CLIFFORD

CHANCE

TRENDS IN AFRICAN MERGER CONTROL FOR TRANSPORT & LOGISTICS

CONTENTS

Trends in African merger control for transport & logistics **3**

- An increasing number of competition law regimes 4
- Overlapping national and supranational jurisdictions 6
- Unpredictable merger review timetables 6
- High or unpredictable filing fees 7
- Public interest considerations are more prominent in transaction reviews 8
- Notes on substantive competitive analysis for the transport & logistics sector 9

Map of competition law regimes in Africa **11**

Authors **12**

Contacts **12**

TRENDS IN AFRICAN MERGER CONTROL FOR TRANSPORT & LOGISTICS

As Africa is an increasingly attractive investment destination, establishing functional competition law regimes and modernising existing ones is important to the development trajectory of African jurisdictions, improving their profile with foreign investors and aligning them closer with global regulatory trends.[1]

The past decade has seen an increasing number of national and regional competition law regimes being established for the first time across Africa, while existing regimes have become much more active in scrutinising transactions, with well-established regimes, such as those in South Africa, the West African Economic and Monetary Union (WAEMU) and the Common Market for Eastern and Southern Africa (COMESA), leading the way. For example, since 2021, the number of merger filings reviewed by the COMESA Competition Commission has increased by 40%.

Africa's transport & logistics sector presents significant opportunities for global investors. Contrary to other sectors, the global transport and logistics sector has been performing well since the COVID-19 pandemic, having benefited from an increasing global demand for reliable delivery of goods following a long period of supply chain disruptions. The sector is experiencing increasing levels of investment, in particular by financial investors. Commentators have estimated the sector to have represented 50% of all announced M&A deals globally in the first half of 2022.[2]

Investments can contribute to addressing local challenges the sector is facing. The costs of moving goods domestically across Africa have been estimated as nearly five times higher compared with countries such as the US, while transporting those goods takes significantly longer, including as a result of fragmented logistics and supply chains across the continent (owing not only to tariffs, but also to infrastructure gaps). The right investments in infrastructure and digitalisation projects across Africa (including by global investors who are partnering with local players and governments) can unlock the continent's trade potential, with indirect benefits empowering local communities, such as increased employment and reduced climate impact.

For investors in the transport & logistics sector, African merger control regimes present unique regulatory challenges. In this note, we highlight five key merger control trends that investors should keep in mind when contemplating investments in the transport & logistics sector with an Africa focus.

1 See, *inter alia*, commentary in the Strategic Plan 2021-2025 of the Egyptian Competition Authority, which notes that "*the rate of increase of GDP for countries that adopt competition policy is approximately higher by 2-3% than that of countries that do not adopt such policies. Overall, competition policy may become an instrument for sustainable development*."

2 PWC, Transport & Logistics Barometer: 2022 mid-year analysis.

An increasing number of competition law regimes

The pace of competition law reform in Africa is accelerating quickly. Compared with 2010, the number of African jurisdictions that have a national competition law regime or are part of a supranational, regional competition law regime has increased by more than a third.

More specifically, out of the 54 countries in Africa, 29 (some 54%) currently have an active national merger control regime (*see* map on page 11) and a number of others fall within the jurisdiction of supranational regimes such as the Common Market for Eastern and Southern Africa (COMESA) or the Central African Economic and Monetary Community (CEMAC). Of these, almost all impose mandatory filing obligations and a prohibition on closing prior to clearance. Exceptions include the voluntary regimes in the Ivory Coast, Mauritius, Malawi and the West African Economic and Monetary Union (WAEMU), and the absence of a prohibition on closing in COMESA, despite the fact that making a filing is mandatory.

While there are sometimes similarities across certain African merger control regimes, usually reflecting close geopolitical ties between jurisdictions, there is little actual or intentional harmonisation among the various regimes. Merger control filing volumes and enforcement rates vary significantly across jurisdictions. As a result, investors in Africa face a patchwork of very different merger control regimes, each with its own unique characteristics.

Several of these regimes are new and, as a result, still in flux, which can lead to unpredictable outcomes for transactions (see Trends 3 and 4 below). Often, it is not clear exactly when newly introduced regimes actually come into force in practice and as of which date parties need to notify transactions. For example, often, while a new mandatory filing regime may be formally in place, there may be no established competition authority or no published jurisdictional thresholds to allow investors to assess whether a transaction triggers a notification requirement.

Even long-established regimes have recently been amended, seeking to modernise and become more consistent with international norms. Four notable recent examples are Zambia, Egypt, Zimbabwe and Mozambique:

Zambia

As of January 2023, Zambia has considerably increased its merger control thresholds. The revised threshold is ZMW 30 million (approx. USD 1.72 million) of the combined annual turnover or total asset value of the merging parties, whichever is higher, in Zambia. The previous threshold was ZMW 15 million (approx. USD 860,000). The Zambian Ministry of Commerce, Trade and Industry attributed this change to a desire to reduce the cost of doing business in Zambia and encourage foreign direct investment.[3]

Egypt

On 30 December 2022, a major amendment to Egyptian merger control rules came into force, capturing transactions which were signed on or after 30 December 2022.[4]

3 Press Release by the Zambian Ministry of Commerce, Trade and Industry dated 3 April 2023.
4 Press Release by the Egyptian Competition Authority on the amendments, dated 4 January 2023.

The previous regime, which had been in force for several years, required transactions to be filed only post closing (within 30 days of closing). The previous turnover-based jurisdictional threshold for filing in Egypt was EGP 100 million (approx. USD 4 million) combined Egyptian revenue of the parties to the transaction. The new regime introduces a pre-closing, suspensory filing regime while increasing the applicable turnover thresholds to: (a) combined Egyptian turnover or value of Egyptian assets of all parties to the transaction exceeding EGP 900 million (approx. USD 36 million), and (b) Egyptian turnover of each of at least two parties to the transaction exceeding EGP 200 million (approx. USD 8 million). The initial (Phase 1) review period is 30 working days, with the option for an additional 15-working day extension. If the Egyptian competition authority finds that the transaction raises competition concerns, it can initiate a Phase 2 review lasting for up to 60 working days, with the possibility of an extension.

Zimbabwe

In March 2022, Zimbabwe significantly increased its merger control thresholds. A merger is now notifiable where the combined annual revenue in or from Zimbabwe or the combined gross asset value in Zimbabwe of the acquiring group and the target group is equal to or exceeds USD 1.2 million (expressed in USD in the local law). The previous threshold was set at ZWD 10 million (approx. USD 30,000). This suggests that the new regime will trigger fewer filings.[5] At the same time, merger filing fees increased. While the filing fee remains 0.5% the combined annual revenue or the combined gross value of assets in Zimbabwe of the parties to the transaction, whichever is higher, the fee is now capped at a maximum of USD 40,000 with a minimum of USD 10,000, payable in ZWD at the prevailing auction rate of the day.

Mozambique

In December 2021, Mozambique introduced a new merger control regime with increased financial merger control thresholds, leading to fewer deals being captured. A merger is now notifiable where the combined net turnover of the acquiring group and the target group in Mozambique exceeds MZN 925 million (approx. USD 14.49 million), provided that the net turnover generated in Mozambique of at least two of the parties exceeds MZN 105 million (approx. USD 1.65 million). Alternatively, a merger is also notifiable where it results in: (a) the acquisition, creation or reinforcement of a market share equal to or higher than 50%; or (b) the acquisition, creation or reinforcement of a market share ranging between 30% and 50%, provided that the net turnover generated in Mozambique of at least two of the parties was higher than MZN 105 million (approx. USD 1.65 million) in the previous financial year.

The Mozambican merger control regime closely resembles that of Portugal, and, in November 2022, the Mozambican Competition Authority and the Portuguese Competition Authority signed a co-operation agreement with the aim of strengthening their bilateral co-operation. The agreement aims to establish robust co-operation based on the sharing of technical expertise and experience in the various areas of enforcement and advocacy.[6]

5 Newsletter (Issue 12) of the Competition & Tariff Commission of Zimbabwe, dated 22 June 2022.
6 Press Release by the Portuguese Competition Authority, dated 16 November 2022.

Overlapping national and supranational jurisdictions

The number and overlapping scope of supranational, regional merger control regimes in Africa, such as COMESA, are a particularity of African merger control. They have proliferated in Africa and are becoming increasingly active. COMESA[7] remains the most active regional regime in Africa, while others, such as WAEMU (voluntary regime) have become more active in the past few years having gone through an initial period of inactivity.

Investors should be cautious, as the reach of these regional regimes often overlaps with (rather than replaces) the jurisdiction of national regimes, which means that filings are required both regionally and nationally. For instance, there is uncertainty as to whether COMESA member states Egypt and Tunisia may still require mergers to be notified nationally in circumstances where a COMESA filing is also required, despite COMESA nominally being a 'one-stop shop'. Another issue arises in relation to information sharing between regional authorities and the national authorities of the member states. For instance, the COMESA Competition Commission can share information on transactions with the COMESA member states and their national competition authorities, provided that the latter are subject to obligations to respect the confidentiality of the information communicated. This is to allow the member states to input into COMESA's merger review. This often leads to merging parties receiving unexpected information requests by these national authorities, even where the latter do not have jurisdiction to review the transaction. In February 2023, the COMESA Competition Commission issued a Practice Note to merging parties, encouraging them to engage with national authorities on these information requests, as they form part of the COMESA one-stop shop merger review process and are aimed at allowing the national authorities to feed back into the COMESA Competition Commission's review.[8]

Moreover, supranational regimes can sometimes overlap with each other, leading to questions as to whether one supranational filing might lead to another – perhaps less established – supranational jurisdiction also taking an interest in the transaction.

Unpredictable merger review timetables

While certain African merger control regimes are rapidly modernising, many others remain largely new and untested. It is often the case that the local regime is not clear as to when the formal review timeline starts running, so giving the authority significant discretion to extend or 'stop the clock' on any given statutory time frame, often leading to unpredictably long review periods that can delay closing. This can be especially frustrating for investors in circumstances where a transaction does not raise competition concerns and when review in other jurisdictions is uncomplicated, with prompt and unconditional clearance decisions.

7 COMESA includes the following national jurisdictions: Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda. Seychelles, Sudan, Tunisia, Somalia, Eswatini, Uganda, Zambia and Zimbabwe.

8 COMESA Practice Note Regarding Engagements with the COMESA Competition Commission, Relevant Authority in Member States and Merging Parties with regard Notified Merger, issued on 22 February 2023.

In other jurisdictions, such as Tanzania, gaps in the local law may allow third parties to intervene at a late stage in the review process with objections (or, in extreme circumstances, even after the deal has been approved), creating uncertainty for merging parties.

When assessing an appropriate long-stop date, understanding the practical realities of how long clearances may take in specific jurisdictions, and why, is far more important than any statutory deadlines for merger control reviews. Under-resourced authorities may not have the capacity to complete their review within stipulated time frames and may push even straightforward cases into an in-depth investigation with a longer review timeline or may use their powers to request additional information to 'stop the clock' on the review timeline. In one extreme example, changes in the composition of the Fair Competition Commission of Tanzania (FCC) led to an eight-month period in which the FCC was not quorate and did not consider any filings.

High or unpredictable filing fees

African authorities have historically charged some of the highest filing fees for merger clearances anywhere in the world. Unlike other regions, fees in Africa are often set as a percentage of the parties' turnover or assets in the jurisdiction in question. For example, the COMESA filing fee is 0.1% of the parties combined turnover or assets (whichever is the higher) in the entire COMESA region, subject to a USD 200,000 cap. We have also seen authorities insist on multiple filing fees for the same transaction; for instance, where the target has more than one legal entity in the jurisdiction in question.

However, there are also examples of authorities responding pragmatically to concerns regarding excessive filing fees. For instance, Mozambique launched a new merger control regime in 2021. Initially, the regime provided for significantly high filing fees, set at 5% of the parties' combined turnover in Mozambique, without a cap. Following concerns raised by business and other stakeholders, the local government recognised the need for a reduction of the fee. The merger filing fee was amended in August 2021 and is now set at 0.11% of the parties' turnover in Mozambique in the previous year with a cap of MZN 2.25 million (approx. USD 31,137).

Also in August 2021, the Nigerian competition authority amended its own merger filing fee to respond to stakeholder concerns. The amended filing fee is still calculated on an incremental basis, the increments being based on either the consideration for the transaction (deal value) or the combined annual turnover of the transaction parties, whichever is higher. As a result of these recent amendments:

- At level 1 (first NGN 500 million ~ USD 1.1 million), the percentage fee payable has increased from 0.3% to 0.45%.
- At level 2 (second NGN 500 million) the percentage fee payable has increased from 0.225% to 0.40%.
- In contrast, at level 3 (any sum thereafter), the percentage fee payable has been reduced from 0.75% to 0.35%.

Filing fees are typically the responsibility of, and paid by, buyers. However, the size of fees in some jurisdictions is driving buyers to ask sellers to split the filing fees, especially where transactions involve more than one filing. In practice, the statutory review timeline does not start until filing fees have been paid, so internal processes for calculating and paying large filing fees may need to start well in advance of payment being required to minimise delay to the review timeline.

In circumstances where the necessity to file, or the basis for calculation of the filing fee, is unclear, underfunding may result in a tendency for some authorities to interpret merger control rules in a manner that results in the imposition of the highest possible fee. Any decisions to consult with an authority to obtain comfort on whether a filing is required, or the level of the filing fee, must be taken with this potential issue in mind.

As competition legislation in Africa is rapidly evolving, receiving the right advice from experienced local counsel on filing fee calculations and determining whether and, if so, when and how contact should be made with the authority is critical in helping parties navigate the filing fee calculation process and negotiations with the local authorities.

Public interest considerations are more prominent in transaction reviews

Public interest considerations tend to feature more prominently in African merger control than in non-African jurisdictions. Many African authorities have mandates that go beyond the promotion of competition, encompassing, *inter alia*, employment, the protection of historically disadvantaged persons, consumer protection and price regulation. Notable examples of such jurisdictions include South Africa, Kenya, Cameroon, Botswana, Namibia, Zambia and Zimbabwe. Authorities can take public interest considerations into account alongside the expected effects of a transaction on competition in deciding whether to clear (whether unconditionally or with conditions) a transaction, which can often lead to authorities and local governments using merger control as a vehicle to fulfil political objectives.

In certain jurisdictions, such as South Africa, competition authorities have previously interpreted public interest provisions as creating *positive* obligations on merging parties, even in transactions that are net neutral to the public interest (e.g., are not expected to cause local retrenchments or disempower shareholders belonging to historically disadvantaged groups). This can often result in authorities imposing remedies such as the establishment of an Employee Share Ownership Programme (ESOP) through which employees will retain a minimum interest in the local business or an obligation of local capital expenditure commitments. Buyers often take this into account during transaction negotiations by lowering the purchase price accordingly.

Public interest considerations lead to a higher proportion of notified mergers being subject to conditions than in non-African jurisdictions, often unrelated to the effects of the transaction on competition. As a result, buyers may resist taking the risk of a 'hell or high water' undertaking in their deal documentation and insist on reducing the strength of undertakings to obtain clearance.

Many jurisdictions are seeking to increase transparency in their application of public interest considerations. For example, South Africa[9], Botswana[10], Kenya[11] and Zambia[12] have developed or are in the process of drafting guidelines on their public interest assessments.

Such public interest considerations can become especially relevant in, but are certainly not limited to, transactions involving strategic transport infrastructure assets, such as ports and logistics terminals.

Notes on substantive competitive analysis for the transport & logistics sector

When newer African merger control authorities lack extensive experience of certain sectors, they may ask parties to provide insights from international precedent, including the EU and the UK, to give them additional reference points in conducting their analysis, especially when it comes to defining new markets or reviewing novel or creative deal structures.

Currently, this would be favourable for merging parties in the logistics sector, as both the European Commission (EC) and the UK Competition and Markets Authority (CMA) have largely viewed the logistics sector as highly fragmented, served by major global players that compete vigorously with each other, in addition to a large number of smaller, specialised service providers.

For instance:

- In 2021 and 2022, the EC cleared unconditionally (in many cases through the fast-track process of a Short Form CO) a number of logistics transactions including D*SV Panalpina/Agility, DFDS/HSF Logistics Group, KKR/ Hitachi Transport System and A.P. Møller - Mærsk A/S Group/Senator International*.
- That said, both the EC and the CMA tend to define narrow markets for logistics services (e.g., on the basis of customer type / industry, speed of delivery, mode of transportation and domestic vs international) often with a national or even narrower (local) geographic scope. In practice, this can mean that acquisitions of small targets that are highly specialised in a certain type of logistics and have a strong position in at least one national market in Europe can create complications from a merger control perspective. It is also worth noting that, in transactions focusing on transport infrastructure (e.g., ports), national considerations such as country-specific catchment areas may prevail over EU or UK precedent when delineating the geographic scope of markets, given local sensitivities.

---

9 The Competition Commission of South Africa's Guidelines on the Assessment of Public Interest Provisions in Merger Regulation.

10 Botswana Competition Authority's Guidelines on The Application of Public Interest Under The Competition Act.

11 Competition Authority of Kenya's Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act.

12 Zambia's Competition and Consumer Protection Commission's Guidelines for Merger Regulations.

Outside the strict logistics context, both the EC and the CMA have recently started to scrutinise more heavily major transactions in the broader transport sector, even where the concerned parties are predominantly based outside of the EU and the UK. This trend could create issues for players seeking to create an end-to-end logistics offering, including by acquiring key transport or logistics infrastructure.

For instance:

- In 2022, the EC blocked the takeover of Daewoo Shipbuilding & Marine Engineering by rival Hyundai

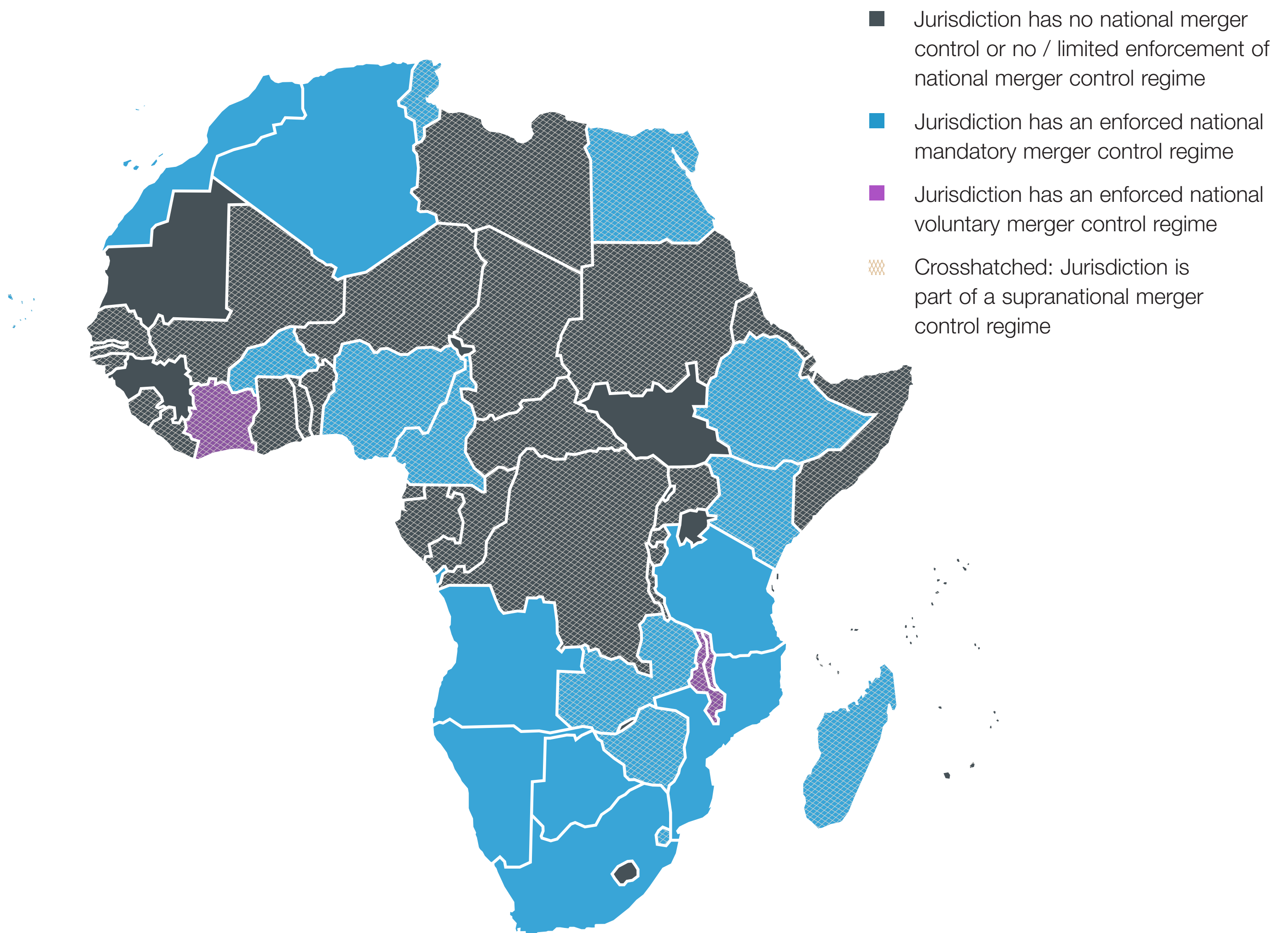
  Heavy Industries Holdings, two major South Korean shipbuilding companies, over concerns that the deal would restrict the supply of large liquefied gas carriers, posing a threat to Europe's energy security.

- Similarly, in March 2022, the CMA blocked the proposed USD 5 billion merger between Finnish companies Cargotec and Konecranes following an in-depth phase two investigation. The CMA found that the merger would be expected to give rise to competition concerns in the supply of a wide range of container handling equipment products. The CMA found that Cargotec and Konecranes are competing closely for business in the UK, and that UK customers would have few remaining alternative suppliers after the merger. While the merging businesses suggested that there would be an increased competitive threat from Chinese suppliers across all markets in future, the CMA found that this was not sufficient to prevent a loss of competition, perceived as significant, from the merger between two established suppliers. The CMA concluded, *inter alia*, that this loss of competition could have serious consequences for UK port terminals and other customers, including higher prices and lower quality products and services across a wide range of container handling products. The EC also examined this case[13], but diverged from the CMA's conclusion by clearing the transaction with divestiture remedies. However, as the CMA (and the US DOJ) did not clear the transaction, the deal was abandoned by the parties.

Clifford Chance has been supporting investors across the African continent for over 50 years, including helping investors navigate the complex web of African merger control regimes. Our Africa practice is truly pan-African and we maintain long-standing relationships with local law firms through our dedicated African Counsel Initiative. This allows us to combine our international sector and product expertise with expertise from the most suitable local counsel, under a 'one-stop shop' approach.

13 Case COMP/M.10078 - *Cargotec/Konecranes*.

MAP OF COMPETITION LAW REGIMES IN AFRICA



Based on publicly available information, and in some instances, advice from local counsel. Competition law developments in the Africa region rapidly evolve so always seek advice from legal advisers when making decisions on whether a filing is required.

AUTHORS

Stavroula Vryna
Senior Associate
T: +44 207006 4106
E: stavroula.vryna@
cliffordchance.com

Mehjabin Ahmed
Associate
T: +44 207006 1918
E: mehjabin.ahmed@
cliffordchance.com

CONTACTS

Greg Olsen
Partner and
Head of London
Antitrust Practice
T: +44 207006 2327
E: greg.olsen@
cliffordchance.com

Alex Nourry
Partner
T: +44 207006 8001
E: alex.nourry@
cliffordchance.com

Nelson Jung
Partner
T: +44 207006 6675
E: nelson.jung@
cliffordchance.com

Jennifer Storey
Partner
T: +44 207006 8482
E: jennifer.storey@
cliffordchance.com

Sue Hinchliffe
Partner
T: +44 207006 1378
E: sue.hinchliffe@
cliffordchance.com

Deniz Tas
Partner
T: +971 4503 2676
E: deniz.tas@
cliffordchance.com

Jennifer Chimanga
Partner
T: +44 207006 2932
E: jennifer.chimanga@
cliffordchance.com

Daniel Mutisya
Director EMPE and
Co-Head of Africa
T: +44 207006 1239
E: daniel.mutisya@
cliffordchance.com

Daniel Harrison
Knowledge Lawyer
T: +44 207006 4136
E: daniel.harrison@
cliffordchance.com

Karim Vellani
Associate
T: +44 207006 3155
E: karim.vellani@
cliffordchance.com

Christopher Ndegwa
Associate
T: +44 207006 3626
E: christopher.ndegwa@
cliffordchance.com

C L I F F O R D

C H A N C E

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2023

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

2304-005796