



PUBLIC NOTICE

PROPOSED EXEMPTION APPLICATION FEES BY THE COMPETITION AUTHORITY OF KENYA

The Competition Authority of Kenya (CAK) is a State Corporation established by Section 7 of the Competition Act, No. 12 of 2010 (the Act) of the Laws of Kenya to enhance the welfare of the people of Kenya by, among others, promoting and protecting effective competition and preventing misleading market conduct.

CAK, under section 78(1)(c) and (e) of the Act is mandated to collect fees and penalties and all other payments due to CAK in respect of any matter incidental to its functions. Further, pursuant to section 78(3) of the Act, CAK is mandated to make rules prescribing filing fees and other fees to be paid by persons in connection with procedures of the Authority.

Therefore, IN EXERCISE of powers conferred by section 78(3) of the Act, CAK intends to introduce fees in respect to exemption applications under sections 25, 28 and 29 of the act.

For more information, kindly refer to "Guidance on proposed exemption application filing fees by the Competition Authority of Kenya" available on CAK's website (www.cak.go.ke), or contact Mr. Gideon Mokaya, Manager Enforcement and Compliance on +254 20 2628233 / 254 20 2779000 or gmokaya@cak.go.ke

The purpose of this Notice therefore, is to invite members of the Public and stakeholders to submit comments on the proposed exemption application fees.


The proposals/comments should be delivered within thirty (30) days of the publication of this Notice through either of the following channels.

1. Email:

info@cak.go.ke;

2. P.O. Box 36265 – 00200
Nairobi; or

3. Hand delivered to our offices at
Kenya Railways Headquarters,
Block 'D', Ground floor.



Wang'ombe Kariuki
Director General



GUIDANCE ON PROPOSED EXEMPTION APPLICATION FILING FEES BY THE COMPETITION AUTHORITY OF KENYA

A. Introduction

1. Section 25 of the Competition Act (the Act) provides that the Authority may upon application by an undertaking or association of undertakings grant exemptions in relation to any agreement or practice prohibited under section 21 and 22 of the Act, respectively. Similarly, sections 28 and 29 of the Act provides for application for exemption for agreements on Intellectual Property Rights and Professional Associations, that have the effect of preventing, distorting or lessening competition in the market, respectively.
2. Further, section 30 of the Act has given the Authority the power, with the approval of the Cabinet Secretary, to exclude any category of decisions, practices or agreements by or between undertakings.

B. Jurisdiction

3. Section 78 (c) and (e) of the Act mandates the Authority to fund its activities through collection of fees and penalties and all other payments due to the Authority in respect of any matter incidental to its functions.
4. Further, pursuant to section 78(3) of the Act, the Authority is mandated to make rules prescribing filing fees and other fees to be paid by persons in connection with procedures of the Authority.
5. The Authority therefore proposes to implement exemption application fees with the objective of recouping part of the costs incurred in evaluating exemption applications.
6. These guidelines have informed by international best practices including exemption review regimes from other jurisdictions, and a review of past exemption applications in Kenya.

C. Types of Exemption Fees

7. Internationally, exemption fees are based on different scales such as size of applicants, cost incurred and time taken to review exemption application and complexity of the exemption. These fees are broadly categorized into;

a. Flat fees

8. Flat fees refer to a uniform charge for service at the time of filing. This type of fees has the advantages of objectivity, up-front certainty for parties and ease of administration by agencies. However, it does not bear any correlation to the transaction's size or complexity. It is being used in Australia.

b. Fee for service

9. Filing fees may be charged on a straight "fee for service" basis, pursuant to which the fee directly reflects the amount of time the agency spends reviewing the exemption application. The total filing fee therefore dependent on the number of hours the Agency spends reviewing the file.
10. The main advantage of the fee for service approach is that the fee is related to the cost of assessing the particular exemption application. However, the disadvantage is that parties may not know the actual amount of fee they should pay when they apply for exemption, administration may be more burdensome for the agency.

c. Tiered fees based on complexity

11. This applies in jurisdictions a tiered fee system where transactions are classified as simple or complex. The advantage of this type of fees is that it is perceived fairer as the fee is directly related to the work involved in reviewing the transaction. The disadvantage it has potential for disagreement about the classification of a transaction and uncertainty about the level of the fee at the time of filing.

d. Tiered fees based on size of transaction/size of revenues

12. A tiered fee structure is based on transaction size or on the volume of the parties' revenues in the jurisdiction. The advantage of this type of fees is that the fee may be perceived as a fairer to the extent that there may be a correlation between the size (revenues) of the parties and the resources the Authority is likely to expend in reviewing the exemption application. In addition, tiered fees have the advantage of appearing to be based on the parties' ability to pay, and therefore to be less likely to inhibit exemption applications.

D. Proposed Exemption Application Fees Regime in Kenya

13. The Authority incurs the following costs in evaluating exemption applications;
- i) Costs of staff involved in the review process;
 - ii) Board members expenses;
 - iii) Photocopying/printing expenses;
 - iv) Courier/postal expenses, and;
 - v) Market inquires and request for information
 - vi) Gazette notice expenses
 - vii) Other expenses including telephone costs, field visits and meetings.
14. The cost of evaluating an exemption application is dependent on the nature of the arrangement

being sought to be exempted. In this regard, exemption applications will be categorized as category exemptions and single/individual exemptions.

15. The intention of the fees is not to generate revenue but to recoup costs to be incurred by the Authority in the review of the exemption applications. Taking into consideration that exemptions are granted based on public interest consideration, and the benefits accruing from the exempted arrangement outweigh competition concerns, the Authority will endeavor to recoup only a part of the total costs rather than the whole costs.

16. The proposed exemption application fees have taken into consideration:

- a. The estimate cost of analyzing the exemptions;
- b. International Best Practices (See table 1); and

Table 1: Exemption Application Fees in other jurisdictions

S/NO	JURISDICTION	TYPES OF FEES	EXEMPTION APPLICATION FEES	COMMENTS
1	South Africa-CCSA	Individual exemption Filing fees	R 5000 (Kshs. 40 600) ¹	
		Individual exemption Annual fee	R 500 Per year (Kshs. 4 060)	Payable at the time of application, and equal to the R500 times the number of years for which the exemption is granted
		Category exemption filing fees	R 100, 000 (Kshs. 812 000)	
		Category exemption annual fee	R 1000 per year (Kshs. 8 120)	Payable at the time of application, and equal to the R1000 times the number of years for which the exemption is granted
2	Australia-ACCC	Exemption Filing fees	\$ 7,500 (Kshs. 577 125)	
		An additional application of the same kind.	\$1, 500 (Kshs. 115 425)	An additional application lodged within 14 days.
3	Malaysia-MyCC	Exemption application	RM 50, 000 (Kshs 1,344,500)	Whether individual or block exemption
		Individual exemption annual fee	RM 10,000 (Kshs 268 900)	Payable at the time of application; the amount times the number of years

		Block exemption annual fee	RM 20, 000 (Kshs 537 800)	“
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17. The Authority therefore proposes to charge for single/individual exemptions and category exemptions as below;

Table 2: Proposed exemption application fees

	Simple/ single Cases Kshs	Category cases Kshs	Comments
Cost of Evaluation	680, 233	1, 136, 667	Cost incurred by the Authority
Filing Fee	500,000	1,000,000	Onetime payment at the time of application.
Annual fee (5% of the filing fee)	25,000	50, 000	Payable at the time of application, and equal to the number of years for which the exemption is granted