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THE COMPETITION ACT

(No. 12 of 2010)

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## THE COMPETITION ACT

(No. 12 of 2010)

IN EXERCISE of the powers conferred by section 93 of the Competition Act, 2010, the Cabinet Secretary for the National Treasury and Planning, in consultation with the Competition Authority, makes the following Rules—

## THE COMPETITION (GENERAL) RULES, 2019

## PART I – PRELIMINARY

1. These Rules may be cited as the Competition (General) Rules, 2019. Citation.
2. In these Rules, unless the context otherwise requires— Interpretation.
- “Act” means the Competition Act, 2010; No. 12 of 2010.
- “acquiring undertaking” means an undertaking which—
- (a) would directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking; or
- (b) has direct or indirect control over the whole or part of the business of the undertaking contemplated in paragraph (a);
- “Authority” means the Competition Authority established under section 7 of the Act;
- “Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to finance;
- “complainant” means a person who has submitted a complaint pursuant to the provisions of the Act;
- “COMESA” means the Common Market for Eastern and Southern Africa;
- “confidential information” includes trade, business or industrial information or material that belongs to an undertaking, has a particular economic value and is not publicly available to or known by others, is commercially sensitive or whose disclosure might adversely harm the competitive position of a person;
- “document” includes—
- (a) a publication, or any matter written, expressed or inscribed on any substance by means of letters, figures, or marks or by more than one of those means intended to be used or may be used for the purposes of recording that matter; and
- (b) electronic files;
- “full-function joint venture” means a joint venture which must perform for a period of ten years or more and carries on all the functions of an autonomous economic entity;
- “immunity” means the benefit of partial or full reduction in administrative penalty and or fine;

“leniency” means benefits in the form of any reduction in sanctions that would otherwise be imposed on applicants who do not qualify for immunity;

“leniency programme” refers to the leniency programme established pursuant to section 89A of the Act;

“merger” means a merger within the meaning of section 41(f) of the Act;

“order” means a decision of the Authority made pursuant to the provisions of the Act;

“premises” includes a building where an undertaking ordinarily carries out its business or any other place which is subject to a search pursuant to section 32 of the Act;

“target undertaking” means an undertaking—

- (a) whose business would be directly or indirectly controlled wholly or in part by an acquiring undertaking; or
- (b) which would directly or indirectly transfer control of the whole or part of its business to an acquiring undertaking; and

“writing” includes printing, photography, lithography, typewriting, braille and any other means of representing or reproducing words in a visible form.

3. These Rules shall govern the actions of the Authority in the exercise of the functions conferred under the Act, in particular, procedures for-

Scope of Rules.

- (a) conducting of investigations into contravention of Parts III, IV, V or VI of the Act;
- (b) determination of exemptions applications;
- (c) mergers determinations;
- (d) settlement of contraventions of Part III and Part VI of the Act; and
- (e) determination of penalties and remedies.

4. Where the Authority encounters a situation which is not provided for in these Rules, it shall determine the procedure to be adopted having regard to the provisions of the Fair Administrative Action Act, 2015.

Procedures not provided for.

No. 4 of 2015.

5. (1) A person may deliver or transmit a document to the Authority through—

Delivery of documents.

- (a) delivery by hand to the offices of the Authority;
- (b) registered letter; or
- (c) electronic means.

(2) The Authority shall acknowledge receipt of the document under sub-rule (1).

(3) Where a document is delivered or transmitted outside of the office hours of the Authority, the document shall be deemed to have been delivered on the next working day.

PART II— ASSESSMENT AND DETERMINATION OF MERGERS  
UNDER PART IV OF THE ACT

*A. Definition of mergers*

6. (1) Pursuant to the provisions of section 41 of the Act, the following transactions shall not qualify as mergers—

Definition of  
mergers.

- (a) a joint venture that is not full-function;
- (b) the appointment of a receiver or administrator or entry into an arrangement with creditors that does not result into a change of control;
- (c) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question referred to in section 41(2)(a) where the acquisition is—
  - (i) of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be;
  - (ii) of current assets in the ordinary course of business;
  - (iii) done solely as an investment or in the ordinary course of business where the total shares or voting rights held by the acquiring undertaking directly or indirectly, does not entitle the acquiring undertaking to hold twenty *per centum* or more of the total shares or voting rights of the undertaking, and where there is no acquisition of direct or indirect control of the undertaking whose shares or voting rights are being acquired;
  - (iv) in the case of the acquiring undertaking, prior to acquisition, already controlling the undertaking in the manner prescribed by section 41(3) of the Act except in the cases where the transaction results in transfer from joint control to sole control;
  - (v) not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the undertaking whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the undertaking, of which assets are being acquired and do not comprise a business with a market presence to which a market turnover can be clearly attributed, irrespective of whether such assets are organized as a separate legal entity or not;

- (vi) pursuant to a bonus issue, stock splits or consolidation of face value of shares, buy back of shares, subscription to, or renunciation of rights in a rights issue of shares, not leading to acquisition of control; or
- (vii) of stock-in-trade, raw materials, stores and spares in the ordinary course of business.

(2) For the purpose of rule 6 , a merger involving a holding company and its subsidiary wholly owned by undertakings belonging to the same group or amalgamations involving subsidiaries wholly owned by undertakings belonging to the same group shall not be subject to notification.

*B. Mergers generally*

7. For the purpose of rule 6, and for the purpose of clarifying section 6 of the Act, a merger shall not be subject to notification if it is taking place wholly or entirely outside of Kenya and has no local connection.

Restructuring and reorganisation within the same group.

8. Where a merger meets the threshold prescribed under the COMESA Competition Regulations and Rules, the parties shall notify the COMESA Competition Commission in the prescribed form, and inform the Authority in writing regarding the notification.

Extra-territorial mergers.

9. (1) A merger excluded pursuant to section 42 (1) of the Act shall not require an authorizing order from the Authority.

Mergers excluded from notification requirements.

(2) In determining a merger to be excluded from notification, the Authority shall be guided by the Merger Threshold Guidelines set out in the First Schedule.

10. In determining if a merger has been implemented without authority, the Authority may consider whether—

Implementation of a merger without prior approval.

- (a) there has been an actual integration of any aspect of the merging parties, including, but not limited to, the integration of infrastructure, information systems, employees, corporate identity or marketing efforts;
- (b) there has been placement of employees from the target undertaking to the acquiring undertaking;
- (c) there has been an effort by the acquiring undertaking to influence or control any competitive aspect of the target undertaking's business, such as setting prices, limiting discounts or restricting sales to certain customers or of certain products; or
- (d) there has been an exchange of strategic information between the merging parties for purposes other than valuation or on a need-to-know basis during due diligence or in ways compromising the strategic independence of each of the parties to the merger.

11. In analysing transactions relating to private equity funds, including venture capital funds control shall always be deemed to rest with the general partner.

Private equity funds.

12. (1) The gross annual turnover or value of assets of an acquiring undertaking shall be calculated by adding either the annual turnover or the value of assets in Kenya of the following—
- (a) the undertaking concerned;
  - (b) its parents undertaking;
  - (c) its subsidiaries; and
  - (d) other subsidiaries of its parents not included in (c).
- (2) The gross annual turnover or value of assets of a target undertaking shall be calculated by adding, either the annual turnover or the value of assets in Kenya of the undertaking concerned, its subsidiaries or segment of business being acquired.
- (3) The parties shall furnish the Authority with details of all their investments in Kenya indicating the particulars of the investments which they control for purposes of enabling the Authority to calculate the relevant turnover or assets of the merging parties.
13. The Authority may require parties to any transaction which has been excluded pursuant to section 42 (1) of the Act to seek approval, even if it falls beneath the exclusion thresholds, where it is likely that it will substantially prevent or lessen competition, restrict trade or raise public interest concerns.
14. An undertaking may seek an advisory opinion from the Authority on whether it needs to notify the transaction in accordance with section 43(1) of the Act.
- C. Procedures for merger determination*
15. A merger notification determined pursuant to section 46(1) of the Act shall be in the Form III set out in the Second Schedule.
16. (1) The parties shall pay the filing fee on or before the date of filing of the application.
- (2) The filling fee paid under sub-rule (1) shall not be refundable.
17. (1) Where a person has information that a merger has been implemented without the approval of the Authority, such a person shall notify the Authority by submitting any information concerning the merger.
- (2) Where the Authority receives a notification under sub-rule (1) or suspects a merger is being implemented without approval, it shall commence an investigation.
- (3) An investigation conducted by the Authority under this rule may include—
- (a) a specific request for information from any undertaking or groups of undertakings;
  - (b) an invitation to provide information on any specific matter, event or business agreement or transaction;

Calculation of turnover or assets for merger review.

Exclusions likely to raise competition concerns.

Pre-merger consultation.

Application for approval of a merger.

Merger filing fee.

Notification and investigation of Mergers implemented without authorization.



- (c) an invitation to attend an interview before the Authority;
  - (d) a request for written explanations or otherwise as required for the purposes of the issue at hand;
  - (e) the issuing of summons to a person to supply information, document or evidence or to appear before the Authority in person; or
  - (f) an inspection of a locus or site.
- (4) Where the Authority establishes that there is a contravention of section 42(2) of the Act, the parties shall-
- (a) be allowed to make representations in their defense before the Authority invokes sections 42(5) or 42(6) of the Act; and
  - (b) subsequently regularize the merger in accordance with the provisions of the Act.
18. In the assessment of a merger, the Authority may-
- (a) request for any information relevant to the subject matter of the case, including economic data in writing from the main undertakings or third party undertakings;
  - (b) conduct interviews of undertakings to the merger;
  - (c) convene a hearing conference;
  - (d) receive oral or written proposals or submissions from the merging undertakings when the Authority intends to decline an application or grant conditional approval before the final decision is made;
  - (e) consult with other Government agencies; and
  - (f) discuss with the undertakings which are party to the merger or any other relevant party the written submissions made by them to the Authority.
19. (1) Where a merger raises competition or public interest concerns, the Authority may-
- (a) prescribe structural or behavioural remedies to address any detriment posed by a merger which is likely to substantially lessen competition or raise public interest concerns in the post-merger market in Kenya; or
  - (b) engage in discussions with an undertaking which is party to the merger or any other relevant party or experts with a view to identifying structural or behavioural measures which would ameliorate any effects of the merger on the public interest or competition in Kenya.
- (2) Where a merger is approved with conditions, the merged entity may be required to submit a compliance report on the implementation of the conditions at intervals to be determined by the Authority.

Assessment of  
mergers.

Merger remedies.

## PART III– EXEMPTIONS UNDER PART III OF THE ACT

20. (1) An application for exemption pursuant to sections 25, 28 and 29 of the Act shall be in the Form IV set out in the Second Schedule to these Rules and shall be accompanied by the requisite fee.

Procedures for applying for an exemption.

(2) Where an undertaking applies for an exemption on behalf of another undertaking, it shall submit written consent of that other undertaking with the application under sub-rule (1).

(3) An undertaking may not apply for exemption if the decision, practice or agreement has been excluded by the Authority pursuant to Section 30 (2) of the Act.

21. Where an exemption is granted under this Part, the Authority shall issue an exemption certificate in the Form V set out in the Second Schedule.

Exemption certificate.

22. Where the Authority revokes an exemption, it shall issue a notice of revocation in the Form VI set out in the Second Schedule.

Notice of Revocation.

## PART IV– BLOCK EXEMPTIONS

23. Section 30 (2) of the Act shall apply to vertical restraints included in practices, decisions or agreements between undertakings and agreements entered into for purposes of exports.

Eligibility for block exemptions.

24. (1) In determining the category of practices, decisions, or agreements that warrant grant of block exemptions under rule 30, the Authority shall be guided by the Block Exemption Guidelines set out in the Third Schedule and shall consider–

Determination of block exemptions.

- (a) the market share of each of the undertakings which are party to the agreement ;
- (b) whether or not the agreements have any restrictions;
- (c) the nature of the markets; and
- (d) any other relevant consideration.

(2) Notwithstanding sub-rule (1), agreements for purposes of export shall be eligible for exemption under this Part.

## PART V – UNSAFE GOODS

25. (1) Pursuant to section 58 of the Act, the Authority may by a notice declare goods to be unsafe goods.

Notice of unsafe goods.

(2) The Authority shall, before making the declaration under sub-rule (1) and on the grounds of reasonably foreseeable use, take all circumstances into account including–

- (a) likelihood of a person being injured;
- (b) seriousness of the resulting injury;
- (c) how often injury is likely to occur;
- (d) mitigation measures taken by an undertaking ; and

(e) whether making the declaration is in the public interest.

(3) A notice issued under this rule shall last for the period stipulated by the Authority in the notice or until the Authority determines that the manufacturer or supplier of the goods which are the subject of the notice has undertaken the necessary steps to ensure the safety of the goods and to prevent future infringements pursuant to section 59 of the Act.

(4) A notice may become permanent depending on the circumstances of the case and taking into account the feedback of persons likely to be substantially affected by the suspension thereof.

(5) Upon conclusion of investigations on unsafe goods, the Authority may by a notice in writing, require the supplier to take remedial measures pursuant to section 61(2) of the Act including—

- (a) recalling of the goods for the purpose of repair, replacement or refund of the purchase price of the goods;
- (b) informing the public or a class of consumers identified in the notice that the supplier undertakes to—
  - (i) repair the goods;
  - (ii) replace the goods; or
  - (iii) refund to the consumer to whom the goods were supplied the price of the goods.

(6) The Authority may order the supplier to inform the public by notice of the following—

- (a) the nature of the defect in, or dangerous characteristic of, the goods;
- (b) the circumstances in which the use of the goods is dangerous; and
- (c) procedures for disposing the said goods.

26. (1) Pursuant to sections 59 (1) and 37 of the Act, the Authority may impose an interim ban on products or product-related services after taking into account the following considerations—

Interim ban.

- (a) whether the product is likely to injure someone;
- (b) whether as a result of the service being supplied, the product is likely to injure someone;
- (c) whether it is reasonably foreseeable that the use or misuse of a product, or the product to which the service relates, may injure a person; or
- (d) where another government agency or sector regulators has imposed an interim ban on the product or service, which is still in force.

(2) An interim ban imposed by the Authority shall apply nationally.

(3) The Authority shall give the supplier an opportunity to be heard in accordance with section 61(3) of the Act before an interim ban is imposed under this rule, unless it determines that there is an impending danger to the public.

(4) An interim ban may last for a period not exceeding ninety days and may be extended for further ninety days to allow for the conclusion of investigations.

(5) An interim ban may be made permanent upon conclusion of investigations, depending on the findings of the case.

27. (1) Pursuant to section 59 of the Act, the Authority may, in consultation with the relevant Government agencies, declare a permanent ban on a product or product-related service.

Permanent ban.

(2) Where the Authority proposes to impose a permanent ban under sub-rule (1), it shall invite affected undertakings to make written or oral representations or both.

(3) If there is an imminent risk of death or injury from the unsafe product, an interim ban may be imposed immediately but undertaking will be given an opportunity to be heard before the ban is made permanent.

(4) The Authority may impose a permanent ban where—

- (a) it considers that it is uneconomical or impractical to modify the product concerned to remove the hazard; and
- (b) reliance on voluntary withdrawal of the product from the market is unlikely to be a viable long term solution.

28. (1) A supplier may recall goods upon detection of a safety related hazard in relation thereto or upon receipt of complaints by consumers, consumer bodies or other persons regarding any dangerous characteristic of the goods or injury result from the use of the said goods.

Voluntary recall.

(2) Where a supplier voluntarily recalls goods, the supplier shall—

- (a) notify the Authority of the recall and provide details of other entities within the supply chain that have been notified;
- (b) prepare a recall strategy for approval by the Authority;
- (c) publish a written recall notice in at least two newspapers with wide circulation in Kenya;
- (d) retrieve the affected product from consumers and from the supply chain; and
- (e) submit regular progress reports to the Authority.

(3) A written recall notice shall include the following—

- (a) a product description indicating a clear description of the product, including the name, make and model, batch or serial numbers and dates on which the product was available for sale and any distinguishing feature;

- (b) a photograph or drawing of the product to provide the consumer with a convenient and effective means of identification;
  - (c) a description of the defect describing the defect in simple terms for the benefit of the average consumer can understand;
  - (d) a statement of the hazard describing the maximum potential hazard and associated risk should be included;
  - (e) a section explaining the immediate action the consumer should take; and
  - (f) contact details to inform the customer who they should contact in order to receive a refund or have the product repaired or replaced.
- (4) A supplier shall make arrangements for the retrieval of the product by—
- (a) establishing collection points across its distribution network;
  - (b) notifying the relevant parties, including other entities within the supply chain and consumers, of the intended method of retrieval of the recalled product; or
  - (c) arranging for the returned product to be quarantined until it can be rectified or safely destroyed.
- (5) A supplier shall submit progress reports to the Authority until a final report is approved by the Authority.

29. (1) Any product that has been recalled in a foreign jurisdiction shall also be recalled in Kenya.

International recalls.

(2) An undertaking involved in the supply of a product that is subject to an international or regional recall shall put in place measures to facilitate the recall in Kenya and report to the Authority quarterly on the same.

#### PART VI – UNILATERAL FEES AND CHARGES

30. Pursuant to section 56 (3) of the Act, a person providing banking, micro-finance, insurance and other services shall not impose unilateral fees and charges without informing a consumer in advance of the imposition of the fees and charges.

Imposition of unilateral fees and charges.

31. (1) The unilateral fees and charges referred to in rule 30 shall be disclosed before any execution of a transaction, contract or a legal agreement, acquisition of a product in order to receive a product or service.

Disclosure of unilateral fees and charges.

(2) The disclosure under paragraph (1) shall be in writing through the same channel by which the consumer is transacting or acquiring the product or service.

32. (1) The terms and conditions governing a product or service shall be disclosed prior to the imposition of the unilateral fees or charges, transaction or purchase of the product.

Terms and conditions of a product, transaction or

- (2) The terms and conditions shall— service.
- (a) be summarised in clear, concise and intelligible manner to enable the consumer to understand;
  - (b) indicate the following at a minimum—
    - (i) minimum price to be charged;
    - (ii) penalties applicable in the provision of the product, service or transaction;
    - (iii) data through the provision of the service, in the course of the transaction or purchase of product;
    - (iv) the privacy policies applicable to the provision of the service, in the course of the transaction or purchase of product, and to whom the data will be shared with.
- (3) The terms and conditions shall be conspicuously displayed and made available to the consumer through the same channel the consumer is transacting or acquiring the product

#### PART VII – CONSUMER BODIES

33. (1) Pursuant to section 9(e) of the Act, the Authority may recognize organizations formed for the purposes of protecting consumers or furthering of consumer welfare. Recognition of consumer bodies.

(2) An organization may apply to the Authority to be recognised as a consumer body.

(3) Without prejudice to sub-section (2), the Authority may, on its own motion, carry out a market survey and identify organizations involved in consumer protection and invite them to apply to be recognized as consumer bodies.

(4) The Authority shall assess and profile organizations which have applied for recognition.

(5) The following considerations may apply in order to be recognized by the Authority as a consumer body—

- (a) be duly registered by the relevant government agencies;
- (b) have a postal, email, and physical address
- (c) have an established office premises;
- (d) have an organisation structure;
- (e) have evidence of adherence to corporate governance principles; and
- (f) have proof of engagement in consumer protection activities.

(6) After consideration of an application by an organization to be recognized as a consumer body, the Authority shall make a determination in respect of the application, and may—

- (a) recognize the organization as a consumer body;
- (b) recognize a consumer body with conditions; or

- (c) refuse to recognize the organization as a consumer body.
- (7) Where the Authority recognizes a consumer body, it may revoke the recognition if it finds that—
  - (a) the recognition was granted based on materially incorrect or misleading information;
  - (b) there has been a material change of circumstances since the recognition was granted; or
  - (c) a condition upon which the recognition was granted has not been complied with.
- (8) Where the Authority proposes to revoke recognition of a consumer body, it shall—
  - (a) give notice in writing of the proposed action to the consumer body; and
  - (b) give the consumer body an opportunity to make any representations within twenty-one days of receipt of the notice.

#### PART VIII – COMPLAINTS AND INVESTIGATIONS

34. (1) The Authority may conduct an investigation if there are reasonable grounds that any person has infringed any of the provisions of the Act.

Complaints and investigations.

- (2) Any aggrieved person may lodge a complaint by—
  - (a) submitting information in writing concerning alleged contravention of Part III or VI of the Act;
  - (b) filling form I or II set out in the Second Schedule; or
  - (c) submitting an anonymous complaint to the Authority.
- (3) The Authority shall make a preliminary assessment of the facts available to it to decide whether a complaint is to be subject to a full investigation.
- (4) Where the complaint does not disclose sufficient information to make a preliminary assessment, the Authority may issue to such person—
  - (a) a notice requesting for further information on any specific matter, case, event or business agreement or transaction under investigation; or
  - (b) a notice to appear before the Authority for an interview in relation to the matter under investigation.
- (5) Notwithstanding sub-rule (1), a complaint may not be considered by the Authority where—
  - (a) the complaint lodged, in whole or in part, is before any court or the Competition Tribunal;
  - (b) the complainant fails to cooperate and provide information sought by the Authority.

(6) Without prejudice to the generality of sub-rule (1), the Authority may commence investigations under this rule based on information received pursuant to a leniency application under section 89A of the Act.

35. (1) The Authority may issue an interim relief in accordance with sections 37 and 70A (2) of the Act. Interim measures.

(2) The Authority may set aside an interim order where a party to the proceedings has shown sufficient cause or after the Authority reaches a determination of the matter.

36. (1) Pursuant to sections 31(4) and 70A of the Act, the Authority may, during the course of its investigation, issue a notice to any person to supply information, document or evidence or to appear before the Authority. Information request.

(2) The notice under sub-rule (1) shall state the legal basis, the purpose of the request and indicate the consequences of not complying therewith in accordance with section 88 of the Act.

37. (1) The Authority shall conduct a search in accordance with the Act and the Criminal Procedure Code. Procedure for conducting a search.

(2) An authorised officer of the Authority who removes anything from the premises being searched shall prepare an inventory of the inspection duly signed by the authorized persons and the representative of the undertaking or their authorized agent. Cap. 75.

(3) Where the representative of the undertaking or their authorized agent refuses to sign, the reasons for the refusal shall be indicated in the inventory of the inspection.

(4) The Authority shall in its discretion detain, retain or return all or any material seized at any time, during or after the investigation.

(5) The Authority may conduct the search on any day between sunrise and sunset, unless specifically authorized in terms of a search warrant to conduct the search at any other time.

38. Pursuant to sections 34 and 70A of the Act, the Authority shall, upon the completion of its investigation but before a final decision has been rendered— Procedure for determining an investigation.

(a) serve a notice to each party which may be affected by the decision, as provided for in the Act;

(b) afford due process to undertakings that are likely to be affected by the decision including the right to access evidence relied on by the Authority.

39. Pursuant to section 34(2)(c) of the Act, where requested by a party to the proceedings, or at its own initiative, the Authority may convene a pre-hearing conference and give directions as to the conduct of the hearing. Pre-hearing conference.

40. Where a party fails to appear on the date set for hearing, the Authority may, after having satisfied itself that due notice of the Failure to appear.



hearing was served and received by that party, proceed to hear and determine the matter before it, their absence notwithstanding.

PART IX— SETTLEMENT OF AN INFRINGEMENT UNDER THE  
ACT

41. (1) An undertaking intending to enter into settlement negotiations pursuant to sections 38 of the Act shall notify the Authority in writing.

Settlement  
proceedings.

(2) The Authority shall inform the parties within seven days of whether it is amenable to the request for settlement.

(3) Where the Authority consents to the request for settlement, the parties shall conclude the settlement negotiations and execute a settlement agreement within ninety days.

(4) Notwithstanding sub-rule (3), the Authority may extend the settlement negotiation period for a further period of thirty days.

(5) An undertaking which applies to the Authority to commence settlement, may be deemed to be in contravention of the alleged infringement which the undertaking is accused of, in order to qualify for settlement:

Provided that if the settlement negotiations collapse, the Authority shall not rely on the information adduced by the parties during the negotiations.

42. (1) An undertaking which has agreed to settle may be entitled to a reduced penalty which the Authority shall determine taking into account—

Factors to be  
considered.

- (a) the nature of contravention;
- (b) cooperation by the undertaking with the Authority;
- (c) whether the undertaking is a first time offender;
- (d) whether the conduct has since ceased;
- (e) the effect and duration of the misconduct;
- (f) amount of commerce affected by the misconduct;
- (g) profits made as a result of the misconduct; and
- (h) pre-meditation; and
- (i) any other relevant factors.

(2) In addition to sub-rule (1), the Authority shall consider the following factors in relation to consumer welfare infringements—

- (a) remedial measures put in place by the undertaking; and
- (b) degree of harm to health and livelihood.

43. Where the audited financial statements made available by an undertaking are incomplete or unreliable, the Authority may determine the value of the sales, services, the turnover or assets of that undertaking by applying the International Financial Reporting Standards.

Assessment of  
turnover.

44. (1) The settlement negotiations shall be deemed to have collapsed where—
- (a) the prescribed period for settlement after commencement of the settlement lapses;
  - (b) the parties to the settlement fail to reach an agreement;
  - (c) there occurs a material change of circumstances during the course of the negotiations;
  - (d) there are reasonable grounds for suspecting that information which led to the acceptance of the binding commitments was materially incomplete, false or misleading; or
  - (e) any other matter arises which is sufficient to cause the collapse.
- (2) If the settlement negotiations collapse, the Authority will revert to the investigation process and remedies provided for under the Act.

Collapse of settlement negotiations.

#### PART X: MISCELLANEOUS

45. The Authority shall take into account the factors set out in rule 42 when imposing a financial penalty under section 36(d) and 38(2)(b) of the Act.
46. (1) In determining a penalty pursuant to section 42 (6) of the Act, the Authority shall take into account the following factors—
- (a) whether the infringement has resulted in anti-competitive effects on any part or substantial part of Kenya;
  - (b) whether the target undertaking was in significant financial distress at the time of the implementation of the merger;
  - (c) whether the undertakings have brought the infringement to the attention of the Authority in a timely manner and cooperated with the Authority during the investigation; and
  - (d) any other relevant considerations.
- (2) Upon imposition of the penalty, the undertaking shall be required to comply with section 42(2) of the Act and any penalties imposed by the Authority pursuant to provisions of the Act shall be paid within the period prescribed by the Authority and shall attract interest at court rates if they remain unpaid thirty days after the prescribed period.
- (3) Where appropriate, the Authority may also refer the alleged infringements of the Act to the Office of the Director of Prosecutions.
47. (1) A person who supplies any information or makes submissions may claim confidentiality on any material submitted to the Authority
- (2) A person claiming confidentiality under sub-rule (1) shall clearly identify the material that is considered to be confidential and state the reasons for the claim in the Form VII set out in the Schedule.

Remedies under Part III and VI of the Act.

Penalty under section 42 (6) of the Act.

Claim of Confidentiality.

(3) Upon receiving a claim under sub-rule (1), the Authority shall consider the request pursuant to section 20 of the Act.

48. Any penalties imposed by the Authority pursuant to provisions of the Act shall be paid within the period stipulated by the Authority failure to which it shall attract interest at court rates if they remain unpaid thirty days after the stipulated period, until settled in full.

Payment of penalties.

49. Any grammatical and typographical mistakes in a decision of the Authority, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Authority either on its own motion or on the application of any of the parties to the decision.

Amendment of a decision of the Authority.

## FIRST SCHEDULE

(s. 9(2))

## THE MERGER THRESHOLD GUIDELINES

## PART A: PRELIMINARY PROVISIONS

## 1. Introduction

(1) These Guidelines set out the principles for the determination of merger threshold as provided under section 42 (1) of the Competition Act, 2010.

(2) The Guidelines should be read in conjunction with the Competition (General) Rules, 2019 and may be revised from time to time.

## 2. Objectives of the Guidelines

(1) The main objective of these Guidelines is to improve transparency, predictability and accountability regarding the Authority's merger enforcement process for the benefit of the business community and thereby easing cost of doing business and improving the investment climate.

(2) Specifically, these Guidelines are aimed at—

- (a) identifying notifiable transactions and transactions that qualify for exclusion;
- (b) enhancing clarity in the calculation of the relevant turnover or assets;
- (c) ensuring consistency in the computation of relevant merger filing fees; and
- (d) providing clarity on the transactions notifiable to the Authority and the COMESA Competition Commission, respectively.

## 3. Definitions

In these Guidelines, unless the context otherwise requires—

“Act” means the Competition Act, 2010;

“associated exploration assets” means equipment, machinery, fixtures and other assets that are integral and exclusive to current or future exploration or production where the merging parties carry out activities associated with carbon-based mineral reserves;

“Authority” means the Competition Authority;

“carbon-based minerals” means oil, natural gas or coal but does not include downstream retailing of these products;

“COMESA” means the Common Market for Eastern and Southern Africa;

“merging parties” means both the acquiring undertaking and target undertaking.

(2) Any other terms used in these Guidelines but not defined herein shall have the same meaning as defined in the Act and the Competition (General) Rules, 2019.

## PART B – TRANSACTIONS SUBJECT TO NOTIFICATION

## 4. Notifiable mergers

A merger which meets the following threshold shall be notified to the Authority –

- (a) where the undertakings have a minimum combined turnover or assets (whichever is higher) of one billion shillings and the turnover or assets

(whichever is higher) of the target undertaking is above five hundred million shillings;

- (b) where the turnover or assets (whichever is higher) of the acquiring undertaking is above ten billion shillings and the merging parties are in the same market or can be vertically integrated, unless the transaction meets the COMESA Competition Commission Merger Notification Thresholds;
- (c) in the carbon based mineral sector, if the value of the reserves, the rights and the associated assets to be held as a result of the merger exceeds ten billion shillings;
- (d) where the undertakings operate in the COMESA, meet the criteria set in subparagraph 6 (a) and two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya.

#### PART C – TRANSACTIONS EXCLUDED FROM NOTIFICATION

##### 5. Excluded transactions requiring approval of the Authority

(1) A merger which meets the following threshold may be considered for exclusion from notification –

- (a) where the combined turnover or assets (whichever is higher) of the merging parties is between five hundred million shillings and one billion shillings;
- (b) if the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.

(2) An undertaking may apply to be considered for exclusion under this paragraph and the Authority shall respond within fourteen days.

##### 6. Excluded transactions not requiring approval of the Authority

A merger which meets the following thresholds shall be excluded from notification under the Act –

- (a) the combined turnover or assets (whichever is higher) of the merging parties does not exceed five hundred million shillings; or
- (b) the merger meets the COMESA Competition Commission Merger Notification threshold and at least two-thirds of the turnover or assets (whichever is higher) is not generated or located in Kenya.

##### 7. Transactions notifiable to the COMESA Competition Commission

Undertakings shall inform the Authority in writing that a transaction has been notified to COMESA Competition Commission within fourteen days of filling the notification to the COMESA Competition Commission.

#### PART D – FILING FEES

##### 7. Threshold for merger filing fees

The filing fees applicable for notification of a merger shall be as set out below–

<i>Threshold (Combined value of assets/turnover (Kshs)</i>	<i>Fees per proposed merger (Kshs)</i>
Zero (0)– Five Hundred Million (500,000,000)	Zero (Excluded from notification)
Five Hundred Million and one (500,000,001) –	Zero (Excluded transactions)

<i>Threshold (Combined value of assets/turnover (Kshs))</i>	<i>Fees per proposed merger (Kshs)</i>
One billion (1,000,000,000)	requiring approval of the Authority)
One billion and one(1,000,000,001)– Ten billion (10,000,000,000)	One million (1,000,000)
Ten billion and one(10,000,000,001) – Fifty billion (50,000,000,000)	Two million (2,000,000)
Above Fifty billion (>50,000,000,000)	Four million (4,000,000)

## PART E – DETERMINATION OF TURNOVER OR ASSETS

## 8. Determination of the relevant turnover or assets

(1) In determining the merger threshold, the Authority shall consider the combined turnover or assets (whichever is higher) of the undertakings in Kenya.

(2) In calculating the relevant thresholds, the Authority shall be guided by the undertaking's most recent audited financial statements, and where the audited financial statements made available by the undertaking are incomplete or unreliable, the Authority may determine the value of the sales or services of that undertaking by applying the International Financial Reporting standards.

(3) The turnover of an undertaking shall comprise of the amounts derived as revenue in the preceding financial year from the sale of goods or the provision of services falling within the undertaking's ordinary activities.

(4) The asset value of an undertaking shall be based on the gross value of the firm's assets as recorded in the undertaking's most recent balance sheet.

(5) If, between the date of the financial statements being used to calculate the asset value or turnover of an undertaking and the date on which that calculation is being made, the undertaking has acquired or divested another undertaking or joint venture not shown on those financial statements—

- (a) the following items must be added to the calculation of the firm's asset value—
  - (i) the value of recently acquired assets, in a case of recent merger; or
  - (ii) any asset received in exchange for recently divested assets, as the case may be;
- (b) the following shall be excluded in the calculation of an undertaking's asset value—
  - (i) the value of the recently divested assets at the date of their divestiture; or
  - (ii) any asset that was shown on the balance sheet and was subsequently used as consideration in another recent acquisition; and
- (c) the turnover shall be calculated from the date of completion of the previous transaction involving the target undertaking.

(6) Any trading within a company and its subsidiaries shall be disregarded in the determination of turnover or assets where such kind of trading is usually excluded from the consolidated income statement and is already included in the sales revenue of one group company and the purchases of another.

(7) The turnover or assets of credit institutions and other financial institutions shall be the sum of the following income items—

- (a) interest income and similar income;
- (b) income from securities, shares and other variable yield securities;
- (c) income from participating interests;
- (d) income from shares in affiliated firms;
- (e) any commissions receivable;
- (f) net profit on financial operations; and
- (g) other operating income.

(8) For joint venture undertakings jointly controlled by a party to a merger and third parties, the turnover or assets of the joint venture shall be attributed equally between its controlling parents, irrespective of the size of their financial or other interests such as voting interests.

(9) For investment funds, the investment company shall be deemed to have control over the various investment funds or vehicles through the general partner and therefore the relevant turnover or assets to be considered shall be the combined turnover or assets of all the entities of which the investment company has control either directly or indirectly through the various investment funds.

#### PART G – ABANDONMENT OF A MERGER

##### 10. Abandonment of a Merger

(1) A party to a proposed merger shall be deemed to have abandoned the merger if they fail to respond to the Authority's request for additional information within twenty-one days from the date of request.

(2) A party who withdraws from a merger which has been notified to the Authority, shall inform the Authority in writing.

(3) The Authority shall not refund any merger filing fees duly paid with respect to the abandoned merger.

#### PART H – ADVISORY OPINIONS

##### 11. Advisory Opinions

An undertaking may seek an advisory opinion from the Authority where it is unclear on any matter provided in these Guidelines.

##### 12. Revocation of G.N. No. 7406 of 2014

Gazette Notice No. 7406 of 2014 (Merger filing fees) is revoked.

## SECOND SCHEDULE

## FORMS

## FORM I – RESTRICTIVE TRADE PRACTICE COMPLAINT FORM (r. 34(2))

COMPETITION AUTHORITY OF KENYA

Telephone: 254-20-2628233  
 Direct Line : 254-20-2779000  
 Website: [www.cak.go.ke](http://www.cak.go.ke)  
 Email: [info@cak.go.ke](mailto:info@cak.go.ke)

Competition Authority of Kenya  
 Kenya Railways HQs  
 Block "D" Drop – Point; Ground Floor  
 P. O. Box 36265-00200  
 Haile Selassie Avenue

RESTRICTIVE TRADE PRACTICE  
COMPLAINT FORM <sup>1</sup>

## Rule 6(2)

## 1. Complainant

Title:	
First Name (optional):	
Organization (if applicable):	
Physical address:	
Postal address:	
Telephone Number:	
Email address:	

## 2. Undertaking (person or enterprise) whose conduct is the subject of this complaint

Name:	
Sector/market of operation:	

## 3. Description of complaint (provide a concise statement of the conduct that is the subject of the complaint):

## 4. Please attach to this form any relevant documents, as well as a statement describing the conduct that is the subject of this complaint, including-

- the name of each party involved in the conduct;
- the dates on which the conduct occurred;
- a statement indicating when and how you became aware of the conduct and
- any other information you consider relevant

## 5. Is the conduct continuing? \_\_\_\_\_

If not, when did the conduct end? \_\_\_\_\_

If the conduct continues, is there any interim measure you consider urgent?

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6. Names of any other government bodies and organizations contacted about this issue:

I understand:

- (a) that it is an offence in terms of section 90(d) of the Competition Act for a person to provide false information to the Authority; and
- (b) that section 91 of the Competition Act provides for a penalty of a fine, imprisonment, or both if I am found guilty of knowingly providing false information to the Authority.

77. Signed by the complainant<sup>2</sup>:

Signature.....

Full name.....

Date (dd/mm/yy).....

FOR OFFICIAL USE ONLY

Authority file reference number: .....

Date filed: .....

Notes:

1. This form is issued under the Competition Act, No 12 of 2010.
2. This form shall be completed to the best of your knowledge, and submitted to the Authority for consideration of the complaint.
3. If this complaint is lodged by a person other than an individual, the contact details of the person authorized to discuss the complaint should be provided.
4. The submitted form is a public record. However, the attached description of conduct and other information relating to the complaint is not part of the public record. The complainant has the right to identify information believed to be confidential by completing the Confidentiality Claim form (Form II) and submitting it with this form.

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<sup>2</sup> This section is only applicable where the complainant has indicated their name/identity. It is not applicable to anonymous complaints

## FORM II

(r. 34(2))

COMPETITION AUTHORITY OF KENYACONSUMER COMPLAINT FORM

The Competition Authority of Kenya (the Authority) is mandated to protect consumers against false and misleading representations amongst others. The Authority takes consumer complaints seriously and has developed an internal procedure to handle them. Kindly use this form to inform us about your complaint so that we can be able to address it. If you're having any difficulties filling in this form, please get in touch with us by phone or email. This form can also be downloaded from our website [www.cak.go.ke](http://www.cak.go.ke).

If this complaint is lodged by a person other than the complainant, please provide contact details of the person authorized to discuss the complaint.

Type of Complaint	
Tick as appropriate	
<input type="checkbox"/> False or Misleading Representations	<input type="checkbox"/> Unsafe Goods/Expired Goods
<input type="checkbox"/> Unfair Conduct	<input type="checkbox"/> Unsuitable Goods
<input type="checkbox"/> No expiry date	<input type="checkbox"/> Defective Goods
<input type="checkbox"/> No ingredients listed	
<input type="checkbox"/> Other _____	
Prior Action taken to redress the complaint	
1. Have you raised the complaint with the accused? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Date complaint was raised _____	
If yes, what was the response? _____	
2. Have you raised the complaint with any other agency? <input type="checkbox"/> Yes <input type="checkbox"/> No	
If Yes, please provide the following:	
Date complaint was raised _____	
Name of the Agency _____	
Case Number (if applicable) _____	
Contact Person _____	
Contact Phone Number _____	
Case filed in Court? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Date _____	
Give details? _____	
_____	
_____	



Additional sheets attached? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Attach copies of the following documents as applicable:			
Please tick appropriately			
<input type="checkbox"/> Contracts	<input type="checkbox"/> Warranty	<input type="checkbox"/> Invoices	<input type="checkbox"/> Receipts
<input type="checkbox"/> Others (Specify) _____			

- This form is issued for the purpose of lodging a consumer complaint relating to Part VI of the Competition Act, No 12 of 2010 (the Act).
- You may claim confidentiality for the information you provide by filling the Confidentiality Claim Form downloadable from the Authority's Website: [www.cak.go.ke](http://www.cak.go.ke)
- I understand:
  - (a) a that it is an offence in terms of section 90(d) of the Competition Act for a person to provide false information to the Authority; and
  - (b) that section 91 of the Competition Act provides for a penalty of a fine, imprisonment, or both if I am found guilty of knowingly providing false information to the Authority.
- I confirm that the information given above is true and accurate to the best of my knowledge.

Name of Complainant:

Date:

Signature :

*NB: After filling this form, you may submit any further documents using the following contact information:*

Kenya Railways HQs  
 Block "D" Drop- Point; Ground Floor  
 P.O. Box 36265-00200  
 Haile Selassie Avenue  
 Email: [complain@cak.go.ke](mailto:complain@cak.go.ke); [info@cak.go.ke](mailto:info@cak.go.ke)

## FORM III

(r. 15)

COMPETITION AUTHORITY OF KENYA

Telephone: 254-20-2628233  
 Direct Line : 254-20-2779000  
 Website: [www.cak.go.ke](http://www.cak.go.ke)  
 Email: [info@cak.go.ke](mailto:info@cak.go.ke)

Competition Authority of Kenya  
 Kenya Railways HQs  
 Block "D" Drop – Point; Ground Floor  
 P. O. Box 36265-00200  
 Haile Selassie Avenue

MERGER NOTIFICATION FORM*Instructions*

1. *This form is issued Pursuant to Section 43 (1) of the Competition Act which stipulates that each of the undertakings to the merger shall notify the Authority of the proposal in writing or in the prescribed manner.*
2. *The objective of this merger notification form is to improve the efficiency, transparency and predictability of the merger notification process.*
3. *Please note that the Competition Act empowers the Competition Authority of Kenya to obtain information relevant to evaluate mergers and acquisitions. This form facilitates the process by identifying relevant information depending on the activities of the merging parties and whether they are operating in the same markets and/or are actual or potential customers or suppliers to each other. By anticipating the likely information required by CAK and collating it in advance the time taken for the evaluation of the merger will be reduced. However, omitting relevant information may lead to the merger evaluation being delayed.*

*This table below summarizes the schedules which should be normally submitted, depending on the characteristics of the merger. The thresholds referred to therein are according to the CAK Merger Threshold Guidelines.*

<i>Characteristics of the merger</i>	<i>Schedules to be submitted</i>
<ul style="list-style-type: none"> <li>• Firms applying for exclusion as prescribed by the CAK Merger Threshold Guidelines,</li> </ul>	<i>Schedule I (only questions 1-26) and Schedule IV</i>
<ul style="list-style-type: none"> <li>• Merger at or above the prescribed thresholds</li> <li>• Merging parties do not operate in the same line of business; and/or</li> <li>• No vertical relationships among merging parties</li> </ul>	<i>Schedules I and IV</i>
<ul style="list-style-type: none"> <li>• Merger at or above the prescribed thresholds; and</li> <li>• Merging parties operate in the same line of business or there are vertical relationships among merging parties</li> </ul>	<i>Schedules I, II, IV</i>
<ul style="list-style-type: none"> <li>• Merger at or above the prescribed thresholds</li> <li>• Merging parties operate in the same line of business or there are vertical relationships among merging parties; and/or</li> <li>• High likelihood that combined market share of merging parties falls above 35% in one or more markets and/or one or more of the parties are dominant in at least one market</li> </ul>	<i>Schedules I, II, III, IV</i>

- a. Schedules I (Question 1-26) must be completed by all undertaking applying for exclusion. For firms that qualify for exclusion, refer to the CAK Merger Threshold Guidelines. Please note that all firms applying for exclusion must provide all documentation requested in Schedule 1.
  - b. Schedules I and IV must be completed by all undertakings in mergers which are at or above the prescribed merger thresholds. Also, where there are public interest issues, such as whether the merger will be accompanied by some employment losses as the merging firms rationalise their operations and/or whether the merger is claimed to generate employment, information should be provided on such. Note that claims about the benefits of the merger for the economy must be backed up by evidence that demonstrates the likely effects and why the merger is necessary for them to be realised. These can be taken into account and weighed against possible lessening of competition as a result of a merger. For reference to CAK Public Interest Guidelines, download the Guidelines by clicking the following link:-  
  
[http://cak.go.ke/index.php/status-regulations/the-competition-act-no-12-of-2010/cat\\_view/6-mergers/22-balancing-public-interest-guidelines.html](http://cak.go.ke/index.php/status-regulations/the-competition-act-no-12-of-2010/cat_view/6-mergers/22-balancing-public-interest-guidelines.html)
  - c. Schedule II identifies the products and services of the merging parties and is part of assessing the competition analysis that is required to review the merger. For example, if the merging parties operate in the same line of business there is a possible horizontal overlap and more detail is required on the specific products and services they supply, by geographic area, and on the other competitors which exist. If the merging parties are in a vertical relationship to each other information will be required on the extent and nature of competition in both the upstream and downstream markets. Typically a more detailed assessment is required if the merging parties have a combined market share of greater than 35% in one or more markets.
  - d. Schedule III sets out detailed information that will be required for a more detailed competition assessment. This includes information at different market levels and on barriers to entry. By anticipating the need for such information and collating it in advance merging parties can substantially reduce the time required for the merger to be assessed.
  - e. Schedule IV is a declaration.
4. Answer questions on separate sheets marked Schedules I to IV, as appropriate.  
  
*It is important that relevant documents are attached pertaining to the issues addressed in the different schedules. Note that parties are obliged to provide all relevant documents including those that may not be consistent with what is being claimed in the merger filing. Note that the provision of documents/information that may not be consistent with information in the merger filing will not necessarily result in the application being denied.*
  5. Where supporting documents are not available an affidavit must testify to the accuracy of the information provided and the non-existence of supporting documents.
  6. You may identify material you consider as commercially sensitive and apply for confidentiality as provided in Section 20 of the Competition Act.

7. The completed Merger notification form together with the most recent documents should be submitted to:

Director General  
Kenya Railways Headquarters,  
Block D Ground Floor, Workshop Road off Haile Selassie Avenue  
P.O. Box 36265-00200  
NAIROBI

Tel: +254-20-2779000, 2628233

Website: [www.cak.go.ke](http://www.cak.go.ke)

Email: [info@cak.go.ke](mailto:info@cak.go.ke)

8. Parties are free to consult the Authority in case of clarification regarding the completion of this Form.

#### PART I - BASIC INFORMATION

Provide hard copies of the following documents:

A signed copy of Sale and Purchase Agreement,

Audited Financial Statements for the last three years duly signed by the Board of Directors and Certified Public Accountant Member ,

The latest Annual Reports, Board resolutions and related documents regarding the merger.

Copies of Certificates of Incorporation/Registration Certificates or equivalent and similar documents including other shareholder companies where there is chain ownership

A breakdown of employees, and plans to realise cost savings, efficiencies and plans documenting investment evaluations.

1. State the name and principal business address of the undertaking filing this notification.
2. Provide the following details of the contact person for the undertaking filing this notice
  - Name:
  - Position:
  - Address
  - Telephone:
  - Fax number:
  - Email:
3. Please take notice of a merger as defined in section 43(1) of the Competition Act and state whether you are the acquiring or target undertaking.
4. Have you authorized any representative to act on your behalf?
  - Name:
  - Position:
  - Company/firm:

5. State the names and principal business address of all the undertakings directly or indirectly controlling you.
6. State the names and business address of the shareholders directly or indirectly controlling you
7. List the names and principal business address of each undertakings directly or indirectly controlled by each undertaking referred to in 5 above.
8. Do you directly and indirectly control other undertakings? If yes, list them and describe their main operations.
9. Provide a detailed organizational structure for both the acquiring and target undertaking.
10. Give a brief history of your firm including the date of incorporation.
11. Provide the Names of the directors of the acquiring undertaking and their nationalities (attach a copy of current CR/12) or equivalent issued within the last 2 months)
12. Provide the Names of the directors of the target undertaking and their nationalities (attach a copy of current CR/12) or equivalent issued within the last 2 months)
13. List all the undertakings where the directors of the acquiring and target undertaking serve as directors and or shareholders.
14. Indicate previous merger applications involving the acquiring and target undertaking, or their affiliates, if any.
15. Indicate the nature of transaction of the previous transaction and the sector or market affected.
16. Indicate the industry sector or sectors involved(s) (e.g. Manufacturing, Construction, Mining, Retail, Telecommunications). Applicants should indicate the standard industrial classifications (SIC) code that are most applicable to the industry/sub-sector in which they operate (SIC codes should have a minimum of 3 digits).
17. What are main activities of the target and acquiring undertaking?
18. Indicate the areas where you sell your products or provide services, in terms of:
  - (a) National
  - (b) County(ies)
  - (c) Regional markets
  - (d) Others (specify)
19. State your annual turnover in Kenya for the preceding year. (Refer to merger threshold guidelines [link-www.cak.go.ke/Statutes/Regulations/Guidelines/mergers/Merger Thresholds/Guidelines for Section 42](http://www.cak.go.ke/Statutes/Regulations/Guidelines/mergers/Merger_Thresholds/Guidelines_for_Section_42) and [and](http://www.cak.go.ke/Statutes/Regulations/Guidelines/mergers/Merger_Thresholds/Guidelines_for_Section_42) [Regulations/Guidelines/mergers/Merger Thresholds/Guidelines for Section 42](http://www.cak.go.ke/Statutes/Regulations/Guidelines/mergers/Merger_Thresholds/Guidelines_for_Section_42).)
20. If the parties have no operations in Kenya, kindly provide the global turnover or assets and countries of operation.
21. State the value of your assets for the preceding year.
22. What is the monetary value of the consideration being offered? If other, specify.



23. Type of transaction (e.g. whether it is an acquisition or sale of assets, acquisition or sale of shares, acquisition of minority shareholding giving material control, amalgamation, etc.) (refer to section 41(2) for more details).
24. Has the transaction been notified to other regulatory authorities (Insurance Regulatory Authority, Capital Markets Authority, Central Bank of Kenya, etc. and to other jurisdictions (countries or regional economic blocks)?
25. The ownership structure and control before and after the transaction.
26. The business rationale for the transaction including strategic, commercial and economic reasons.
27. Provide information on the market participants in this market and the number of entrants and exits in this market over the last five years
28. Provide an assessment of the likely impact of the merger on
  - (a) Employment (if the transaction is likely to result in employment loss, indicate the number, type (skilled or unskilled) of jobs to be lost and the justification for the loss),
  - (b) Ability of merging parties to compete in international markets; and
  - (c) Ability of SMEs directly affected by the merger to gain access to or to be competitive in any market.
29. Is the transaction likely to generate efficiencies? If yes, identify the efficiencies and how they will be achieved and passed on to consumers.
30. If one of the parties is a failing firm, include:
  - (a) Financial information showing that the firm is unable to meet its obligations now and in the future.
  - (b) Information to prove that the failing firm would reasonably be expected to exit of the market absent the merger.
  - (c) What will happen to the productive assets if the firm exits the market?

#### PART II - PRODUCTS AND SERVICES SUPPLIED BY EACH OF THE MERGING PARTIES

In addition to documents specified in Schedule I, please attach the following:

- (a) Documents prepared for the Board of Directors, regulatory bodies in relation to the transaction;
  - (b) Reports, surveys, analysis or other documents assessing the transaction with respect to its impact on competition; and
  - (c) Latest business plans, marketing plans, sales report and strategic plan.
31. List the products that you sell and/or services that you provide.
  32. For each of the main products and services specify the amounts supplied (in volume and/or Kshs) into each geographic area where you sell your products or provide services (e.g. national, county(ies), international. If international, specify the countries.
  33. Provide estimates of your market shares and those of your competitors (including the other merging party) in each of the markets you operate for the last three years.

34. Identify your main actual and potential suppliers, for each product/service grouping (including the other merging party where applicable).
35. Identify your main actual and potential customers, for each product/service grouping (including the other merging party where applicable).
36. Explain the nature of the vertical relationship and how it is likely to affect competition in the upstream and downstream markets.

**PART III - EVALUATION OF HORIZONTAL OVERLAPS AND VERTICAL  
RELATIONSHIPS OF MERGING PARTIES**

Please provide hard copies of the following documents:

- (i) Business plans; marketing plans, including for relevant subsidiaries and divisions and current Strategic Plan;
  - (ii) Periodic (such as monthly and quarterly) review of sales and market trends including by customer category and by different geographic areas for the last three (3) years; and
  - (iii) Pricing schedules including terms of discounts and rebates offered.
37. For each of the products you produce or services you provide; a) give monthly data over previous three years on prices charged, and sales by region, b) state whether you charge a national price and the rationale, and c) provide details of your pricing strategy (including discounts and rebates).
  38. Sales volumes, monthly over previous three years for main products, by area
  39. Are there products or services you consider to be reasonably substitutable with your products or services? Taking into account these products or services, provide an estimate of your market shares and those of your competitors and indicate the sources of your information.
  40. Explain the basis on which you compete (such as on price, quality, service, distribution) in each of the markets possibly affected by the merger.
  41. Provide a list of your top five customers and their contact details in each of the markets you operate and the percentage sales shares accounted for by each of them, nationally and by region.
  42. Provide a list of your top five suppliers and their contact details in each of the markets you operate and the percentage sales shares accounted for by each of them, nationally and by region.
  43. Are imports an important source of competition? If yes, give details.
  44. Do you have contractual agreements with suppliers of your key inputs? If yes, attach examples.
  45. Do you have contractual agreements with customers? If yes, attach examples.
  46. Identify entry and exit barriers into the markets likely to be affected by the transaction i.e. market where merging parties have product overlaps or vertical links.
    - (a) Identify what is required for a new entrant, including the costs that have to be incurred to establish the necessary scale of operation to be an effective competitor. What are the key inputs and facilities a new entrant should access to operate in the market?

- (b) What is the time taken from taking the decision to enter the market to being fully operational?
- (c) What regulatory requirements have to be met to establish operations, including patents, trademarks, copyrights, licenses, tariffs, quotas, marketing board rules, zoning restrictions and environmental studies? ii) State if there are regulations likely to constrain pricing, quality and other competition parameters.
- (d) What is required in terms of establishing a brand awareness, establishing distribution operations, and the challenges of competing with established firms?

#### PART IV DECLARATION

“To the best of my knowledge, the information contained in this merger notification and the attachment to it, is true, correct, and complete, except to the extent that I have indicated-

- (a) The requested data is not available in books or records, and reasonable estimates have been used instead; or
- (b) Complete information has not been provided because it is unavailable in which case I have attached an affidavit sworn by me explaining why the information is unavailable.

I understand:-

- (a) that it is an offence in terms of section 90 (d) of the Competition Act for a person to provide false information to the Authority;
- (b) That section 91 of the Competition Act provides for a penalty of a fine, imprisonment, or both if I am found guilty of knowingly providing false information to the Authority; and
- (c) That the Authority has power as prescribed in Section 47 (1) to revoke a decision approving a proposed merger if the decision was based on materially incorrect or misleading information.

Signature and official seal or stamp:

Name: (block letters)

Position: (block letters)

Date:

I confirm that the person named in reply to question 4 (if any) is authorized to act on my behalf for the purposes of this Notice.

Signed:

## FORM IV

(r.20)

COMPETITION AUTHORITY OF KENYA

Telephone: 254-20-2628233  
 Direct Line : 254-20-2779000  
 Website: [www.cak.go.ke](http://www.cak.go.ke)  
 Email: [info@cak.go.ke](mailto:info@cak.go.ke)

Competition Authority of Kenya  
 Kenya Railways HQs  
 Block "D" Drop – Point; Ground Floor  
 P. O. Box 36265-00200  
 Haile Selassie Avenue

EXEMPTION APPLICATION FORM*Rule 1A(1)*

*(This form is for the application for exemption for Restrictive Trade Practices, Intellectual Property Rights and Professional Rules)*

To: The Competition Authority of Kenya

From:

Title:	
First Name:	
Surname:	
Organization:	
Postal address:	
Email address:	

2. We apply in terms of section ..... [25, 28 or 29] of the Competition Act for an exemption from the application of Part III A and B of the Act for the following decision, agreement or practice: \_\_\_\_\_

3. We seek an exemption for a period of \_\_\_\_\_ (duration).

4. In respect of this matter, has previous exemption been:

Granted?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Refused?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

If you answered "yes" to either question above, please provide the case number for the previous exemption application \_\_\_\_\_

5. The following information must be included in your description of the agreement or practice for which you seek an exemption

- (i) Description of the nature of your business;
- (ii) Description of the business carried out by the other persons on whose behalf the application is made;
- (iii) Names and addresses of all the other parties to the practice to be exempted;
- (iv) The facts and contentions on which you rely;
- (v) Description of goods/services to which the proposed or actual restrictive practices relate;
- (vi) The section of the Act that you believe may be contravened by this practice;

7. Description of the market(s) in which the goods or services described are supplied or acquired and other affected markets including significant suppliers and purchasers; substitutes available for the relevant goods or services; any restrictions on the supply or acquisition of the relevant goods or services

8. Justification for the exemption based on the following criteria set out in section 26(3) of the Act:

I understand:

- (a) that it is an offence in terms of section 90(d) of the Competition Act for a person to provide false information to the Authority;
- (b) That section 91 of the Competition Act provides for a penalty of a fine, imprisonment, or both if I am found guilty of knowingly providing false information to the Authority; and
- (c) That the Authority has power as prescribed in Section 27(1)(a) to revoke an exemption if the it was issued based on materially incorrect or misleading information.

6. Signed by the complainant

Signature.....

Full Name.....

Official seal or stamp (if applicable).....

Date (dd/mm/yyyy):.....

7. For official use only:

Authority file reference number: .....

Date filed: .....

## FORM V

(r. 21)

COMPETITION AUTHORITY OF KENYA

Telephone: 254-20-2628233  
Direct Line : 254-20-2779000  
Website: [www.cak.go.ke](http://www.cak.go.ke)  
Email: [info@cak.go.ke](mailto:info@cak.go.ke)

Competition Authority of Kenya  
Kenya Railways HQs  
Block "D" Drop – Point; Ground Floor  
P. O. Box 36265-00200  
Haile Selassie Avenue

EXEMPTION CERTIFICATE(PURSUANT TO SECTIONS 25, 28 OR 29 OF THE COMPETITION ACT 2010)

Exemption certificate code  
File Reference Number

1. Date and number of the notice on the exemption application
2. Name of the undertaking that obtained the exemption
3. Description of the decision(s), practice(s) or agreement(s), including parties involved
4. Specific factors considered to grant the exemption according to provisions in Part III D of the Act
5. Duration of the granted exemption, start and end date
6. Conditions for the exemption
7. Justification for the exemption
8. Acknowledgement of submissions received by stakeholders
9. Name and contact information for queries

*Notice is given in terms of the Competition Rule 12 (10) that any person with a substantial financial interest affected by the abovementioned decision may appeal the decision to the Competition Tribunal.*

FORM VI

(r. 22)

COMPETITION AUTHORITY OF KENYA

Telephone: 254-20-2628233  
Direct Line : 254-20-2779000  
Website: [www.cak.go.ke](http://www.cak.go.ke)  
Email: [info@cak.go.ke](mailto:info@cak.go.ke)

Competition Authority of Kenya  
Kenya Railways HQs  
Block "D" Drop – Point; Ground Floor  
P. O. Box 36265-00200  
Haile Selassie Avenue

NOTICE OF REVOCATION OF EXEMPTION

Exemption notice code .....

File Reference Number .....

1. Date and number of the notice on the exemption granted
2. Name of the undertaking that obtained the exemption
3. Description of the decision(s), practice(s) or agreement(s), including parties involved, for which exemption was revoked
4. Specific factors considered to revoke the exemption according to provisions in Part III D of the Act
5. Date for the implementation of the revocation decision
6. Acknowledgement of submissions received by stakeholders
7. Name and contact information for queries

FORM VII

(r. 47(2))

COMPETITION AUTHORITY OF KENYA

Telephone: 254-20-2628233  
 Direct Line : 254-20-2779000  
 Website: [www.cak.go.ke](http://www.cak.go.ke)  
 Email: [info@cak.go.ke](mailto:info@cak.go.ke)

Competition Authority of Kenya  
 Kenya Railways HQs  
 Block "D" Drop – Point; Ground Floor  
 P. O. Box 36265-00200  
 Haile Selassie Avenue

CONFIDENTIALITY CLAIM FORM<sup>1</sup>

1. File reference number

.....

2. Name of the matter

.....

3. Confidential information

On a separate sheet of paper, list the following information and set out facts and contentions supporting your claim that the identified information is confidential-

Column 1 – Name of the document that contains the confidential information

Column 2 – The page and line number at which the confidential information begins and ends

Column 3 – The name of the person that owns the particular information

Column 4 – The nature of the commercial value of the information

Column 5 – The existing restrictions on access to the information

Column 6 – The type of injury to competition the disclosure of the information may cause and the extent to which the information is commercially sensitive.

3. Statement of Confidentiality:

I, ....., compiled or supervised the persons who compiled the attached list. I believe that the information identified in that list is confidential information.

I understand:

- (a) that it is an offence in terms of section 90(d) of the Competition Act for a person to provide false information to the Authority; and
- (b) That section 91 of the Competition Act provides for a penalty of a fine, imprisonment, or both if I am found guilty of knowingly providing false information to the Authority.

4. Name and title of Person authorized to sign:

.....  
 Authorized signature and seal or stamp: \_\_\_\_\_ Date (dd/mm/yyyy)

.....



5. For official use only:

Authority file number: .....

Date filed: .....

---

This form is issued for the purpose of identifying and protecting confidential materials. The Authority shall treat confidentially any material identified by you in this form after satisfying itself that the material is confidential according to the provision of the Act. Until the Authority satisfies itself on the confidentiality of your material, your material will be treated as confidential by the Authority, subject to any public notice requirements set out in the Act.

## THIRD SCHEDULE

(r. 24(1))

## THE BLOCK EXEMPTION GUIDELINES

## PART A – PRELIMINARY PROVISIONS

## 1. Introduction

(1) These Guidelines set out the general principles in applying provisions of section 30(2) of the Act regarding the exclusion of any category of decisions, practices or agreements by or between undertakings from the application of the provisions of Part III of the Act.

(2) The Guidelines shall be read in conjunction with the Act, Rules and other Guidelines.

## 2. Objective of the Guidelines

(1) The main objective of these Guidelines is to guide undertakings in making self-assessment as to whether the agreements, decisions or practices which they intend to enter into qualify for block exemption without the need to seek the Authority's intervention.

(2) Specifically, these Guidelines are aimed at—

- (a) assisting the Authority in the implementation of section 30(2) of the Act to exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions Part III of the Act otherwise referred to as Block Exemptions;
- (b) enabling the Authority to achieve transparency and predictability in the market regarding the grant of block exemptions;
- (c) allowing the Authority to concentrate its resources on agreements which are likely to distort competition in the economy.

## 3. Application

These Guidelines apply to the following categories of vertical agreements—

- (a) franchise agreements;
- (b) stadia and sport branding rights agreements;
- (c) content development and broadcasting agreements; and
- (d) one-off sporting and promotional events.

## 4. Definitions

In these Guidelines, unless the context otherwise requires—

“Act” means the Competition Act, 2010;

“allocation of exclusive territories” means the limitation of markets whereby the franchisor imposes limitations on the franchisee by specifying the area where the franchisee can operate or supply the contract of goods and services, class of customers to serve or products to deal in;

“Authority” means the Competition Authority established under section 7 of the Act;

“block exemption” means any category of decisions, practices or agreements by or between undertakings excluded from the application of the provisions of Part III of the Act;

“bundling” means where goods must be purchased together with another as a package;

“franchise” means a licence that a party acquires to allow them to have access to a business proprietary knowledge, processes and trademarks in order to allow the party to sell a product or provide a service under the business name;

“franchise agreement” means an agreement where one undertaking (the franchisor) grants to another undertaking (the franchisee), in exchange for direct or indirect financial consideration, the right to exploit a package of industrial or intellectual property rights (franchisee) for the purposes of producing or marketing specified types of goods or services;

“minimum resale price maintenance” means a form of price fixing where the franchisor imposes a minimum resale price on the franchisee thereby limiting or excluding the franchisee’s ability to offer discounts or to sell at lower prices than those imposed by upstream player;

“non-competing restriction” means a restriction that prevents the franchisee from competing with the franchisor or other franchisees or setting up a similar business, during and after the term of their agreement and includes–

- (a) starting up a competing business during or after the term of the agreement for a specified duration of two years;
- (b) de-badging(re-branding) their store upon the expiry of the agreement; and
- (c) continuing to conduct business under a new name at that location.

“stadia and sport branding agreement” means vertical agreements between the Sports Stadia Management Boards (whether at National or County level) and undertakings which confers exclusive advertising, branding rights within the stadium to the undertaking in return for funding and investments to revamp and maintain the facility;

“tying” means the practice by the franchisor of selling a product or service as a mandatory addition to the purchase of a different product or service;

“vertical agreement” means an agreement concluded between parties in a vertical relationship as envisaged under section 21 of the Act.

#### PART B – BLOCK EXEMPTION FOR FRANCHISE AGREEMENTS

##### 5. Franchise Agreement

A franchise agreement may qualify for a block exemption under these Guidelines if it meets threshold set out under this Part relating to the following–

- (a) the market share threshold;
- (b) maintenance of the minimum resale price;
- (c) allocation of exclusive territories;
- (d) tying and bundling restrictions;
- (e) restriction on output; and

(f) non-competing restrictions.

6. Market share threshold

(1) A franchise agreement may qualify for a block exemption where the individual market share of the undertakings on the relevant market does not exceed fifteen *per centum*.

(2) The market share of the undertakings shall be determined on the basis of the average market sales or any other reliable market information parameter in the relevant market for the preceding three years.

(3) The parties shall be guided by the Market Definition Guidelines issued by the Authority to familiarize with the principles employed in the definition of the relevant markets.

7. Minimum resale price maintenance

(1) A franchise agreement may qualify for block exemption where the agreement does not have clauses that prevent the franchisee from determining their own selling price.

(2) A minimum resale price maintenance may be allowed where—

- (a) the undertaking is establishing a foothold in the country where the restriction is necessary to develop the market;
- (b) the resale price maintenance is with regard to a promotion with a specified time frame not exceeding three months aimed at promoting a new product;
- (c) it is demonstrated that the undertakings pioneered the development of a new product or service through research and development and therefore need to recoup investment.

8. Allocation of exclusive territories

The allocation of exclusive territories, products or customers to a franchisee may qualify for block exemption if the following conditions are satisfied—

- (a) the market share of either of the parties in the contract goods market is not more than fifteen *per centum* in the allocated territory;
- (b) the undertaking is testing a new product in the allocated territory or limited group of customers;
- (c) the undertaking is a startup or developing a new market with high sunk costs therefore exclusivity is necessary to recoup costs.

9. Tying and bundling

A franchise agreement containing tying and bundling restrictions may qualify for a block exemption where—

- (a) it is necessary to achieve the consistency in the quality of the goods or services;
- (b) it ensures the standardization of the goods and services across the franchises.

10. Restriction on output

A franchise agreement containing provisions regarding output restriction will qualify for a block exemption where such a restriction is critical for the testing of a new product in a limited geographic area or across a limited group of customers.

#### 11. Non-competing restrictions

A franchise agreement containing a non-competing restriction may qualify for a block exemption where the restriction intended to protect the franchisor's commercial interests in their goodwill and trade know-how.

#### PART C – BLOCK EXEMPTION FOR STADIA AND SPORT BRANDING AGREEMENT

#### 12. Block exemptions for stadia and sport branding

A stadia and sport branding agreement qualifies for a block exemption where—

- (a) there is an express benefit to the public, including the rehabilitation and development of the existing infrastructure; and
- (b) there was competition for the market in the form of a competitive bidding process.

#### PART D – BLOCK EXEMPTION FOR MEDIA CONTENT GENERATION AGREEMENT

#### 13. Block exemptions for media content generation agreement

(1) A media content generation agreement qualifies for a block exemption where it is practicable and there is competitive bidding at entry.

(2) A party to any of the following types of exclusive agreements may qualify for a block exemption under paragraph (1) –

- (a) local media content;
- (b) naming rights;
- (c) one-off sporting events; and
- (d) one-off promotional events.

(3) The one-off sporting and promotional events qualify for block exemption if the duration is for a period of not more than three months.

#### PART E – GENERAL PROVISIONS

#### 14. Advisory Opinions

An undertaking may seek an advisory opinion from the Authority where it is unclear on any matter provided in these Guidelines.

#### 15. Self-assessment

(1) A party who after self-assessment determines that they qualify for block exemption pursuant to these Guidelines shall inform the Authority before executing the vertical agreement.

(2) A person who qualifies for a block exemption shall assess themselves from time to time to determine whether they continue to qualify for the exemption.

#### 16. Validity of the block exemption

A category of block exemption granted pursuant to these Guidelines and Gazetted, shall be valid for a period of five years from the date of publication of the exemption.

**17. Review of the Guidelines**

(1) The Authority shall review the market periodically to establish if there have been major changes that might warrant a review of these Guidelines.

(2) These Guidelines shall be reviewed from time to time to account for the developments in the market place and changes in policy and law.

Dated the 25th October, 2019.

UKUR YATANI,  
*Ag. Cabinet Secretary,  
The National Treasury and Planning.*

EXPLANATORY MEMORANDUM TO THE COMPETITION (GENERAL) RULES, 2019

LEGAL NOTICE NO. 176 OF 2019

PART I

Name of Statutory Instrument: The Competition (General) Rules, 2019

Name of the Parent Act : The Competition Act, No 12 of 2010

Enacted Pursuant to : Section 93 of the Competition Act, No 12 of 2010

Name of the Ministry : The National Treasury and Planning

Gazetted on : 25<sup>th</sup> November, 2019

Tabled on : .....

PART II

1. Purpose of the Statutory Instrument

The purpose of the Competition (General) Rules, 2019 is to:

- i) Ensure that the Competition Authority of Kenya (“Competition Authority”) complies with the provisions of the Constitution of Kenya, 2010 regarding due process in undertaking both its investigatory and quasi- judicial roles;
- ii) Mainstream International Best Practices in the regulation of competition in Kenya;
- iii) Give the Authority the requisite discretion as a Regulator to avoid disruptive interference in market conduct and practices, with insignificant anti-competitive effect while at the same time maintaining its extensive reach;
- iv) Empower the Authority to adequately handle new and emerging anti-competitive trends in the Kenyan market;

- v) Generally, make the Competition Act a dynamic and progressive legislation that catalyzes innovation and promotes creation of wealth;
- vi) Embolden the enforcement capacity of the Authority to address emerging challenges in the retail sector; and
- vii) Creating transparency and predictability in the competition law enforcement process.

## **2. Legislative Context**

The legal framework for the Competition (General) Rules, 2019 (“Competition Rules”) is provided generally under section 93 of the Competition Act, No 12 of 2010 (“Competition Act”) which empowers the Competition Authority, to from time to time, make Rules and/or Guidelines for the better carrying out of the Competition Act.

## **3. Policy Background**

The Competition Authority embarked on the development of the Competition Rules in 2016 under the Competition Act in order to outline the processes relating to the various functions of the Authority under the Competition Act. This was geared towards ensuring the requirements of the Fair Administrative Actions Act, 2015 are met through the transparency in the processes attached to the various functions of the Competition Authority under the Competition Act.

The Competition Rules contain the Merger Threshold Guidelines and Block Exemption Guidelines in the First and Third Schedule. The Merger Threshold Guidelines (First Schedule) have been developed by the Competition Authority in accordance with section 42 (1) of the Competition Act which provides that the Authority may by Notice in the Gazette set the threshold for any merger to be excluded from the provisions of the Act. The purpose of the Guidelines is to enhance the ease of doing business. Currently, all parties seeking to merge including small and medium size enterprises have to seek the Authority’s approval which is a bureaucratic bottleneck to investment. Further, the Competition Authority is cognizant that merging parties have continuously faced challenges when notifying mergers with a regional dimension, such as with respect to mergers which qualify for notification both at the Competition Authority and the COMESA Competition Commission. The Guidelines aim to address these challenges by exempting small transactions from notification and streamlining notification for mergers with a regional dimension.



The Block Exemption Guidelines (Third Schedule) on the other hand have been developed in accordance with section 30 (2) of the Competition Act which provides that the Competition Authority may with the approval of the Cabinet Secretary and by notice in the Gazette, exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions of Part III of the Act. Development of block exemptions is driven by the need for consistent and predictable application of effects-based competition law and policy. Specifically, the nature of contraventions outlined in part III of the Competition Act means that agreements, such as those for franchising, will require undertakings and their associations to seek repeated approval from the Authority for transactions and agreements that might have benign effect on competition. Block exemptions will additionally ease the regulatory burden of undertakings by reducing the transaction costs of firms seeking approval for said agreements.

The Competition Rules are aligned with the Competition Authority's mandate of developing the sector. It is expected that the observance of these Rules will greatly enhance the level of accountability and transparency in relation to the processes that fall within the scope of the Competition Authority and increase regulatory compliance by stakeholders.

#### 4. Consultation Outcome

In developing the Rules and Guidelines attached in the Schedules (First and Third), the Authority consulted with its key stakeholders. This consultation was done in recognition of the Constitution of Kenya, 2010 which mainstreams public participation as a crucial pillar in all governance processes. Taking cognizance of this crucial Constitutional requirement, the Authority in developing the Rules exposed them to all its stakeholders ranging from; legal firms, regulatory agencies (such as the Kenya Civil Aviation Authority, the Communications Authority of Kenya, the Kenya Airports Authority, KASNEB, the Salaries & Remuneration Commission and the following County Governments: Kiambu, Murang'a, Kirinyaga, Embu, Meru, Isiolo, Laikipia, Nyandarua, Nakuru, Machakos, Makueni, Kitui, Garissa, Taita Taveta, Mombasa, Kilifi, Kwale, Kericho, Narok, Uasin Gishu, Kisumu, Kisii, Nyamira, Migori, Kakamega, Vihiga, Bungoma, and Trans Nzoia. The Authority received overwhelming response from various stakeholders who wrote back to the Authority giving feedback on the draft Rules and Guidelines.

In addition, a Workshop was held in October, 2017 with various stakeholders ranging from; the Attorney General's office, the Kenya Law Reform Commission, the Competition Tribunal and the Kenya Law Reports. Following this Workshop, the Authority proceeded to incorporate the comments received from these stakeholders.

This ensured that the drafting process addressed all the pertinent issues and the interests of various stakeholders were taken into account.

A summary of the comments received from various stakeholders and the incorporation of the same is contained in a Matrix attached herein as **Annexure**.

## **5. Guidance**

In addition to the stakeholder consultation indicated in (4) above, the draft Rules (and Guidelines as contained in the First and Third Schedule of the Rules ) were uploaded on the Authority's website for ease of access by stakeholders and the public. Further, as indicated above, the Authority has been creating awareness by educating the public on the existence of these Rules in various County Forums it has held in Kiambu, Murang'a, Kirinyaga, Embu, Meru, Isiolo, Laikipia, Nyandarua, Nakuru, Machakos, Makeni, Kitui, Garissa, Taita Taveta, Mombasa, Kilifi, Kwale, Kericho, Narok, Uasin Gishu, Kisumu, Kisii, Nyamira, Migori, Kakamega, Vihiga, Bungoma, and Trans Nzoia. The comments received in these public forums were included as indicated in (4) above.

Documents incorporated into the Rules by reference are:-

- a. The Constitution of Kenya, 2010
- b. The Competition Act, No 12 of 2010
- c. The Fair Administrative Actions Act, 2015
- d. The Civil Procedure Code Cap. 75)

## **6. Impact**

### *6.1 Impact on Fundamental Rights and Freedoms*

The Rules seek to strengthen the process of fair trial in the administration of matters by the Competition Authority in its role as a quasi-judicial body. In particular, the Rules have taken into consideration Chapter four (4) of the Constitution of Kenya, 2010 by incorporating principles like equality and freedom from discrimination and right to fair trial.

The Rules do not limit or infringe upon any right or fundamental freedom under the Bill of Rights. On the contrary, it ensures mechanisms are in place to promote transparency of processes relating to settlement, administration of fines, efficiency and accountability in the Authority's investigation, hearing and determination of disputes.

### *6.2 Impact on the Private Sector*

The Rules seek to enhance the ease of doing business through removal of bureaucratic bottlenecks such as the requirement for all parties seeking to merge including small and medium size enterprises having to seek the Authority's approval. Further, the Rules address the administrative and financial burden parties have faced when notifying mergers with a regional dimension by exempting small transactions from notification and streamlining notification for mergers with a regional dimension.

The Rules will also lead to consistency and predictability in application of effects-based competition law and policy by removal of the requirement placed on undertakings and their associations to seek repeated approval from the Competition Authority. This is with respect to transactions and agreements that might have minimal or no effect on competition. Further, the Rules will lead to ease of the regulatory burden of undertakings by reducing the transaction costs of firms seeking approval for agreements which fall within the scope of Block exemptions.

### *6.3 Impact on the Public Sector*

The Rules will lead to increased investor confidence due to the ease of administrative, financial and regulatory burden they have faced in transactions falling within the purview of the Competition Act. Public confidence is expected to grow as the Competition Authority will be able to focus its resources on transactions which have an actual impact on the economy as opposed to handling all transactions including those with a benign effect on competition in the economy of Kenya.

### *6.4 Summary of Impact Assessment*

The Rules will greatly promote transparency in the processes relating to the functions vested upon the Competition Authority by the Competition Act and, reduce the administrative and regulatory burden placed on investors in transactions falling within the purview of the Competition Act

## **7. Monitoring and review**

The Authority will regularly monitor the implementation of the Rules. The Block Exemption Guidelines contained in the Third Schedule of the Rules also contain a provision for regular monitor and review to ensure the Guidelines are compliant with market trends and changes.

## **8. Contact**

**Hon. (Amb.) Ukur Yatani**  
Ag. Cabinet Secretary for the  
National Treasury and Planning  
P.O Box 30007-00100  
**NAIROBI**

**3<sup>rd</sup> December, 2019**

## **ANNEXURE 1**

### **MATRIX ON THE STAKEHOLDER CONSULTATION ON THE COMPETITION GENERAL RULES**

#### **1. COMPETITION GENERAL RULES**

Stakeholders' Comments	Authority's Consideration
<p><b>1. Part I: Preliminary</b></p> <p>i. Improvement may be made to include CAK logo.</p> <p>ii. Proposal to amend the definition of "confidential information" to include trade, business, industrial information or material that belongs to an undertaking, has a particular economic value and is not generally available to or known by others.</p> <p>iii. Proposal to remove the definition of "joint control" as instances of joint control are multi-faceted and not limited to equal voting rights.</p>	<p>i. Proposal not adopted as the logo cannot appear in legislation.</p> <p>ii. The proposal was adopted with amendments so as to comply with the Constitution of Kenya, 2010.</p> <p>iii. Proposal carried and adopted.</p>
<p><b>Part II: Assessment and Determination of Mergers under Part IV of the Act</b></p> <p>i. Use 'financial reporting standards' instead of 'accounting standards'.</p> <p>ii. To include non-notification of transactions involving vertical integration. Proposal for the rule to refer to all mergers as long as indirect control or beneficial ownership does not change.</p> <p>iii. The rules refer to merging parties to the merger, which is generally understood to refer to the acquiring undertaking and the target undertaking. Proposal that a definition be inserted to clarify</p>	<p>i. Proposal carried and adopted.</p> <p>ii. This is already catered for under the Competition Act.</p> <p>iii. Proposal carried and adopted.</p>

<p>on the definition in order to avoid any potential reference to the divesting undertaking.</p> <p>iv. Proposal to supplement Rule 10 with additional criteria for determining whether a merger has been consummated without approval.</p> <p>v. Proposal to the effect that control in private equity mergers be evaluated on a case-by-case basis with reference to actual control relationships.</p> <p>vi. Proposal to introduce the reference to the relevant Schedule with respect to the Merger Notification Form as provided for in Rule 15.</p> <p>vii. Proposal to amend Rule 19 to introduce public interest remedies and a reporting obligation on the merging parties with respect to the remedies imposed by the Competition Authority.</p> <p>viii. Proposal to introduce a requirement that where the undertaking fails to pay the Penalty in a stipulated time period, the Authority may refer the matter to the Office of the Director of Prosecutions.</p>	<p>iv. Proposal carried and adopted.</p> <p>v. Proposal not adopted as this recommendation deviates from international best practice.</p> <p>vi. Proposal adopted with necessary modifications.</p> <p>vii. Proposal was adopted with necessary modifications.</p> <p>viii. Proposal was adopted.</p>
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<p><b>2. Part III: Exemptions under Part III of the Act</b></p> <p>i. Proposal to introduce the reference to the relevant Schedule with respect to the exemption certificate as provided for in Rule 21.</p> <p>ii. Proposal to introduce the reference to the relevant Schedule with respect to the Notice of revocation as provided for in Rule 22.</p>	<p>i. Proposal carried and adopted.</p> <p>ii. Proposal carried and adopted.</p>
<p><b>3. Part IV: Block Exemptions</b></p> <p>i. Proposal to delete the phrase “for the purposes of exports”, because the Act does not include this limitation.</p> <p>ii. Proposal to delete sub rules (a)-(c) of Rule 24 and replace with broad guidelines as to the nature of conduct or agreements to be considered for block exemption.</p>	<p>i. Proposal not adopted because vertical agreements for purposes of exports do not have anti-competitive effects in the domestic market.</p> <p>ii. Partly adopted by modification of this section to include determination of block exemptions.</p>
<p><b>4. Part V: Unsafe Goods</b></p> <p>Where the supplier/manufacturer intends to voluntarily recall goods, they should make such information known to the public through advertisement in a newspaper of national circulation for consumer information.</p>	<p>Proposal carried and adopted.</p>

**5. Part VIII: Complaints and Investigations**

- i. The Authority to provide a rule to give reasons to a complainant when it decides not to initiate a full investigation.
- ii. Proposal to include the phrase "... or immunity..." as the Leniency and immunity application processes appear to be separate processes.
- iii. Proposal to delete reference to "a person" and replacing it with reference to "the complainant".
- iv. Proposal that reference to "a person" be replaced with "respondent or party under investigation" and also for the sub rule to be drafted wide enough so as to include a summons that requires appearance before the Authority.
- v. Proposal for a time limit to be stipulated by which the Authority must return all seized documents.
- vi. Proposal that reference to "the hours" in Rule 37 (5) which provides for conducting of a search,

- i. Proposal was not adopted as it is already provided for under section 31 (2) of the Competition Act.
- ii. This was not adopted as the processes are not separate. Immunity is a benefit that may accrue from an application for Leniency.
- iii. Proposal adopted and definition introduced on who a complainant is.
- iv. Proposal was not adopted as it is already catered for in the Competition Act section 31.
- v. Proposal partially adopted in line with the Criminal Procedure Code provisions on conducting a search.
- vi. Proposal carried and adopted.
- vii. Proposal carried and



<p>be deleted.</p> <p>vii. Proposal to delete the phrase “an undertaking” and replacing it with “a party” in Rule 39 provides for a pre-hearing conference.</p> <p>viii. Proposal to include a Rule providing that where a party fails to appear on the date set for hearing, if it transpires that such absence was malicious, the Authority may proceed to make any orders it deems necessary their absence notwithstanding.</p> <p>ix. Proposal to introduce the reference of the relevant Schedule and that the sentence be slightly amended in relation to the payment of the fee in Rule 20 (1).</p> <p>x. Proposal to introduce in Rule 20 a requirement that where an undertaking applies for an exemption on behalf of another undertaking, written consent from the latter should be provided.</p>	<p>adopted.</p> <p>viii. Proposal partly adopted as guided by the Civil Procedure Rules, 2010.</p> <p>ix. Proposal partly adopted.</p> <p>x. Proposal was carried and adopted.</p>
<p><b>6. Part IX: Settlement of an infringement under the Act</b></p> <p>i. Proposal to amend Rule 41 to clarify that the settlement process is initiated</p>	<p>i. Proposal adopted with modifications in compliance</p>

<p>by an undertaking.</p> <p>ii. Proposal that the requirement for guilt in order to qualify for settlement, be removed from Rule 41 (5).</p> <p>iii. Proposal to rename Rule 42 (1) to read as "Factors to be considered", because the factors may not always be applied in a mitigating context and in sub-rule (i) , renaming of "mitigating factors" to read as "any relevant factors".</p>	<p>with the Competition Act.</p> <p>ii. Proposal adopted with modifications in compliance with international practice.</p> <p>iii. Proposal was carried and adopted.</p>
<p>7. <b>First Schedule: Merger Threshold Guidelines</b></p>	<p>As provided in (2) below</p>
<p>8. <b>Third Schedule: Block Exemption Guidelines.</b></p>	<p>As provided in (3) below</p>

## 2. MERGER THRESHOLD RULES (FIRST SCHEDULE)

Stakeholders' Comments	Authority's Consideration
<p><b>1. Introduction</b></p> <p>i. Proposal to delete the phrase "and the Rules".</p>	<p>i. Proposal was adopted with necessary modifications.</p>
<p><b>2. Objectives of the Guidelines</b></p> <p>i. Proposal to amend the objective to read as follows:</p> <p><i>The main objective of these Rules is to deepen transparency, predictability and</i></p>	<p>i. Proposal was adopted with necessary modifications.</p>

<p><i>accountability among the business community regarding the Authority's merger enforcement process and thereby reducing the cost of doing business and cultivating a positive investment climate.</i></p> <p>ii. Proposal to delete Rule 2 (2) (d) and replacing with a new sentence.</p>	<p>ii. Proposal was adopted.</p>
<p><b>3. Definitions</b></p> <p>i. Proposal to introduce a definition on acquiring undertaking.</p> <p>ii. Proposal to introduce a definition of the word 'Authority'.</p>	<p>i. Proposal not adopted as the definition is already included in the Competition Act and Rules.</p> <p>ii. Proposal adopted.</p>
<p><b>4. Notifiable mergers</b></p> <p>i. Proposal to re-word Rule 4 (b) thresholds.</p> <p>ii. Proposal to include the words 'in the carbon based mineral sector' in Rule 4 (c).</p>	<p>i. Proposal adopted.</p> <p>ii. Proposal adopted.</p>
<p><b>5. Excluded transactions requiring approval of the Authority</b></p> <p>Proposal to consider the target's thresholds on notifiable transactions.</p>	<p>Proposal was not adopted as the Authority's proposed thresholds were informed by the Authority's implementation experienced of the Gazetted Merger thresholds.</p>
<p><b>6. Excluded transactions not requiring approval of the Authority</b></p> <p>i. Proposal to amend the introductory</p>	<p>i. Proposal was adopted with</p>

<p>sentence of Rule 6.</p> <p>ii. Proposal to re-word Rule 6 (b).</p>	<p>necessary modifications.</p> <p>ii. Proposal was adopted with necessary modifications.</p>
<p><b>7. Determination of the relevant turnover or assets</b></p> <p>Proposal to elaborate on how figures are arrived at.</p>	<p>Proposal adopted.</p>
<p><b>8. Abandonment of a Merger</b></p> <p>Proposal to introduce a provision on abandonment of a merger and withdrawal.</p>	<p>Proposal was adopted and timelines introduced.</p>
<p><b>9. Advisory Opinions</b></p> <p>Proposal to provide for Advisory opinions to a party where they need clarity on Merger Threshold Guidelines.</p>	<p>Proposal was adopted with necessary modifications.</p>

### 3. BLOCK EXEMPTION (THIRD SCHEDULE)

Stakeholders' Comments	Authority's Consideration
<p><b>1. Introduction</b></p> <p>Proposal to rephrase Rule 1 (2) to provide that the Guidelines are not a substitute for the Act and the Competition (General) Rules, and must therefore be read in conjunction with the Act.</p>	<p>Proposal adopted with necessary modifications.</p>
<p><b>2. Objective of the Guidelines</b></p> <p>Proposal to amend the introductory statement in Rule 2.</p>	<p>Proposal adopted</p>
<p><b>3. Application</b></p> <p>i. Proposal to list the types of agreements covered under the Guidelines.</p> <p>ii. Proposal to expand block</p>	<p>i. Proposal adopted.</p> <p>ii. Proposal adopted with necessary</p>

<p>exemptions to include short term (more than 7 days but less than 30 days) continuous sporting and promotional events.</p> <p>iii. Proposal to amend the wordings in Rule 3 to align with the European Competition Commission Block Exemptions on the effects of vertical integration in competition and efficiency.</p>	<p>modifications.</p> <p>iii. Proposal not adopted as it has been elaborated in detail in the Restrictive Trade Practices Guidelines of the Competition Authority.</p>
<p><b>4. Franchise Agreement</b> Proposal to clarify in the Guidelines whether only one or all of the criteria will apply in order for a franchise agreement to be exempted.</p>	<p>Proposal adopted.</p>
<p><b>5. Market share threshold</b> Proposal to amend Rule 6 to include interbrand and intrabrand criteria of 15 per cent.</p>	<p>Proposal not adopted the Rule has already provided for the criteria in a simplified manner and therefore the proposed terms, are technical jargons which might be confusing to the public.</p>
<p><b>6. Allocation of exclusive territories</b> Proposal to re-word Rule 7.</p>	<p>The proposal was adopted with necessary modifications.</p>
<p><b>7. Tying and bundling</b> Proposal to re-word Rule 8.</p>	<p>Proposal not adopted as the Rule sufficiently addresses the issues raised.</p>
<p><b>8. Restriction on output</b> Proposal to re-word Rule 9 to provide for timelines.</p>	<p>Proposal was not adopted as this is determined on a case by case basis.</p>

<p><b>9. Advisory opinions</b></p> <p>A new sub-rule be added under this rule allowing an undertaking to approach the Authority for an advisory opinion.</p>	<p>Proposal was adopted.</p>
<p><b>10. Validity of the block exemption</b></p> <p>Proposal to clarify on the time period of 5 years validity of the block exemptions and the Guidelines.</p>	<p>Proposal was adopted to clarify the difference between the validity of the block exemption and the Guidelines.</p>