

MERGER NOTIFICATION AND PROCEDURES TEMPLATE

Kenya

IMPORTANT NOTE: This template is intended to provide introductory material. Reading the template is not a substitute for consulting the referenced statutes and regulations. If you are analyzing a particular transaction, this template should be a starting point only.

Merger notification and review materials (please provide title(s), popular name(s) and citation(s))

Notification provisions	RTP Act	
Notification forms or information requirements	Pre-merger and Takeover notification Form	
Substantive merger control provisions	Sections 29 and 70 of the RTP Act.	
Implementing regulations		
Interpretive guidelines and notices		
Annual report		

Authority or authorities responsible for merger enforcement.

Name of authority. If there is more than one authority, please describe allocation of responsibilities.	Monopolies and Prices Commission of Kenya (a department of the Ministry of Finance)	
Address, telephone and fax (including country code), e-mail, website address and languages available.	Monopolies and Prices Commission, P.O. Box 30007 Nairobi KENYA Tel : 254-2-338111 Fax : 254-2-217275 E-mail : mpc@skyweb.co.ke Website(s) : www.treasury.go.ke/monopolies.htm www.treasury.go.ke/monopolies.html	
Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.	Yes. However pre-notification consultation is not a requirement, and parties rarely request it.	

Notification requirements

Is notification mandatory pre-merger?	Yes.	
Is notification mandatory post-merger?	No. A merger without the Commission's approval is null and void.	
Can parties make a voluntary pre- or post-merger filing even if filing is not mandatory?	Yes they can.	

Covered transactions	
Definitions of potentially covered transactions If change of control is a determining factor, how is control defined? Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels? Do the notification requirements cover production joint ventures or any other type of joint venture? Are any sectors excluded from notification requirements? If so, which sectors? Are transactions that do not meet merger notification thresholds subject to substantive merger control?	<p>-Control is defined as having the mandate to make major decisions in the running of the business.</p> <p>-The majority shareholder with beneficial interest in the business and able to make major decisions.</p> <p>-Yes, partial stock acquisitions is covered, if the stock to be acquired is 50% or more of the total stock.</p> <p>-No, joint ventures automatically can merge but notification is still mandatory, so that the Competition agency can take note of changes in every industry.</p> <p>-No sectors are excluded from notification requirements. Parastatals/privatization of public companies fall within the government budgetary plans</p> <p>The agency has discretion to assess and evaluate all transactions, regardless of size. NB: We do not have thresholds in the Kenya's Competition Law. All mergers must be notified to the Commission.</p>

Thresholds for notification

What are the general thresholds? Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.

All mergers that involve 50% or more than all the assets must be notified.

To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)? Describe methodology for identifying and calculating any values necessary to determine if notification is required, including:

The amount of assets, which is necessary to determine what percentage will change ownership (since 50% or more is required for notification), are measured by the firm's calendar year or fiscal year.

i. The methodology for identifying and calculating the value of the transaction, if applicable.

Not applicable. Reference is made to the value of assets to be acquired.

ii. The methodology for identifying and calculating relevant sales or turnover, if applicable.

Not applicable. They are taken as given in the questionnaires.

iii. The methodology for identifying and calculating the value of relevant assets, if applicable.

Not applicable. Taken as given by the firms.

iv. Methodology for calculating exchange rates.

Not applicable.

Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?

To both.

How is the nexus to the jurisdiction determined? If based on an "effects doctrine," please describe how this is applied.

If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?

If there are market share tests, are there guidelines for calculating market shares?

Yes

If there are market share tests, do they apply even if there is no horizontal overlap in the parties' activities, either in the jurisdiction or worldwide?

Describe the methodology for determining relevant undertakings/firms for threshold purposes (e.g., group-wide? only the acquired entity? If based on control, how is control determined?).

Only on the acquired identity relative to its competitors in the relevant market.

Control is determined on who has the beneficial interest to make major decisions.

Are there special threshold

No

calculations for joint ventures?

Are there special threshold calculations for particular sectors (e.g., banking, airlines) or particular types of transactions (e.g. partnerships, financial investments)?

No

Transactions in which the acquiring and acquired parties are foreign
Are there special rules or exemptions

With respect to application of jurisdictional thresholds?	No	
With respect to information required (e.g. information submitted or document legalization)?	No	
With respect to waiting periods?	No	

Simplified procedures

Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, waivers, etc.).	Not applicable.	
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Timing of notification

What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive)?	No definitive agreement is required. The time must be reasonable relative to the effective date of the transaction so as to give agency time to assess and evaluate the transaction.	
Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event.	No. Only when the parties are ready and want to carry on with the transaction.	

Documents to be submitted		
Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).	<ul style="list-style-type: none"> • The most recent version of all documents constituting the merger agreement • Most recent annual report • Any document, including minutes, reports prepared for boards of directors regarding the transaction. • Proposed business plan for the new entity to be formed. 	
Are there any document legalization requirements (e.g., notarization or apostille)?	No	

Translation		
Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information, including the categories or types of documents for which translation is required, requirements for certification, language(s) accepted, and whether selected excerpts are accepted in lieu of complete documents.	Translations must be submitted together with the notification. All documents must be in English, and excerpts are not permitted.	

Review and waiting periods/Suspensive effects		
Describe any applicable review and/or waiting periods following notification, including whether closing is suspended during any initial review or waiting period and/or further review periods (i.e., second-phase proceedings).	N/A. Depends on the technicality of the case.	
Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?	Yes	

<p>Are the applicable waiting periods limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance. (e.g. request for a derogation from the bar on closing, commitment to hold separate the local business operations.)</p>	<p>N/A</p> <p>Must wait for approval. Can only proceed with the transaction after approval.</p> <p>No procedures. Must wait for clearance.</p>	
<p>Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period. Is there a statutory maximum for extensions of the review period by the authority.</p>	<p>N/A</p> <p>N/A</p>	
<p>Describe any procedures for obtaining early termination of the applicable waiting period, and the criteria and timetable for deciding whether to grant early termination.</p>	<p>N/A</p>	
<p>Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).</p>	<p>No provisions</p>	

Responsibility for notification / representation		
<p>Who is responsible for notifying – the acquiring person(s), acquired person(s), or both?</p>	<p>Both parties</p>	
<p>Do different rules apply to public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>Yes. Capital market rules and regulations.</p>	
<p>Are the parties required to appoint a joint representative?</p>	<p>No</p>	
<p>Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?</p>	<p>N/A</p>	

How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?	No. Only if the case goes to the High Court which has never happened.	

Filing fees		
Are any filing fees assessed for notification? If so, in what amount and how is the amount determined?	No filing fees. However this might be considered in future.	
Who is responsible for payment?	N/A	
When is payment required?	N/A	
What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?	N/A	

Confidentiality		
To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?	Notification is confidential. After the Minister's approval; the merger approval is published in a gazette.	
Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?	Under no circumstances do the parties access to the authority's file.	
Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?	No. Materials are restricted to the Monopolies and Prices Commission and the Minister for Finance.	
Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.	All notification materials are confidential, they are restricted to the Monopolies and Prices Commission.	
Is the agency or government a	A finalized case can be used as a reference in	

<p>party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?</p>	<p>explaining points or for clarification. (Only finalized cases can be pre-empted)</p>	
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Sanctions/penalties

<p>What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods?</p>	<p>The transaction is null and void and unenforceable in a court of Law. Parties doing so will be found guilty of an offence; liable to imprisonment for a term not exceeding three years or a fine not more than USD2700 or both.</p>	
<p>Which party/ies are potentially liable?</p>	<p>The parties involved in the merger.</p>	

Judicial review

<p>Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.</p>	<p>N/A</p>	
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Additional filings

<p>Are any additional filings/clearances required for some types of transactions, e.g., foreign investment or regulated sectors?</p>	<p>Not required; but the regulated sectors eg banking do notify the Commission about mergers in that sector; though under no obligation.</p>	
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Closing deadlines

<p>When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?</p>	<p>No</p>	
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