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Guide to Kenyan Merger Control: 2025

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LEGISLATIVE FRAMEWORK

Competition Act No. 12 of 2010 (“**Act**”)

Competition (General) Rules, 2019 (“**Rules**”)

RELEVANT COMPETITION AGENCIES

Competition Authority of Kenya (“**CAK**”)

Competition Tribunal (“**Tribunal**”)

WHAT IS A “MERGER”?

The Act defines a ‘merger’ as:

“an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.”

Section 41(2) of the Act confirms that a merger may take several forms, including the acquisition or lease of shares or the acquisition of a ‘controlling interest’ in a business of an undertaking which is capable of being operated independently.

WHAT IS “CONTROL”?

Section 41(3) of the Act provides that a firm controls another where it:

- (a) beneficially owns more than 50% of the issued share capital, business or assets of the other firm;
- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to directly or indirectly control the voting of a majority of those votes;
- (c) is able to appoint, or to veto the appointment of, a majority of the directors of the other firm;
- (d) is a holding company, and the other firm is a subsidiary of that company as contemplated in the Companies Act, 2015;
- (e) in the case of the other firm being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- (f) in the case of the other firm being a nominee undertaking, owns the majority of the

members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

- (g) has the **ability to materially influence the policy of the other firm** in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Paragraph (g) makes it clear that even a minority shareholder (or an acquisition of a minority shareholding) may result in that shareholder having or acquiring 'control' over a firm, necessitating an assessment of the relevant merger thresholds.

MERGER THRESHOLDS

Mergers which meet any of the following thresholds shall be notified to the CAK:

Mandatorily Notifiable Transactions	
i.	Acquirer and Target have a combined turnover or asset value in Kenya (whichever is higher) of $\geq$ KES 1 billion. <u>and</u> Target has a turnover or asset value in Kenya (whichever is higher) of $\geq$ KES 500 million;
ii.	Where the turnover or assets in Kenya (whichever is higher) of the Acquirer is above KES 10 billion <u>and</u> the merging parties are in the same market or can be vertically integrated, unless the transaction meets the COMESA Competition Commission Merger Notification Thresholds;
iii.	If 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 KES 10 billion;
iv.	where the undertakings operate in COMESA, if two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya.

TRANSACTIONS EXCLUDED FROM MANDATORY NOTIFICATION

Transactions ‘excluded from notification’ are separated into two categories: (i) those requiring prior approval from the CAK; and (ii) those not requiring prior approval from the CAK.

Excluded transactions requiring prior approval from CAK	
i.	Where the combined turnover or assets (whichever is higher) of the merging parties is between KES 500 million shillings and KES 1 billion; or
ii.	If the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.

Excluded transactions not requiring prior approval from CAK	
i.	The merger takes place wholly or entirely outside of Kenya and has no local connection;
ii.	The combined turnover or assets (whichever is higher) of the merging parties does not exceed KES 500 million; or
iii.	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.

MERGER FILING FEES

Combined turnover and/or asset value (whichever is higher) (KES)	Filing fee (KES)
0 – 500 million	N/A (excluded transaction not requiring approval from CAK)
500 million (and one) – 1 billion	Nil (excluded transaction requiring prior approval from CAK)
1 billion (and one) – 10 billion	1 million
10 billion (and one) – 50 billion	2 million
50 billion and above	4 million

ARE FOREIGN-TO-FOREIGN MERGERS NOTIFIABLE?

Yes, mergers occurring outside of Kenya must be notified if it results in the change of control and the relevant merger thresholds requiring prior notification are met.

SUSPENSORY OR NON-SUSPENSORY MERGER REGIME?

Parties are prohibited from implementing a merger transaction prior to receiving clearance from the CAK and any sector specific regulators.

PENALTIES FOR FAILURE TO NOTIFY

A financial penalty not exceeding 10% of the merging parties preceding years’ gross annual turnover in Kenya may be imposed for a failure to notify.

Additionally, the prior implementation of a transaction amounts to an offence in terms of the Act and may result in a term of imprisonment not exceeding five years, a fine not exceeding KES 10 million, or both.

WHAT IS THE SUBSTANTIVE TEST USED TO ASSESS A MERGER?

The CAK reviews a notified transaction by conducting both a competition and public interest test.

Importantly, the public interest test is weighted equally to the competition test and, in this regard, an otherwise pro-competitive or competitively benign merger may still be prohibited if it results in a significant adverse effect on the public interest.

The relevant factors for each test include:

Competition Test	Public Interest Test
the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;	the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a	the extent to which the proposed merger would be likely to affect employment;

Competition Test	Public Interest Test
market;	
the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;	the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
	the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and
	any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

TIMING OF THE MERGER REVIEW PROCESS

The CAK must consider and make a determination of a transaction within:

- (a) 60 days from the date on which the notification was received by the CAK after receipt of all required information; or
- (b) if the CAK requests further information from the merger parties, in accordance with section 43(2) of the Act, within 60 days of the CAK receiving such information; or
- (c) if the CAK determines that a hearing conference is required, it must decide so within 60 days of being notified of the transaction or having received additional information from the merging parties. The CAK must, thereafter, make its determination within 30 days of the conference.

Where the CAK is of the opinion that the timelines above are unfeasible due to complexities of a particular transaction, the CAK shall, before expiry of the period and with notice in writing to the undertakings, extend the period for a further period not exceeding 60 days.

ARE THERE APPEAL PROCEDURES?

Yes, an appeal against the decision of the Authority can be made to the Competition Tribunal, provided it is made within 30 days from the day notice is given by the Authority in the Kenya Gazette.

If the Authority or aggrieved parties wish to appeal the decision of the Tribunal, they may appeal to the High Court of Kenya, provided the appeal is made within 30 days from the day the Tribunal gave notice of its decision being filed.

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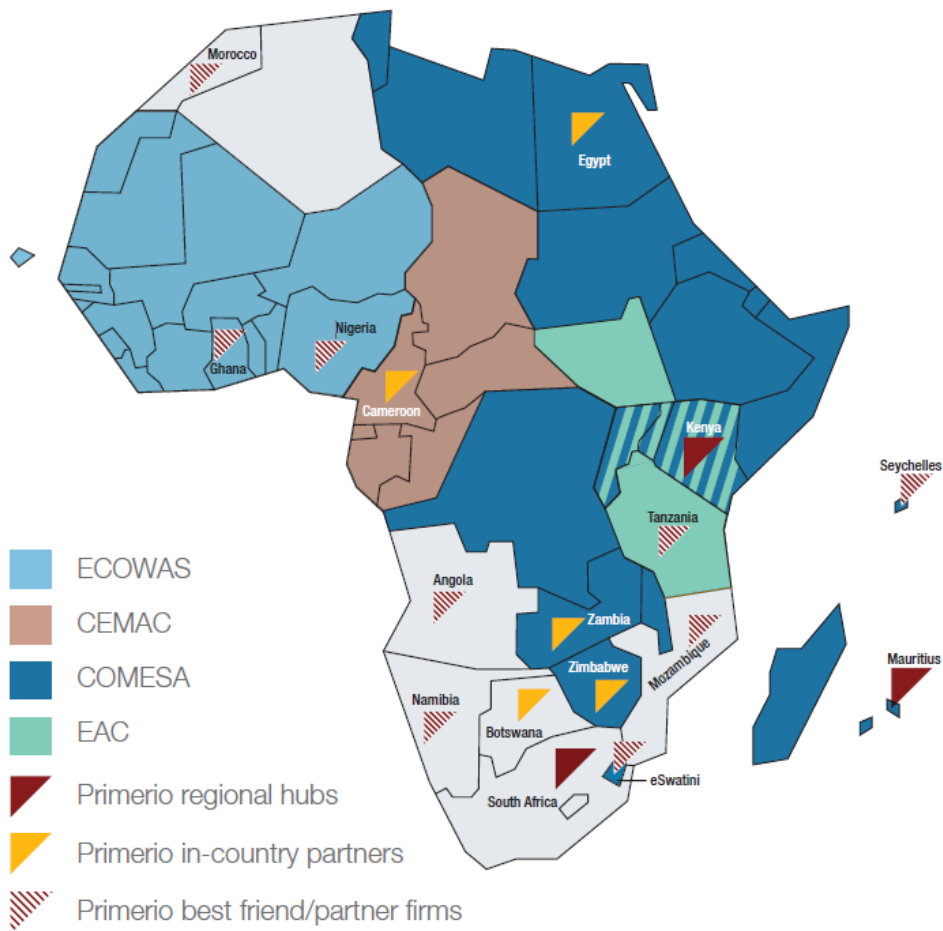
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About Primerio

Primerio is a Pan-African law firm with on-the-ground personnel specialising in core competencies, and strategically positioned regional hubs across the Continent. Primerio’s practitioners work intimately with clients to navigate an increasingly complex legal landscape to deliver commercially oriented legal advice and counselling.

With three regional hubs in South Africa, Mauritius and Kenya, and a network of dedicated in-country partners in key strategic locations across the continent, Primerio delivers seamless, cost-effective, and high-quality legal advice across Africa, with highly competent, experienced professionals and a combination of decades of experience.





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