



# MERGER THRESHOLD RULES, 2018



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## Part A: Preliminaries

### Introduction

1. These Rules shall be known as the Merger Threshold Rules, 2018.
2. It sets out the principles for the determination of merger thresholds as provided for under section 42 (1) of the Competition Act, No. 12 of 2010.
3. These Rules are not a substitute of the Act and should be read in conjunction with the Act and the Rules. They may be revised from time to time, should need arise.

### Objectives

4. The main objective of these Rules is to deepen transparency, predictability and accountability among the business community regarding the Authority's merger enforcement process and thereby easing cost of doing business and deepening of the investment climate. Specifically, the Rules are aimed at;
  - a. providing clarity on the transactions notifiable at the national and regional levels;
  - b. identifying notifiable transactions, transactions that qualify for exclusion and transactions exempt form notification;
  - c. enhancing clarity in the calculation of the relevant turnover or assets; and
  - d. ensuring consistency in the computation of relevant merger filing fees.

### Definitions

5. **"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.
6. **"Carbon-based minerals"** means oil, natural gas or coal but does not include downstream retailing of these products
7. Other terms used in these Rules shall have the same meaning as defined in the Competition Act, No. 12 of 2010 (herein after referred to as the Act), the Competition (General) Rules, 2018 and Consolidated Guidelines on the Substantive Assessment of Mergers under the Act.

## Part B: Transactions Subject to Notification

8. Mergers meeting the thresholds set out below qualify for mandatory notification to the Authority:-

### Full mergers

- a) (i) Undertakings which have a minimum combined turnover/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.
- (ii) Notwithstanding the thresholds in a (i) above, any proposed transaction where the value of turnover/assets (whichever is higher) of the acquirer is above ten billion shillings and the merging parties are in the same market(s) and/or can be vertically integrated is notifiable to the Authority unless it meets the COMESA Merger Notification Thresholds.
- b) 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 (10) billion shillings
- c) Undertakings operating in the COMESA common market which meet the criteria set in 8(a) above and two thirds (2/3) or more of their turnover or assets (whichever is higher) is generated or located in Kenya respectively.

### Exclusions

9. Mergers meeting the thresholds set out below may be considered for exclusion under Section 42(1) of the Act by the Authority:-
- a) Where the combined turnover/assets (whichever is higher) of the merging parties is between five hundred million shillings and one billion shillings;
- b) Firms engaged in prospecting in the carbon based mineral sector irrespective of asset value.
10. Undertakings may request to be considered under Para 9 and the Authority will respond within fourteen (14) days.

## Part C: Mergers Exempt from Notification

11. The following mergers shall be exempted from notification under the Act:
- i. Mergers with combined turnover/assets (whichever is higher); of between zero and five hundred million shillings or

- ii. Mergers which meet the COMESA Merger Notification Threshold and two thirds (2/3) or more of their turnover or assets (whichever is higher), relevant in the COMESA common market is not generated or located in Kenya.

**Part D: Thresholds for Merger Filing fees**

12. The relevant merger filing fees shall be as guided below

<b>THRESHOLD (COMBINED VALUE OF ASSETS/TURNOVER (KSH))</b>	<b>FEES PER PROPOSED MERGER (KSH)</b>
<b>Zero – Five Hundred Million</b>	Zero (Exempt from notification)
<b>Five Hundred Million – One billion</b>	Zero (May be Excluded from Provisions of Part IV of the Act)
<b>One billion – Ten billion</b>	One million
<b>Ten billion – Fifty billion</b>	Two million
<b>Above Fifty billion</b>	Four million

**Part E: Determination of the relevant turnover or assets**

- 13. In determining the thresholds, the Authority shall consider combined turnover or assets, whichever is higher in Kenya
- 14. In calculating the relevant thresholds, the Authority will be guided by the undertaking’s most recent Audited Financial Statements. Where the audited financial statements made available by an undertaking are incomplete or unreliable, the Authority may determine the value of the sales or services of that undertaking by applying the internationally accepted accounting standards.
- 15. The turnover shall comprise the amounts derived by a party to a merger as revenue in the preceding financial year, from the sale of products and the provision of services, falling within the firms' ordinary activities. While the asset value of an undertaking will be based on the gross value of the firm’s assets as recorded on the firm’s most recent balance sheet.
- 16. 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; and
    - ii. Any asset received in exchange for recently divested assets, if any
  - b. The following shall be excluded in the calculation of an undertaking's asset value:
    - i. The value of those recently divested assets at the date of their divestiture; and
    - ii. Any asset that was shown on the balance sheet and was subsequently used as consideration in another recent acquisition.
  - c. The turnover shall be calculated from the date of completion of the previous transaction involving the target undertakings.
17. Trading within a company and its subsidiaries, shall be disregarded as the effect of this kind of trading is usually eliminated from the consolidated income statement. Such trading is already included in the sales revenue of one Group Company and the purchases of another.
  18. With regard to credit institutions and other financial institutions, turnover shall be the sum of the following income items; interest income and similar income; income from securities, income from shares and other variable yield securities, income from participating interests, income from shares in affiliated firms, commissions' receivable, net profit on financial operations and other operating income.
  19. For Joint Venture (JV) undertakings jointly controlled by an undertaking concerned and third parties, the JV's turnover or assets shall be attributed equally between its controlling parents, irrespective of the size of their financial or voting interests.
  20. For Investment funds, the investment company shall be deemed to have control over the various investment funds/vehicles through the General partner(s) and therefore the relevant turnover or assets to be considered is the combined turnover or assets of all the entities that the investment company has control either directly or indirectly through the various investment funds.

**Part F: Transactions notifiable to COMESA Competition Commission (CCC)**

21. Undertakings shall inform the Authority in writing when a transaction is notified to CCC.

## **Part G: Abandonment of a Merger**

22. Undertakings to a proposed merger shall notify the Authority in writing that they have abandoned the intended merger. The merger notification fee paid in respect of that merger shall be non-refundable.

## **Part H: Advisory Opinions**

23. Where it is unclear to an undertaking regarding the merger Threshold Rules, it should seek an advisory opinion from the Authority to clarify the matter.