



## GUIDELINES

### **EXCLUSION OF PROPOSED MERGERS FROM PROVISIONS OF PART IV OF THE COMPETITION ACT, No. 12 of 2010**

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#### **A. Objective**

1. The Authority is mandated under Section 42 (1) of the Competition Act, No. 12 of 2010 (the Act) to declare any proposed merger to be excluded from the provisions of Part IV of the Act.
2. To facilitate operationalization of Section 42 (1) and also create transparency and predictability in actualization of the said Section while also deepening accountability of the Authority in its enforcement function, the Authority hereby issues the following guidelines.

#### **B. Guidelines**

3. In these guidelines:-

“assets means the value of the assets of the merging parties, including their audited accounts and those of subsidiaries and holding companies for the preceding year, and the value of assets shall be considered in lieu of turnover.

“associated exploration or production 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.

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

“excluded sector” means carbon based mineral exploration and prospecting;

“healthcare” includes hospitals, hospital management firms and health maintenance organizations;

“requisite documents” includes-

- a) copies of the audited annual accounts for the merging parties preceding three years;
- b) a signed copy of the Sale Purchase Agreement or its equivalent approved by the Authority; and
- c) relevant Board documents from the Boards of the respective parties;

“sale purchase agreement” means the agreement between the merging parties to actualize the merger transaction;

“turnover” includes the value of the annual sales turnover for the merging parties within Kenya, based on the audited accounts of the holding company, the subsidiaries and other related companies for the preceding year.

**4. Mergers meeting the thresholds set out below SHALL NOT BE CONSIDERED FOR EXCLUSION under Section 42(1) of the Act by the Authority:-**

- a) Undertakings which have a minimum combined threshold of one billion shillings and the turnover of the target undertaking is above one hundred million shillings.
- b) In the health-care sector, where the undertakings which have a minimum combined threshold of five hundred million shillings and the turnover of the target undertaking is above fifty million shillings.
- c) In the carbon based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds four billion shillings.
- d) In the oils sector, where the merger involves pipelines and pipeline systems which receive oil and gas from processing fields belonging to and passing

through the meters of, the target undertaking, even where the value of the reserves is below four billion shillings.

**5. Mergers meeting the thresholds set out below MAY BE CONSIDERED FOR EXCLUSION under Section 42(1) of the Act by the Authority:-**

- a) Any of the mergers specified in Para 4(a), where the combined turnover of the merging parties is between one hundred million shillings and one billion shillings;
  - b) In the healthcare sector, where the combined turnover of the merging parties is between fifty million shillings and five hundred million shillings.
  - c) In the carbon based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger is below four billion shillings.
  - d) Undertakings under the excluded sector;
  - e) All other undertakings not included under this Para and Para 4.
6. Undertakings may request to be considered under Para 5 and if the Authority does not inform the undertakings within fourteen days after receipt of such request including the requisite documents that the merger has been declared excluded from Part IV of the Act, the undertakings shall await determination of the Authority pursuant to Section 46 of the Act.
7. These guidelines apply from 1<sup>st</sup> August, 2013.