

# Projects & Energy

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## Merger control in the Kenyan energy sector

The Energy Act, Cap 314 Laws of Kenya (Act) is the primary legislation that provides the legal framework for the energy, electricity and petroleum sectors in Kenya. The Act also establishes the Energy and Petroleum Regulatory Authority (EPRA), which regulates renewable energy, electricity and petroleum undertakings in Kenya. In addition to the Act, merger control is also provided for in the recently enacted Energy (Electric Power Undertaking Licensing) Regulations, 2024 (2024 Licensing Regulations) that repeal the (Electricity Licensing) Regulations, 2012 (2012 Licensing Regulations) which were promulgated under the Energy Act, 2006.

### What constitutes a change of control requiring the approval of EPRA?

Section 124 of the Act provides that a licensee should not transfer or divest any rights, powers or obligations conferred or imposed upon them by the licence without EPRA's written consent. Transfer of licence is defined in the Act to include the "*acquisition of a controlling interest directly or indirectly in the licensee*". Controlling interest on the other hand is defined as the "*possession, directly or indirectly, of the power to direct or cause the direction of the management of that person, whether through the ownership of shares, voting, securities, partnerships or other ownership interests, agreements or otherwise*".

The Act and the 2012 Licensing Regulations did not, however, specify the manner in which a person could direct or cause the direction of the management of another person through ownership of shares, voting or other ownership arrangement. This created a lack of certainty on what constituted a change in control requiring approval by EPRA where a minority stake was being acquired. As a result, the approach was to require all transactions involving an acquisition of any shares in a licensee, including an acquisition of minority shareholding to be subjected to an approval process (and not only notification). Importantly, this resulted in significant delays in the conclusion of transactions and, consequently, financial constraints for licensees seeking to raise funding.

Now, the 2024 Licensing Regulations provide in Regulation 12 that any person who wishes to transfer a licence or change the controlling interest in an undertaking must apply for approval in the form prescribed in the Sixth Schedule. The definition of a transfer of licence is that contained in section 124 of the Act (outlined above). A change in controlling interest, on the other hand, is defined to include **any acquisition by a third party of more than 50% of the licensee's share capital**.

Presumably therefore, the acquisition of a minority stake (being one that is less than 50%) will not require notification or approval by EPRA. We note that the form of licence contained in the Fourth Schedule of the 2024 Licensing Regulations is similar to what was provided for in the 2012 Licensing Regulations with regard to the test to be applied to determine control. Control is defined in



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the form of licence as the acquisition of the majority of the issued share capital or the exercise of a majority of the voting rights in the licensee, and prior notification to EPRA is required. The license provision therefore contradicts Regulation 12, which requires approval from EPRA in the case of an acquisition of more than 50% of a licensee's share capital. Hopefully this will be revised or streamlined to avoid any confusion to applicants since EPRA has the authority in section 122 of the Act to determine the conditions attached to a licence. It would be prudent to assess the implications of any proposed transaction against the conditions attached to the licence in addition to the Act and the 2024 Licensing Regulations.

Notwithstanding the above, the revised test to be applied to establish controlling interest will provide greater clarity and certainty on the nature of transactions that require approval by EPRA and those that only require notification. The acquisition of a majority of a licensee's share capital (50+1%) is what will be subject to approval by EPRA under Regulation 12 of the 2024 Licensing Regulations, while an acquisition of minority shareholding in a licensee will not require notification or approval.

There is also now a prescribed form for an application for the transfer of a licence or a change of control as well as a schedule of the documents that should accompany each of the applications. Notably, the form refers to a change of control while the Act and the 2024 Licensing Regulations still refer to controlling interest and there is need for alignment of these terms to avoid any confusion.

## Conclusion

The 2024 Licensing Regulations introduce significant changes to the regulatory framework governing mergers and acquisitions in the energy sector. The key takeaway is that any acquisition of a majority stake (50+1%) requires EPRA approval, while the acquisition of minority shareholding will presumably not require notification or approval (although it will be important to confirm whether there are any notification requirements in the licence, as we have noted that there are some contradictions). Importantly, the 2024 Licensing Regulations also explicitly require that an applicant obtains Competition Authority approval first.

Additionally, the introduction of a prescribed application form and supporting documentation requirements streamlines the approval process. However, inconsistencies in terminology between the Act and the 2024 Licensing Regulations may necessitate amendments to ensure clarity.

The introduction of the 2024 Licensing Regulations was a necessary step in modernising Kenya's energy sector, as the Act had long been operating under the outdated 2012 Licensing Regulations, which were issued under the previous legal framework. Overall, the 2024 Regulations have to a great extent provided guidance that will be crucial in navigating mergers and acquisitions in the energy sector.

**Sammy Ndolo, Damaris Muia, and Nicole Gacheche**



## OUR TEAM

For more information about our Projects & Energy sector and services in South Africa, Kenya and Namibia, please contact:



**Andrew van Niekerk**  
Head: Projects & Energy  
Director: Corporate & Commercial  
T +27 (0)21 481 6491  
E [andrew.vanniekerk@cdhlegal.com](mailto:andrew.vanniekerk@cdhlegal.com)



**Sammy Ndolo**  
Managing Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [sammy.ndolo@cdhlegal.com](mailto:sammy.ndolo@cdhlegal.com)



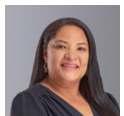
**Mashudu Mphafudi**  
Practice Head & Director:  
Banking, Finance & Projects  
T +27 (0)11 562 1093  
E [mashudu.mphafudi@cdhlegal.com](mailto:mashudu.mphafudi@cdhlegal.com)



**David Thompson**  
Deputy Practice Head & Director:  
Corporate & Commercial  
T +27 (0)21 481 6335  
E [david.thompson@cdhlegal.com](mailto:david.thompson@cdhlegal.com)



**Jackwell Feris**  
Sector Head:  
Industrials, Manufacturing & Trade  
Director: Dispute Resolution  
T +27 (0)11 562 1825  
E [jackwell.feris@cdhlegal.com](mailto:jackwell.feris@cdhlegal.com)



**Megan Rodgers**  
Sector Head: Oil & Gas  
Director: Corporate & Commercial  
T +27 (0)21 481 6429  
E [megan.rodgers@cdhlegal.com](mailto:megan.rodgers@cdhlegal.com)



**Timothy Baker**  
Director:  
Dispute Resolution  
T +27 (0)21 481 6308  
E [timothy.baker@cdhlegal.com](mailto:timothy.baker@cdhlegal.com)



**Tessa Brewis**  
Director:  
Corporate & Commercial  
T +27 (0)21 481 6324  
E [tessa.brewis@cdhlegal.com](mailto:tessa.brewis@cdhlegal.com)



**Jerome Brink**  
Director:  
Tax & Exchange Control  
T +27 (0)11 562 1484  
E [jerome.brink@cdhlegal.com](mailto:jerome.brink@cdhlegal.com)



**Johan de Lange**  
Deputy Practice Head:  
Banking, Finance & Projects  
Director: Projects & Energy  
T +27 (0)21 481 6468  
E [johan.delange@cdhlegal.com](mailto:johan.delange@cdhlegal.com)



**Claudette Dutilleux**  
Director:  
Dispute Resolution  
T +27 (0)11 562 1073  
E [claudette.dutilleux@cdhlegal.com](mailto:claudette.dutilleux@cdhlegal.com)



**Peter Hesseling**  
Director:  
Corporate & Commercial  
T +27 (0)21 405 6009  
E [peter.hesseling@cdhlegal.com](mailto:peter.hesseling@cdhlegal.com)



**Anja Hofmeyr**  
Director:  
Dispute Resolution  
T +27 (0)11 562 1129  
E [anja.hofmeyr@cdhlegal.com](mailto:anja.hofmeyr@cdhlegal.com)



**Burton Meyer**  
Director:  
Dispute Resolution  
T +27 (0)11 562 1056  
E [burton.meyer@cdhlegal.com](mailto:burton.meyer@cdhlegal.com)



**Anita Moolman**  
Director:  
Corporate & Commercial  
T +27 (0)11 562 1376  
E [anita.moolman@cdhlegal.com](mailto:anita.moolman@cdhlegal.com)



**Clarice Wambua**  
Consultant | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [clarice.wambua@cdhlegal.com](mailto:clarice.wambua@cdhlegal.com)



**Deon Wilken**  
Director:  
Banking, Finance & Projects  
T +27 (0)11 562 1096  
E [deon.wilken@cdhlegal.com](mailto:deon.wilken@cdhlegal.com)



**Lauriene Maingi**  
Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [lauriene.maingi@cdhlegal.com](mailto:lauriene.maingi@cdhlegal.com)



**Alecia Pienaar**  
Counsel:  
Environmental Law  
M +27 (0)82 863 6279  
E [alecia.pienaar@cdhlegal.com](mailto:alecia.pienaar@cdhlegal.com)



**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.  
Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114  
E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**NAMIBIA**

1<sup>st</sup> Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia  
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020  
T +264 833 730 100 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

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