional reach across several jurisdictions. The firm also has a liaison office in London headed by a partner. KN Law LLP provides legal solutions, and comprehensive and sound advice on a range of areas including: capital markets, corporate finance, employment and retirement benefits law, private equity and corporate M&A, and real estate investments.

The firm's recent experience includes advising in the acquisition and subsequent disposal of a majority stake in a fund manager with operations in Kenya and Uganda, giving legal advice in a USD200 million merger deal, acting in a multi-tranche note issuance facility of KES2 billion, giving legal advice in a KES4 billion Commercial Paper issue, and advising in the privatisation of four state-owned enterprises.

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