The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research

The Mergers & Acquisitions Review

The Mergers & Acquisitions Review

Reproduced with permission from Law Business Research Ltd.
This article was first published in The Mergers & Acquisitions Review - Edition 8
(published in August 2014 – editor Mark Zerdin).

For further information please email
Nick.Barette@lbresearch.com

The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anna Andreoli

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-16-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

ÆLEX

AGUILAR CASTILLO LOVE

AKD N.V.

ALLEN & GLEDHILL LLP

ANDERSON MŌRI & TOMOTSUNE

ARIAS, FÁBREGA & FÁBREGA

ARIAS & MUÑOZ

BEITEN BURKHARDT RECHTANSWALTSGESELLSCHAFT MBH

BHARUCHA & PARTNERS

BNT ATTORNEYS-AT-LAW

BOWMAN GILFILLAN

BREDIN PRAT

BRIGARD & URRUTIA

CAMPOS FERREIRA, SÁ CARNEIRO & ASSOCIADOS

CLEARY GOTTLIEB STEEN & HAMILTON LLC

COULSON HARNEY

CRAVATH, SWAINE & MOORE LLP

DEGUARA FARRUGIA ADVOCATES

DELFINO E ASSOCIATI WILLKIE FARR & GALLAGHER LLP

DENTONS

DITTMAR & INDRENIUS

DRYLLERAKIS & ASSOCIATES

ELİG ATTORNEYS-AT-LAW

FENXUN PARTNERS

HARNEYS

HENGELER MUELLER

HEUKING KÜHN LÜER WOJTEK

ISOLAS

KBH KAANUUN

KEMPHOOGSTAD, S.R.O.

KIM & CHANG

KING & WOOD MALLESONS

KINSTELLAR, S.R.O., ADVOKÁTNÍ KANCELÁŘ

MAKES & PARTNERS LAW FIRM

MANNHEIMER SWARTLING ADVOKATBYRÅ

MATHESON

MNKS

MORAVČEVIĆ VOJNOVIĆ I PARTNERI IN COOPERATION WITH SCHÖNHERR

MOTIEKA & AUDZEVIČIUS

NISHIMURA & ASAHI

OSLER, HOSKIN & HARCOURT LLP

PÉREZ BUSTAMANTE & PONCE

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU & ASOCIAȚII

RAIDLA LEJINS & NORCOUS

ROJS, PELJHAN, PRELESNIK & PARTNERS

RUBIO LEGUÍA NORMAND

RUSSIN, VECCHI & HEREDIA BONETTI

S HOROWITZ & CO

SANTAMARINA Y STETA, SC

SCHELLENBERG WITTMER LTD

SCHÖNHERR RECHTSANWÄLTE GMBH

SELVAM & PARTNERS

SEYFARTH SHAW LLP

SKRINE

SLAUGHTER AND MAY

STRELIA

SYCIP SALAZAR HERNANDEZ & GATMAITAN

TORRES, PLAZ & ARAUJO

URÍA MENÉNDEZ

UTEEM CHAMBERS

WEERAWONG, CHINNAVAT & PEANGPANOR LTD

WILSON SONSINI GOODRICH & ROSATI

CONTENTS

Editor's Preface xiii
Mark Zerdin

Chapter 1 EUROPEAN OVERVIEW 1
Mark Zerdin

Chapter 2 EUROPEAN COMPETITION 13
Götz Drauz and Michael Rosenthal

Chapter 3 EUROPEAN PRIVATE EQUITY 20
Thomas Sacher, Steffen Schniepp and Guido Ruegenberg

Chapter 4 US ANTITRUST 33
Scott A Sher, Christopher A Williams and Bradley T Tennis

Chapter 5 CROSS-BORDER EMPLOYMENT ASPECTS OF INTERNATIONAL M&A 51
Marjorie Culver, Darren Gardner, Ming Henderson, Dominic Hodson and Peter Talibart

Chapter 6 AUSTRALIA 64
Lee Horan and Greg Golding

Chapter 7 AUSTRIA 79
Christian Herbst

Chapter 8 BAHRAIN 91
Haifa Khunji and Maryia Abdul Rahman

Chapter 9 BELGIUM 106
Olivier Clevenbergh, Gisèle Rosselle and Carl-Philip de Villegas

Chapter 10 BRAZIL 117
Fernando Alves Meira and Gustavo Paiva Cercilli Crêdo

Chapter 11 BRITISH VIRGIN ISLANDS 128
Jacqueline Daley-Aspinall and Murray Roberts

Chapter 12 CANADA 144
Robert Yalden and Emmanuel Pressman

Chapter 13 CAYMAN ISLANDS 160
Marco Martins

Chapter 14 CHINA 177
Fred Chang, Wang Xiaoxiao and Huang Jiansi

Chapter 15 COLOMBIA 191
Sergio Michelsen Jaramillo

Chapter 16 COSTA RICA 207
John Aguilar Jr and Alvaro Quesada

Chapter 17 CYPRUS 217
Nancy Ch Erotocritou

Chapter 18 CZECH REPUBLIC 224
Lukáš Ševčík, Jitka Logesová and Bohdana Pražská

Chapter 19 DOMINICAN REPUBLIC 233
María Esther Fernández A de Pou,
Mónica Villafaña Aquino and Laura Fernández-Peix Perez

Chapter 20 ECUADOR 243
Diego Pérez-Ordóñez

Chapter 21 ESTONIA 253
Sven Papp and Karl-Erich Trisberg

Chapter 22 FINLAND 266
Jan Ollila, Anders Carlberg and Wilhelm Eklund

Chapter 23 FRANCE 277
Didier Martin and Raphaël Darmon

Chapter 24 GERMANY 292
Heinrich Knepper

Chapter 25 GIBRALTAR 304
Steven Caetano

Chapter 26 GREECE 317
Cleomenis G Yannikas, Sophia K Grigoriadou and Anna S Damilaki

Chapter 27 GUATEMALA 330
Jorge Luis Arenales de la Roca and Luis Pedro Del Valle

Chapter 28 HONG KONG 338
Jason Webber

Chapter 29 HUNGARY 347
Levente Szabó and Réka Vízi-Magyarosi

Chapter 30 ICELAND 363
Hans Henning Hoff

Chapter 31 INDIA 371
Justin Bharucha

Chapter 32 INDONESIA 390
Yozua Makes

Chapter 33 IRELAND 404
Éanna Mellett and Robert Dickson

Chapter 34 ISRAEL 413
Clifford Davis and Keith Shaw

Chapter 35 ITALY 424
Maurizio Delfino

Chapter 36 JAPAN 437
Hiroki Kodate and Junya Ishii

Chapter 37 KENYA 447
Joyce Karanja-Ng'ang'a and Felicia Solomon Ndale

Chapter 38 KOREA 458
Jong Koo Park, Bo Yong Ahn, Sung Uk Park and Young Min Lee

Chapter 39 LITHUANIA 473
Giedrius Kolesnikovas and Michail Parchimovič

Chapter 40 LUXEMBOURG 479
Marie-Béatrice Noble and Stéphanie Antoine

Chapter 41 MALAYSIA 493
Janet Looi Lai Heng and Fariz Abdul Aziz

Chapter 42 MALTA 505
Jean C Farrugia and Bradley Gatt

Chapter 43 MAURITIUS 515
Muhammad Reza Cassam Uteem and Basheema Farreedun

Chapter 44 MEXICO 525
Aarón Levet V and Isaac Zatarain V

Chapter 45 MONTENEGRO 534
Slaven Moravčević and Nikola Babić

Chapter 46 MYANMAR 544
Krishna Ramachandra and Benjamin Kheng

Chapter 47 NETHERLANDS 554
Carlos Pita Cao and François Koppenol

Chapter 48 NIGERIA 566
Lawrence Fubara Anga

Chapter 49 NORWAY 571
Ole K Aabø-Evensen

Chapter 50 PANAMA 608
Julianne Canavaggio

Chapter 51 PERU 618
Emil Ruppert and Sergio Amiel

Chapter 52 PHILIPPINES 628
Rafael A Morales, Philbert E Varona, Hiyasmin H Lapitan and Catherine D Dela Rosa

Chapter 53 POLAND 637
Paweł Grabowski, Rafał Celej and Agata Sokołowska

Chapter 54 PORTUGAL 650
Martim Morgado and João Galvão

Chapter 55 ROMANIA 662
Andreea Hulub, Alexandra Niculae and Vlad Ambrozie

Chapter 56 RUSSIA 677
Scott Senecal, Yulia Solomakhina, Polina Tulupova, Yury Babichev and Alexander Mandzhiev

Chapter 57 SERBIA 696
Matija Vojnović and Luka Lopičić

Chapter 58 SINGAPORE......706
Lim Mei and Lee Kee Yeng

Chapter 59 SLOVENIA......716
David Premelč, Bojan Šporar and Jakob Ivančič

Chapter 60 SOUTH AFRICA......727
Ezra Davids and Ashleigh Hale

Chapter 61 SPAIN......739
Christian Hoedl and Javier Ruiz-Cámara

Chapter 62 SWEDEN......755
Biörn Riese, Eva Hägg and Anna Brannemark

Chapter 63 SWITZERLAND......763
Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon, Harun Can and David Mamane

Chapter 64 THAILAND......774
Troy Schooneman and Jeffrey Sok

Chapter 65 TURKEY......781
Tunç Lokmanhekim and Nazlı Nil Yukaruç

Chapter 66 UNITED ARAB EMIRATES......790
DK Singh and Stincy Mary Joseph

Chapter 67 UNITED KINGDOM......802
Mark Zerdin

Chapter 68 UNITED STATES......829
Richard Hall and Mark Greene

Chapter 69 VENEZUELA 869
Guillermo de la Rosa, Juan D Alfonzo, Nelson Borjas E, Pedro Durán A and Maritza Quintero M

Chapter 70 VIETNAM 882
Hikaru Oguchi, Taro Hirosawa, Ha Hoang Loc

Appendix 1 ABOUT THE AUTHORS 893

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 943

EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2014

Chapter 37

KENYA

Joyce Karanja-Ng'ang'a and Felicia Solomon Ndale[1]

I OVERVIEW OF M&A ACTIVITY

Kenya has experienced a substantial increase in mergers and acquisition activity during the period 2013–2014. The Deal Drivers Africa Report, published by Mergermarket, ranked Kenya as Africa's fourth most sought-after country for mergers and acquisitions. This was mostly in the consumer and information technology sectors. Some of the major deals that took place in 2013–2014 include: Dimension Data Holdings plc, a South-Africa based provider of IT solutions and services, acquisition of AccessKenya Group Limited, a Kenyan IT solutions and wireless ISP provider; and L'Oreal South Africa (Pty) Limited's acquisition of Interconsumer Products Limited, a Kenyan firm dealing in personal care and beauty products. Other deals include the acquisition of I&M Bank Limited by City Trust Limited, the acquisition of 66.66 per cent of Mercantile Insurance Company Limited by Saham and REA Trading's offer to acquire all of the shares it does not already own in NSE listed REA Vipingo Plantations Ltd. The successes in oil and gas exploration activities in Kenya are also projected to raise Kenya's profile in oil-related deals depending on the commercial viability of the oil and gas discovered.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The following laws play an important role in providing for and regulating mergers and acquisitions in Kenya.

1 Joyce Karanja-Ng'ang'a is a partner and Felicia Solomon Ndale is an associate at Coulson Harney.

i Competition Act (Chapter 504 of the laws of Kenya)

The key statute regulating mergers and acquisitions in Kenya is the Competition Act, which came into force on August 2011. In addition to regulating mergers and acquisitions, the Competition Act also contains provisions regulating restrictive trade practices, unwarranted concentrations of economic power, abuse of dominance and consumer protection.

All mergers that fall within the definition set out in the Competition Act require the Competition Authority's authorisation prior to consummation. However, pursuant to the Guidelines for Exclusion of Proposed Mergers from Provisions of Part IV of the Competition Act, which came into effect on 1 August 2013, it is now possible to apply to the Competition Authority for a merger to be excluded from the provisions of the Competition Act (we discuss this further below).

Any person found guilty of failing to obtain an authorising order is liable, upon conviction, to imprisonment for a term not exceeding five years or a fine not exceeding 10 million Kenya shillings or both. In addition to these penalties, the Competition Authority may impose a financial penalty of an amount not exceeding 10 per cent of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.

Further details on the Competition Act are provided in Section IX, *infra*.

ii Companies Act (Chapter 486 of the laws of Kenya)

Companies are the most prevalent form of business entity used in Kenya. The Companies Act regulates the formation, conduct and winding up of companies registered in Kenya. The Companies Act does not specifically regulate mergers and acquisitions but it has an impact on the financing of acquisitions, as it prohibits a company from giving financial assistance to any person to acquire its shares. Accordingly, a company is prohibited from giving a loan, issuing a guarantee, providing security or in any way financially assisting a person in acquiring its shares. The only exceptions to this prohibition are where the company lends money as part of its ordinary business (for example a bank); or where there is an employee share ownership scheme; or where the company assists its employees (other than directors) to acquire shares.

Therefore, with the possible exception of management buyouts, leveraged buyouts are restricted in Kenya. A third party acquirer would need to finance the acquisition by other means and would not have the advantage of using the target company's assets or cashflow to finance the acquisition.

It should be noted that it is likely that there will be an overhaul of the Companies Act in 2014/15, so as to bring it in line with modern companies' legislation, which provides, *inter alia*, for a framework for leveraged buy outs.

iii COMESA Competition Rules

Kenya is a member of the Common Market for Eastern and Southern Africa (COMESA), which brought into effect the COMESA Competition Regulations via gazette notices issued in January 2013. The Regulations were first adopted in December 2004 by the Council of Ministers that is empowered under the provisions of the COMESA Treaty to make regulations for the COMESA region. The Regulations came into force without transitional provisions for their application and implementation.

According to the Regulations, a merger must be notified to the COMESA Competition Commission (CCC) where both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more member states.

The Regulations do not set any meaningful thresholds for determining whether or not a merger is notifiable, as these are presently indicated as zero.

The absence of a proper threshold regime for COMESA mergers and the lack of legal precedent within COMESA on competition matters places merging parties in a difficult position. To ease this situation, COMESA has published draft guidelines, including: Draft Merger Assessment Guidelines, Draft Public Interest Guideline and Draft Market Definition Guideline. However, these Guidelines are still in draft and have not yet been adopted and therefore remain untested. Until absolute clarity is provided on the applicability of the Regulations and the draft Guidelines (once adopted), parties engaging in mergers and acquisitions activity within the COMESA region would be well advised to seek legal counsel prior to consummating any such transaction. Some COMESA Member States, including Kenya, have questioned the mandate of the CCC and the validity of the Regulations for the time being, but negotiations are underway to establish a suitable co-existence solution.

iv Capital Markets (Takeovers and Mergers) Regulations 2002 (Takeover Regulations)

The Takeover Regulations are promulgated under the Capital Markets Act (Chapter 485A of the Laws of Kenya). The Takeover Regulations set out provisions detailing the steps and approvals required in order to effect the takeover or acquisition of a controlling interest in a listed company in Kenya. The lowest threshold to trigger the Take Over Regulations is the intention to acquire 25 per cent or more of the shares in the listed company.

The approval sought from the Capital Markets Authority is not exclusive of any regulatory approval needed under the Competition Act or from any other regulator of the target company. An acquirer of a listed company would therefore be required to seek the approval of the Capital Markets Authority, the Competition Authority and any other applicable regulator.

v Other sector-specific laws

Other industry or sector-specific Kenyan legislation contains ownership restrictions, prohibitions or rules requiring regulatory notification or approval prior to effecting a change of control of a regulated entity. We highlight some of this industry-specific legislation below.

Capital Markets Act (Chapter 485A of the Laws of Kenya)

In addition to the provisions of the Takeover Regulations set out above, a company listed on the Nairobi Stock Exchange is required to reserve a minimum of 25 per cent of its ordinary shares for investment by local investors, who are defined as natural persons that are citizens of an East African Community (EAC) partner state and bodies corporate that are incorporated under the Kenyan Companies Act or similar statute of an EAC partner state, in which the citizen or relevant government owns 100 per cent of the beneficial interest.

Kenya Information and Communications Act (Chapter 411A of the Laws of Kenya)
Companies licensed under the Kenya Information and Communications Act include broadcasters, telecommunications service providers and radio communication service providers. Typically, the licences issued by the regulator (Communications Authority of Kenya (formerly the Communications Commission of Kenya) contain provisions that require the approval of the Communications Authority of Kenya to be sought prior to the change of control in a licensee. In addition, any firm licensed to provide telecommunication services is required to maintain at least 20 per cent local equity participation.

Banking Act (Chapter 488 of the Laws of Kenya)
The Banking Act provides for the licensing of banks and other financial institutions such as mortgage finance providers. Any amalgamation or arrangement that involves a licensed institution as one of the principal parties to the transaction and any arrangement for the transfer of all or any part of the assets and liabilities of a licensed institution to another person, is of no legal force if it is consummated without the prior written approval of the Cabinet Secretary of Finance.

In addition, the Banking Act prohibits the transfer of more than 5 per cent of its share capital to an individual or an entity except with the prior written approval of the Central Bank of Kenya. The Banking Act also prohibits single ownership of more than 25 per cent of the shares in a bank by any person other than another bank (including a foreign bank), government, state corporation, or non operating holding company.

Insurance Act (Chapter 487 of the Laws of Kenya)
Under the Insurance Act, where two or more insurers registered under the Insurance Act, intend to amalgamate; or where an insurer intends to transfer insurance business of any class to another insurer; then the approval of the Insurance Regulatory Authority must be obtained prior to the amalgamation or transfer, as the case may be.

In addition, the Insurance Act requires that the prior written approval of the Commissioner of Insurance must be obtained prior to any transfer or disposal of more than 10 per cent of the paid-up share capital or voting rights of an insurer. Failure to obtain such approval results in such transfer, disposal or acquisition being null and void ab initio. The Insurance Act also contains restrictions on the ownership of shares in an insurer. For example, it requires that at least one-third of the paid up capital of an insurer must be owned by Kenyan citizens; or by a partnership whose partners are all Kenyan citizens; or wholly owned by citizens of Kenya; or wholly owned by the government. Any amalgamation or transfer of shares of an insurer must comply with this provision, in default of which, the insurer would be guilty of an offence and would be liable upon conviction to a penalty of 100,000 Kenya shillings (and if the offence is a continuing one, to a further 5,000 Kenya shillings for every day during which the offence continues). The insurer would also be liable to having its registration cancelled.

It should be noted that plans are underway to overhaul the Insurance Act to also bring it in line with modern insurance legislation.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i The Competition Act

The Competition Act grants the Competition Authority discretion to exclude certain mergers from the requirement to obtain prior merger approval. Pursuant to this provision of the Competition Act, the Competition Authority published the Exclusion Guidelines setting thresholds for mergers and acquisitions that may be excluded from the merger notification process. These Exclusion Guidelines came into effect on 1 August 2013 and provided that the Competition Authority may consider the following mergers for exclusion:

a undertakings where the combined turnover of the merging parties is between 100 million and 1 billion Kenya shillings;
b in the health-care sector, where the combined turnover of the merging parties is between 50 million and 500 million Kenya shillings;
c 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 is below 4 billion Kenya shillings;
d undertakings in the carbon based mineral exploration and prospecting sector; and
e all other undertakings not included above, and not mandated to be notified.

Note: in respect of (a) and (b) above, it is not entirely clear what purpose the lower threshold serves.

The Competition Authority has expressed its intention to introduce merger filing fees with effect from 1 July 2014. Although Kenya has had an antitrust legislation in place since 1989, this will be the first time in Kenya's history that merger filing fees are payable.

The fees proposed by the CAK are as follows:

Combined turnover of the merging parties	*Filing fee payable*
500 million to 1 billion Kenya shillings (health-care sector only)	500,000 Kenya shillings
Below 1 billion Kenya shillings	No filing fee payable (note: merger filing or exclusion application still required)
1 billion to 50 billion Kenya shillings	1 million Kenya shillings
Above 50 billion Kenya shillings	2 million Kenya shillings

We understand that the test above relates to the turnover of the merging parties only within Kenya, although this remains to be officially confirmed by the Competition Authority.

Further, the Competition Authority has also indicated that it intends to review the merger notification process in order to simplify it, particularly for small merger transactions. In this respect, the Competition Authority is proposing to introduce a four-part notification form with effect from 1 July 2014, which is made up of:

a Schedule 1 – requiring basic information on the merging parties. This section covers 'know-your-client' types of questions and would be compulsory for all merging parties to complete;

b Schedule 2 – which covers the products and services supplied by each of the merging parties. This section would largely have to be completed by parties operating in the same market;

c Schedule 3 – containing questions aimed at evaluating the horizontal overlaps and vertical relationships of the merging parties. This section is designed to conduct an in-depth assessment of the products and services provided or rendered by the merging parties; and

d Schedule 4 – which contains a declaration confirming that the information contained in the merger notification form is not false or misleading. This section would be compulsory for all merging parties to complete.

The above draft proposals are yet to be adopted by the Competition Authority and may therefore be subject to change.

ii The Companies Bill 2014

The Companies Bill is under consideration in Parliament. As at 6 June 2014, the Companies Bill had undergone the first reading in Parliament. If passed, the Bill will repeal the Companies Act (Chapter 486 of the Laws of Kenya). The Bill contains several proposals that will affect the conduct of mergers and acquisitions in Kenya, one of the most significant being the proposal to relax the current prohibition against financial assistance. This is expected to open up financing options to purchasers in funding the acquisition of companies in Kenya. However, it remains to be seen whether the Bill will be approved by Parliament in its current form.

iii Limited Liability Partnerships Act (No. 42 of 2011)

The Limited Liability Partnerships Act affords investors a new form of business entity for use in carrying out business and establishing special purpose vehicles, by introducing limited liability partnerships to Kenya.

The Limited Liability Partnerships Act also allows companies to convert from limited liability companies to limited liability partnerships therefore affording a measure of fluidity in structuring business entities in Kenya.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Over the years, Kenya has been an attractive destination for foreign direct investment (FDI). According to Ernst & Young's 2013 Africa Attractiveness Survey, Kenya has recorded a 43 per cent compounded annual growth rate in attracting FDI between 2007 and 2012. In addition, the same survey indicates that Kenya has recorded a 60 per cent compounded annual growth rate as a source of FDI to other African countries.

M&A activity is set to heighten due to the increased business confidence, consumer demand and improving economic conditions in Kenya. Depending on the commercial viability of the oil and gas reserves found in Kenya, M&A activity involving foreign entities is expected to increase as these entities have the capacity to commercially exploit the natural resources.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Merger activity has been witnessed in most sectors of the economy. Some recent examples are:

a the takeover of Kenyan car dealership, CMC Holdings Limited by Al-Futtaim Auto & Machinery Company LLC. The deal was worth close to US$87 million;

b the takeover of Kenyan internet service provider, AccessKenya Group Limited, by Dimension Data Holdings PLC. This US$36 million transaction is one of the few public listed company takeovers ever to take place in Kenya;

c L'Oréal acquisition of Kenyan health and beauty company, Interconsumer Products Limited. The transaction was worth billions of Kenya shillings but the actual price remains undisclosed; and

d REA Trading Limited's offer to takeover REA Vipingo Plantations Limited, which is Kenya's first listed company contested takeover.

The main areas for M&A activity will be in financial services, banking, telecommunications and consumer goods or services.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

According to an analysis done by *The East African* newspaper, based on publicly announced deals since the beginning of 2013, information, pharmaceutical and mining companies have attracted the highest capital inflows from investors. The majority of transactions in Kenya have been financed either through acquirers' own resources (such as cash) or through shares swaps or banking facilities.

Interest rates in Kenya are high and this disincentivises companies from using Kenyan-bank provided financing. Additionally, corporate bond issuance to finance acquisitions have not been utilised much in the Kenyan market.

In Kenya, like in many emerging markets, private equity-driven mergers and acquisitions are increasing as the main drivers of M&A activity. In recent years, Kenya has seen an increase in interest from private equity and venture capital firms looking to invest in banking and financial services, telecommunications, technology, fast-moving consumer goods and real estate, among other sectors. More than 10 private equity funds targeting Kenya and the East African region have been formed in the past two years.

Development finance institutions (DFIs) have also stepped up their activities in participating in and financing merger activities. The DFIs have provided debt capital to a number of institutions (for example, banks and insurance companies) enabling these institutions to boost their core capital and in some cases, complete mergers and acquisitions across Kenya's borders.

VII EMPLOYMENT LAW

The Employment Act (No. 11 of 2007) overhauled the previous regulatory regime governing the employer–employee relationship. The Employment Act does not specifically address or legislate on the impact of a merger or acquisition on employees.

Under Kenyan law, an employee cannot have their employment transferred to another employer without his or her consent. Where there is a change of ownership of the shares of a target company, the employment relationship is not affected since the employees continue to be employed by the same legal entity, albeit with new owners in place.

Where the merger or acquisition results in the transfer of the assets of a company to an acquirer (including the obligation to transfer employees) then a redundancy event is deemed to occur and the target company is required to pay the employees redundancy dues. In practice, employees are offered new employment with the acquirer and the affected employees are given the option of waiving their redundancy dues in consideration of the acquirer recognising the previous years of continuous service of the employee with the target. In this manner, no redundancy dues are payable. However, where an employee rejects this option, they are entitled to be paid redundancy dues that are calculated at the rate of 15 days for each completed year of service.

With respect to other employment dues, such as accrued salary, leave days earned and not taken and any over-time entitlements, in practice, the target is obligated to satisfy these before the acquisition is completed if the transaction will result in a transfer of employees.

VIII TAX LAW

The Finance Act 2012 introduced a withholding tax payable in respect of the amount or value of the consideration from the sale of property or shares, in respect of oil companies, mining companies and mineral prospecting companies. The withholding tax is payable at the rate of 20 per cent for payments to non-resident persons and 10 per cent for payments to resident persons.

There is no withholding tax payable in respect of the sale of shares in companies in any other sector.

With the exception of the above, there have not been any recent major overhauls of the tax legislation with respect to how it affects M&A. Generally speaking, parties to a merger or acquisition would be subject to the following taxes:

i Sale of shares

Stamp duty is payable on the transfer of shares at the rate of 1 per cent of the higher of the consideration paid and the market value of the securities being transferred.

Determination of the value is made by the auditors of the target who must issue a certificate of value (Form D). Where new shares are being issued and additional capital is being created, the increase in authorised capital of the company must be stamped at a rate of 1 per cent.

Transfers of securities of companies that are listed on the Nairobi Securities Exchange are exempt from stamp duty, as are increases in the authorised share capital of listed companies.

Certain exemptions from stamp duty are available in connection with business combinations under Section 95 and Section 96 of the Stamp Duty Act. These relate to reliefs on duty otherwise chargeable in reconstructions, amalgamations and transfers between associated companies.

ii Asset and business sales

Where a merger transaction involves a sale of assets (as opposed to the sale of a business as a going concern), it would be deemed to be a taxable supply of goods on which VAT has to be levied at a rate of 16 per cent. However, if the transaction is on a 'going concern' basis it would be considered a zero-rated supply under the new Value-Added Tax Act 2013.

iii Compensating tax

Kenyan law does not currently provide for taxation on capital gains earned by a business or individual. However, the untaxed capital gains may be taxed under the Income Tax Act provisions on compensating tax.

Compensating tax is a penalty tax payable if dividends are paid out of untaxed profits or reserves that have not borne income tax at the corporate rate. Therefore, compensating tax can have the effect of subjecting to income tax certain capital gains that would not otherwise be subject to income tax when those gains are distributed to shareholders.

IX COMPETITION LAW

As mentioned above, competition law in Kenya is regulated by the Competition Act. The Competition Act, which came into effect on 1 August 2011, is a relatively new piece of legislation enacted with the purpose of promoting and safeguarding competition in Kenya. The Act provides measures prohibiting a wide array of anti-competitive conduct in Kenya.

In addition to the Competition Authority established under the Competition Act (to replace the Monopolies and Prices Commission), the Competition Act also establishes the Competition Tribunal (which took over the functions of the Restrictive Trade Practices Tribunal).

Any merger or takeover that is caught by the definition in the Competition Act requires the prior approval or exclusion of the Competition Authority. As already mentioned, Kenya still does not have merger thresholds. However, pursuant to the Guidelines for the Exclusion of Proposed Mergers from the Provisions of Part IV of the Competition Act, it is now possible to apply to the Competition Authority for a merger to be excluded from the provisions of the Competition Act if it falls within the thresholds provided by the Guidelines.

The Competition Act has extraterritorial reach in that it applies to conduct outside Kenya by any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business in Kenya.

i Timing

The Competition Authority is required to make a determination on an application to merge within 60 days after the date on which it receives the notification.

However, within 30 days of the receipt of the notification to merge, the Competition Authority is entitled to request further information in writing from any of the parties involved, in which case the Competition Authority would be required to make a determination within 60 days after the date it receives the additional information requested.

In some instances the Competition Authority may allow the parties to make oral representations as a result of which the Competition Authority would be required to make its determination within 30 days after the date the hearing conference is concluded.

In addition, the Competition Authority has the power to extend any of the above periods due to the complexity of the issues involved, as long as any such extension is done before that period's expiry and is in writing. The extension must not exceed 60 days.

X OUTLOOK

The financial sector in Kenya has recorded impressive growth over the decade attracting multinational and international banks to set up in Kenya. Most have chosen to acquire existing financial service providers, for example: Guaranty Trust Bank Plc's acquisition of a 70 per cent stake in Fina Bank Limited and City Trust's acquisition of I&M Bank Limited. This trend is expected to continue. In addition, indigenous and multinational banks with their East African headquarters in Kenya have expanded regionally and they are expected to be a leading source of FDI from Kenya and to fuel some merger and acquisition activity in the larger east African community. It is expected that there will be some consolidation and expansion of FDI into the insurance sector in the short term.

Further, according to Deloitte's 2014 East Africa Private Equity Confidence Survey Report, Kenya recorded 12 private equity deals in 2013, as compared with 10 and 9, in South Africa and Nigeria respectively. Some of the deals include, Amethis Finance's first equity investment of US$10.5 million in Chase Bank (Kenya) Limited in March 2013 and 8 Miles LLP equity investment of US$5 million in Eleni LLC. According to the Deloitte report, Kenya continues to be a main focus for investors, including private equity players, for 2014.

Oil discoveries in Kenya continues to attract more foreign interest in Kenya for exploration activities in oil and gas, both offshore and onshore. Determination of the commercial viability of the oil finds has the potential to propel deals made in the oil and gas sector to the top merger and acquisition deals in Kenya in a few years.

The Capital Markets (Real Estate Investment Trust) (Collective Investment Schemes) Regulations 2012 introduced real estate investment trusts (REITS), which are regulated investment vehicles that enable collective investment in professionally managed real estate assets. The REITS Regulations are still new and are expected to add to the growth impetus that the real estate market in Kenya is experiencing. REITS may fuel some merger and acquisition activity as property portfolios are developed and built. The Capital Markets Authority has currently licensed five REITS managers.

As mentioned above, Kenya has witnessed increased merger and acquisition activities in the information, communication and technology (ICT) sector. This is partly due to the expansion of ICT infrastructure in Kenya that has improved growth in all other sectors. Kenya continues to have a thriving ICT sector, as it experiences rapid growth. The growth in ICT is expected to continue for the foreseeable future and to contribute to both GDP growth and mergers and acquisition activity.

The recent development of the Growth Enterprise Market Segment (GEMS) on the Nairobi Securities Exchange is intended to provide an avenue for small and medium-sized businesses to list. This will help to further deepen the growth of the capital markets and could help to give private equity and venture capitalists an exit option. The availability of this exit option may increase the activity of private equity and venture capital firms in the market. So far, only one company has listed on GEMS.

The proposed enactment of the Companies Bill and the Insolvency Bill is expected to bring Kenya in line with international best practice. Two key proposals in the Insolvency Bill include new procedures for company voluntary arrangements and administration of insolvent companies, and the requirement for qualification of Insolvency Practitioners. This will in turn provide greater flexibility to investors in structuring their acquisitions and realisation of investment and provide potentially new financing alternatives.

Chapter 60

SOUTH AFRICA

Ezra Davids and Ashleigh Hale[1]

I OVERVIEW OF M&A ACTIVITY

M&A activity started picking up again in the first quarter of 2013 and this trend has continued in the first half of 2014. Most recent M&A activity in South Africa has been in the telecommunications, financial services, real estate, mining and resources, and hospitality and leisure sectors. While there has been some inward investment into South Africa, M&A activity has been more pronounced between South African companies and by companies investing from South Africa into other African jurisdictions.

Recent transactions involving foreign investors have included Marriott's acquisition of the Protea Hotel Group and BNP Paribas's acquisition of RCS Investment Holdings Ltd. There is also increasing interest shown by Japanese and Korean investors in all sectors.

There were again relatively few large black economic empowerment (BEE) deals, which for a number of years provided great impetus to the South African M&A market.

The number of private equity exit transactions is set to increase as investment periods (usually five to seven years) come to an end. In addition, private equity acquisitions have started to increase in the rest of Africa, with many institutional investors viewing Africa as having more attractive returns than other emerging markets.

The signs point to steady activity in the M&A market and this is set to increase in the second half of 2014.

1 Ezra Davids and Ashleigh Hale are partners at Bowman Gilfillan.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The cornerstone of the South African M&A legislative framework is the Companies Act 2008 (the Companies Act), which took effect on 1 May 2011. This has significantly overhauled the existing company law regime and the M&A legislative framework in general.

Among other things, the Companies Act regulates fundamental transactions, which include schemes of arrangement (a statutory procedure, which has in the past been the most commonly used method of implementing a recommended takeover), amalgamation and mergers (which is new to our company law but similar to the statutory merger and amalgamation procedure applicable in the United States) and disposals of all or the greater part of the assets or undertaking of a company. Each of the fundamental transactions requires the approval of shareholders supported by at least 75 per cent of the voting rights that can be exercised on the resolution. The Companies Act also regulates tender offers, which includes mandatory offers and comparable and partial offers. Takeover Regulations have been published in terms of the Companies Act and are largely based on the UK City Code on Takeovers and Mergers. The Takeover Regulation Panel has been established in terms of the Companies Act and is the authority responsible for overseeing any affected transaction, which includes the three fundamental transactions described above and tender offers. The Takeover Regulations apply to public transactions and to private transactions in certain instances.

Other key pieces of legislation include the Financial Markets Act (which, *inter alia*, regulates the South African insider trading, market manipulation, transactions in unlisted securities and over-the-counter transactions) and the Competition Act.

In M&A transactions involving companies listed on South Africa's securities exchange, the JSE Limited, the JSE Listing Requirements are of relevance.

For many years, South Africa has had a system of exchange controls in place aimed at regulating the flow of capital in and out of the country. These controls (which are set out in the Exchange Control Regulations 1961) have often played a significant role in the manner in which M&A transactions in South Africa, particularly cross-border transactions, are structured. Recently, these exchange controls have been gradually relaxed, with the intention that they will ultimately be abolished. Examples of changes that have been made to the system include the reduction of size of the minimum equity stake that South African corporates are required to hold in their foreign investments, and allowances being made for foreign companies to use their non-South African shares as acquisition capital for M&A transactions by means of a secondary listing on the JSE. A key development has been a recent change in exchange controls that allows inward-listed shares of foreign companies to be treated as South African assets. This may have the effect of facilitating cross-border share-for-share deals. In February 2013 it was announced as part of the 'gateway to Africa' reforms that JSE-listed companies will be able to establish a holding company for African and offshore operations that will not be subject to exchange control. Among other things, such companies can operate as a treasury centre – cash pooling will be allowed without restriction and income from cash management activities will be freely transferrable.

Over and above the statutory framework outlined above, the South African Law of Contract also obviously plays a significant role in regulating M&A transactions. This is derived primarily from South African common law, which is not codified.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Our Companies Act, which took effect on 1 May 2011, introduced certain key changes in the M&A sphere including:

a provision for a new statutory merger and amalgamation procedure allowing for the merger of one entity into another or the amalgamation of two entities into a new separate entity. Previously, there was no provision in South African law for mergers in the true sense of the word, and mergers and acquisitions in South Africa were generally effected through the acquisition by one company of the shares in or business or assets of another company;

b the introduction of a shareholder appraisal rights regime for dissenting minority shareholders in the context of schemes of arrangement, mergers, a disposal of substantially all of the assets or business of an undertaking or material changes to the constitutive documents. This will allow dissenting minority shareholders to put their shares to the company at fair market value;

c the limitation of the role of the court in schemes of arrangement;

d the introduction of a new regulator for M&A to replace the Securities Regulation Panel with the Takeover Regulation Panel;

e a new regime for affected transactions; and

f the introduction of a new business rescue procedure.

The Financial Markets Act, which took effect on 3 June 2013, has replaced the Securities Services Act and introduced key changes including:

a greater regulation of transactions in unlisted securities and over-the-counter transactions;

b extended liability for insider trading; and

c improving alignment between the regulation of securities services and other relevant legislation such as the Banks Act.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Since 2010, there has been a relative upturn in foreign involvement in M&A transactions in South Africa. Recent examples of this are:

a the successful hostile takeover by Japan's Kansai Paint Co Limited of Freeworld Coatings Limited;

b the acquisition by Wal-Mart Stores of 51 per cent of Massmart Holdings Limited;

c the acquisition by Aon of Glenrand MIB;

d the acquisition by Marsh of Alexander Forbes Risk Services;

e the acquisition by Marriott of the intellectual property and hotel management and franchise business of the Protea Hotel Group.

There have also been numerous investments by mainly Chinese, Indian and Korean companies in South Africa, often focused on the resources sector. For example, China Investment Corporation recently purchased 25 per cent of Shanduka Group. In 2011, Chinese investor Jinchuan acquired 100 per cent of JSE-listed base metals mining company, Metorex. Jinchuan's offer trumped that of Brazil mining giant, Vale.

In the health-care sector, Chilean company CFR Pharmaceuticals failed in the first few months of 2014 in its takeover bid for JSE listed Adcock Ingram.

South African and multinational companies are investing in key growth jurisdictions in Africa (such as Nigeria, Ghana, Kenya, Uganda and Tanzania) using South Africa as their base. For example, in acquiring the Protea Hotel Group based in South Africa, Marriott has also acquired hotel operations across seven other African countries. Marsh acquired the short-term insurance broking business of Alexander Forbes in 2012 that gave it reach from South Africa into Namibia, Botswana, Uganda, Malawi, Zambia and Nigeria. In addition, large South African-based companies such as PPC Cement, Shoprite (supermarket retailer) and Nampak (packaging company) have expanded rapidly into the rest of Africa through a mix of greenfield investments and acquisitions.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i BEE transactions

One of the main drivers of local M&A activity in recent years has been a type of transaction that is unique to the South African environment, namely BEE transactions.

Over the past 16 years, the South African government has put in place a regulatory framework aimed at ensuring the economic empowerment of previously disadvantaged black South Africans. It has become a key commercial imperative for companies aiming to do business in South Africa to ensure that they have sufficient empowerment credentials.

From an M&A perspective, one of the key elements of the government's BEE policies has been the targets prescribed in respect of black equity ownership, and most of the major companies in South Africa have concluded transactions in terms of which they have disposed of a significant equity stake (generally up to 25.1 per cent) to black shareholders.

Such transactions have created their own challenges, particularly as BEE investors often do not have access to sufficient funds to pay for the stake that they are acquiring. Given the high cost and onerous terms generally applicable to third-party debt, many BEE transactions have been structured in such a way that the BEE investors pay off their shares through notional funding structures, which include the forfeiture of dividends for a period of time.

The BEE equity ownership requirements have also proved challenging for multinational entities doing business in South Africa. In recognition of this, exceptions have been made for multinationals: in lieu of disposing of an equity interest in their local operation, they can invest in equity equivalent programmes or dispose of a stake in the offshore parent company. Hewlett Packard, for example, has an established HP Business Institute for the purpose of skills development in the ICT sector as an equity equivalent programme. Other multinationals such as Cisco and Merrill Lynch have concluded empowerment transactions whereby empowerment shareholders acquired shares in the ultimate listed offshore parent companies of those corporations.

Changes have been proposed to the BEE legislation and regulations, which if implemented could mean that companies have to achieve a minimum score for each element of BEE in order to be able to count that score towards its overall BEE rating. The elements of BEE include, among others, ownership and management control by black persons, preferential procurement and employment equity. Currently, companies are scored on the overall total achieved for all BEE elements. These amendments, expected to take effect at the end of April 2015, could see existing BEE structures changed to accommodate the amended legislation and regulations.

ii Real estate

The listed real estate sector has been one of the most active in terms of real estate acquisitions and capital markets activity in the last few years. This is set to continue in 2014 with every current listed property fund (whether structured as a property loan stock company or a collective investment scheme in property) committing to convert to real estates investment trusts (REITs). The sector is also likely to see a number of large new property fund listings (or reverse listings) as significant privately held property funds look to leverage off the tax benefits afforded to listed REITs. There is also a lot of consolidation happening in the sector with many of the smaller listed funds being targets for the bigger players. Predictions are that the 30 or so listed funds that comprise the sector could shrink to 20 by the end of 2014.

iii Private equity

Prior to the global 'credit crunch' in 2008, South Africa experienced a significant increase in large private equity deals. Examples of large deals that have taken place include the acquisition by Bain Capital of Edcon Limited, a major South African retailer, for US$4.5 billion and the acquisition by Actis of Alexander Forbes, a major player in the South African insurance and financial services industry. Mainly due to the higher cost of debt, the private equity market in South Africa has been slow in terms of the number and value of deals. However, the numbers of private equity exit transactions are set to increase as investment periods (usually five to seven years) come to an end. For example, Alexander Forbes has signalled a possible IPO on the JSE later this year. In addition, private equity acquisitions have started to increase in the rest of Africa, with many institutional investors viewing Africa as having more attractive returns than other emerging markets.

iv Telecommunications

A number of significant transactions in the telecommunications sector have recently been announced. These include Telkom's 2.7 billion rand offer to acquire Business Connexion. Vodacom has announced that it will acquire 100 per cent of fixed line operator Neotel. These transactions may signal further consolidation in the sector and cross-border expansion into Africa as companies seek margin growth and revenue diversification.

v Other key trends

The mining sector in South Africa is experiencing significant and ongoing labour unrest following the strike-related violence that left 44 people dead at Lonmin's Marikana mine in August 2012. The platinum sector has also been hit by a strike that started in January 2014 and was only resolved at the end of June 2014. This will have an impact on the broader economy as significant job losses in the sector are anticipated as mining companies restructure and streamline their operations in South Africa.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Borrowers are again receiving more favourable lending terms compared with those achievable a couple of years ago. Changes to the regulatory regime applicable to banks pursuant to the introduction of Basel III have affected the borrowing climate and will continue to do so in the foreseeable future. Also, more stringent sanctions and environmental protections required by the lenders are affecting the negotiation of financing documentation. The local leveraged acquisition market is sector specific and, for example, borrowers in the manufacturing sector have been able to attract favourable terms from lenders, whereas borrowers in the resources and allied sectors have been under pressure. Many acquisitions, in particular private equity acquisitions, were financed using offshore 'high-yield' bonds in preference to bank debt financing. Many of these 'high-yield' bonds have been refinanced over the past year, largely through the issue of new 'high-yield' bonds in the offshore and local bond market. There has been an increased move to procure local debt capital market (in particular 'high-yield' bonds) or bank debt funding to refinance non-rand denominated debt, as a result of the large hedge liabilities, which many of the issuers of 'high-yield' bonds in the offshore markets incurred, as a result of the strengthening of the rand.

Due to market volatility, certain deals have required modification in order to achieve successful hold positions and in some instances syndications have been postponed as the prevailing market conditions have been deemed unfavourable. In addition, market flex terms and market disruption events have become much more prevalent in leveraged finance transactions, something that was fairly uncommon a few years ago.

VII EMPLOYMENT LAW

From an employment law perspective, one of the key legislative provisions in the context of mergers and acquisitions is Section 197 of the Labour Relations Act, which provides for the automatic transfer of employment contracts from a seller to a purchaser where there is a sale of a business (which is defined as the whole or part of any business, trade, undertaking or service) as a going concern. The effect of this is that:

a the new employer (i.e., the purchaser) is automatically substituted in the place of the old employer (i.e., the seller) in respect of all the relevant contracts of employment in existence on the date of the sale;

b all the rights and obligations between the old employer and the transferring employees at the time of the sale continue in force as if they had been rights and obligations between the new employer and the transferring employees;

c anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or an act of discrimination, is considered to have been done by or in relation to the new employer; and

d the transfer does not interrupt the transferring employees' continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

Employees who are transferred must be employed by the new employer on terms and conditions that are 'on the whole not less favourable'. In addition, the purchaser is bound by collective agreements that relate to conditions of service and by relevant arbitration awards and, as mentioned in (c) above, any conduct of the seller, such as discriminatory practices, is deemed to be the conduct of the purchaser. Therefore, proper due diligence is key for the acquirer of any business and appropriate warranties and indemnities are advised.

Section 197(7) requires an agreement in writing between the seller and the purchaser, which sets out the value of amounts accrued to the transferring employees, namely their accrued annual leave pay, severance pay (i.e., an amount of at least one week's remuneration for every completed year of service with the seller) and any other amounts accrued to the transferring employees as at the transfer date. The agreement must furthermore specify which of the seller or the purchaser will be liable to the transferring employees for payment of these amounts as and when they fall due, as well as what provision has been made for payment. In the absence of such a written agreement, the seller remains jointly and severally liable with the purchaser for a period of 12 months after the transfer date to any employee who becomes entitled to payment of these amounts as a result of a dismissal for operational requirements, or the employer's liquidation or sequestration.

It is possible to contract out of the provisions of Section 197 but such agreement requires the written agreement of the employees concerned. It is therefore not possible for the seller and the purchaser to agree between them that certain consequences of Section 197 will not apply, and the written consent of the affected employees is required.

Section 187(1)(g) of the Labour Relations Act is also relevant to mergers and acquisitions. In terms of this Section, a dismissal is automatically unfair if the reason for an employee's dismissal is a transfer in terms of Section 197, or a reason related to a transfer in terms of Section 197. The remedy for an employee for an automatically unfair dismissal in terms of the Labour Relations Act is reinstatement (potentially at the purchaser) or a maximum of 24 months' remuneration as compensation. The effect of section 187(1)(g) is that retrenchments prior to a merger or acquisition with the purpose of making the transaction more attractive for the parties should be approached with extreme care as such dismissals may well be regarded as automatically unfair. On the other hand, our courts have recognised that if there are genuine operational requirements necessitating a restructuring either prior to or after the merger or acquisition, retrenchments may be permissible. Careful due diligence is important in this regard as is obtaining legal advice before embarking upon retrenchment exercises in the context of a merger or acquisition.

Pension funds are primarily regulated by the Pension Funds Act. Many South African employers still subscribe to private retirement funds, whose membership is restricted to employees of a particular company or group of companies, although multi-employer 'umbrella' retirement funds are more common among smaller and newer companies. In a merger or acquisition, a new employer may only become a participating employer if the rules of the fund allow for the new employer's participation, which may necessitate rule amendments or transfer of business to the acquiring entity's fund. Such a transfer would need to be approved by the Registrar of Pension Funds, which would involve a delay of some months, although retrospective approval is usually permitted on application. Therefore, proper due diligence of the existing fund is advisable, whether it remains the applicable vehicle or transfers its business to a new fund.

Other employee benefits, such as medical insurance, share incentive schemes, housing and building loans, HIV/Aids education and treatment programmes and post-employment medical subsidisation, among others, are generally dealt with in accordance with the ordinary common law principles of contract or trust law, but in a number of important respects they are subject to the provisions of the Labour Relations Act, the Employment Equity Act, the Basic Conditions of Employment Act and the Constitution, especially in regard to anti-discrimination provisions. Due diligence in these respects is always advised.

VIII TAX LAW

i Tax rates

Companies pay income tax in South Africa at a rate of 28 per cent. This rate applies to both South African resident and non-resident companies. The reduction of the income tax rate for non-resident companies is the result of the abolition of the secondary tax on companies (STC) with effect from 1 April 2012.

ii Implementation and increase of dividends tax

STC was replaced by a withholding tax on dividends (dividends tax) on 1 April 2012. Initially the dividends tax was to be levied at a rate of 10 per cent but this was increased unexpectedly to 15 per cent in February 2012. The increase was stated to be 'for equity reasons', because interest, dividends or capital gains should all be taxed equitably and high-income individuals tend to receive a larger portion of their income in the form of dividends and capital gains. Also, the rate increase would partially mitigate the revenue losses caused by the move from STC to dividends tax.

The amendment affected individual investors and foreign companies (South African-resident companies are exempt from the dividends tax, but individual resident shareholders are not exempt). In addition to the increase in the rate of tax, the use of STC credits under the dividends tax regime is permissible for a period of three years and not the five-year period that was initially proposed. Therefore, companies have until 31 March 2015 to use their STC credits.

In 2012 the South African government indicated that it would coordinate and streamline the procedures, rates and times for all withholding tax regimes. In February 2013 it was announced that the cross-border withholding regime on interest and royalties was to be extended to cross-border service fees, subject to treaty relief. To facilitate administration, it was announced that all three sets of withholding regimes (interest, royalties and cross-border service fees) will become effective from 1 March 2014. All three withholding taxes will be charged at the same rate of 15 per cent. However, when the Taxation Laws Amendment Act No. 31 of 2013 (Amendment Act) became law, the effective dates of the withholding tax on interest and the withholding tax on service fees were deferred to 1 January 2015 and 1 January 2016, respectively. In addition, the increase in the rate of the withholding tax on royalties from 12 per cent to 15 per cent, which was supposed to come into effect on 1 July 2013, was deferred to 1 January 2015.

iii Capital gains tax

The South African capital gains tax rates were also increased in 2012. The inclusion rates were increased for companies from 50 per cent to 66.6 per cent, resulting in an effective rate of 18.6 per cent (28 per cent of 66.6 per cent) (previously 14 per cent). The higher rates apply to the disposal of capital assets from 1 March 2012.

iv Interest exemption for non-residents: changes

Currently, interest received by or accruing to non-residents is exempt from South African income tax, provided that the non-resident does not carry on business in South Africa at any time during the course of the tax year, through a permanent establishment. If a non-resident receives interest income that does not qualify for the income tax exemption, the tax payable does not take the form of a withholding tax and the recipient of the interest will have to account for the tax.

The tax treatment of interest earned by non-residents has been amended. The amendments will apply in respect of any interest that is paid or that becomes due and payable on or after 1 January 2015. The general effect of the amendment is that interest received by non-residents from a South African source will now be subject to a withholding tax of 15 per cent. Interest will be exempt from withholding tax if the interest is earned in respect of certain domestic investments such as government bonds, bonds listed on the JSE, any debt owed by a domestic bank, the Development Bank of Southern Africa, the Industrial Development Corporation or the South African Reserve Bank. The exemption for debts owed by domestic banks does not include back-to-back loan agreements designed to circumvent the general rules of taxation. Accordingly, the exemption will not apply if the domestic bank acts as an intermediary to facilitate the borrowing of funds by a domestic company from a foreign lender, international trade finance, dealer and brokerage accounts.

v Thin capitalisation changes

The South African transfer pricing and thin capitalisation rules were amended with effect from 1 April 2012. The amended rules apply to what are referred to as 'affected transactions' concluded between connected or related entities. The parties to the affected transaction may be a South African resident and a non-resident, two South African residents, one of whom has a foreign permanent establishment to which the transaction relates, two non-residents, one of whom has a South African permanent establishment to which the transaction relates or a non-resident and the controlled foreign company of a resident. The rules also apply to transactions involving the granting of financial assistance, which includes debt, security and guarantees. One of the consequences of the provisions is that the South African branches of foreign companies will be treated in the same manner as the subsidiaries of foreign companies. Another consequence is that there is no disallowance of a deduction of interest, as was the case under the previous provisions. Instead, the legislation requires that the tax liability of a party that benefits from non-arm's-length terms and conditions to be determined on arm's-length terms. In addition, any difference between the tax liability calculated on non-arm's-length terms and the tax liability calculated on arm's-length terms will be treated as a non-arm's-length loan (an affected transaction) and the lender will be subjected to income tax on the interest earned on the deemed loan, calculated under the arm's-length principle.

IX COMPETITION LAW

A transaction is required to be notified to the South African competition authorities in terms of the Competition Act, No. 89 of 1998 (the Competition Act), as amended, if it constitutes a merger as defined in Section 12 of the Competition Act, the parties meet the asset and turnover thresholds established in terms of the Competition Act, and it has an effect within South Africa. The Competition Act is applicable to foreign mergers to the extent that parties have assets in South Africa or turnover generated in, into or from South Africa. Neither party requires a physical presence in South Africa.

A transaction constitutes a merger when 'one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm'. A merger may be achieved in any manner, including through purchase or lease of shares, an interest or assets of the firm in question, or amalgamation or other combination with the other firm in question.

In terms of Section 12(2) of the Competition Act, a person controls another firm if that person, *inter alia*:

- *a* beneficially owns more than one half of the issued share capital of the firm;
- *b* is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- *c* is able to appoint or to veto the appointment of a majority of the directors of the firm;
- *d* is a holding company, and the firm is a subsidiary of that company; or
- *e* has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in (a) to (d) above.

In 2009, the thresholds for mandatory merger notification were raised. There are two categories of mandatory notifiable mergers in South Africa: intermediate and large mergers. To qualify as an intermediate merger, the entire acquiring group and the target firm must have combined assets in or turnover in, into or from South Africa (whichever combination is the higher) equal to or greater than 560 million rand and the target firm must have assets in or turnover in, into or from South Africa (whichever is the higher) equal to or greater than 80 million rand. To qualify as a large merger, these values are replaced by 6.6 billion rand 190 million rand respectively.

A party to an intermediate or large merger may not implement that merger until the merger has been approved (with or without conditions) by the relevant competition authority (either the Commission in the case of an intermediate merger or the Competition Tribunal (the Tribunal) in the case of a large merger). Implementation of the merger without approval may result in the imposition of an administrative penalty. The penalty may not exceed 10 per cent of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year. In addition, the Tribunal may order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to a merger that is implemented without clearance or declare void any provision of an agreement to which to the merger was subject.

Mergers that do not meet the above prescribed thresholds for an intermediate merger constitute small mergers. The Competition Act does not require the parties to a small merger to notify that merger. However, if the Commission is of the opinion that the small merger may substantially prevent or lessen competition or cannot be justified on public interest grounds, it is entitled (at its discretion) to call upon the parties to notify the small merger. This procedure must be initiated by the Commission within six months after the merger has been implemented. In addition, the Commission (in 2009) indicated that it will require the notification of a small merger if at the time of entering into the transaction any of the firms are: (1) subject to an investigation by the Commission in terms of Chapter 2 of the Competition Act (in respect of prohibited conduct such as cartel conduct, resale price maintenance or abuse of dominance); or (2) respondents to pending proceedings referred by the Commission to the Tribunal in terms of chapter 2 of the Competition Act.

In terms of Section 12A(1) of the Competition Act, whenever required to consider a merger, the Commission or Tribunal (as the case may be) must initially determine whether or not the proposed transaction is likely to substantially prevent or lessen competition. If it appears that the proposed transaction is likely to substantially prevent or lessen competition, then the competition authorities determine whether or not the proposed transaction 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 proposed transaction, and would not likely be obtained if the proposed transaction is prevented.

In addition, in terms of Section 12A(3) of the Competition Act, in every merger the competition authorities must assess whether the proposed transaction can or cannot be justified on public interest grounds by assessing the effect the proposed transaction will have on: (1) a particular industrial sector or region; (2) employment; (3) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (4) the ability of national industries to compete in international markets.

The Competition Amendment Act, No. 1 of 2009, was signed by the President in 2009. From an M&A perspective, the most significant amendment (which has not yet come into effect) provides expressly for an investigation and evaluation by the Commission where merging parties have implemented a merger without competition clearance (although, as noted above, fines have already been imposed for this conduct).

For the year ending March 2013, 327 merger notifications were finalised. Of these proposed mergers, 278 were approved unconditionally, 37 were conditionally approved and 12 were withdrawn. No mergers were prohibited during this period. The public interest grounds in Section 12A(3) of the Competition Act continue to play a major role in merger analysis, especially where transactions result in losses of employment.[2]

X OUTLOOK

Although South Africa faces social challenges in respect of unemployment, a large current account deficit, a volatile currency and slower demand for commodities, there is huge scope for foreign direct investment in resources, financial services, telecommunications and information technology, retail, pharmaceuticals, hospitality and the fast-moving consumer goods sectors. This is partly driven by the African growth story, which South Africa, through its well-developed infrastructure, financial services, telecommunications and legal system, is well placed to benefit from. This creates great opportunities for increased M&A activity. This is reflected by the continued interest shown by Chinese, Indian, Brazilian and French investors and the increased interest shown by Japanese, Korean and US investors.

2 When determining whether a merger can or cannot be justified on public interest grounds, the Commission or the Tribunal must consider the effect that the merger will have on (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small businesses, or firms owned by previously disadvantaged persons, to become competitive; and (iv) the ability of national industries to compete in international markets.

Appendix 1

ABOUT THE AUTHORS

EZRA DAVIDS

Bowman Gilfillan

Ezra Davids specialises in mergers and acquisitions, capital markets, and securities law. He is the Chairperson of the Faculty Advisory Board of the Law School of UCT, Member of the board of trustees of the Legal Resources Trust, and a Director of Freedom Under Law. Ezra is also a patron of the Student Sponsorship Programme (a non-profit organisation that places and enables academically talented, low income students to excel in South Africa's best high schools), former Chairperson of the M&A subcommittee of the International Bar Association and currently Vice-Chair, Africa Regional Forum of the International Bar Association.

Some of the most recent transactions in which Ezra has acted as lead partner include: advising Verizon Communications in its disposal of its subsidiary, Verizon Business (South Africa); acting as South African Counsel to M1 and Investcom in the latter's acquisition by MTN (US$5.5 billion); advising Barrick Gold Corporation in its disposal of Barrick Gold South Africa (US$1.55 billion) and for Goldman Sachs and Citigroup in the disposal by Polyus (Norilisk) of its entire shareholding in Gold Fields Limited (US$2.02 billion); acting for Old Mutual Plc in the aborted negotiations related to the acquisition by HSBC control of Nedbank Limited; acting for Tokyo Stock Exchange listed Kansai Paint Co. Ltd. in its successful hostile bid for JSE listed Freeworld Coatings Limited (3.3 billion rand); acting as South African counsel for PPR in the disposal of its furniture and household goods business, Conforama, to JSE-listed Steinhoff International Holdings Limited (12 billion rand); advising Marriott International in its acquisition of the intellectual property and the hotel management, marketing and franchise business of the Protea Hotel Group (2 billion rand); and advising BNP Paribas SA (through its wholly owned subsidiary BNP Paribas Personal Finance SA) in it acquiring 100 per cent of the shares in RCS Investment Holdings Limited from

JSE listed shareholders, The Foschini Group Limited (acting through its wholly owned subsidiary Retail Credit Solutions Proprietary Limited) (2.65 billion rand).

ASHLEIGH HALE

Bowman Gilfillan

Ashleigh Hale specialises in mergers and acquisitions and the privatisation and restructuring of state assets. She also has a broad range of general corporate and commercial law experience, for example, relating to joint ventures, IT outsourcing and commercial contract negotiations.

Some of the recent transactions in which Ashleigh has acted as lead or co-lead partner include: advising Rio Tinto in the sale of certain coal prospecting rights to Coal of Africa Ltd; advising Marsh Inc. in its purchase of Alexander Forbes' short term insurance broking and risk consulting businesses in South Africa, Namibia, Botswana, Zambia, Uganda and Nigeria; advising Standard Chartered Bank in its acquisition of the custody and trustee business of Absa Bank Limited; advising Marriott International in its acquisition of the intellectual property and the hotel management, marketing and franchise business of the Protea Hotel Group.

JOYCE KARANJA-NG'ANG'A

Coulson Harney

Joyce Karanja-Ng'ang'a qualified as a kenyan advocate in 2005 and worked with Kaplan & Stratton Advocates until 31 August 2008 when she moved to Coulson Harney Advocates as a senior associate. In March 2009, Joyce Karanja-Ng'ang'a was promoted to partner at Coulson Harney.

Her work at Coulson Harney Advocates encompasses primarily mergers and acquisitions, competition law and company, corporate and commercial work. She also has experience in due diligence, banking and finance, real estate/property development, securities, conveyancing, corporate reorganisations, project management and privatisations.

Joyce has also been recently recognised as a rising star by IFLR 1000 (2013 and 2014) and as an up-and-coming lawyer by Chambers & Partners (2013 and 2014). She has been cited in various publications and has spoken on competition-related matters in various forums.

FELICIA SOLOMON NDALE

Coulson Harney

Felicia Solomon graduated with a bachelor of laws (LLB) degree from the University of Nairobi. She joined Coulson Harney as a pupil and is now an associate at the firm. Felicia has been admitted as an advocate of the High Court of Kenya.

BOWMAN GILFILLAN
165 West Street
Sandton 2146
South Africa

Tel: +27 11 669 9342
Fax: +27 11 669 9001
a.hale@bowman.co.za
e.davids@bowman.co.za
www.bowman.co.za

COULSON HARNEY
Unit A, Nairobi Business Park, Ngong Road
Nairobi
PO Box 10643-00100
Nairobi
Kenya
Tel: +254 20 289 9000
Fax: +254 20 289 9100
j.karanja@coulsonharney.com
f.solomon@coulsonharney.com
www.coulsonharney.com