



## PUBLIC INTERESTS TEST IN MERGER DETERMINATIONS

---

### A. Objective

1. The following guidelines have been developed in order to provide clear criteria regarding Public Interest Test (PIT) in Mergers' determinations under the Competition Act No. 12 of 2010.
2. The main object is to deepen transparency and predictability in the merger enforcement process. This is expected also to enhance accountability in the Authority's decision making, under the PIT, premised on the fact that the Test is quite expansive and hence it may motivate different interpretations or misinterpretations. By explicitly highlighting the parameters the Authority shall be considering during the merger enforcement process, in regard to the PIT, the guidelines endeavor to insulate the Authority from the risks of commission, omission or ambiguity.
3. The guidelines have been informed by international best practice and also Case Law of mainly Commonwealth jurisdictions.
4. Nonetheless, and most importantly, the parameters encapsulated in the guidelines are premised on the Kenya Government's overall economic Agenda as articulated in the *Vision 2030* and as cascaded in the current Medium Term Plan for the Vision. In summary, the two documents visualize a competitive economy, globally, and to paraphrase, with shared prosperity. This is also the Vision of the Authority.
5. To achieve the above, the guidelines take cognizant of the need to enhance and sustain employment, of both human and capital resources, through supporting (i) measures to ensure no substantial job losses occur as a result of mergers; (ii) salvaging of failing and dormant firms, and; (iii) also,

encouraging mergers of media firms that will enhance production of local content/programmes and thereof support youth employment. In addition, mergers involving Small and Medium Enterprises (SMEs) will fast-tracked as an initiative of enhancing their capacity to penetrate certain markets in order to offer credible competition and enhance employment.

6. The guidelines also aim at supporting the export market, to facilitate expansion of Kenya's foreign exchange earnings, through making the local firms more competitive in the international market.
7. However, to ensure the vulnerable members of the society are not affected as a result of mergers, sectors which have high impact on the poor will have in-depth scrutiny. This will include mergers concerning utilities.
8. In addition, the guidelines are predicated upon the need for media plurality. This is aimed at ensuring that no media house should and will be allowed, through mergers, to control and manipulate the media output to the detriment of public interest.

## **B. Guidelines**

9. In its determination of mergers, the Authority shall take into account both the Substantial Lessening of Competition (SLC) and the PIT.
10. SLC criteria shall basically focus on economic efficiency and consumer benefits issues. This includes the extent to which the merger would likely prevent or lessen competition or restrict output; lead to acquisition or strengthening of dominance position in a market, and; minimize efficiency in production and distribution.
11. The PIT shall consider the extent to which a merger would affect: - employment; ability of SMEs to gain access or to be competitive in any market; ability of national industries to compete in international markets and a particular industrial sector, and; salvaging of dormant and failing firm.

12. The Authority's determination in regard to public interest will be determined on a Case-by-Case basis.
13. However, parties are expected to provide a definitive analysis of the impact of the merger on employment. In order to satisfy the Authority, the parties must show that: -
  - (i) A rational process has been followed to arrive at the determination of the number of jobs to be lost. That is, the reason for the job reduction and the number of jobs proposed to be lost are rationally connected, and;
  - (ii) The public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognizable under the Act.
14. The Authority shall consider efficiency argument for substantial job losses, if they are justified on a ground that is public in nature to countervail the public interest in preserving jobs. Thus although a party may be able to demonstrate that employment loss is rationally connected to an efficiency claim this would on its own not be sufficient if the efficiency gain is private one.
15. The Authority's position is that a gain to shareholders is purely private.
16. Nonetheless, the Authority will always balance the merger efficiencies and the impact of the retrenchments on the public interest.
17. The Authority will focus on stability of individual industrial sectors by ensuring stability and growth. Therefore, a party acquiring another, especially where dominance is evident, and there exists no other plausible acquirer, may be approved on conditions that they continue manufacturing the products of the party acquired for a period to be based on the time which new entry in the said market is feasible.

18. The Authority may require the acquirer to invest substantially in R&D in the sector. This is in order to introduce choices, at reduced costs for the consumers.
19. Also, the Authority may approve the merger with conditions to achieve all the commitments the parties presented in their merger application, especially the ones detailing capacity and products expansion in the sector.
20. As an initiative to encourage media plurality, diversity and production of local content, the Authority shall consider whether any intended merger, over and above the SLC test, affects:-
  - (i) The strength and competitiveness of media business indigenous to Kenya;
  - (ii) The extent to which ownership or control of media businesses in Kenya is spread amongst individuals and other undertakings.
  - (iii) The extent to which the diversity of the local content is reflected through the activities of the various media business. This is aimed at supporting local production, hence increased employment, especially for the youth.
21. Mergers aimed at exports will be under relatively less SLC scrutiny so long as they do not have buyer-power to distort competition to the detriment of their suppliers, especially the local ones.
22. Mergers involving a failing firm, a dormant firm and also a firm under receivership will be fast-tracked, with the aim of saving jobs and choice for consumers.
23. The Authority shall consider any mergers involving utilities companies with utmost scrutiny under both SLC and PIT.
24. Nonetheless, the Authority will always determine remedies in regard to public interest on 'Case-by-Case' basis and shall apply, if need be, conditions that are rational, proportionate and enforceable.

