EVALUATING THE LEGAL FRAMEWORK GOVERNING MERGERS AND ACQUISITIONS OF COMMERCIAL BANKS IN KENYA

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DECLARATION

I hereby declare that this project is my original work and that no part has been copied or submitted before.

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II. ABSTRACT

This paper explores the conduciveness of the legal framework governing mergers and acquisitions of commercial banks in Kenya and whether it is prudent to maintain it at the current level. The legal and institutional framework plays a vital role in promoting the growth of commercial banks, banking sector governance, consumer protection, and enhancement of international best practice.

The 2030 vision for financial services in Kenya is to have a vibrant and globally competitive financial sector driving high-levels of savings and financing Kenya's investment needs. It proposes to reform the banking sector to facilitate the transformation of the large number of small banks in Kenya to larger, stronger banks. Larger stronger banks may be created through mergers and acquisitions which as we shall see are one of the avenues that promote growth and broaden revenue resources. This vision may not be attained as it may be hampered by the current legal framework that is characterized by overlaps, duplications, multiplicity of laws and regulatory bodies.

Banking and financial services is also a pillar of both the East Africa Community Vision 2050 and African Union's Agenda 2063. To stimulate investment within the East Africa Community, the Community proposes to have competitive cross-border banking and financial products and services, focused on the needs or demands of citizens.

To feed into both the East Africa Community and African Union Agenda, the legal framework governing mergers and acquisition activity of commercial banks in Kenya should be a tool for development and enhancement of vibrancy in the banking sector.

III. LIST OF ABBREVIATIONS

CMA	Government of Kenya, the Capital Markets Act
CA	Government of Kenya, the Competition Act
CAK	Competition Authority of Kenya
CBK	Central Bank of Kenya
CCA	East African Community Competition Authority
CCC	COMESA Competition Commission
COMESA	Common Market for East and South African States
EAC	East African Community
EACCA	East African Community Competition Act
NSE	Nairobi Securities Exchange
RTPA	Restrictive Trade Practices, Monopolies and Price Control Act
TBA	Government of Kenya, the Banking Act
TCMA	The Capital Markets Authority
OECD	Organisation for Economic Co-operation and Development

IV. LIST OF STATUTES

1. Republic of Kenya, Banking Act
2. Republic of Kenya, Capital Markets Act
3. Republic of Kenya, Companies Act 2015
4. Republic of Kenya, Competition Act 2010
5. East African Community Competition Act

V. Contents

CHAPTER ONE 1
INTRODUCTION TO MERGERS AND ACQUISITIONS IN KENYA 1
1.1 Introduction 1
1.2 Statement of the problem 5
1.3 Justification of the study 7
1.4 Objectives of the study 7
1.5 Hypothesis 8
1.6 Research question 8
1.7 Theoretical framework 8
1.8 Literature review 11
1.9 Research methodology 17
1.10 Limitation of the study 19
1.11 Chapter break down 20
CHAPTER TWO 22
THE LEGAL FRAMEWORK GOVERNING MERGERS AND ACQUISITIONS OF COMMERCIAL BANKS IN KENYA 22
2.1 Introduction 22
2.1.1 The Competition Act 22
2.1.2 The Companies Act 2015 28
2.1.3 The Capital Markets Act 28
2.1.4 The Banking Act 29
2.1.5 The East African Community Competition Act 30
2.1.6 Conclusion 32
2.2 THE REGULATORY FRAMEWORK 33
2.2.1 Competition Authority of Kenya Regulations 33
2.2.2 The Capital Markets (Takeovers and Mergers) Regulations 2002 34
2.2.3 Prudential Guidelines on Mergers, Amalgamations, Transfers of Assets and Liabilities (CBK/PG/12) 34
2.2.4 Common Market for East and Southern African States (COMESA) Competition Regulations 35
2.2.5 Conclusion 37
2.3 THE INSTITUTIONAL FRAMEWORK 38

2.3.1 The Competition Authority of Kenya (CAK) 38
2.3.2 The Capital Markets Authority (TCMA) 39
2.3.4 Ministry of Finance/Treasury 39
2.3.5 Central Bank of Kenya (CBK) 40
2.3.6 East African Community Competition Authority (CCA) 40
2.3.7 The Common Market for East and Southern African States (COMESA) Competition Commission (CCC) 41
2.4 REGULATION OF COMPETITION 41
2.4.1 The Objectives of Financial Services Regulation 41
2.4.2 Objectives for Regulation of Competition 44
2.4.3 Conclusion 45
CHAPTER THREE 46
MERGERS AND ACQUISITIONS OF COMMERCIAL BANKS IN KENYA: CASE STUDIES 46
3.1 Introduction 46
3.2 Ecobank Kenya Limited 46
3.3 Guaranty Trust Bank Kenya Limited 48
3.4 Themes arising from the merger and acquisition of commercial banks in Kenya 49
3.4.1 Merger Thresholds 50
3.4.2 Entities granting approval 51
3.4.3 Technology 52
3.4.4 Policy considerations 53
3.4.5 Confidentiality 54
3.4.6 Collaboration 54
3.4.6 Conclusion 55
CHAPTER FOUR 56
CONCLUSION AND PROPOSALS FOR REFORM 56
4.1 Conclusion 56
4.2 Proposals for Reform 56
4.2.1 Legal Reforms 57
4.2.2 Regulatory Reforms 59
4.2.3 Institutional Reforms 59

CHAPTER ONE

INTRODUCTION TO MERGERS AND ACQUISITIONS IN KENYA

1.1 Introduction

Merger and acquisition reviews indicate that mergers have recently attracted immense popularity as a form of growing the business of corporations.[1] For instance, financial analysts' reported a fifty-nine per cent increase in the number of mergers worldwide in the first nine months of the year 2014.The surge in numbers is reported to have surpassed the full year levels of mergers and acquisitions in the year 2013[2] alluding to the fact that business corporations witnessed enhanced growth in 2014. However, it could be possible that enhanced merger and acquisition activity also meant that some business corporations struggled more in 2014 necessitating a bail out in the form of mergers or takeovers.

In Kenya, the word merger[3] has no doubt become one of the newest buzzwords. The news is rife with information about mergers and acquisitions and the country is said to be fourth in ranking among Africa's most sought-after countries for mergers and acquisitions.[4] What seems to have increased Kenya's appeal as a desired destination for mergers is the fact that the mergers that have occurred are in emerging sectors of the economy, for instance, consumer products, the beauty industry and information technology.[5]

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[1] Thomson Reuters, 'Mergers & Acquisitions Review: Financial Advisors (First Nine Months 2011)' <http://dmi.thomsonreuters.com/Content/Files/3Q11_MA_Financial_Advisory_Review.pdf>.
[2] Ibid.
[3] The Competition Act defines a merger as an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.
[4] See http://afkinsider.com/36419/kenya-ranks-4th-for-african-mergers-acquisitions/, accessed on January 31, 2015 where Kenya is ranked after South Africa, Nigeria and Ghana
[5] Ibid. This is in reference to the acquisition in 2013 between Dimension Data Holdings – a South Africa-based provider of Information Technology solutions and services and Access Kenya. There was also the acquisition of part of Kenya's Interconsumer Products Ltd by L'Oreal South Africa.

However, not much merger and acquisition activity seems to have happened in the financial services sector within the period ranging from 2012 to 2013. Out of a total number of sixty five merger notifications received by the Competition Authority of Kenya in 2012 to 2013, only five of these notifications arose from commercial banks.[6] The period between 2014 to date has seen a somewhat increased merger and acquisition activity in the Kenyan banking sector with most of the activity happening in 2016. During that year, M bank of Tanzania acquired a majority stake in Oriental Commercial Bank Limited, I&M Holdings completed a 100% acquisition of Giro Bank Kenya Limited while Mauritian firm SBM holdings acquired Fina Bank Kenya Limited.[7]

Various reasons have been adduced as to why companies merge. Mohlman[8] cites growth, efficiency, and improved management as some of the reasons for merging. He argues that companies merge to promote efficiency principally through cost reduction by elimination of duplicate cost factors. Efficiency is said to come by through the merged entity enjoying the benefits of economies of scale of a larger entity.[9] Mohlman also argues that growth and enhancement of income is one of the most deep-seated motives for mergers and acquisitions.

Companies may also merge to enable them expand outside their business category, which means enhanced diversification.[10] Duksait *et al*,[11] also indicate that companies may use merger and acquisition activity to grow and expand into another geographic region. In their view, it may be more expeditious and less risky to expand geographically through acquisitions rather than through internal development. The writers raise a valid point as

[6] See the Competition Authority Annual Report, 2012 -2013 available at www.cak.go.ke, accessed February 28, 2015.
[7] Seehttp://www.aibcapital.com/phocadownload/AIB%20Capital%20Kenya%20Banking%20Sector%20Update_2017.pdf, accessed August 5, 2017.
[8] BW. Mohlman, 'Hostile Takeovers : The Long Term Effect on Shareholder Value of Acquiring Companies' (Erasmus University Rotterdam 2012).
[9] Ibid.
[10] Egl Duksait and Rima Tamošiūnien, 'Why Companies Decide To Participate in Mergers and Acquisition Transactions' (2009) 1 Science - Future of Lithuania 21.
[11] Ibid.

expanding geographically through internal development would ordinarily entail formal set up in the new region by registering a new entity, setting up structures, and hiring human capital. Indeed, it may be easier in such cases to merge with or acquire a rival or company in the new geographical region.

It has also been reported[12] that companies merge in order to consolidate their market share and broaden their revenue sources. In Kenya and East Africa for instance, regional insurers have sought to take over smaller insurance companies in order to pool resources that can enable them undertake more complicated risks. For instance in the year 2014, it was reported that Britam acquired a 90% stake in rival Real Insurance Company of Kenya Limited. The acquisition was intended to enable Britam broaden its investments and gain entry into new markets like Mozambique and Malawi.[13]

Like other companies, commercial banks[14] in Kenya also merge for the foregoing reasons. Based on a banking sector report for Kenya in 2017,[15] the banking sector is ready for growth and consolidation through mergers and acquisitions. The main reasons for this conclusion are however unique to Kenya. Following difficult business times and statutory management of Imperial and Dubai banks between 2015 and 2016, [16]customer confidence in this sector is tilted in favour of large banks. Consumers feel safer keeping their deposits with the larger banks under the belief that these will not fail.

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[12]Steve Mbogo, *Insurance sector hit by wave of mergers, takeovers*, THE EAST AFRICAN, April 19, 2014, available at http://www.theeastafrican.co.ke/business/-/2560/2285204/-/item/1/-/13k0ftbz/-/index.html, accessed on February 2, 2015.

[13] See THE EAST AFRICAN, *Britam's buying spree shows insurers are ready to expand beyond region*, February 1, 2014, available at http://www.theeastafrican.co.ke/business/Britam-buying-spree-shows-insurers-expanding-beyond-region/-/2560/2169134/-/item/0/-/v7df1sz/-/index.html, accessed June 5, 2015.

[14] Commercial bank refers to a company which carries on, or proposes to carry on, banking business (as defined in the Banking Act) in Kenya but does not include the Central Bank of Kenya.

[15]http://www.aibcapital.com/phocadownload/AIB%20Capital%20Kenya%20Banking%20Sector%20Update_2017.pdf, accessed August 5, 2017.

[16]http://www.nation.co.ke/business/Banks-hit-following-Imperial-Banks-closure-/996-2912840-5ha3kl/index.html, accessed August 5, 2017.

The recently enacted law that seeks to control interest rates that banks pay on deposits and charge clients for lending[17] is also expected to negatively impact the small banks more than larger ones. This is because banks are generally expecting lower margins from their mainstream lending business following the interest rate cap. The full effect of the rate cap law will be felt when banks publish their full year results for 2017. However, it has been reported that going by the results published in quarter one of 2017, interest income for several banks has steeply declined.[18]

However, in the past, some Kenyan banks have been acquired or merged due to regulatory requirements like meeting core capital requirements stipulated by the Central Bank of Kenya and expanding their market share.[19] These include the merger between Equatorial Commercial Bank Limited and Southern Credit Banking Corporation to form Equatorial Commercial Bank Limited and the acquisition of East African Building Society Bank Limited by Eco Bank Kenya Limited to form Eco Bank Limited.[20] The law or legal requirements have thus been a contributory factor to the merger and acquisition of commercial banks in Kenya.

The importance of banks in Kenya today cannot be over emphasised and the government has recognised the significance of banks in driving investment and growing the Kenyan economy. This is not only true for Kenya but the East Africa Community and Africa as well.

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[17] The Banking (Amendment) Act 2016 (Kenya Gazette Supplement) 1.
[18] https://www.standardmedia.co.ke/business/article/2001241756/banks-feel-the-heat-as-rate-cap-trims-quarter-one-profits
[19]This is true for a number of banks following a directive issued in 2008 by the then Finance Minister Amos Kimunya proposing to raise the minimum core capital for banks from 250 million shillings to 1 billion shillings, giving 2012 as the deadline for all banks to comply.
[20] A list of some of the institutions that have merged or been acquired for these reasons is available at https://www.centralbank.go.ke/index.php/commercial-banks-mortgage-finance-institutions/mergers-or-acquisitions, accessed June 6, 2015.

The law governing mergers and acquisitions of commercial banks in Kenya is characterized by overlaps, duplications, multiplicity of laws and regulatory bodies. In some instances, this makes it a hindrance to the benefits of undertaking a merger.

1.2 Statement of the problem

While banks in Kenya may seek growth through merger or acquisition of other banks, they will face various hurdles comprising of statutory and procedural challenges in the mergers and acquisitions process.

First is the need to comply with the multiple requirements of the legal framework including the Companies Act, the Competition Act, the Banking Act, and if listed on the Nairobi Securities Exchange, the Capital Markets Act. Additionally, there is need to comply with various rules and regulations of the regulatory framework like the Prudential Guidelines on Takeovers and Mergers, Competition Authority Regulations and the Capital Markets (Takeovers and Mergers) Regulations. The need to comply with these multiple legal requirements no doubt increases institutional compliance costs as commercial banks often have to engage and pay external legal counsel and other consultants to ensure compliance with the law and regulations.

Second, the Competition Act has supremacy in instances where there is a conflict between its provisions and the provisions of any other written law with regard to matters concerning competition, mergers and the powers or functions of the Authority under the Act.[21] However, the process of seeking merger approvals for banks is still fragmented. Depending on whether the proponents of a bank merger are listed on the securities exchange or not, banks have to seek multiple consents before finally submitting a merger application to the Competition

[21] 'S. 5 Competition Act.'

Authority of Kenya. This beats the purpose of having the Competition Act as the supreme law on mergers.

Additionally, the Competition Act is a fairly recent piece of legislation.[22]A review of the Act as at August 2017 raises some concerns. There is concern with the manner in which the Competition Authority handles confidential information.[23] When parties submit an application, there is no automatic obligation on the Authority to treat information as confidential and this could be a disincentive to knowledge critical businesses like commercial banks.

There is also concern with merger approval thresholds[24] as any merger or takeover whether over the whole or a portion of a business requires the approval of the Authority. Should this provision be strictly enforced, the Authority is likely to be swamped with applications which could affect the time frame within which approvals are granted and reduce the desire by entities to undertake growth through mergers and takeovers.

[22] The Competition Act was assented to on December 30, 2010 with a commencement date of August 1, 2011. As per the preamble to the Act, its purpose is to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes

[23] See S.20 of the Competition Act which provides that the Competition Authority of Kenya may treat material as confidential only if a person claims confidentiality in respect of the material.

[24] S. 42 of the Competition Act requires the Competition Authority of Kenya (CAK) to consult with the Cabinet Secretary and by notice in the Gazette, set the threshold for any merger excluded from the provisions of the Act. This has not been done and instead, CAK has published merger guidelines that are unclear on the threshold of mergers that should be submitted for approval.

1.3 Justification of the study

The following considerations have informed the need to undertake this study:

(i) This study, its findings and proposals for reform will, if adopted, help improve competition policy in Kenya and boost investor confidence in the banking sector; and

(ii) Mergers and acquisitions is a very topical issue not only in Kenya but worldwide. It is a way through which corporations can grow their businesses. Commercial banks are a vital channel through which the public saves money, builds credit, enables businesses to start up, and further promotes economic growth. An effective and conducive legal framework for mergers in this sector will help ensure that banks can grow their businesses through mergers and acquisitions and in turn drive investments that will promote greater economic growth.

1.4 Objectives of the study

The general objective of the research is to interrogate the legal framework governing mergers and acquisitions of commercial banks in Kenya with a view to determine whether it is effective and conducive in promoting bank mergers. The specific objectives of the research are as follows:

(i) To discuss the historical development and growth of the legal framework governing mergers of commercial banks in Kenya and the role of the Competition Act.

(ii) To critically review the nature and scope of the legal framework governing mergers of commercial banks in Kenya and whether it is conducive to industry players.

(iii) To formulate proposals for reform that if adopted will make the law governing mergers of commercial banks in Kenya more conducive.

1.5 Hypothesis

This research is based on the hypothesis that the multiplicity in the current legal framework governing mergers of commercial banks in Kenya is not conducive for promoting growth through merger and acquisition activity.

1.6 Research question

This study addresses itself to the following research questions:

(i) What is the effect of the multiplicity in the legal framework governing mergers and acquisitions of commercial banks in Kenya?

(ii) What proposals for reform if adopted will improve the effectiveness of the law governing mergers of commercial banks in Kenya and make it more conducive?

1.7 Theoretical framework

This study will make use of three theories, the economic analysis of law, public interest and capture theories.

Law and economics is an interdisciplinary movement that dates back to the 16th and 17th century concerned with the relationship between concepts of law and those of economics.[25] The law and economics movement finds basis on the conviction that economics is a powerful tool for analysing a vast number of legal questions affecting markets.

Eli Salzberger[26] observes that traditionally, economic analysis of law focused on those legal fields, which aimed to regulate activities in the traditional economic markets. Laws and legal concepts in these fields originate from traditional economic analysis of markets, their special

[25] It is part of the applied economics. Franseco Parisi & Ben Depooter, 'Positive, normative and functional schools of law and economics' in Jurgen G Backhaus(eds) *The Elgar Companion To Law And Economic* (Elgar Publishing Limited 2005).

[26] Salzberger Eli, 'The Economic Analysis of Law–The Dominant Methodology for Legal Research?'.(15/8/2007). University of Haifa Faculty of Law Legal Studies Research Paper No. 1044382. Available at SSRN: http://ssrn.com/abstract=1044382, accessed February 5, 2015.

characteristics, and failures. The fields in question include corporation law; anti-trust or competition law and tax law.

The law and economics movement has two historical periods.[27] This paper discusses competition law and lies within the first generation, which relates to economists that sought to show the relation of economics to regulations of explicit markets. This movement revealed the relationship between concepts of economics and areas of law such as competition (antitrust) law, taxation (state and international), corporate insolvency and intellectual property (with special reference to copyright & trademarks). Scholars aimed at explaining the functioning of explicit markets and the impact of alternative legal constraints such as taxes and regulations on the market and the economic effects of legislation. This school of thought is not out-dated but continues to develop even in modern times.

The aim of economic analysis of law is to identify the effects that legal rules have on the behaviour of relevant actors and whether these effects are generally desirable.[28] The movement applies to this research to the extent that the paper seeks to identify the effects that legal rules on mergers and acquisitions have on commercial banks and whether the effects are desirable.

The second and third theories are the public interest and capture theories which pertain to economic regulation as discussed by Posner[29] and Peltzman.[30] Economic regulation refers to

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[27] Richard Posner, 'Some Uses and Abuses of Economics in Law' (1978) 46 University of Chicago Law Review 281 available at <http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/uclr46&section=18>, accessed February 5, 2015.

[28] See Mitchell Polinsky and Steven Shavell's paper on 'Economic Analysis of Law 'available at http://ssrn.com/abstract=859406, accessed February 5, 2015. The writers survey the economic analysis of five primary fields of law: property law; liability for accidents; contract law; litigation; and public enforcement and criminal law. They also consider some criticisms of the economic analysis of law.

[29] See Richard Posner, 'Theories of Economic Regulation' (1974) 5 The Bell Journal of Economics and Management Science 335, available at <http://www.jstor.org/stable/3003113>, accessed March 5, 2015.

[30] Sam Peltzman, Michael E Levine and Roger G Noll, 'The Economic Theory of Regulation after a Decade of Deregulation'(1989)Brookings Papers on Economic Activity. Microeconomics available at

government intervention in the market through *inter alia*, explicit legislative and administrative controls over rates, entry, and other facets of economic activity.[31]

The authors note that public interest and capture theory are the two main theories of economic regulation. First is the public interest theory, which is to the effect that regulation arises as a response to the demand by the public for correction of inefficient or inequitable market prices. The capture theory on the other hand states that regulation arises as a response to the demands of interest groups struggling among themselves to maximize the incomes of their members. This theory assumes that with time, regulation will come to serve the interests of the branch of industry under regulation.[32]

Public interest is considered to be for the benefit of the society at large and views government regulation as a way of ensuring the efficient functioning of institutions.

In reviewing the legal framework governing mergers and acquisitions of commercial banks in Kenya, this paper falls within the ambit of the economic analysis of law theory. It seeks to identify the effects that legal rules on mergers have on the behaviour of commercial banks and whether these effects are generally desirable.

<http://www.jstor.org/discover/10.2307/2534719?uid=3737608&uid=2&uid=4&sid=21104382661203> accessed March 5, 2015.

[31] Posner n.18

[32] See Johan Den Hertog, 'General Theories of Regulation' [2000] Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics 223 available at <http://encyclo.findlaw.com/index.html>.

1.8 Literature review

1.8.1 Role of the law governing mergers of commercial banks in Kenya as a promoter of development

Kerry Rittich[33] while discussing the future of law and development acknowledges that law has instrumental value to development. He argues that the influential value of the law is evident in the identification of legal and institutional reforms as being vital to successful development. Rittich notes that legal reform is vital in promoting economic growth and that law has become a constitutive element of development. He notes that:

> Respect for the rule of law, the implementation of particular institutions; and the recognition of certain legal rights have become definitional to the achievement of development itself.

The writer also observes that legal reform is significant to development. The laws significance to development arises from its role in enhancing the security of entitlements and the efficiency of economic transactions. The idea is that efficiency of economic transactions creates a favourable environment for stable investment and human development to occur.

Rittich's speaks to the growth and development of competition law and policy in Kenya since 1956 to date. There was a realisation for the need to move from merely regulating price controls to other concerns like restrictive trade practices. A review of this writer's work provides insights into why regulation of bank mergers in Kenya has been evolving over time with a view to creating efficiency in this sector of economic transactions.

In discussing competition and development, Abel Mateus[34] notes that other than political systems, choosing and implementation of economic policies and the regulatory framework form part of the most important institutions in each country.

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[33] Kerry Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social, (2004) 26 Mich. J. Int'l L. 199.

[34] Abel M Mateus, 'Competition and Development: Towards an Institutional Foundation for Competition Enforcement' (2010) 33 World Competition <http://heinonline.org>., accessed August 28, 2017. See also

He adopts the definition of competition policy, also known as markets policy, as a set of policies directed at promoting competitive markets. The writer observes that apart from setting the rules of the game of competition among firms, competition policy promotes entry, growth, and exit in the dynamic process of an economy.

In Mateus view, certain social infrastructure is required in order for a country to have a regime of competition law. This social infrastructure includes a State and political system with a minimum functioning democratic regime, a separation of powers and checks and balances among the three branches of the State, and periodic general elections with political parties representing the spectrum of society. There should also be a public administration and regulatory system with a minimum of efficiency, without a high level of corruption. Additionally, the rule of law should form the basis of establishment of the countries institutions including the judicial system.

This writer also thinks that the core of a country's competition law should comprehend prohibition of cartels and monopolization or attempts to monopolize. It should include control of mergers that may have significant impact on social welfare and merger control should prohibit mergers that impose a substantial lessening of competition.

Mateus study is not specific to Kenya and does not look into the effectiveness of the legal framework governing bank mergers in Kenya. However, it provides useful insights into what such law should be and helps gauge the Kenyan Competition Act to determine whether the underlying competition policy promotes entry, growth, and exit in various sectors and in this case, the banking sector.

Daniel P Weick, 'Competition Law and Policy in Senegal: A Cautionary Tale for Regional Integration?' (2010) 33 World Competition 521 available at <http://heinonline.org>, accessed March 14, 2015. The author discusses competition policy in Senegal and points out the measures to be taken to address the challenges being faced in the Country.

1.8.2 Role of mergers and the merger process

Joseph Kithitu et al[35] discuss the role of mergers and acquisitions on the performance of commercial banks in Kenya. The authors delve into a discussion of why two are better than one and detail some reasons why there are corporate mergers. They acknowledge the fact that post 2010; the need to meet the stipulated core capital requirements informed mergers of some Kenyan commercial banks. They conclude that the mergers and acquisitions improved the profitability of the financial institutions. The authors recommend mergers of institutions having a weak capital base in order that they may derive the benefits of merging including enjoying large economies of scale.

This paper is relevant to our research as it builds on the background of our study to indicate more reasons why companies should merge. It also notes the proliferation of mergers in Kenya post 2010 albeit with a focus on the banking sector.

The current research seeks to take the focus off bank mergers themselves and critically examine the legal framework governing them and the actions that, if taken, may improve the effectiveness of the current legal framework.

Roberta Romano[36] discusses regulation of mergers in the United States, lists and rehashes some of the various reasons put forward to explain why companies merge. The writer notes that there is evidence to show that what informs mergers and takeovers is the value maximization and efficiency they bring to the new organization. The writer discusses the various theories governing takeovers and notes that takeovers generate significant gains for a company's shareholders since those listed companies targeted for takeover tend to experience

[35] Joseph Kithitu and others, 'Role of Mergers and Acquisitions on the Performance of Commercial Banks in Kenya' 2 IJMBS 7. In International Journal of Management and Business Studies Vol. 2, Issue 4, Oct - Dec 2012. Available at: www.ijmbs.com, accessed February 2, 2014.

[36] Roberta Romano, 'A Guide to Takeovers: Theory, Evidence, and Regulation' (1992) 9 Yale J. Reg. 119. Faculty Scholarship Series Paper 1954. Available at http://digitalcommons.law.yale.edu/fss_papers/1954, accessed February 3, 2014.

a positive surge in their share prices following the announcement of a possible takeover or merger.

In Mergers and acquisition basics: all you need to know Donald Depamphilis[37] demystifies the mergers and acquisition process by providing an overview of the entire process. The author notes that mergers and acquisitions may act as a change agent in that they may bring new managers and new ways of doing business into a company. Donald also discusses the various types of mergers being, vertical[38], horizontal[39] and conglomerate mergers[40].He offers guidance on how a company may develop takeover strategies and how this may affect its corporate governance. The author notes the role of special service providers in this process. These include investment banks and lawyers. Lawyers are vital in the mergers and takeover process as they involved in the entire deal from structuring, evaluating possible risks, explaining financial terms and conditions and at times arranging financing for the deal. The book is useful in helping acquire a basic understanding of the entire merger and acquisition process.

1.8.3 Regulation of bank mergers in Kenya

Nzomo[41] makes a case for consolidation of financial sector regulation in Kenya .In discussing the purpose of financial sector regulation; he notes that the main reason why Governments regulate industries is to protect consumers. He takes issue with the current regulatory structure in the financial services sector and identifies some of its weaknesses. These include overlaps in regulation, multiple regulators, and differences in the operational standards of the various regulators. The writer then examines some countries like Australia and the United

[37] Donald M DePamphilis, *Mergers and Acquisition Basics: All You Need to Know* (2011).
[38]Ibid.This type of merger involves two companies that participate at different stages of a production or value chain.
[39] Ibid. Defined as a merger that occurs within two companies in the same industry
[40] Ibid.In a conglomerate merger, the acquiring company purchases a company in an unrelated industry
[41] See Nzomo Mutuku, Case for Consolidated Financial Sector Regulation in Kenya, RBA Research Papers, 16-7 (2008), available at http://www.rba.go.ke/publications.html, accessed on February 2, 2014.

Kingdom that have embraced the concept of a single regulator for their financial services sectors. He then makes a case for and against consolidation of financial services regulation in Kenya. In conclusion he admits that the case for consolidation in Kenya is weak, citing the nascent market.

Though Nzomo does not specifically undertake a study of regulation of bank mergers in Kenya, the weaknesses he identifies in regulation of the financial services sector are similar to those appearing in the regulation of bank mergers. The sector is replete with overlaps in regulation and multiple regulators with each controlling a portion of the bank merger process.

In the Mergers and Acquisitions Review,[42] Joyce Nganga and Felicia Ndale provide an overview of merger and acquisition activity in Kenya. This includes an overview of the legal framework governing mergers and acquisition and the effect the law has had on merger and acquisition activity. The challenges brought about by the various pieces of legislation governing mergers are considered. The writers then conclude that Kenya has exhibited impressive growth, some of which has arisen from the various mergers and takeovers. A deeper discussion of the legal framework governing mergers and acquisitions of commercial banks will form a substantial part of this paper.

In 1997, the Organisation for Economic Co-operation and Development (OECD) published a report on regulatory reform[43]. The report looked at reform in three categories including economic regulations.[44] The definition adopted for economic regulations was those regulations that intervene directly in market decisions such as pricing, competition, market

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[42] Simon Robinson and Mark Zerdin Eds, *The Mergers & Acquisitions Review* (2011) 27.Available at http://www.bowman.co.za/FileBrowser/ArticleDocuments/The-Mergers-and-Acquisitions-Review.pdf, accessed February 4, 2015.

[43] See OECD, 'The OECD Report on Regulatory Reform Synthesis' 40.Available at www.**oecd**.org/gov/**regulatory-policy**/2391768.pdf, accessed August 28, 2017.

[44] Ibid.The other two categories being (i) Social regulations which protect public interests such as health, safety, the environment, and social cohesion, and (ii) Administrative regulations which are paperwork and administrative formalities -- so-called "red tape" -- through which governments collect information and intervene in individual economic decisions.

entry, or exit. As per the report, reform of these regulations aims to increase economic efficiency by reducing barriers to competition and innovation, often through deregulation and use of efficiency-promoting regulation, and by improving regulatory frameworks for market functioning and prudential oversight.

The report made several policy recommendations for regulatory reform. There was a recommendation to review and strengthen where necessary the scope, effectiveness and enforcement of competition policy. In the absence of evidence suggesting that compelling public interests cannot be served in better ways, countries were encouraged to eliminate gaps in the coverage of competition law. Additionally, they are to enforce competition law vigorously where collusive behaviour, abuse of dominant position, or anticompetitive mergers risk frustrating reform. A final recommendation was for countries to provide competition authorities with the authority and capacity to advocate reform.

Kenya is a member of the OECD and some of the reforms she has undertaken in her competition law have adopted these recommendations.

A review of Kenya's new competition policy regime by Robert Mudida et al[45], concludes that Kenya has laid a good foundation for a modern competition policy regime as recommended by the OECD report.[46]The writers argue that progress has been made in adopting legislation that seeks to regulate mergers in Kenya.

They take issue with the Restrictive Trade Practices, Monopolies, and Price Control Act which regulated competition from 1980 to 1988. They opine that this law was not effective as it was quite unfriendly to investors in terms of transparency. Regarding merger review, in particular, the writers note that the process was neither transparent nor subject to published

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[45] Wagura .&Thomas W ROS Mudida, Robert, Ndiritu, 'Kenya ' S New Competition Policy Regime' (2015) 38 W.Comp. Kluwer Law International 437.
[46] Supra n.43.

time frames. Additionally, the Monopolies and Prices Commission did not communicate the reasons for not approving mergers to the applicants.

They compare the Restrictive Trade Practices, Monopolies, and Price Control Act with the Competition Act and note improvement to the extent that the latter sheds clarity on the merger process in terms of providing guidelines on the definition of a merger, the merger review process, deadlines, and rights of appeal of merger decisions.

The writers' work feeds into the current study that seeks to establish efficacy and conduciveness of the nature and scope of the legal framework governing mergers, in matters concerning mergers of commercial banks in Kenya

1.9 Research methodology

This study was based on both primary and secondary data.

Kothari defines primary data as that which is collected afresh and hence is original in nature. [47]This data is collected through various mediums including questionnaires and other instruments like interview schedules. In this study, the primary source of data was collected through a questionnaire[48] to commercial banks that merged or were acquired between 2005 and 2010 and commercial banks that merged or were acquired after August 2011 when the Competition Act came into force.

The sample size constituted ten commercial banks that merged or were acquired during the periods indicated above based on mergers and acquisitions statistics that were available on the Central Bank of Kenya website.

[47] C.R Kothari, *Research Methodology Methods, and Techniques,* Second Revised Edition 2011 p.95.
[48] See appendix A for the questionnaire to commercial banks.

Three interview schedules were sent to the heads of the legal departments of each Bank and two of their legal managers making a total of thirty interview schedules.

The questionnaire was used to seek and obtain information from relevant respondents on their interaction with the legal framework governing bank mergers during the merger process. To focus on the study, the questionnaires were used to obtain information from in house legal counsel of banks that have merged and also from officers involved in approving mergers at the Competition Authority of Kenya and Central Bank of Kenya. No questionnaire was issued to the Capital Markets Authority as their role in bank mergers is restricted to banks listed on the Nairobi Securities Exchange. The researcher employed structured and unstructured interview questions so that the latter could provide room for the respondents to air their views and provide further explanation or answers that the researcher had not included in the questions.

In terms of selecting the institutions for case study, this study adopted simple random sampling. The criteria used to select the institutions was based firstly on the time of merger to select institutions that merged before and those that merged after the Competition Act 2010 came into force. Secondly, institutions were selected based on the entities merging and samples of Kenyan banks acquired by banks outside Kenya selected in order to determine the cross border experience. All institutions selected had an equal and independent chance of being selected a member of the case study.

The response rate was poor as the researcher received two complete responses from Eco Bank and two responses from GT Bank. There was no written response from both the Capital Markets Authority and Central Bank of Kenya. In order to collect data from a regulatory perspective, the researcher scheduled a phone interview using the questionnaire with a senior manager in the mergers department at the Competition Authority and a senior manager in the bank supervision department at the Central Bank of Kenya.

Secondary data has been defined as data collected and analysed by a third party and is thus readily available.[49]The secondary sources of data used to enrich this study included various statutes, books, articles, and online journals available in the institution's library. These contained information relevant to the study particularly on topics like the reasons for mergers, the role of law in development, the history of merger regulation in Kenya and amendment of competition law in Kenya over the years. The sources reviewed in this study were limited to sources with relevant information which contributed to the research.

The researcher also utilized relevant secondary data to draw conclusions and provide answers to the study questions under study and make proposals for reform.

1.10 Limitation of the study

The response rate to the questionnaires was poor as not many of the respondents completed and returned the questionnaire. The study will lack the benefit of the experiences of the affected entities. Some of the respondents returned but had not fully complete the questionnaire thus rendering it unusable for purposes of the study. Additionally, some respondents were unwilling to be interviewed posing a challenge to collecting data from the regulatory agencies.

[49] Ibid, p.111.

1.11 Chapter break down

Chapter One: Introduction

This chapter lays down the foundation for the rest of the paper by introducing the content of the research. It does this through providing the objectives and justification for this study. Additionally, it will discuss the theoretical framework governing the subject under study. This chapter will also contain a literature review to ascertain what other writers have written about the subject.

Chapter Two: The Legal framework governing mergers and acquisitions of commercial banks in Kenya

This chapter will build on the introduction given in chapter one. It will critically analyse the legal, institutional, and regulatory framework governing mergers and acquisitions of commercial banks in Kenya with a focus on the Competition Act which is the supreme law governing matters competition in Kenya. The chapter will seek to identify the strengths and weaknesses of this existing framework and possible areas for reform.

Chapter Three: Mergers and Acquisitions of Commercial Banks in Kenya – Case Studies

This chapter will contain two case studies on mergers and acquisitions in the banking sector. It will compare the experiences of an institution that merged before and one that merged after enactment of the Competition Act. The chapter will analyse the merger provisions of the Competition Act, and how they impacted the merger of GT Bank Kenya Limited, an institution that merged after this Act came into force.

Chapter Four: Conclusion

This chapter will give an overview of the findings of the paper. It will also give proposals for reform that if implemented may make the legal framework governing mergers and acquisition of commercial banks in Kenya more vibrant and effective. It will also contain the conclusion to the paper.

CHAPTER TWO

THE LEGAL FRAMEWORK GOVERNING MERGERS AND ACQUISITIONS OF COMMERCIAL BANKS IN KENYA

2.1 Introduction

In this chapter we will examine the legal framework governing mergers and acquisitions of commercial banks in Kenya and seek to understand how the general legal framework operates. The chapter will also look at the industry specific laws that govern mergers and acquisitions of commercial banks. It will also attempt a critique of these laws and conclude.

2.1.1 The Competition Act[50]

Before independence, Competition law in Kenya was governed by the Restrictive Trade Practices, Monopolies, and Price Control Act[51] (the "RTPA"). The RTPA came into force following the deliberations of Sessional Paper Number 1 of 1986 which articulated the need for a market driven economy in Kenya.

Ochieng and Maxon[52] note that the Government recognized that that business were becoming more complicated and were developing undesirable tendencies including price fixing.[53] Due to the growing complexity of business transactions, the RTPA was passed into law to curb price fixing and monopolistic tendencies among business men in the country. It follows that the statutes main objective was to enhance competition in the economy by ridding it of

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[50] *Competition Act 2010*.
[51] Restrictive Trade Practices , Monopolies and Price Control Act 1990. The Act came into force in August 2011 repealing the Restrictive Trade Practices Monopolies and Price Control Act
[52] William Robert Ochieng' and Robert M Maxon, *An Economic History of Kenya* (1992) <http://books.google.com/books?id=4WAwtUYnNPwC&pgis=1>.
[53] Ibid.

monopolies and price fixing.[54]To achieve this goal, the Monopolies and Prices Commission was established to monitor and regulate any restrictive practices.

The RTPA did not lack some shortcomings. A review of the statute as at August 2017 reveals what some of these challenges were. There was no clarity in the definition of terms like price fixing, one of the concerns that the statute was meant to address. Review of mergers, the topic under discussion lacked transparency as it was not subject to published time frames.[55]

Though the Ministers decisions regarding merger approval were published, the reasons for not approving a merger were not communicated to the applicants.[56] The penalties for consummating a merger without authorization did not provide sufficient deterrence plus the Act covered horizontal mergers only.[57]This implied that other types of mergers were not covered under the Act and in a way, outlawed mergers between enterprises distributing substantially different commodities or those engaged in supplying substantially different services.

A review of the RTPA by the OECD[58] during one of the global competition forums noted the following:

> Kenya's Competition Policy is heavily over-loaded with objectives which quite often are in conflict with one another, and which would be better served if specifically addressed through separate policy and legal instruments. For instance, protection and promotion of consumer welfare may in the short and medium terms be in conflict with competition objectives and similarly public welfare may be in conflict with private commercial interests in the field of the exploitation of competitive advantage in

[54] Ibid.
[55] See Ss.30-31*Restrictive Trade Practices , Monopolies and Price Control Act*.
[56] Ibid.
[57] The RTP defined these as Mergers and takeovers that involve two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities, or supplying substantially similar services.
[58] Organisation for Economic Co-operation and Development, 'Global Forum on Competition' (2001). (pp. 1–6). Geneva: Centre for Co-operation with Non Members Directorate for Financial, Fiscal and Enterprises Affairs (2002)

> the market place. Equally, the legislation is complex and distressing to the minds of the administrators and businessmen in the process of its interpretation and implementation…

The conclusion was unflattering and among other factors, this agitation by the OECD led to the review of the RTPA and passing into law of the Competition Act to cure the perceived weaknesses and gaps identified in the law, to further strengthen regulation and promote competition in Kenya.

Currently, the Competition Act ("CA") is the key statute governing competition law in Kenya. The preamble to the CA provides the purpose of enactment which is to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.

The CA provides for regulation of *inter alia*, restrictive trade practices, control of unwarranted concentration of economic power and mergers, the main topic of discussion in this research. Under the CA, a merger occurs when one or more undertakings directly or indirectly acquires or establishes direct or indirect control[59] over the whole or part of the business of another undertaking.[60] Control is acquired through various ways including ownership of more than half of the issued share capital of an entity. This definition of a

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[59] *Competition Act 2010*. See S. 41(3) which provides details as to how an entity acquires control of another.

[60] Ibid. See S. 41. This section also provides the manner in which a merger may be achieved including through (a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;
(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;
(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;
(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
(f) vertical integration;
(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or (h) amalgamation, takeover or any other combination with the other undertaking.

merger in the CA departs from the restrictive definition of a merger as contained in the RTPA and creates room for mergers between all kinds of entities.

The Competition Authority of Kenya (CAK)[61] established under the CA to take over the functions of the Monopolies and Prices Commission may exclude a proposed merger from the provisions of Part IV of the Act. Without such exclusion, no person may implement a proposed merger without the approval of the Authority. Additionally, an approved merger should also be undertaken in accordance with any conditions attached to it.[62]

Parties proposing to undertake a merger are both required to notify the CAK in writing[63] and approval by the CAK of a proposed merger does not relieve the concerned entities from the obligation to comply with any other applicable laws[64]such as the ones discussed in this chapter.

Once notified of the proposed merger, the CAK is generally required to review the application and make a determination within sixty days from the date it receives the notification.[65]

If the entities proposing to merge have provided materially incorrect or misleading information or have failed to comply with a condition that is material to the approval of the merger, then the CAK may revoke its decision approving implementation of the proposed merger.[66]

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[61] Established under S. 7 Ibid.
[62] Ibid.S. 42
[63] Ibid.S. 43
[64] Ibid.S. 49
[65] Ibid.S. 44
[66] Ibid.S. 47

Entities aggrieved by the decision of the CAK may submit their grievances to the Competition Tribunal for consideration[67] with a further right of appeal to High Court. The decision of the High Court in determining such a matter is final.

The Cabinet Secretary for Finance in conjunction with the Competition Authority is required to make rules for the better carrying into effect of the provisions of the Act.[68]

At a first glance, the CA is a more effective statute than the RTPA. It appears to have addressed some of the shortcomings of the RTPA raised by the OECD.[69] The objectives of the CA are clear, the timelines for approval of merger applications are clearly stipulated, and the process for review of CAK's decisions is also provided for.

With regard to bank mergers, some issues of concern arise. First, is the manner in which the CA provides for the CAK to treat confidential information submitted by applicants during the merger notification procedure. There is no automatic obligation on the CAK to treat information as confidential and this could be a disincentive to knowledge critical businesses like commercial banks.

David Chaikin[70] has argued that banks as agents owe a duty of confidentiality to their customers because of the trust placed by customers in the professional status of banks. Consequently customer –banker confidentiality is a practical necessity because banks often have access to a good deal of information about their customer's business. Without the duty to maintain confidentiality, a customer would have no ability to place faith in his bank and the financial community generally.

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[67] Ibid.S. 48
[68] Ibid.S. 93
[69] Organisation for Economic Co-operation and Development. (pp. 1–6). Geneva: Centre for Co-operation with Non Members Directorate for Financial, Fiscal and Enterprises Affairs (2002)
[70]Chaikin David, 'Adapting the Qualifications to the Bankers Common Law Duty of Confidentiality to Fight Transnational Crime' 33:265 Sydney Law Review.

The writer also states that the disclosure by banks of details of a customer's financial affairs to the wrong person or at the wrong time could occasion harm to the customer. Banks should therefore not be allowed to disclose customer-related information for marketing and other commercial purposes without obtaining the customer's prior consent.[71]

A lot of the information submitted by banks proposing to merge to CAK is confidential. It includes but is not limited to providing a copy of the proposed agreement for the acquisition, merger /amalgamation, the financial projections for the first three years of operation after acquisition, merger/ amalgamation together with respective assumptions. In the writers view, CAK should be mandated to keep this information confidential. Additionally, deterrent measures should be put in place to hinder CAK staff from unnecessarily disclosing the information.

Second, any merger or takeover over the whole or a portion of a business requires the approval of CAK. Should this provision be enforced strictly, CAK is likely to be swamped with applications which could affect the time within which approvals are granted and reduce the desire by entities to undertake growth through mergers and takeovers.

It is laudable that the CA provides the timeframe within which merger decisions should be granted. This is a move in the right direction departing from the uncertainty that prevailed under the RTPA regime. However, considering the many other legal and regulatory requirements that banks must comply with during a merger application, the period of sixty days is quite long for entities to await a decision.

[71] David Chaikin, 'Adapting the Qualifications to the Bankers Common Law Duty of Confidentiality to Fight Transnational Crime' (2014) 1.P. 269

2.1.2 The Companies Act 2015[72]

This is a recently enacted statute that departs from the statute it repealed in the way it extensively provides for governance of matters. For instance, private companies will now be permitted to provide financial assistance for the purchase of their own shares albeit with some restrictions.

The Act also introduces a new legal framework for handling mergers and acquisitions of public companies in Kenya. Directors of merging companies will now be required to prepare terms of scheme for the proposed merger with extensive details including their particulars, share exchange ratios, and the amount of any cash to be paid.[73] Under the new regime governing companies, the directors of each of the merging entities is then required to lodge the terms of the proposed merger with the Registrar of Companies.[74]

From the foregoing, this adds a new layer of regulation of mergers and acquisitions of public listed companies. Public listed banks are now required to prepare the terms of the proposed merger and arrange for registration of the same.

2.1.3 The Capital Markets Act[75]

This statute ("CMA") regulates Public companies listed on the Nairobi Securities Exchange ("NSE"). It would therefore apply to regulate commercial banks listed at the NSE.

The CMA confers power on the Cabinet Secretary for Finance to make regulations required to regulate various aspects of the capital markets in Kenya.[76] Pursuant to this power, the Capital Markets (Take- Overs and Mergers) Regulations were made in the year 2002. These

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72 The Companies Act No 17 of 2015.
73 Ibid. S.934
74 Ibid.S 935
75 Government of Kenya, 'the Capital Markets Act'.
76 Ibid. S. 12

regulations shall be examined more extensively when we look at the regulatory framework governing mergers and acquisitions of commercial banks in Kenya.

However, it should be noted that where commercial banks listed on the NSE propose to merge, they must obtain relevant approvals and comply with the provisions of the CMA and relevant regulations.

2.1.4 The Banking Act[77]

The Banking Act ("TBA") regulates institutions carrying on banking business.[78]Institutions licensed under TBA shall not amalgamate, transfer their assets or liabilities without the prior approval of the Cabinet Secretary for Finance.[79]

Pursuant to Sections 9 and 13 of TBA, the Central Bank of Kenya has published Prudential Guidelines to assist institutions intending to undertake an acquisition, merger or amalgamation, transfer assets and liabilities and/or to facilitate transfer of significant shareholding.

In practice, applications are submitted to the Bank Supervision Department of the Central Bank of Kenya in the form required by the Prudential Guidelines with a detailed list of information concerning the proposed merger. *Inter alia*, the entities are required to provide financial projections for the first three years of operation after acquisition, merger/

[77]Government of Kenya, 'the Banking Act'.
[78] Banking business is defined by the TBA to mean (a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;
(b) the accepting from members of the public of money on current account and payment on and acceptance of cheques; and (c) the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money; (d) such other business activity as the Central Bank may prescribe.
[79] Ibid.S. 9

amalgamation together with respective assumptions.[80]No doubt, this is detailed and confidential information pertaining to the affected entities.

2.1.5 The East African Community Competition Act[81]

The East African Community Competition Act ("EACCA") applies to all economic activities and sectors having a cross border effect. The passing of this Act was informed by the East African Community (EAC); the regional integration organisation of the Republics of Kenya, Uganda, Tanzania, Rwanda, and Burundi. The Treaty establishing the EAC (the EAC Treaty) was signed on November 30, 1999 and came into force on July 7, 2000.[82]This marked the rebirth of the old EAC that collapsed in 1977.

One of the purposes for which the EACCA was enacted is to enhance the competitiveness of Community enterprises in world markets by exposing them to competition within the Community. EAC has attempted to do this through the EAC Vision 2050.[83] Banking and financial services is a pillar of the EAC Vision 2050 with potential to stimulate growth through free movement of labour and capital.

[80] See the Prudential Guideline on Acquisitions, Mergers, Amalgamations, Transfers of Assets and Liabilities. At a minimum, institutions are required to provide a) An extract of minutes of the general meeting of the shareholders of each of the institutions involved passing the resolutions to acquire, merge or amalgamate and the terms and conditions of the relevant agreement. Also attach a copy of the resolution of the board of directors of all the participating companies approving the proposed merger or amalgamation. b) Latest audited accounts for all the institutions involved in the acquisition merger/amalgamation. A copy of consolidated accounts of the institution's duly certified by an independent firm of auditors as at the date of application for approval. The certified accounts should meet CBK minimum disclosure requirements. c) Memorandum and Articles of Association of merging/ amalgamating institutions or institutions involved in an acquisition. d) A statement of the nature and objectives of the acquisition, merger/amalgamation. e) A copy of the proposed agreement for the acquisition, merger /amalgamation. f) Financial projections for the first three years of operation after acquisition, merger/ amalgamation together with respective assumptions. g) Proposed details of the method of valuation and the name of the valuer. h) Proposed organisation structure of the resulting institution. i) Proposed details of senior management. j) Proposed shareholding structure. k) Proposed board of directors. l) Particulars of Directors Loans. m) Proposed branch network. n) Proposed staff rationalization program. p) Operational contingencies and marketing plan. q) Business strategy to be adopted. r) ICT strategy and system software to be adopted. s) Legal due diligence covering all areas of any legal concerns that may face the resulting institution. This should include current litigations and anticipated litigation

[81] East African Community THE EAST AFRICAN COMMUNITY COMPETITION ACT , 2006.

[82] http://www.eac.int/ accessed August 25, 2018.

[83] East African Community, 'EAC Vision 2050'.

To stimulate investment within the EAC, the Community proposes to have competitive cross-border banking and financial products and services, focused on the needs or demands of citizens.

The Act establishes the East African Community Competition Authority[84] ("CCA") with power to implement and enforce the EACCA. The CCA is also the dispute resolution mechanism for disputes arising under the EACCA.

Part IV of the EACCA deals with cross border mergers and acquisitions within the EAC and requires an entity seeking to undertake a cross border merger must notify the CCA.

There is a point of departure from the Kenyan CA regarding the process of notification. Whereas the CA requires each of the companies involved in the merger to notify CAK in writing[85], the EACCA only requires one notification to be made by the entity acquiring control through the merger.[86]

In the researcher's view, the EACCA's is a more efficient way of making notification as it avoids duplication in the efforts of making a merger application in respect of two similar entities.

Upon making an application, the CCA notifies the applicant of its decision within forty five days from the date of the application. If the CCA does not provide its response within the stipulated time frame, the proposed merger may be implemented.[87]

Contrary to the provisions of the CA that places no obligations on the authority to safeguard confidentiality, the CCA's employees and its agents are mandated not to disclose any information acquired during the performance of their duties under the EACCA.

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[84] S. 37
[85] *Competition Act 2010*.S. 46.
[86] See S.11,*East African Community Competition Act , 2006*.
[87] Ibid.S.12

Those who breach this requirement commit an offence and are liable to pay a fine, serve a prison term or both.[88]

2.1.6 Conclusion

This paper seeks to determine whether the legal framework governing mergers and acquisitions of commercial banks in Kenya is effective, whether the law is adequate to accomplish the purpose for which it has been legislated. From the foregoing discussion, Kenya has moved on greatly from the days of the RTPA as the current legal framework governing mergers and acquisitions of commercial banks in Kenya has clear objectives and is quite extensive.

The extensive nature of the legal framework has its pro and cons. In the researchers view, the need to comply with all the legal requirements of a merger will increase institutional compliance costs as banks often have to engage and pay external legal counsel and other consultants to ensure compliance with the law.

As aforementioned, the manner in which CAK handles information received from applicants needs to be reconsidered to protect confidentiality and consequently protect the interests of information sensitive entities.

Procedural technicalities in the Competition Act like the need to submit two separate applications by the merging entities should also be reviewed. In the writers view, submitting two applications adds no value to the process and hampers the effectiveness of the merger process.

[88] Ibid.S.25

2.2 THE REGULATORY FRAMEWORK

The separation between the legal and regulatory framework in this paper is merely done to make the discussions clear. These two overlap because the regulatory framework is set up by the legal framework. Various regulations have been put in place for the effective carrying out of the provisions to the statutes governing mergers and acquisitions discussed above.

2.2.1 Competition Authority of Kenya Regulations

Though the Competition Act came into force in August 2011, no rules have been made by the Cabinet Secretary as required under Section 93 of the Competition Act. The Competition Authority has however issued several guidelines pertaining to the various matters under the CA including management of mergers.

These include guidelines on balancing public interest, guidelines on the various types of mergers contemplated under the CA (Horizontal, Vertical and Conglomerate), guidelines for market definition and guideline for merger thresholds.[89]

Under the guidelines, mergers meeting certain thresholds may not be excluded from the provisions of the Act. This includes mergers between undertakings which have a minimum combined threshold of one billion shillings and the turnover of the target undertaking is above one hundred million shillings.[90]

In the researcher's opinion, the guidelines for merger thresholds have not been effective in determining merger thresholds in Kenya. All types of mergers continue to be referred to CAK for approval as evidenced by CAK's annual report for 2014 to 2015.[91]

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89 All the guidelines are available on the Competition Authority's website at http://www.cak.go.ke/index.php/status-regulations/guidelines.html.

90 See Competition Authority Kenya, 'Guidelines on Exclusion Of Proposed Mergers From Provisions Of Part IV Of Competition Act', vol 42 (2010).

91 Republic of Kenya, 'Annual Report 2014/2015', vol 71 (2015) <http://www.spp.org/documents/28682/ar-2014%0A04302015.pdf>.

The decision for a good number of the applications was that they were exempted from Part IV of the CA which in the writers view suggests that they ought not to have been submitted for consideration in the first instance.

To improve the current situation where all types of mergers are caught up and require the consideration of CAK, the Authority may consider providing clear guidelines on the thresholds of those mergers that do not require its approval. These should then be automatically exempted from the purview of the Competition Act.

2.2.2 The Capital Markets (Takeovers and Mergers) Regulations 2002

These regulations were published pursuant to Section 12(1) of the Capital Markets Act. They apply to companies listed on the Nairobi Securities Exchange and make provision for various matters.

The regulations provide a detailed procedure for takeover, lay out the obligations of the parties during the takeover, and also guide the parties on the information to be provided to the various agencies during the takeover.

The takeover procedure is quite elaborate and extensive. The information to be provided is also detailed and as pointed out earlier, it will be a tall order for an entity proposing to merge to do so without the input of legal and other consultants.

2.2.3 Prudential Guidelines on Mergers, Amalgamations, Transfers of Assets and Liabilities (CBK/PG/12)[92]

These guidelines are part of the guidelines published by the Central Bank of Kenya to regulate and ensure the efficient operation of the Kenyan banking sector. They apply to all commercial banks licensed under the Banking Act.

[92] Central Bank of Kenya, 'Prudential Guidelines' 310- 321.

The guidelines provide the procedure to be followed by Banks intent on carrying out a merger. Merging or amalgamating institutions are required to seek approval from the Central Bank of Kenya for the name under which they intend to use in case of change of name. They should then ascertain with the Registrar of Companies that the selected name is available and appropriately reserved for their use.

The institutions are also required to provide a long list of information and a letter of approval for the merger from the Competition Authority of Kenya. Thereafter, the Central Bank of Kenya shall only approve the merger if the application meets its very rigorous assessment process and approval criteria.

There is a good avenue for co-operation between CAK and the Central Bank of Kenya in terms of the information to be provided by banks proposing to merge. A review of the information to be provided under CBK/PG/12 and that to be provided to CAK[93] reveals differences in the type and the form in which the information should be submitted. Granted the information submitted to the two institutions cannot be exactly similar, however, they could consider synchronising the form of presentation of similar information including business plans and related acquisition agreements to ease the application process for applicants.

2.2.4 Common Market for East and Southern African States (COMESA) Competition Regulations[94]

The COMESA Competition Commission ("CCC") has put in place regulations for control of competition among the member states. Among other issues, the regulations provide for control of mergers and acquisitions.

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[93] See https://www.cak.go.ke/images/new/merger_notification_form.pdf, accessed August 28, 2017.
[94] See COMESA Competition Regulations 2004.Available at http://www.comesa.int/competition/wp-content/uploads/2014/06/2012_Gazette_Vol_17_Annex_12-COMESA-Competition-Regulations-as-at-December-2004.pdf, accessed August 25, 2017.

With regard to this research, the COMESA merger regulations would apply to commercial banks proposing to undertake a merger requiring notification[95], that is, a merger with a regional dimension and whose value meets the thresholds prescribed by the CCC.

These regulations govern mergers and takeovers where both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more COMESA member States; and meet the threshold of combined annual turnover or assets provided for in the regulations.[96]

A party to a merger requiring notification is required to notify the CCC in writing not later than thirty days from the date the parties make the decision to merge. The CCC shall then consider the application and make a determination within one hundred and twenty days from the date the notification is made.

A person aggrieved by the decision of the CCC may appeal against the decision to the Board of Commissioners as provided for in the COMESA Competition Regulations.

The COMESA Competition Regulations are a necessary evil and provide clear guidance to merger proponents who are COMESA member States. Given that the regulatory framework of the member states may differ, it is vital to have a central point of reference to provide clarity and guidance on matters mergers to the member states.

It is also worth noting that the CCC provides an option when it comes to submission of notifications. Notifications must be completed jointly by the parties to the merger or in the case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification.

[95] Ibid.Article 23
[96] Ibid.

2.2.5 Conclusion

The regulatory framework discussed above assists to provide clarity as to how parties may go about undertaking a merger both within the host country, EAC and COMESA.

2.3 THE INSTITUTIONAL FRAMEWORK

Though the focus in this section is on the institutional framework, the researcher reiterates that the distinction is only done to ensure clarity in our discussion.

2.3.1 The Competition Authority of Kenya (CAK)

Given that the Competition Act is the supreme law governing competition matters in Kenya, it follows that CAK is a vital government institution in the institutional framework for notification and approvals of mergers and acquisitions in Kenya.

CAK is a body corporate established under Section 7 of the CA. Its mandate and objectives are broad and extensive and include promoting and enforcing compliance with the Act, receiving and investigating complaints, promoting among others, public knowledge, awareness and understanding of the Act and the duties, functions and activities of the Authority, making available to consumers information and guidelines relating to the obligations of persons under the Act and the rights and remedies available to consumers under the Act, carrying out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers.

To date, there are no rules, or regulations made that clearly stipulate the role of CAK in the mergers and acquisitions of commercial banks in Kenya. CAK has published some guidelines on the assessment of mergers under the Competition Act, aimed at assisting entities that propose to undertake mergers and acquisitions.[97]

Given that no formal regulations governing mergers and acquisitions have been made, this is a laudable move. A reading of the guidelines reveals that unfortunately, they are not

[97] Available at https://www.cak.go.ke/index.php/mergers-aquisition/forms-and-guidelines, accessed July 2, 2017.

exhaustive on matters like transactions excluded from notification. Business entities must still employ the services of legal representatives to review the Act and determine whether their transactions fall within the ambit of transactions subject to notification. Due to the lack of clarity, CAK continues to receive merger notifications of all kinds, the guidelines notwithstanding.[98]

In order to enhance user experience, CAK has recently provided for the online filing of merger notifications. [99]Part of CAK's role in promoting and protecting consumer welfare is consumer education on competition matters. CAK also has a forum for consumer education on its website, but more may be done including the arranging of public discussions as the majority of the Kenyan public may not have access to this website.

2.3.2 The Capital Markets Authority (TCMA)

TCMA is also a body corporate established under the Section 5 of the CMA. It oversees implementation of the various regulations issued under the CMA including the regulations on takeovers and mergers. Additionally, TCMA plays a vital role in approving the takeovers and mergers of institutions listed on the Nairobi Securities Exchange.

2.3.4 Ministry of Finance/Treasury

The Cabinet Secretary for Finance has a role to play in the development of financial institutions in Kenya. For instance the CMA tasks him with the duty to make rules to promote the effective functioning of the capital markets.

[98] Kenya, 'Annual Report 2014/2015'.

[99] See https://www.cak.go.ke/index.php/file-a-merger-acquisition-exemption-application, accessed August 28, 2017 providing an alternative for applicants to make email applications.

2.3.5 Central Bank of Kenya (CBK)

Established by the Constitution of Kenya 2010 and governed by the Central Bank of Kenya Act, the CBK is mandated to exercise any type of central banking activity, to formulate and implement monetary policy, to achieve and maintain stability in the general level of prices, to foster the liquidity, solvency and proper functioning of a stable market based financial system.

CBK also regulates all commercial banks in Kenya and to this end, it has issued several guidelines and regulations aimed at achieving this purpose. These include the Prudential Guidelines on Mergers, Amalgamations, Transfers of Assets, and Liabilities.[100] The regulations add onto the already numerous laws and regulations that banks must comply with in order to facilitate a merger or takeover.

2.3.6 East African Community Competition Authority (CCA)

CCA is established by Section 37 the EACCA A. The CCA has various powers including power to impose sanctions and remedies and power to issue legally binding decisions.

The CCA has supremacy over the member states competition authorities. Where a case or legal dispute is pending before the CCA and also before a member states competition authority, the member states competition authority is required to stay its proceedings until the CCA has made a decision.[101]

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[100] Kenya, 'Prudential Guidelines'.
[101] *East African Community Competition Act , 2006*.S.44.

2.3.7 The Common Market for East and Southern African States (COMESA) Competition Commission (CCC)

The CCC is tasked with addressing competition matters arising from the member states. The regulations made by the CCC apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market.

The CCC has various functions including monitoring and investigating anti-competitive practices of undertakings within the Common Market, mediating disputes between member States concerning anti-competitive conduct and regularly reviewing regional competition policy so as to advise and make representations to the Council with a view to improving on the effectiveness of the Regulations. Additionally, the CCC is tasked with helping member States promote national competition laws and institutions, with the objective of the harmonisation of those national laws with the regional regulations. This is done with a view to achieve uniformity of interpretation and application of competition law and policy within the Common Market.

Taking Kenya as an example, it is clear that the CCC has some work to do in achieving harmonisation of national laws with regional regulations. This will not only ease the merger notification process for proponents but will go a long way in supporting achievement of the EAC Vision 2050 and African Union Agenda 2063 for banking and financial services.

2.4 REGULATION OF COMPETITION

2.4.1 The Objectives of Financial Services Regulation

Three main objectives have been identified as the reasons for regulation of financial institutions:

a) to sustain systemic stability,

b) to maintain the safety and soundness of financial institutions, and

c) to protect the consumer.[102]

It has been argued that it is vital to protect against systemic risk or sustain systemic stability because the failure of a financial institution could, through confidence and contagion effects, undermine the functioning of the financial system as a whole. In banking for instance, certain characteristics of banking, like the importance of depositor confidence in institutions which borrow short and lend long, the difficulties of objectively valuing many bank assets, and the interconnection of banks through the payments system, mean that one institution's problems can spread quickly to others.[103]

Kenya recently experienced this when CBK placed institutions like Chase Bank Kenya Limited and Imperial Bank Kenya Limited[104] among others, under statutory management. It was reported that following this move, authorities in Uganda took the cue from their Kenyan counterpart and similarly put five subsidiaries of Imperial Bank under statutory management. To add onto Imperial Banks woes, the CMA rescinded a recent decision granting crucial bond approvals for Imperial Bank.[105]

Regarding efficiency, safety, and soundness of financial institutions, it is said that competition among financial institutions enhances efficiency by improving the accessibility, design and pricing of financial services. This is achieved through limiting the scope for harmful restrictive practices, and by leading to the most productive allocation of resources.

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[102] See David Llewellyn, 'The Economic Rationale for Financial Regulation' [1999] FSA Occasional Papers in Financial Regulation <http://www.fsa.gov.uk/pubs/occpapers/op01.pdf>., The Economic Rationale for Financial Regulation. Available at http://foundation.ifmr.co.in/2013/02/12/the-economic-rationale-for-financial-regulation/, accessed June 11, 2015.

[103] Insurance and Superannuation Commission, 'Chapter One - Rationale of Financial Supervision' (1996) <http://fsi.treasury.gov.au/content/downloads/PubSubs/000053e.pdf>., Rational of Financial Supervision, available at http://fsi.treasury.gov.au/content/downloads/PubSubs/000053e.pdf, accessed June 11, 2015.

[104] See http://www.nation.co.ke/business/Imperial-Bank-placed-under-receivership/996-2911156-5g3a6z/index.html, accessed August 28, 2018.

[105] Ibid

Competition among financial institutions also encourages them to become strong, profitable, and dynamic, and leads to more satisfied customers.[106]

The need for consumer protection is based on a number of reasons. First is the need to address the market imperfections which arise from inadequate and unequal information, and enable consumers to properly assess the risks, quality, and relative prices of diverse and often complex financial products and services.

Large financial institutions often have superior bargaining power, and are naturally in a position to exploit their more vulnerable customers. This would result in a negative effect on the interests of consumers through fraud or misrepresentation by financial organisations selling certain products or services.

It is argued that such market imperfections and the scope for incompetent and unethical practices can be substantially reduced, however, by information disclosure requirements and codes of practice regulating business behaviour.[107]

It is worth noting that the aim of consumer protection is to provide a level playing field. The regulation of financial institutions will thus provide a framework that enables consumers to make informed decisions protects and compensates those consumers who may fall victim of fraud and unfair practices in the market. In Kenya we have the Deposit Protection Fund established by the Central Bank of Kenya to protect consumers against the systemic risk of failure of commercial banks.

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[106] Llewellyn.Supra note 101, p.4
[107] Ibid.

2.4.2 Objectives for Regulation of Competition

The Association of Southeast Asian Nations sets out some objectives and benefits for competition policy. Competition policy is defined to include legislation, judicial decisions, and regulations specifically aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers.[108]

The guidelines identify several benefits and objectives of competition policy including promotion of a competitive process through creation of a level playing field for all market players, enhanced efficiency arising through disciplining firms to produce at the lowest possible cost and passing these cost savings on to consumers, and contributing to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Competition policy also supplements trade, industrial and regulatory reform policy.[109]

Kenya's Competition Act captures the country's competition policy. Section 3 of the Act states that the purpose of the Act is to increase efficiency in the production, distribution and supply of goods and services, promote innovation, maximize the efficient allocation of resources, protect consumers, create an environment conducive for investment, both foreign and local, capture national obligations in competition matters with respect to regional integration initiatives, bring national competition law, policy and practice in line with best international practices, and promote the competitiveness of national undertakings in world markets.

In the writers view, Kenya is still on the growth curve in terms of enhancing competition policy governing commercial banks to make it more conducive to industry players and

[108] See the ASEAN Regional Guidelines on Competition Policy available at http://www.asean.org/archive/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf, accessed June 11, 2015.
[109] Ibid.

investors. There is no level playing field as envisaged under the Competition Act. The duplicity in the existing legal and regulatory framework has resulted in several issues including a costly regulatory system, heavy compliance costs to be incurred by institutions through compliance with numerous legal and regulatory requirements. The variance in the time frames for approval of mergers between CAK, the EACCA, and CCA also points to the need to pursue regional integration initiatives for alignment.

2.4.3 Conclusion

In this chapter, we have critically examined the existing legal, regulatory, and institutional framework governing mergers and acquisitions of commercial banks in Kenya. We have noted some strengths and shortcomings of the Competition Act and Competition Authority in their approach to regulating mergers and acquisitions and how this affects bank mergers. We have also highlighted areas of the existing legal framework needing reform and review.

In the researchers view, political good will is required if we are to achieve effective and lasting reforms in legislating and implementing competition policy in Kenya. Notwithstanding the fact that we have an extensive legal framework governing competition matters, there is continued political interference from the political class as evidenced by the recent legislation of the Banking (Amendment) Act.[110] A review of the Amendment Act reveals that it lacks clarity as it was hastily passed just before an election year to control the rate of interest to be charged by banks on loans.

Such interference hampers the aims of competition policy to promote a competitive process as it introduces extraneous forces into the regulation of competition.

[110] *The Banking (Amendment) Act*.

CHAPTER THREE

MERGERS AND ACQUISITIONS OF COMMERCIAL BANKS IN KENYA: CASE STUDIES

3.1 Introduction

In this chapter we will examine the acquisitions that happened between Ecobank Transnational Incorporated and East Africa Building Society Bank and that between Guarantee Trust Bank of Nigeria and Fina Bank (Kenya) Limited. As indicated in the research methodology adopted for this paper, the criteria used to select the institutions was based firstly on the time of merger to select institutions that merged before and those that merged after the Competition Act 2010 came into force and compare their experience.

Secondly, institutions were selected based on the entities merging and samples of Kenyan banks acquired by banks outside Kenya selected in order to determine the cross border experience.

We will review the process followed in the two acquisitions and how it was impacted by the legal framework governing mergers and acquisitions of commercial banks in Kenya at the respective times. The chapter will also use the second case study to undertake a critical analysis of the CA and conclude.

3.2 Ecobank Kenya Limited

In June 2008, Ecobank Transnational Incorporated (ETI) acquired 75% shareholding of East Africa Building Society Bank. Following the acquisition, the bank altered its name to Ecobank Kenya Limited.[111] The respondent to the questionnaire on mergers and acquisitions

[111] See https://www.ecobank.com/ke/personal-banking/countries, accessed on July 15, 2017.

indicated that the acquisition was informed by ETI's need to acquire an affiliate Bank in Kenya as part of its expansion drive across middle Africa.

At the time of the acquisition, EABS had 8 branches and ETI planned to double the number of branches to promote financial inclusion in greater access to the Banks facilities and products. ETI also intended to leverage on its International Technology & Shared Services Centre based in Accra to enable the new entity provide web based, electronic banking services.[112] This was seen as a measure that would give the acquired entity a competitive edge in the dynamic and rapidly developing Kenyan banking sector.[113]

The respondent also indicated that the acquisition process took one year[114], partly because ETI had to obtain approvals in Togo West Africa while EABS also had to obtain local internal and regulatory approvals in Kenya. In 2008, Central Bank of Kenya was the key regulatory body and aided the entities by approving the acquisition, the new Board of Directors and granting ETI a ten year exemption from the requirement that no person should own more than 25% of a Kenyan Bank.[115] It was thought that exemption was granted partly to encourage foreign investment in Kenya.

With regard to dealing with the legal framework, the respondent was of the view that apart from the ownership challenge indicated above, the legal framework for mergers and acquisition of banks under the Banking Act provided clarity in the acquisition process, consequently encouraging foreign investment.[116]

[112] See https://www.microcapital.org/microcapital-story-ecobank-completes-its-takeover-of kenya%E2%80%99s-east-african-building-society-eabs-bank/, accessed on July 15, 2017.
[113] Questionnaire, Eco Bank official one
[114] Questionnaire question 2 measuring merger timelines
[115] *Banking Act*. See Section 13(1) detailing this provision and the instances when the regulator may allow such ownership to happen.
[116] Ibid. See Section 9 of the Act governing amalgamations and transfers of assets and liabilities. No such amalgamation or transfer of assets has legal force without the approval of the Cabinet Secretary.

The respondent at CBK[117] indicated that merger and acquisition approvals are reviewed on a case by case basis. Any requests for flexibility in approval are similarly reviewed in light of prevailing legal and economic circumstances. In the researcher's view, the flexibility of Central Bank of Kenya in granting approvals for this acquisition should be lauded.

3.3 Guaranty Trust Bank Kenya Limited

In 2013, Guaranty Trust Bank plc headquartered in Lagos, Nigeria, acquired 70% of the shareholding and controlling stake of Fina Bank Kenya Limited to form Guaranty Trust Bank Kenya Limited (GTBK).[118] At the time, the Guaranty Trust Bank Group already had presence in Coted'Ivore, Gambia, Ghana, Liberia Sierra Leone, and Nigeria. It was reported that the takeover of Kenya's Fina Bank was part of the Guaranty Trust Bank group's effort to benefit from the East African region's booming economies.[119]

The GTBK respondent to the questionnaire on mergers and acquisitions indicated that it took a year to complete the takeover process. Whereas parties had agreed and concluded internal arrangements by July 2013, Central Bank of Kenya approval was granted in November 2013 followed by Competition Authority of Kenya approval in December 2013.

There was interaction with Central Bank of Kenya and the Competition Authority of Kenya. The two offered support services by providing guidance on the takeover process and granting approvals. The respondent noted that CBK also carried out background checks on the Guaranty Trust Bank group to ensure that the two entities made full disclosure of material facts relating to the transaction to each other.[120]

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[117] Phone interview with CBK official (anonymous)
[118] See http://gtbank.co.ke/home/about-us/, accessed July 15, 2017.
[119] See http://venturesafrica.com/kenyas-fina-bank-renamed-guaranty-trust-bank-cbk/, accessed July 15, 2017.
[120] Questionnaire Guaranty Trust Bank official one

However, one of the respondents[121] was of the view that there's need for more collaboration between CAK and CBK. He opined that since CAK is the secondary and final approver in most of the local acquisitions, it should liaise more with the primary approvers and regulators (in this case CBK) to expedite the acquisition process and avoid the possibility of conflicting decisions. He wondered what would have happened had the CBK granted approval for the takeover only for the same to be declined by CAK.

No other specific challenges were reported in terms of dealing with the legal framework. However, it was noted that had Fina Bank been listed on the Nairobi Securities Exchange, then there would have been need to obtain approvals from multiple regulators.

Given that the CA was passed into law in 2010 with a commencement date of August 2011, it may be argued that 2013 was too early to determine the actual effects of CAK on the mergers and acquisitions of banks in Kenya. In the writer's view, the object of creating a suitable environment for local and foreign investment was not met.[122] As previously indicated, a year may be too long to wait for entity needing to make an investment. Additionally, the many touch points involved in obtain necessary approvals are time consuming and increase the entities compliance costs.

3.4 Themes arising from the merger and acquisition of commercial banks in Kenya

Certain common themes and challenges arise from the acquisitions discussed in our case studies and we will proceed to look at these:

[121] Questionnaire Guaranty Trust Bank official two
[122] *Competition Act 2010*. Section 3 of the Act states the various objects of the statute aimed at promoting and protecting effective competition.

3.4.1 Merger Thresholds

Until 2013, Kenya did not have clearly pre-determined thresholds for mergers and acquisitions that needed to be notified to the CAK. This was not peculiar to the banking sector but affected all industries across the board.

CAK published some merger thresholds in 2013 with an effective date of August 1, 2013.[123] Based on the thresholds, commercial banks undertaking a merger or takeover are required to obtain approval from CAK if they have a minimum combined threshold of one billion shillings and the turnover of the target undertaking is above one hundred million shillings. It is not clear what is meant by combined threshold as the term threshold is neither defined in the guidelines nor the CA. Further clarity should be provided as the effect of this has been that all notifications for mergers continue to be submitted to CAK for a final decision.

The Cabinet Secretary is also yet to publish the regulations governing assessment of mergers and parties are currently using guidelines on assessment of mergers published by the CAK.[124] The guidelines provide direction on various matters including what type of mergers are eligible for notification as required under part IV of the CA. Regrettably, the guidelines do not have the force of law and it is high time the Cabinet Secretary published guidelines that are legally binding on parties.

One of the objects of the CA is to bring national competition law, policy and practice in line with best international practices.[125] The lack of clarity in these two instances alludes to the fact that some objects were merely good to have but are not to be taken seriously.

In South Africa for instance, the thresholds for merger notifications are monetary, based on a clearly defined combined annual turnover or assets of both the entities merging /acquiring

[123] Guidelines available at https://www.cak.go.ke/images/docs/guidelines, accessed August 28, 2017.
[124] Available at https://www.cak.go.ke/images/docs/Merger%20Guidelines.pdf, accessed July 22, 2017.
[125] Ibid.See Section 3 for a detailed description of the objects of the Act.

and the new entity to be formed.[126] The competition commission also provides a merger threshold calculator, a free tool aimed at assisting parties to determine whether their mergers meet the threshold set out by the commission.

With such guidance, only those mergers that meet the commission's criteria are actually notified to the competition commission. This saves time for the proponents and is cost efficient to the commission as it only applies itself to notifications requiring its approval.

3.4.2 Entities granting approval

The number of entities granting approval for mergers and acquisitions of commercial banks has continued to grow over the years resulting in the need for parties to obtain multiple approvals. One of the respondents to the questionnaire wondered what would have happened if FINA Bank was listed on the Nairobi Securities Exchange as this would have meant obtaining additional approvals from the Capital Markets Authority.

The regulatory arrangement governing mergers and acquisitions of commercial banks in Kenya is fragmented with each regulatory agency covering a particular segment. CMA regulates the securities markets while CBK regulates commercial banks. In the competition arena, we have CAK, CCA, and CCC looking at local and cross border regulation of competition.

Gakeri notes that ours is a largely politicized regulatory structure which in his view is a product of piece-meal reform and gradual evolution as opposed to deliberate planning.[127] Additionally, we do not appear to critically analyse the impact of existing laws and regulations when passing new ones. Perhaps it is high time we started planning towards making CAK a single regulator of competition matters in Kenya as having a central point of

[126] See http://www.compcom.co.za/merger-thresholds/, accessed July 22, 2017.
[127] Jacob Gakeri, 'Financial Services Regulatory Modernization in East Africa : The Search for a New Paradigm for Kenya' (2011) 1 International Journal of Humanities and Social Science 1.

reference for matters competition would ease the burden of obtaining multiple approvals currently being faced by commercial banks seeking to merge.

However, this is likely to remain a pipe dream. The recently established Financial Services Authority that many thought would consolidate regulation of the financial services sector is still required to operate within the confines of existing laws.

3.4.3 Technology

The Government of Kenya has made great strides in embracing use of technology to provide various Government services. This includes use of e-citizen[128], for passport applications, renewal of driving licenses, registration of motor vehicles', registration of companies and most recently, registration of securities on the collateral registry established under the Movable Property Security Rights Act of 2017.

This has improved efficiency in access to Government services as it obviates the need for people to physically present themselves and queue to access these services. Granted technology may also fail but in the researchers view, the overall benefits of embracing its use outweigh the use of manual processes.

In India, the competition commission put in place an electronic filing system that *inter alia*, allows persons who propose to enter into a merger to electronically submit relevant notices.[129] Although filing a merger notification is listed as one of the actions that one can take on the CAK website, this appears to be work in progress as there is no electronic filing system. Adoption of technology will enhance the merger notification experience both for CAK and the merger proponents.

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[128] Available at https://account.ecitizen.go.ke/, described as an official digital payments platform that enables Kenyan citizens, residents and visitors access and pay for government services online.
[129] Available at http://efilingcci.gov.in/, accessed on July 22, 2017.

3.4.4 Policy considerations

One of the respondents[130] to the Ecobank questionnaire indicated that in granting approval for the acquisition, the CBK considered the benefit of foreign direct investment that would accrue to the country. But for this consideration, the proposed acquisition would probably have been declined for breaching the legal requirement forbidding persons from owning more than 25% of a Kenyan Bank.

In the researchers view, Kenya needs clearly stipulated policy considerations that will inform whether or not CAK may approve a proposed merger or acquisition of a commercial bank in Kenya. The CA provides for the granting of certain exemptions[131] relating to restrictive trade practices applicable to trade associations and restrictive agreements, practices and decisions. However, the Act does not have similar considerations when it comes to mergers. Clear stipulation will ensure fairness in the merger process as opposed to leaving this to the whims of a particular approver.

South Africa has actively worked on the Black Economic Empowerment[132] initiative which is reported to include measures like employment preference, skills development, ownership, management, socioeconomic development, and preferential procurement for previously disadvantaged groups. In the banking sector, financial institutions were required to have a target of a minimum of 25% black ownership by 2010.[133]

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[130] Questionnaire Eco Bank official two in response to question 12

[131] See S. 25 of the *Competition Act 2010*.

[132] Black economic empowerment is seen as a racially selective programme launched by the South African government to redress the inequalities of Apartheid by giving certain previously disadvantaged groups (Blacks, Coloureds, Indians, and Chinese) of South African citizens economic privileges previously not available to them under White rule.

[133] More details on the requirements of the Black Economic Empowerment Charter for financial institutions available at https://web.archive.org/web/20070927200614/http://www.dti.gov.za/bee/beecharters/gazetteno610.pdf, accessed July 22, 2017.

As a proposal for reform of Kenyan competition policy in the banking sector, foreign commercial banks seeking to merge with local ones could be mandated to hire a minimum number of Kenyans for skills impartation to enable them handle more complex products. Alternatively, they could be required to make a larger impact on the economy through active financing of Small and Medium Enterprises so that the latter are able to create more opportunities for employment and drive vision 2030 for the banking sector.

3.4.5 Confidentiality

Compared to the EACCA, the CA does not have a legal obligation to maintain the confidentiality of the information submitted to CAK by merger applications. In the researchers view, this is an oversight and confidentiality requirements should be embedded in the CA to protect banks and other information critical businesses. CAK seems to have identified this lacuna in the CA and has developed a 'confidentiality claim form'.[134] The form is to be used for the purpose of identifying and protecting confidential materials and once an applicant uses the form to declare any material confidential, the Authority shall treat confidentially any material so identified.

3.4.6 Collaboration

From the foregoing discussions, each of the local regulators, that is, CAK, CBK, and CMA operate within the confines of the statutory framework establishing them. The respondent to the questionnaire at CBK decried the lack of active cooperation on bank mergers between these regulators. Merger applications are dealt with as and when an application is made to the relevant regulator. There is room for collaboration between the regulators including through

[134] Available at https://www.cak.go.ke/images/docs/confidentiality_claim_form(1).pdf, accessed August 28, 2017.

standardization of the information to be contained in the merger application forms to enable the applicants collate the requisite information with ease.

At a regional level, similar collaboration among the competition regulators is required for effective cross border merger control. CAK has taken a step in the right direction and in 2016, signed a memorandum of understanding with the CCC.[135] The purpose of the memorandum is said to be to facilitate coordination and promotion of harmonization or regional and national laws and policies and lessen the possibilities or impact of difference. Such mutual co-operation can assist in the early detection of differences so that they are addressed to make regional competition law more effective.

3.4.6 Conclusion

This chapter has compared the experiences between an institution that merged before and one that merged after enactment of the Competition Act. Based on the responses from the FINA Bank acquisition in 2013, Kenya's competition law has grown and is more effective than what the country had before legislation of the CA. In the banking sector, there are clear structures and institutions handling the merger notification process. The chapter has also analysed the merger provisions of the Competition Act and addressed some of the concerns arising.

[135] Competition Authority of Kenya, 'MoU-with-CAK.pdf'.

CHAPTER FOUR

CONCLUSION AND PROPOSALS FOR REFORM

4.1 Conclusion

We have looked at competition policy in Kenya with a focus on the legal framework governing mergers and acquisitions of commercial banks throughout this paper. Based on the findings from the study, and the responses from the respondent at the Capital Markets Authority,[136] this chapter will seek to give concluding remarks and proposals for reform.

The findings of the study have proved that the hypotheses is true as it has been shown that the multiplicity in the current legal framework governing mergers and acquisitions of commercial banks in Kenya is not conducive for promoting growth through merger and acquisition activity.

4.2 Proposals for Reform

In order to increase efficiency and reduce barriers to mergers, competition policy in general, and innovation in Kenya's banking sector, we will no doubt need to start by improving the regulatory framework governing oversight of this sector.

We already have an extensive regulatory framework, established structures, and institutions governing mergers. However, it has been noted that there are multiple regulatory requirements and multiple regulators that merger proponents must deal with before making a notification. It has also been noted that the approving regulators do not always collaborate with each other as they all operate within the confines of the law establishing them.

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[136] Phone interview with CMA official (anonymous)

Additionally, though competition law in Kenya has generally grown and improved, there is still room for improvement including the use of information technology to enhance efficiency by the approving authorities.

CAK has been quite active under its new mandate as evidenced from the number of high profile and other mergers reviewed and approved by the authority.[137] CAK has also endeavoured to carry out its mandate of investor education through its website by providing information and other useful links available to any member of the public accessing their website. Whereas there are no regulations published under the CA, CAK has also published guidelines with a view to assisting the public navigate through various matters including guidelines on merger thresholds, and forms for protection of confidentiality for those proponents who wish to protect the confidentiality of material submitted to CAK.

4.2.1 Legal Reforms

The researcher makes the following proposals for legal reform:

Amendment of the existing legislative framework is vital to attend to the concerns raised in chapter 3 and make the bank merger process more vibrant. Regulatory reform is required to address clarity in the definition of merger thresholds, handling of confidential information, time taken by CAK to approve mergers and the number of persons required to submit merger notifications.

With regard to handling of confidential information, the researcher proposes that Section 20 of the Competition Act be amended to specifically require CAK officers handling merger notifications to maintain the confidentiality of the material submitted to CAK. This will then be reinforced by the confidentiality claim form that CAK has in place to enable parties

[137] Latest decisions are available at https://www.cak.go.ke/images/new/CAK_DECISIONS_29_AUG_2017.pdf, accessed December 18, 2017.

submit a claim for protection of the confidentiality of the any documentation contained in a merger notification.

The researcher proposes that Section 43 of the Competition Act be amended to clearly provide the merger thresholds for institutions that are required to submit merger notifications to the Competition Authority. Once done, the researcher proposes that this clarity in definition be extended to the current guidelines published by CAK for determining merger thresholds. This could be augmented with an online calculator to guide applicants in working out whether or not a proposed merger should be notified to CAK.

Given the multiple regulatory agencies granting approval for mergers, the researcher proposes that Section 44 of the Competition Act be amended to require CAK to make determination with regard to a proposed merger within 30 days after the date from which the merger notification is received.

Alternatively, if the Competition Act is indeed the supreme law governing competition matters in Kenya, the researcher proposes that all applications for mergers and acquisitions be submitted to CAK without the need of submitting them to any other regulator. CAK should then liaise with the other regulators including CBK and CMA as appropriate and grant one final approval to the merger and acquisition proponents. This will do away with the need for obtaining several separate regulatory consents and make the merger application process more conducive.

There is also need for training of CAK staff involved in merger approval. Given the extensive objectives of CAK under the CA, the researcher proposes that Section 9 of the Competition Act be amended to provide for staff training as one of the functions of CAK. In the researchers view, training will enable CAK equip and retain human capital capable of exercising urbane judgment in expeditiously granting approvals and carrying out the regulatory duties with as much transparency as possible to avoid complaints and conflicts from proponents.

4.2.2 Regulatory Reforms

As discussed in this paper, commercial banks seeking to undertake a local merger are required to comply with the Competition Authority of Kenya regulations, the Capital Markets (Takeovers and Mergers) Regulations 2002, CBK Prudential Guidelines on Mergers, Amalgamations, Transfers of Assets and Liabilities.

The researcher proposes that these regulations be streamlined and amalgamated to only one set of regulations that local commercial bank merger proponents should comply with.

4.2.3 Institutional Reforms

The researcher proposes that CAK, TCMA, Treasury, the Companies Registry, and CBK explore avenues of collaboration to make the bank merger process more conducive. An immediate area for consideration is the synchronisation of the information contained in the merger application forms. The researcher proposes that CAK signs Memoranda of Understanding with the Registrar of Companies, CBK, and TCMA to check that merger proponents do not submit distinctly different notifications/applications to these approving entities.

The collaboration should not be limited to the local regulators only and CAK should actively seek to collaborate with the CCC and CCA to regulate cross border bank merger activity and the detection of anti-competitive practices in the African banking sector.

CAK should also borrow a leaf from the Competition Commissions in India and South Africa and embrace the use of technology in the merger notification process. The researcher proposes that the CAK website be revamped to permit applicants to make merger notifications online. This will no doubt enhance user experience as has been the case in instances where the Government has embraced use of technology for instance with the E-citizen portal.

In conclusion, this paper has reviewed the legislative framework governing bank mergers in Kenya and given proposals for reform to be considered in reforming the legal, regulatory, and institutional framework. In the researchers view, the proposals for reform will enhance the conduciveness of the legal framework if adopted.

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APPENDIX

APPENDIX A: QUESTIONNAIRE

RESEARCH TOPIC: EVALUATING THE LEGAL FRAMEWORK GOVERNING MERGERS & ACQUISITIONS OF COMMERCIAL BANKS IN KENYA

My name is **MERCY NANYAMA MAYABI**, a Masters of Laws (LLM) student at the University of Nairobi. As part of my LLM degree, I am carrying out a study titled **'EVALUATING THE LEGAL FRAMEWORK GOVERNING MERGERS AND ACQUISITIONS OF COMMERCIAL BANKS IN KENYA.'** The purpose of the study is to examine the effectiveness of the legal framework. I would like to ask you questions that will enable me understand the extent to which you have interacted with the legal framework and what your experience was. The data collected will also aid in comprehending the legal related challenges that banks face during the merger process. I intend to use the information gathered through this questionnaire to propose recommendations to the law to the Central Bank, Competition Authority of Kenya and other stakeholders involved in the merger process. These recommendations shall be integrated in to the legal framework in order to enhance its effectiveness and promote greater growth and investment in the Kenya banking sector.

SECTION 1: BACKGROUND INFORMATION

Please note that all information you give is confidential and will be used for research purposes only.

Name of the organization:
Name of resource person (optional):
Position:
Contact details (phones numbers):

SECTION 2: UNDERSTANDING THE ORGANISATION AND THE HISTORY OF THE MERGER AND ACQUISITION

1. When did you have the merger and why?

2. How long did the merger and acquisition process take?

SECTION 3: INSTITUTIONAL FRAMEWORK

3. Which regulatory bodies did you interact with in the process of the merger and acquisition?

4. What support services did you receive from the above mentioned regulatory bodies?

5. What was your general perspective in dealing with the above mentioned regulatory bodies?

SECTION 4: LEGAL FRAMEWORK

6. What procedural challenges did you encounter in the process of the merger and acquisition?

7. How did the legal framework at the time of your merger and acquisition aid in the process?

8. How did the legal framework at the time impede the process of the merger and acquisition?

9. Did you encounter conflict of laws during the process of merger and acquisition?

SECTION 5: REFORM AND WAY FORWARD

10. What institutional reforms should be adopted in Kenya to smoothen the process of mergers and acquisitions?

11. What legal reforms should be adopted in Kenya to smoothen the process of mergers and acquisitions?

12. Kindly give any additional comments or information pertaining to mergers and acquisitions?

Thank you for your time!