

Economic  
Community of West  
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Communauté  
Economique des Etats  
de l'Afrique de l'Ouest

## ECOWAS REGIONAL COMPETITION AUTHORITY

### **MANUAL OF THRESHOLD FOR MERGERS AND ACQUISITIONS AND THRESHOLD INDICATING A DOMINANT AND MONOPOLISTIC POSITION**

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## **Article 1: Definitions**

For the purposes of this Manual-

- (a) "CCR" is the Supplementary Act A/SA.01/12/08 adopting the Community; Competition Rules and its Application Modalities;
- (b) "Days" refers to Calendar days including Saturdays and Sundays;
- (c) "ED" is the Executive Director of ERCA;
- (d) "ERCA Council" is the Council of the ECOWAS Regional Competition Authority;
- (e) "Merger" is defined as the acquisition of control or other business combinations, takeover, joint venture or other acquisition or business combination, including interconnected directorships whether of a vertical, horizontal or conglomerate nature between or among enterprises; and
- (f) "The Merger Regulation" means Regulation C/REG. 23/12/21 on the Rules of Procedure for Mergers and Acquisitions in ECOWAS.

## **Article 2: Objective**

1. The objective of this Manual is to specify the jurisdictional threshold for Notification for Authorisation of Mergers and Acquisitions within the Common Market and the threshold for indicating a dominant or monopolistic position within the Common Market.
2. The Manual sets out the powers of ERCA in relation to control of Mergers and Acquisitions, which may have anti-competitive effects within the Common Market.
3. It also prescribes:
  - (a) the threshold and method of calculation of the relevant turnover for determination of ERCA's powers of Authorisation; and
  - (b) the threshold for the presumption of a dominant position in the Common Market.

## **Article 3: Legal Framework**

1. The ECOWAS Competition Framework is based on:
  - (a) Supplementary Act A/SA.01/12/08 adopting the Community Competition Rules and the modalities of their application within ECOWAS;
  - (b) Supplementary Act A/SA.02/12/08 on the establishment, functions and operation of the ECOWAS Regional Competition Authority;
  - (c) Supplementary Act A/SA.3/12/21 relating to the amendment of Supplementary Act A/SA.2/12/08 on the establishment, functions, and operation of the ECOWAS Regional Competition Authority;
  - (d) Regulation C/REG.21/12/21 on the Powers and Composition of the Council of the ECOWAS Regional Competition Authority;

- (e) Regulation C/REG.22/12/21 on the rules on leniency and immunity procedures in competition within ECOWAS;
  - (f) Regulation C/REG.23/12/21 on the Rules of Procedures for Mergers and Acquisitions in ECOWAS; and
  - (g) Regulation C/REG.24/12/21 of the ERCA's rules of procedure in competition matters.
2. ERCA is charged with the implementation of the CCR and its functions include:
    - (a) keeping under review commercial activities within the Community Market to ascertain practices which may distort the efficient operation of the market; or which may adversely affect the economic interests of consumers.
    - (b) ERCA on its own initiative or upon request may investigate conduct of businesses in the Common Market to determine whether any enterprise is engaging in any conduct which is in contravention of the CCR.
  3. Article 6 of the CCR prohibits the abuse of a dominant position in a relevant market by one or more enterprises.
  4. Under Article 7 of the CCR, Mergers, and other Acquisitions that create an abuse of a dominant position in the relevant market, resulting in a substantial reduction of competition are prohibited.
  5. Such Mergers are automatically void, and of no effect in any Member State of ECOWAS, unless authorised by ERCA upon application by the parties.
  6. The ERCA Council may take any of the following decisions in relation to Mergers and Acquisitions:
    - (a) authorise a merger or acquisition with or without conditions; or
    - (b) reject a merger or acquisition by a reasoned decision.

#### **Article 4: Regulation of Mergers and Acquisitions**

1. The Merger Regulation:
  - (a) serves as a guide to ERCA in the exercise of its power of authorisation in respect of mergers and acquisitions under the CCR;
  - (b) sets out the conditions, rules and procedures for mergers and acquisitions;
  - (c) applies to mergers and acquisitions of undertakings, which operate in at least two Member States of the Community;
  - (d) specifies that the relevant turnover or any relevant balance sheet item of enterprises involved in the merger or acquisition must be above a certain threshold, which is set by ERCA and published in accordance with ECOWAS publication rules;
2. Mergers, which fall within the paragraphs (c) and (d) must be notified to ERCA for authorisation.

## **Article 5: Threshold for Merger Notification**

In accordance with its powers conferred by the CCR and the Merger Regulation, ERCA determines that a Merger or Acquisition shall be subject to notification where in the financial year before the Merger or Acquisition:

- (a) the combined aggregate turnover or a relevant balance sheet item, whichever is higher, of all the merging enterprises within the Common Market is more than **UA 20 Million**; or
- (b) the aggregate Common Market-wide turnover or a relevant balance sheet item, whichever is higher, of each of at least two of the entities engaged in the Merger or Acquisition concerned is more than **UA 5 Million**.

## **Article 6: Calculation of Turnover**

For the purposes of this Manual, the turnover shall be calculated as follows:

- (a) The aggregate turnover shall comprise the amount derived by the merging entities in the financial year before the Merger from the sale of goods and provision of services falling within the enterprises' ordinary activities.
- (b) Financial periods that do not cover a full twelve (12) month-year shall be extrapolated to cover a full year based on the enterprises average turnover of the recorded months.
- (c) Information derived from the enterprises latest published accounts will normally be sufficient to ensure whether the turnover test has been met or not. Where there have been significant changes in circumstances since the accounts were prepared, more recent accounts would provide a better indication of the actual turnover.
- (d) Where the enterprises are unable to provide the relevant details to enable ERCA ascertain the relevant turnover or there is no suitable geographic breakdown of turnover, ERCA will consider the evidence presented by the parties, interested parties, and the opinion of its experts to determine the relevant turnover.

## **Article 7: Prohibited Mergers**

1. Not all Mergers or Acquisitions notified to ERCA are prohibited by the CCR.
2. A Merger or Acquisition is prohibited where it would lead to an abuse of dominant market position resulting in a substantial reduction of competition in the Common Market.

## **Article 8: Dominant Position**

1. For the purpose of the CCR, one or more enterprises hold a dominant position in a relevant market if singularly or collectively, it/they possess a substantial share of the market that enables it/them to control prices and or to exclude competition.
2. The CCR does not prohibit an enterprise from acquiring of a dominant position within the Common Market.

## **Article 9: Abuse of Dominant Position**

1. The CCR prohibits the abuse of a dominant position.
2. Such an abuse of a dominant position may, in particular, consist of:
  - (a) limiting access to a relevant market or unduly restraining competition;
  - (b) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
  - (c) limiting production, markets or technical development to the prejudice of consumers;
  - (d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
  - (e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

## **Article 10: Determination of dominant and monopolistic position**

1. In determination of a dominant or monopolistic position, ERCA will firstly separate the relevant market into two components:
  - (a) the relevant goods or services referred to as the product market; and
  - (b) the geographic extent of the market referred to as the geographic market.
2. ERCA will secondly determine whether the enterprise possesses market power in any of the relevant markets by considering the following:
  - (a) an enterprise has a dominant or monopolistic position if it has substantial market power within a relevant market;
  - (b) a dominant or monopolistic position arises in the absence of strong competitive pressure on the enterprise in that market;
  - (c) market power can be exhibited through the ability of the enterprise to raise and sustain prices above competitive levels or restrict output or quality below competitive levels;
  - (d) an enterprise with market power may also raise entry barriers, slow down innovation and generally restrict development of effective competition in the relevant market;
  - (e) although market shares are important in assessing a dominant or monopolistic position the CCR does not specify a particular threshold at which an enterprise could be considered either dominant or a monopoly;
  - (f) a high market share does not necessarily determine that an enterprise enjoys a dominant or monopolistic position in a relevant market; and
  - (g) it is necessary to consider the position of the enterprise and the strength or weakness of other competitors in the market.

## **Article 11: Threshold for Dominant or Monopolistic Position**

For the purposes of Article 6 of the CCR,

1. ERCA considers the following to be a preliminary indication of a dominant or monopolistic position:
  - (a) a single enterprise with a relevant market share below 40% is unlikely to be considered dominant;
  - (b) a single enterprise with a market share of 40% or above in the relevant market is presumed dominant;
  - (c) a single enterprise with a market share of 70% or above in the relevant market is presumed to be a monopoly;
  - (d) two or more enterprises could be presumed to be in a collective dominant position where they have a combined market share of fifty percent (50%) or above of the relevant market. Such collective dominance could occur where collectively two or more legally independent undertakings are linked in such a way that they adopt a common policy on the market; and
  - (e) a dominant or monopolistic position could be determined below the presumed thresholds if other relevant factors such as the weakness of competitors in the market, high barriers to entry strongly suggest singular, collective dominance or a monopolistic position.
2. Enterprises presumed to be in a dominant or monopoly position by ERCA will have the burden of rebutting the presumption of dominance.

**Done at Abuja on the ..... of January 2024**



Dr. Omar Alieu TOURAY

**PRESIDENT OF THE ECOWAS COMMISSION**