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Kenya: Trends & Developments

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Trends and Developments

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Telecommunications and Data Protection

Data protection

After Kenya's Data Protection Act, 2019 (DPA) entered into force on 25 November 2019, the following steps have been taken in the past year to implement it.

- The Office of the Data Protection Commissioner (ODPC) was set up and the first Data Protection Commissioner (DPC) to head it was appointed on 16 November 2020. The DPC oversees the implementation of the DPA and is responsible for the enforcement thereof.
- The DPC has issued for public comment the draft Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021; the draft Data Protection (Compliance and Enforcement) Regulations, 2021; and the draft Data Protection (General) Regulations, 2021. These draft regulations are currently undergoing public participation before they are passed into law.
- The DPC also issued a "Guidance Note on Consent" and a "Guidance Note on Data Protection Impact Assessment". The former provides guidance on the processing of personal data where the consent of the data subject is required, while the latter guides data controllers and data processors on how to conduct data protection impact assessments.

The above efforts are important since they will assist in guiding various stakeholders on compliance with the DPA.

National Information Communications and Technology Guidelines 2020 (the 2020 ICT Policy)

The 2020 ICT Policy was published on 7 August 2020, repealing the 2006 ICT policy. It sets out the Government's objectives and plans in the ICT sector, with the main highlights being as follows.

New local equity participation threshold

The 2020 ICT Policy provides that only companies with at least 30% substantive Kenyan ownership (the 30% Local Ownership Requirement) will be licensed by the Communications Authority of Kenya (CA). This is an increase from the 20% local ownership requirement required under the 2006 ICT policy.

All CA licensees must comply with the 30% Local Ownership Requirement as follows.

- Existing licensees that did not meet the 20% local ownership requirement and have not exhausted their three-year grace period (both provided under the 2006 ICT policy) must meet the 30% Local Ownership Requirement within such grace period.
- Existing licensees that met the 20% local ownership requirement before the 2020 ICT Policy was published have two years from 7 August 2020 to meet the 30% Local Ownership Requirement.
- Existing licensees that had been granted an exemption from complying with the local ownership requirement under the 2006 ICT policy have three years from 9 April 2020 to comply with the 30% Local Ownership Requirement.

- New applicants for CA licences will have three years to meet the 30% Local Ownership Requirement from the date of issue of the licence.
- A company registered to exclusively offer Business Process Outsourcing Services will be exempt from the 30% Local Ownership Requirement.
- For listed companies, the rules of the Capital Markets Authority will guide local equity participation requirements.

However, the 2020 ICT Policy does allow licensees to apply to the relevant cabinet secretary for an extension of the three-year grace period or total exemption from the 30% Local Ownership Requirement.

Fiscal incentives

To promote development of the ICT sector in Kenya, the government is committed to introducing fiscal incentives to stimulate increased investment and growth in the ICT sector, as follows:

- reviewing the taxation regime to facilitate affordable computing, broadband access, financial inclusion and online work;
- providing incentives for majority Kenyan-owned manufacturers of ICT devices, components and infrastructure; and
- creating a rotating venture fund to assist in financing ICT players.

Public-Private Partnerships (PPPs)

To solve the current institutional and governance challenges affecting the successful implementation of PPPs in Kenya, the PPPs Bill, 2021 was published on 12 March 2021 and proposes to repeal the current PPPs Act. The PPPs Bill has the following features:

- it seeks to reduce the number of oversight approvals required from the PPPs Committee in developing a project and gives the Directorate (currently the PPPs Unit) more freedom in project development;
- it introduces direct procurement as a method of procuring a PPP project, which is not currently the case;
- it seeks to address gaps in the existing framework (for example, by providing for PPP projects by County Governments); and
- it expands the scope of arrangements that qualify as PPPs to include annuity-based design projects, build-finance-operate arrangements, joint ventures and strategic partnerships by public agencies.

If passed into law, the PPPs Bill should improve Kenya's track record of implementing PPP projects.

Healthcare

The COVID-19 pandemic led to increased adoption of technology in delivering healthcare services. The Kenya Medical Practitioners and Dentist Council (KMPDC) started issuing provisional approvals for various registered and licensed health institutions to offer virtual medical services.

KMPDC has approved about 20 health facilities to offer telemedicine services in Kenya (virtual consultation health services, for now). Such approvals are subject to review every three months from the issue date and are conditional upon KMPDC's satisfaction that such telemedicine services are aligned to data protection and medical records regulations.

There are currently no laws regulating telemedicine. However, KMPDC developed e-Health guidelines in 2019, and shared them with the relevant government authorities for approval. Furthermore, KMPDC is reviewing the Code of Conduct for medical and dental practitioners to align it to the developments in telemedicine.

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Developments in Competition and Antitrust Law

Informant Reward Scheme Policy

The Competition Authority of Kenya (CAK) published the "External Guidelines on the Informant Reward Scheme Policy" (the Guidelines) to regulate the processing and granting of rewards to informants. The Guidelines took effect on 1 January 2021 and seek to help the CAK to enforce the Competition Act, including investigating restrictive trade practices.

The Guidelines define a "Confidential Informant" as "any person, either natural or juristic, who provides relevant, useful and credible information to the CAK regarding violations of competition law and regulations and from whom the CAK intends to obtain additional useful and credible information for the purposes of any investigation which the CAK decides to carry out." This wide definition effectively covers all whistle-blowers, including employees of undertakings who would be privy to such insider information.

Notably, the Guidelines provide that a Confidential Informant should not have participated directly in the conduct under investigation. This is because such persons are already covered under the Leniency Programme Guidelines, which encourage undertakings engaged in wrongdoing to provide direct evidence and proactively co-operate with the CAK in bringing successful enforcement action, in return for full or partial immunity.

If the CAK is satisfied that the information provided by the Confidential Informant is credible, it shall pay the Confidential Informant a one-off sum at the end of its investigation. The compensation shall be up to 1% of the administrative penalty but not more than KES1 million (about USD10,000).

Draft Joint Venture Guidelines

In early 2021, the CAK published for public comment the draft Joint Venture Guidelines under the Competition Act (JV Guidelines), which seek to guide market participants on what qualifies as a full-function JV and when the CAK's approval is required before establishing a JV, among other things.

The JV Guidelines define a "JV" as the integration of operations between two or more separate firms, where the following conditions are present:

- the enterprise is under joint control of the parent firms;
- each party makes a substantial resource contribution to such enterprise;
- the enterprise exists as a business entity separate from its parents; and
- the JV creates a significantly new enterprise with direct market access in terms of new productive capacity, new technology, new products or entry into a new market.

The JV Guidelines recognise that, in some instances, competitors combine their resources to achieve more efficiency or branch into new markets, but confirm that such collaborations do not reduce competition.

Despite the good intentions of the JV Guidelines, a few issues require further clarification. For example, the following remain unclear:

- whether JVs that do not result in the formation of a separate entity are notifiable to the CAK (eg, consortia);
- whether the JV vehicle must be registered in Kenya or if it is sufficient for it to have access to the Kenyan market;
- whether notification is required for all full-function JVs or only for those that meet the

thresholds set under the Competition (General) Rules 2019; and
- in determining if such thresholds are met, whether parties should consider their global turnover and/or asset value or their turnover and/or asset value in Kenya only (the JV Guidelines require the parties to provide complete financial information when filing, even for entities that do not derive turnover from Kenya before the JV).

The CAK is expected to clarify these and other issues after it receives comments from the public and relevant stakeholders.

Block Exemption Guidelines

The Competition Act authorises the CAK – with the approval of the Cabinet Secretary responsible for finance – to exempt any category of decisions, practices or agreements by or between undertakings from falling within the scope of restrictive trade practices under Part III of the Competition Act.

Following the COVID-19 pandemic, the CAK issued the draft "Block Exemption Guidelines on Certain Covid-19 Economic Recovery Priority Sectors" (the Block Exemption Guidelines), which seek to have businesses operating in the following key sectors of the economy benefit from the above exemption: manufacturing, private healthcare, healthcare research services, horticulture, farming and export, aviation, travel and tourism.

The aim of the Block Exemption Guidelines is to allow businesses in these sectors to collaborate on post-COVID-19 recovery and to continue to provide essential goods and services. In effect, the Block Exemption Guidelines assist businesses in making a self-assessment (rather than obtaining the CAK's confirmation) on whether the agreements, decisions or practices that they intend to enter into qualify for block exemption.

COMESA merger filing updates

It is common for parties engaged in cross-border merger transactions (with a Kenyan component) to consider whether such transactions require notification to the COMESA Competition Commission (the CCC).

On 11 February 2021, the CCC issued a practice note on its application of the term "operate" (the Practice Note) under the COMESA Competition Regulations, 2004 (COMESA Regulations) and the COMESA Competition Rules, 2004 (COMESA Competition Rules) and its approach to the application of Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (COMESA Merger Determination Rules).

Prior to this notice, the COMESA Regulations required parties in a transaction where "both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States" to seek COMESA's approval. The term "operate" was not defined in the COMESA Regulations. However, the COMESA Merger Assessment Guidelines of 2014 (the COMESA Merger Guidelines) state that:

- an undertaking is considered to operate in a Member State (for purposes of the COMESA Regulations) if its operations in that Member State are substantial enough that a merger can contribute to an appreciable effect on trade between Member States and restrict competition in COMESA; and
- an undertaking operates in a Member State if its annual turnover or value of assets in that Member State exceeds USD5 million.

The Practice Note now clarifies that the above definition of "operate" no longer applies, as the COMESA Merger Determination Rules – which were enacted after the COMESA Merger Guidelines – take precedence. This means that, when

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parties to a merger consider whether to notify COMESA of a transaction, they should focus on the thresholds under Rule 4 of the COMESA Merger Determination Rules as follows: "Any merger where both the acquiring firm and target firm, or either the acquiring or the target firm, operate in two or more Member States, shall be notifiable if:

- the combined annual turnover or combined value of assets, whichever is higher in the Common Market of all parties to a merger equals or exceeds US$50 million; and
- the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds US$10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State."

In summary, one should no longer rely on the "operation" threshold under the COMESA Merger Guidelines for the purposes of such notification.

Intellectual Property

COVID-19's impact on operations at the Kenya Industrial Property Institute

As part of the COVID-19 prevention measures, the Government directed all state agencies, such asthe Kenya Industrial Property Institute (KIPI), whose mandate is to administer IP rights, to limit their staff levels and to reduce the interaction of their officials with the members of the public and applicants (or their agents).

Prior to COVID-19, filings at KIPI were wholly manual. As part of the COVID-19 prevention measures, KIPI started offering online filing services through its official email address. Although the implementation of the online filing system has been fraught with challenges, it is a welcome step in ensuring that KIPI continues to offer its services with greater efficiency. Therefore, applicants (or their agents) can file and prosecute applications without having to travel to KIPI offices.

However, once the Government eases the COVID-19 protocols and to facilitate the proper maintenance of records at KIPI's registry, applicants who have used the online filing service may still be required to submit the originals of the documents filed online.

The Intellectual Property Bill, 2020 (the IP Bill)

In the past, Kenya has made efforts to enact legal and institutional reforms to strengthen and protect IP rights. However, a key challenge in this process has been the institutional overlap in the administration of IP rights.

To deal with this problem, the IP Bill seeks to consolidate all laws relating to IP, namely the Industrial Property Act, the Trade Marks Act, the Copyright Act and the Anti-Counterfeit Act. The IP Bill also seeks to merge the three Kenyan IP agencies – the Kenya Copyright Board (KECOBO), KIPI and the Anti-Counterfeit Authority (ACA) – into one agency to be known as the Intellectual Property Office of Kenya (IPOK).

If enacted, the IP Bill will be a welcome step in streamlining the oversight and administration of IP matters in Kenya.

Removal of expired trade marks from the Register of Trade Marks

Under the Trade Marks Act and Rules, the Trade Marks Registry is required to issue a notice to the owner of a trade mark, no less than 30 days and no more than 90 days before the registration period for a trade mark expires, that the mark will be removed from the Trade Marks Register (the Register) unless the registration of the mark is duly renewed.

However, in the past the Registry has not consistently published such notices, which led to numerous marks remaining on the Register despite having expired.

From February 2020, the Trade Marks Registry began the massive exercise of cleaning up the Trade Marks Register by issuing notices to owners of expired trade marks, requiring them to renew the same within the deadlines stated in the notices. The Registry has subsequently published several special editions of the Industrial Property Journal containing details of thousands of trade marks that would be removed from the Register by reason of non-renewal.

This is a progressive step in the process of ensuring that the Register is kept up to date.

Government of Kenya Foreign Investment Initiatives

The Government of Kenya (GOK) and the US Government launched trade negotiations in July 2020 in pursuit of a Free Trade Agreement. GOK seeks to secure a free trade pact ahead of the lapse of the African Growth and Opportunity Act (AGOA) by 2025, which eliminates import tariffs on goods from eligible African nations. However, the negotiations stalled due to the COVID-19 pandemic and the US elections, before picking up again in April 2021. The talks are ongoing. If successful, they could boost Kenya's long-term economic outlook.

GOK and the UK Government entered into a UK-Kenya Economic Partnerships Agreement (EPA), which was approved by the respective parliaments. In the deal, the UK committed to providing immediate duty-free quota-free access to goods exported from Kenya. Kenya committed to gradual tariff liberalisation of goods, with some domestically sensitive products in Kenya excluded from tariff liberalisation.

Recent Fiscal Developments

The Finance Act, 2020 passed into law on 30 June 2020, bringing the following changes to Kenya's tax regime.

- The introduction of a Digital Services Tax payable on income derived or accrued in Kenya from services offered through a digital marketplace. The tax applies at the rate of 1.5% of the gross transaction value, with effect from 1 January 2021.
- The introduction of a Minimum Tax payable at the rate of 1% of gross turnover, with effect from 1 January 2021. This tax applies where a taxpayer earns revenue but the tax payable is lower than 1% of their gross turnover. Minimum Tax does not apply to exempt income, employment income, residential rental income, capital gains, persons undertaking mining or upstream oil and gas activities, and persons subject to turnover tax.

On 19 April 2021, the High Court granted conservatory orders restraining the Kenya Revenue Authority (KRA) from collecting or demanding payment of Minimum Tax pending the hearing and determination of a petition challenging the constitutionality of the tax.

- The Voluntary Tax Disclosure Programme – a tax amnesty programme was introduced that will be in place for three years starting from 1 January 2021. The amnesty applies to outstanding tax liabilities that accrued within the five-year period before 1 July 2020. A taxpayer must apply to the KRA for such amnesty and, if approved, will benefit from:
  - (a) exemption from prosecution for the taxes declared;
  - (b) flexible payment plans not exceeding 12 months; and
  - (c) waiver of penalties and interest at the following rates:

(i) 100% if disclosed in the programme's first year (from January 2021);
(ii) 50% if disclosed in the programme's second year; and
(iii) 25% if disclosed in the programme's third year.

- The programme does not apply to taxpayers currently under audit by the KRA or taxpayers who have been notified of a pending audit. A taxpayer who applies for the amnesty will forego any other remedy, including appealing to the Tax Appeals Tribunal.
- Increased income thresholds for Residential Rental Income Tax (RRIT). RRIT now applies to income of between KES288,000 and KES15 million (it was previously between KES144,000 and KES10 million). This will allow more landlords to take advantage of the simplified tax regime for residential rental income.

The COVID-19 pandemic necessitated the introduction of immediate tax interventions in April 2020 to cushion the economy from the negative effects of the pandemic. These interventions were transient and were reversed in December 2020, when the economy began to show signs of recovery.

Labour

The Employment (Amendment) Act, 2021 (EAA) took effect on 15 April 2021, and amended the existing Employment Act to grant employees the right to pre-adoptive leave (of one month with full pay). This is in addition to the right to other statutory leave entitlements.

The EAA requires employees seeking pre-adoptive leave to notify their employers in writing of the intention of an adoption society to place a child in the custody of such employee, at least 14 days before the placement of the child.

Together with the notice, the employee should provide documents showing the intention of the adoption society to place a child in the employee's custody, including a custody agreement between the employee and the adoption society and an exit certificate. An "exit certificate" is defined as "a written authority given by a registered adoption society to a prospective adoptive parent to take the child from the custody of the adoptive society."

An employee may extend such pre-adoptive leave with the consent of the employer. If the employee takes any other leave with the consent of the employer (if applicable) once the pre-adoptive leave expires but before resuming work, his/her pre-adoptive leave will expire on such extended period.

These amendments are very beneficial to persons seeking to adopt children.

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Dentons Hamilton Harrison & Mathews was formed in 1902 and has 119 years' experience in providing effective and solution-based experiences. It is one of Kenya's largest law firms, offering a full range of legal services to local and foreign clients. The firm has offices in Nairobi and Mombasa, and a dedicated team of 13 partners and 60 associates who are supported by a team of more than 80 support staff. The firm's combination with Dentons, the world's largest law firm, gives it a global presence with access to over 200 locations globally and more than 12,000 lawyers worldwide. The firm's practice experience cuts across vast sectors, including real estate planning and environmental law, aviation, PPPs and privatisation, arbitration, employment, tax, regulatory and compliance, oil, gas, mining, litigation and dispute resolution, energy and infrastructure.

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