

## ICN MERGER NOTIFICATION AND PROCEDURES TEMPLATE

### Merger Working Group

Kenya

Date

**IMPORTANT NOTE:** This template is intended to provide background on ICN jurisdiction's merger notification and review procedures.

Reading the template is not a substitute for consulting the referenced statutes and regulations.

[Please include, where applicable, any references to relevant statutory provisions, regulations, or policies as well as references to publicly accessible sources, if any.]<sup>1</sup>

<b>1. Merger notification and review materials [references to publicly accessible sources (homepage address) and indication of the languages in which these materials are available]</b>	
<b>Statutory Laws all in (English)<sup>2</sup></b>	
<b>A. Notification provisions</b>	<b>Part IV of the Competition Act, No. 4 of 2010 (the Act)</b>
<b>B. Substantive merger review Provisions</b>	<b>Section 46 of the Act</b>
<b>C. Implementing regulations</b>	<b>The Competition General Rules, 2019, Consolidated Guidelines on Merger</b>
<b>D. Notification forms or information requirements</b>	<b>Merger Notification Form, Confidentiality Claim Form</b>
<b>Interpretative Guidelines and Notices</b>	
<b>E. Guidance on Merger Notification Process [e.g., information on calculation of thresholds, etc.]</b>	<b>Merger Threshold Guidelines</b>

<sup>1</sup> Editor's note: all the comments in [square brackets] are intended to assist the agency when answering this template but will be removed once the completed template is made public.

<sup>2</sup> <https://www.cak.go.ke/mergers/overview>

<b>F. Guidance on Substantive Assessment in Merger Review</b> [Please include reference separately, if applicable]	<b>Consolidated Guidelines on Substantive Assessment of Mergers<sup>3</sup></b>
<b>G. Has your agency published guidelines or directives on notification of mergers involving specific sectors (e.g., digital economy)? [If affirmative, please provide references and languages available]</b>	No
<b>H. Other relevant notices, policy statements, interpretations, rules, or guidance on aspects of merger review or the agency's decision-making process</b>	The Competition General Rules 2018

<b>2. Agency (or Agencies) responsible for merger enforcement. COMPETITION AUTHORITY OF KENYA</b>	
<b>A. Name of the Agency which reviews mergers. If there is more than one agency, please describe the allocation of responsibilities.</b>	Competition Authority of Kenya – <b>Mergers and Acquisitions Department</b>
<b>B. Contact details of the agency [address and telephone including the country code, email, website address and languages available on the website]</b>	The Competition Authority of Kenya, Kenya Railways Hq's Block "D" Ground Floor Workshop Road Off Haile Selassie Avenue P.O. Box 36265-00200 City Square Nairobi Kenya. Telephone +254-20-2628233 Email:info@cak.go.ke
<b>C. Is agency staff available for jurisdiction/filing guidance? [If yes, please provide contact points for questions on merger filing requirements and/or consultations]</b>	Yes, any merger staff.

<b>3. Covered transactions</b>
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<sup>3</sup> <https://www.cak.go.ke/sites/default/files/guidelines/Consolidated%20Merger%20Guidelines.pdf>

<b>A. Thorough definition of potentially covered transactions [i.e., share acquisitions, asset acquisitions, mergers, de-mergers, consolidations, consortia, amalgamations, joint ventures or other forms of contractual relationships, such as partnerships and alliance agreements]</b>	All forms of business combination where transaction will lead to change in control.
<b>B. What is the geographic scope of transactions covered?</b>	<b>Depend on the extend of Geographical substitutability but largely national</b>
<b>C. If change of control is a determining factor, how is control defined and interpreted in practice?</b>	Acquisition of more than 50% shares, interest, share capital, material influence, entitlement to majority votes in board meeting.....
<b>D. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels? Are acquisitions of assets ever covered? If so, do the assets have to form a free-standing business or can the combination of the assets with the business of the acquirer be considered in order to have jurisdiction? Does the authority have jurisdiction over “bare” asset purchases, e.g. where the assets purchased do not relate to the acquirer’s existing business?</b>	Yes, Acquisition of assets are covered, both free standing business or combination. The Authority has jurisdiction where assets purchased do not relate to the acquirer’s existing business (conglomerate transactions)

<b>4. Thresholds for notification</b>	
<b>A. What are the general thresholds for notification? [If the thresholds are subject to adjustment, state on what basis and how frequently (e.g., for inflation, annually)]</b>	The general thresholds are combined turnover or assets whichever is higher. The thresholds are not subject to adjustment.
<b>B. To which entities do the merger notification thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?</b>	In case of the acquirer, the holding/parent company(all subsidiaries) while for the target, it’s the entity subject to acquisition(incase a holding company, only the subsidiary/ies to be sold)

<p><b>C. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an “effects doctrine”, please describe how this is applied in practice. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?”</b></p>	<p><b>Both sales and assets whichever is higher. National sales are relevant and based on location of customer.</b></p>
<p><b>D. Can a single party trigger the notification threshold (e.g., one party’s sales, assets, or market share)?</b></p>	<p><b>Yes.</b></p>
<p><b>E. Are any sectors excluded from notification requirements? If so, which sectors? 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)?</b></p>	<p><b>No sectors are excluded.  Most recent audited financial statements</b></p>
<p><b>F. Are there special threshold calculations for specific sectors (e.g., banking, airlines, media, digital markets) or specific types of transactions (e.g., joint ventures, partnerships, financial investments)? If yes, for which sectors and types of transactions?</b></p>	<p><b>Yes, in the carbon based mineral sector.</b></p>
<p><b>G. Are there special rules or exceptions/exemptions regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign (foreign-to-foreign transactions)? [Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or the relevant assets]</b></p>	<p><b>Yes, where a transaction involves COMESA and Kenyan jurisdiction and more than 2/3rds of turnover is outside Kenyan jurisdiction, the transaction is filed at COMESA.</b></p>
<p><b>H. Does the agency have the authority to review transactions that fall below the thresholds or otherwise do not meet</b></p>	<p><b>No, they are exempted from notification.</b></p>

notification requirements? If so, what is the procedure to initiate a review? [Describe methodology for calculating exchange rates]	
I. Are current notification criteria catching relevant transactions related to digital markets?	Yes

**Calculation Guidance and related issues**

J. If thresholds are based on any of the following values, please describe how they are identified and calculated to determine if notification is required: i) the value of the transaction; ii) the relevant sales or turnover; iii) the relevant assets; iv) market shares; v) other (please describe).	i) No. ii) Yes, through most recent audited financial statements. iii) Yes, through most recent audited financial statements. iv) No. v) N/A
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K. Which entities are included in determining relevant investment funds for threshold purposes? If based on control, is the definition of control in these cases any different from the definition of control in general (question 3C)? If yes, how?	The Authority does not calculate thresholds based on investment funds. It is entirely guided by the assets and turnover figures indicated in the audited financial statements
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L. In case an investment fund is part of a transaction, are its controllers required to present turnover information related to other funds under same manager (general partner) control? Are those other funds considered as part of the transaction for turnover purposes?	Yes,
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M. Describe the methodology applied for currency conversion [e.g. which exchange rates are used].	Exchange rate as per the Central Bank of Kenya data
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**5. Pre-notification**

A. If applicable, please describe the pre-notification procedure and whether it can be mandatory or not [e.g., time limits, type of guidance given, etc.].	No time limit. Parties may seek to have pre notification guidance and discuss issues of the case(s) for clarity.
B. If applicable, what information or documents are the parties required to submit to the agency during pre-notification?	Information regarding the transaction.

<b>6. Notification requirements and timing of notification</b>	
A. Is notification mandatory? [Please describe if notification is mandatory in pre-notification phase, post-merger or voluntary]	If parties decide to go ahead with the transaction, notification is mandatory.
B. If parties can make a voluntary merger filing when may they do so?	Upon signing of the form of agreement relevant to the transaction
C. 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?)	As soon as all required documents are available including agreement.
D. When must notification be made? If there is a triggering event, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?	N/A
E. If there is a notification deadline, can parties request an extension for the notification deadline? If yes, please	N/A

describe the procedure and whether there is a maximum length of time for the extension.	
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<b>7. Simplified Procedures</b>	
A. Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain information requirements, etc.).	N/A
B. Describe the criteria adopted to consider a transaction under the simplified procedure.	N/A

<b>8. Information and documents to be submitted with a notification</b>	
A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents, internal documents).	Agreement, Audited Financial Statements (3 most current years), Board Resolutions, Merger Notification Forms, Marketing/Sales documents
B. Is there a distinction between tangible and intangible (e.g., customer portfolio, data on consumers, etc.) assets in the description of the transaction? [In respect to digital markets, state if the agency considers the amount of user data the companies have, and which will be passed on in the transaction]	Yes, the Authority considers data a crucial component of a digital related transaction and may either look at it as an asset or a public interest issue depending on the dynamics of the transaction.
C. Are documents proving the efficiencies of the transaction required? [If applicable, please provide the type of documents normally required]	Yes, write-up on how the merging parties are going to realize efficiencies and how consumers will benefit.

D. What information is required in case the target company is experiencing financial insolvency?	Its financial performance and reasons especially where other players in the same sector as the failing firm are not experiencing the same problem.
E. Is there a specific procedure for obtaining information from target companies in the case of hostile/ unsolicited bids?	No, just through Merger Notification Form, interviews and submissions.
F. Are there any document legalization requirements (e.g., notarization or apostille)? What documents must be legalized?	Affidavit incase a party claims that some required information is not available.
G. What are the agency's rules and practice regarding exemptions from information requirements (e.g., information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign (foreign-to-foreign transaction)?	N/A
H. Can the agency require third parties to submit information during the review process? Can third parties voluntarily submit information or otherwise contact the agency to intervene?	Yes
I. Are parties allowed to submit information beyond what is required in the initial filing voluntarily (e.g., to help narrow or resolve potential competitive concerns)?	Yes
J. Are there different forms for different types of transactions or sectors?	No



<p><b>K. With respect to investment funds:</b></p> <p><b>i) Is it requested that an investment fund taking part in a transaction provide a statement that its controllers do not manage any other investment funds in the same relevant market?</b></p> <p><b>ii) Should an investment fund be controlled by an entity that is also responsible for other funds in the same relevant market, are such funds considered part of the transaction? Is it requested that the controlling entity provide market information (e.g., market share) related to the other funds it manages and which are in the same relevant market?</b></p> <p><b>iii) Should there be no classic concentration, is there any sort of exemption regarding presenting certain information requested in the form?</b></p>	<p>Yes, the Authority explains to the parties the doctrine of single economic entity and the structure of entities with a managing partner for clarity.</p> <p>Yes, to the extent the transaction is likely to lead to acquisition of or enhancement of a dominant position in the relevant market(s)</p> <p>Yes, Parties are only required to fill certain schedules of the Merger Notification Forms where there is not likely to be concentration.</p>
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<b>9. Translation</b>	
<b>A. In what language(s) can the notification forms be submitted?</b>	English
<p><b>B. Describe any requirements to submit translations of documents:</b></p> <p><b>i) with the initial notification; and</b></p> <p><b>ii) later in response to requests for information.</b></p> <p><b>In addition:</b></p> <p><b>iii) what are the categories or types of documents for which translation is required;</b></p>	N/A

<p>iv) what are the requirements for certification of the translation;</p> <p>v) which language(s) is/are accepted; and</p> <p>vi) are summaries or excerpts accepted in lieu of complete translations and in which languages are summaries accepted?</p>	
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<b>10. Review Periods</b>	
<b>A. Describe any applicable review periods following notification.</b>	<b>Within sixty days after the date of receipt/complete information of the transaction.</b>
<b>B. Are there different rules for public tenders (e.g., open market stock purchases or hostile bids)?</b>	<b>NO</b>
<b>C. What are the procedures for an extension of the review periods, if any? Do requests for additional information suspend or re-start the review period?</b>	<b>YES</b>
<b>D. Is there a statutory or other maximum duration for extensions?</b>	<b>NO</b>
<b>E. Does the agency have the authority to suspend review periods? Does suspending a review period require the parties' consent?</b>	<b>NO</b>
<b>F. What are the time periods for accelerated review of non-problematic transactions, if any?</b>	<b>30 days</b>

<b>G. If remedies are offered, do they impact the timing of the review?</b>	<b>Sometimes</b>
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<b>11. Waiting periods / suspension obligations</b>	
<b>A. Describe any waiting periods/suspension obligations following notification (e.g., full suspension from implementation, restrictions on adopting specific measures) during any initial review period and/or further review period.</b>	<b>N/A, implementation is immediate after approval.</b>
<b>B. Can parties request a derogation from waiting periods/suspension obligations? If so, under what circumstances?</b>	<b>N/A</b>
<b>C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the agency's jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent can the parties implement the transaction outside the agency's jurisdiction prior to clearance (e.g., through derogation from suspension, hold separate arrangements)?</b>	<b>N/A</b>
<b>D. Are parties allowed to close the transaction if no decision is issued within the statutory period?</b>	<b>A transaction is assumed as implemented where no decision is issued within the statutory period.</b>
<b>E. Describe any provisions or procedures available to the enforcement agency, the parties and/or third parties to extend the waiting period/suspension obligation.</b>	<b>In-case of incomplete information and if it is required to seek for more information through investigations.</b>

F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.	N/A
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G. Describe any provisions or procedures allowing the parties to close the transaction 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).	N/A
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<b>12. Responsibility for notification / representation</b>	
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A. Who is responsible for notifying – the acquiring company (ies), acquired company (ies), or both? Does each party have to make its own filing?	YES
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B. Do different rules apply to public tenders (e.g., open market stock purchases or hostile bids)?	NO
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C. 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)?	NO
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D. 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?	The declaration (Part IV of the Merger Notification Form) <b>MUST</b> be signed and stamped, where parties do not have some information, they must provide affidavit. Yes
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<b>13. Filing fees</b>	
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<b>A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)? [Please provide the amount in local currency and in USD as of December 31<sup>st</sup>, 2020]</b>	<b>Yes Depends on the combined turnover or assets of the parties whichever is higher. Minimum (Ksh 1million), maximum (Ksh 4million)</b>
<b>B. Who is responsible for payment?</b>	<b>Parties are free to decide whether it is the acquirer or the target to pay.</b>
<b>C. When is payment required?</b>	<b>When filing a transaction.</b>
<b>D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?</b>	<b>Cheques, direct deposit to the Authority's account or wire transfer.</b>

<b>14. Process for substantive analysis and decisions [Please give a brief summary and provide information on relevant Guidance papers]</b>	
<b>A. What are the key procedural stages in the substantive assessment (e.g., screening mergers, consulting third parties)?</b>	<b>Screening mergers, consulting third parties and regulators and interested parties.</b>
<b>B. What merger test does the agency apply (e.g., dominance test or substantial lessening of competition test)?</b>	<b>Substantial lessening of competition test.</b>
<b>C. What theories of harm does the agency consider in practice?</b>	<b>Foreclosure, abuse of market power.....</b>
<b>D. What are the key stages in the substantive analysis? Does this differ depending on the type of transaction (e.g., joint venture)?</b>	<b>Analysis of market structure and concentration, entry and exit barriers and public interest.</b>

E. Are non-competition issues ever considered (in practice or by law) by the agency? If so, can they override or displace a finding based on competition issues?	Yes, public interest issues. No
F. What are the possible outcomes of the review (e.g., unconditional/conditional clearance, prohibition, etc.)?	Unconditional, conditional or prohibition
G. What types of remedies does the agency accept? Is there a preference on any particular type of remedies? How is the process initiated and conducted?	Structural and behavioral.

<b>15. Confidentiality</b>	
A. To what extent, if any, does the agency make public the fact that a premerger notification filing was made or the contents of the notification? If applicable, when is this disclosure made?	N/A
B. Do notifying parties have access to the agency's file? If so, under what circumstances can the right of access be exercised?	NO
C. Can third parties or other government agencies obtain access to notification materials and any other information provided by the parties (including confidential and non-confidential information)? If so, under what circumstances?	Yes, if sanctioned by a Court of law

D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.	YES
E. Can the agency deny a party's claim that certain information contained in notification materials is confidential? Are there procedures to challenge a decision that information is not confidential? If so, please describe.	Yes, where the information claimed to be confidential is publicly available in any form including in the internet.
F. Does the agency have procedures to provide public and non-public versions of agency orders, decisions, and court filings? If so, what steps are taken to prevent or limit public disclosure of information designated as confidential that is contained in these documents?	NO

<b>16. Transparency</b>	
A. Does the agency publish an annual report with information about mergers? Please provide the web address if available.	Yes, <a href="http://www.cak.go.ke">www.cak.go.ke</a>
B. Does the agency publish press releases related to merger policy or investigations/reviews? If so, how can these be accessed (if available online, please provide a link)? How often are they published (e.g., for each decision)?	NO
C. Does the agency publish decisions on why it challenged, blocked, or cleared a transaction? If available online, provide a link. If not available online, describe how one can obtain a copy of decisions.	YES

E. Does the agency publish statistics or the number of annual notifications received, clearances, prohibitions, etc.? [if applicable, please provide a link for these figures]	YES, contained in the Authority's annual report.
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<b>17. Cooperation</b>	
A. Is the agency able to exchange information or documents with international counterparts?	Yes (information)
B. Is the agency or government a 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?	The Agency. Memorandum of Understanding.
C. Does the agency need consent from the parties who submitted confidential information to share such information with foreign competition authorities? If the agency has a model waiver, please provide a link to it here, or state whether the agency accepts the ICN's model waiver of confidentiality in merger investigations form.	The Authority shares general information regarding competition not specific/confidential information.
D. Is the agency able to exchange information or documents with other domestic regulators?	Yes

<b>18.Sanctions/penalties</b>	
A. What are the sanctions/penalties for: i) failure to file a notification; ii) incorrect/misleading information in a notification; iii) failure to comply with information requests;	i) Maximum of 10% of the party's turnover. ii) Can lead to invalidation of approval previously granted based on the misleading information iii) Delay in clearing the transaction.



iv) failure to observe a waiting period/suspension obligation; v) breach of interim measures; vi) failure to observe or delay in implementation of remedies; vii) implementation of transaction despite the prohibition from the agency?	iv) N/A v) N/A vi) Imprisonment or administrative fine vii) 10% of turnover
B. Which party/ies (including natural persons) are potentially liable for each of A(i)-(vii)?	Board of directors
C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.	Can impose directly
D. Are there any recent or significant fining decisions?	Yes.

<b>19. Independence</b>	
A. Is there possibility for any ministry or a cabinet of ministries to abrogate, challenge or change merger decisions issued by the agency or by a court? If yes, to which merger decisions does this apply (e.g., any decision, prohibitions, clearances, remedies)?	NO
B. What are the grounds for such ministerial intervention?	N/A
C. Please provide any description or guidance regarding the ministerial intervention process and procedures [If applicable]	N/A

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<b>20. Administrative and judicial processes/review</b>	
<b>A. Describe the timetable for judicial and administrative review related to merger transactions.</b>	<b>No particular or specific timetable judicial process. The Authority is required to notify the parties of the Authority's decision within 15 days of complete filing</b>
<b>B. Describe the procedures for protecting confidential information used in judicial proceedings or in an appeal/review of an agency decision.</b>	<b>Staff sign code of conduct which contains secrecy of information that is obtained in the line of duty.</b>
<b>C. Are there any limitations on the time during which an appeal may be filed?</b>	<b>Yes. The Tribunal requires that parties launch their appeal 30 days upon gazettelement of the decision</b>

<b>21. Additional filings</b>	
<b>A. Are any additional filings/clearances required for some types of transactions (e.g., sectoral or securities regulators or national security or foreign investment review)?</b>	<b>NO</b>

<b>22. Closing Deadlines</b>	
<b>A. When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized? If yes, can the parties obtain an extension of the deadline to close?</b>	<b>NO</b>

<b>22. Post Merger review of transactions</b>
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<p><b>A. Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?</b></p>	<p><b>YES,</b>  <b>There are no set time limits. However, the Authority must act within the timelines under which the remedies indicated in the approval are still active</b></p>
<p><b>B. Does the agency publish studies regarding ex-post analysis of reportable transactions which have been cleared by the agency? Are these studies publicly available? How does the agency obtain data for carrying out these studies?</b></p>	<p><b>NO, The Authority publishes a brief non-confidential nature of the proposed transaction in its annual reports</b>  <b>NON</b></p>