

# Tanzania

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## Fair competition merger control in Tanzania

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### Regulatory framework

The framework for competition policy enforcement was created by the Fair Competition Act 2003 (Act). The Act prescribes that where there is an acquisition of shares, a business or other assets resulting in a change of control of an asset or business in Tanzania of a requisite value, the merger is mandatorily referable to the Fair Competition Commission (FCC).

The threshold at which anticipated acquisitions (by reference to turnover or assets of the merging firms) must be notified for clearance under the Act is TSh800 million (approximately \$607,500).

### Merger clearance

The FCC has been keen to stress that its policy is not to prohibit mergers as a matter of course, but to ensure that they do not impinge upon competition in the markets that they affect. Tanzania is committed to a full transition to a market economy, and the FCC is aware of the importance of merger and acquisitions activity as part of that process. The FCC is also aware of the fact that the acquisition of interests in firms in Tanzania is an important part of attracting foreign direct investment as well as facilitating market entry, a view retained when considering potential transactions for clearance.

The Act states that a merger is only prohibited where it creates or strengthens a position of dominance in a market.

The position of dominance is a two-part assessment involving an inquiry into whether the merged entity would be capable of restraining or reducing competition in that

market for a significant period of time and possess a relevant market share exceeding 35%.

The adoption of this dominance test is helpful, insofar as it is consistent with the approach taken by other competition authorities around the world. However, one should not expect that the jurisprudence from those jurisdictions can be imported lock, stock and barrel into Tanzanian law. Although case-law from other countries may be a useful point of reference, it should only be applied while bearing in mind that the Tanzanian economy has its own priorities, not least of which is the need to develop and strengthen a developing market economy. It is therefore essential to have advisers who are not only up to speed with the economic and legal concepts attendant in notification, but who also understand the priorities and policies of the FCC.

### Merger notification procedure

A notifiable transaction must be notified to the FCC before being effected. The Act does not specify who must notify a transaction, and thus the practice developed has been for parties to submit a joint notification. Once the submission has been made, the Act provides for a statutory timetable pursuant to which the FCC may decide whether or not the proposed transaction could raise competition issues and require an examination of the merger in more detail, following which it may clear the approval on an unconditional basis, clear the proposed merger with conditions or block the transaction. In the absence of a response from the FCC within a fixed period of time, the parties may proceed.

The Tanzanian system is a relatively straightforward regime, and this bodes well for the notifying parties. The timescales provided for are relatively short periods resulting in parties in short order being able to evaluate their positions. Some may of course fear that, faced with such a brief period for its prelimi-

nary examination, the FCC will seek to protect its position by insisting that the merger proceed to examination in all but the most obviously innocuous cases, though this has not been the position taken by the FCC thus far.

### Penalties for non-compliance

Parties must be aware of the significant risks of failing to comply with the merger regime. Where a person commits or is involved in an offence under the Act, that person may be subject to a fine exceeding not less than 5% of his annual turnover and not more than 10% of his annual turnover (even by the standards of longer-established competition authorities, the financial penalties of the Tanzanian regime are severe). In the case of corporate entities, every director, manager or officer of the body corporate may also be charged jointly in the same proceedings, resulting in personal liability.

The Act also allows for the FCC to make compliance orders of its own initiative where it is satisfied that this is required to avoid an infringement of the Act. This could include an order not to proceed with a pending merger that has not been notified to the FCC, a mandatory disposal of some or all of the shares or assets of an entity or the declaration of an acquisition to be void.

The time limits for doing so are quite generous to the FCC and allow for the possibility of an unscrambling order up to three years after a deal has been effected.

While the Act is relatively clear in terms of the procedure to be followed by notifying parties and when a deal becomes notifiable, there is still a fair degree of fine-tuning to be undertaken in order to bring about legal certainty within the regime. For example, the Act makes numerous references to turnover while not specifying how this is to be calculated. In the absence of such guidelines, there is a risk of confusion and divergent practice in differ-

ent cases. As with other merger jurisdictions, further clarification is likely to be given in the form of guidelines and further orders made by the FCC under the Act.

The Act has been praised by the World Bank as having been well-drafted and presenting a good basis for a workable competition policy regime. However, as with any competition law regime, there will be difficult concepts to deal with, such as dominance, market assessment and barriers to market entry. For parties involved in the notification of a deal in Tanzania, the need could not be clearer for advice from a local law firm with an excellent working relationship with the FCC.

## Financial and corporate

### Recommended firms

#### Tier 1

Mkono & Co

#### Tier 2

Ako Law

Ishengoma Karume Masha & Magai  
Ringo & Associates

#### Tier 3

Abenry & Company

FK Law Chambers

Rex Attorneys

It has been a tumultuous year in the Tanzanian legal market, marked by significant lateral movements and even the emergence of a new firm. Leading lawyers Steven De Backer and Charles Rwechungura left Mkono & Co and Rex Attorneys, respectively, while a large swathe of FK Law Chambers lawyers left the firm to set up a new practice called Ako Law.

If the legal market has created excitement, the actual work has not proved such a draw. Tanzania is not hit as hard as western countries by the global downturn, but there have been effects. A lack of liquidity has affected the M&A market for example, reducing deal flow dramatically. Capital markets work has seen little activity too; a couple of IPOs are in the pipeline, but partners foresee growth in this market based on a regional rather than a national outlook.

What is worrying is that arguments between corporations and government entities about tax, combined with a lack of power generation capability is threatening Tanzania's attractiveness for investment and status as one of Africa's five emerging economies.

However, one partner notes there is still some investment activity coming from outside Tanzania: "We are still seeing money

from funds set up two years ago. For investors, Africa can be sexier than Europe."

Another note of concern for the legal market is the general quality of lawyers. Commentators feel there is a lack of training for lawyers coming from the universities, creating problems for the firms. International clients find a similar concern in the experience of some local lawyers. "The thing with Tanzania is that their lawyers are very expensive and not so good," says an international client of one firm.

### Mkono & Co

Mkono & Co retains the top spot by itself again, but the general feeling is that the firm's position is more fragile now than anytime in the recent past. "In terms of size and turnover nobody can deny they are number one," says one rival. "But from a quality perspective they are not on their own."

The firm has lost the highly-rated partner Steven De Backer and junior partner Brooke Montgomery, but brought in fresh blood in the form of American partner Clark Arrington from the African Development Bank and Bijal Mehta. Arrington will bolster the firm's bench strength through international and continental experience in finance and corporate matters.

The firm benefits from its established association with Denton Wilde Sapte, and has signed a memorandum of association with American firm Hunton & Williams. Thanks in part to these types of international relationships, Mkono & Co still attracts some of the best mandates in the country.

In January 2009 Mkono & Co closed a \$309 million syndicated loan to the mobile phone operator MIC Tanzania. The syndicate included Calyon, Standard Bank of South Africa and a number of Tanzanian banks. MIC is using the loan to refinance debt and for capital investment.

Tanzania's Precision Air Service is buying seven aircraft from the French-Italian manufacturer ATR for \$100 million. Mkono & Co is advising Citibank, in conjunction with Clifford Chance, on the financing for the acquisition.

The firm also advised the non-government organisation Brac on the financing of the NGO's microfinance activities in the country, and on Singaporean company Bitmap's acquisition of a 65% stake in local telecom as part of its expansion in the region.

#### Leading lawyers

Wilbert Kapinga

Nimrod Mkono

### Ako Law

Ako Law is a new name in the Tanzanian legal market but has some familiar faces behind it. The firm is made out of former FK Law Chambers lawyers, including Kibuta Ongwamuhana and Krista Bates, and has also taken FK Law's association with Shadbolt Law with it.

Given the quality of the lawyers at the firm and the association with Shadbolt, Ako Law is expected to be a contender for a top-tier ranking, but as one competitor says: "It is too early to tell. They have some good lawyers, but it depends on their clients."

Krista Bates van-Winkelhof is the driving force in financial and corporate work at the firm. "She brings international law standards to corporate financing. I can't speak highly enough of her," says one client, who adds: "The reason she excels is that she tries to understand what I tell her and how she gives advice on strategy."

Given that Ako Law is made up of FK Law lawyers and has the association with Shadbolt, there is a bit of an overlap in terms of deals. Recent transactions involving the Ako lawyers include advising Songas and Globeleq on the conversion of preferred shares to loan notes by capital reduction, the sale of Chai Bora by Tanzania Tea Packers, and advising Dovetel on the purchase, roll-out and outsourcing of its mobile network.

#### Leading lawyer

Krista Bates van-Winkelhof

Kibuta Ongwamuhana

### Ishengoma Karume Masha & Magai

Ishengoma Karume Masha & Magai (IMMMA) is another Tanzanian practice allied with an international firm – DLA Piper in this case. "They are very good," says one international client. "We mainly use them in Tanzania."

Managing partner Protase Ishengoma and Sadock Magai are both well regarded, but Fatma Karume, who joined when her firm Karume & Co merged with IMMMA, is singled out for praise. "She has brought a new level to that firm. She is very clever," says one peer.

IMMMA worked on the restructuring of an \$80 million financing of a project loan advance to Kagera Sugar. The firm advised lead arranger Stanbic Bank Tanzania as well as the other banks and insurance companies in the syndicate.

Other transactions have seen the firm work on Hodi Hotels and the Southern Africa Enterprise Development Fund's investment in a hotel development in Arusha, and advising

Shelter Afrique in the financing for a housing project in Tanzania.

#### Leading lawyers

Protase Ishengoma  
Sadock Magai  
Fatma Karume

### **Ringo & Associates**

Ringo & Associates is a solid firm that is doing well. "They have been benefitting from the African Legal Network (ALN). They get a lot of referral work," says one rival. The ALN has proved a fillip for the firm, with Mustafa Tharoo's presence also giving the firm a strong position in the market. "He is a good guy, and is sensible to work with" says one peer of Tharoo. "Mustafa is well established," says another.

The only criticism is that the firm is small on numbers, leaving Tharoo stretched thin at times. But in terms of deals, the firm punches above its weight. Tharoo led a team that advised a banking syndicate led by Citibank on a \$150 million facility to mobile operator Vodacom Tanzania in March 2009.

The firm acted for another syndicate comprising International Financial Corporation (IFC), Citibank Tanzania, and Standard Chartered Bank Tanzania on the provision of a \$30 million loan facility for Alaf, a local aluminium manufacturer.

On the corporate side, the firm acted for the Savings and Finance Commercial Bank and its shareholders on the sale of a 51% stake in the bank to NIC Bank.

#### Leading lawyers

Mustafa Tharoo

### **Other ranked firms**

**Abenry & Company** "is a firm you should continue to talk about" says one rival. The firm is small, but thanks mainly to Lucy Sondo, is seen as a reputable practice that is capable in financial and corporate matters.

**FK Law Chambers** has suffered from the exodus of lawyers to Ako Law, but is still a presence in the market. The firm still has leading lawyer Florens Luoga and will look to recover its position in the next few years.

*Leading lawyers:* Florens Luoga

**Rex Attorneys** moves down in the rankings this year as commentators feel the loss of Charles Rwechungura is a significant blow to the firm's bench strength. It is believed that Rwechungura is to set up his own firm.

However, partner Hawa Sinare remains, and is described as "a good lawyer" by one client.

*Leading lawyers:* Hawa Sinare