# Public interest considerations in ECOWAS merger control

Client briefing | Antitrust & Merger Control
ECOWAS | Public interest considerations in ECOWAS merger control
31 May 2026

The ECOWAS merger control regime vests the ERCA Council with the discretion to approve otherwise anti-competitive transactions where a clear and demonstrable public interest exists in the transaction—a power that is analytically distinct from the competition assessment and carries significant strategic implications for parties transacting in the region. The public interest concept under the ECOWAS regulations serves as a corrective element in the merger control process.

The Economic Community of West African States (ECOWAS), currently comprising twelve Member States following the formal withdrawal of Burkina Faso, Mali, and Niger in early 2025, introduced a supranational merger control regime that became fully operational in October 2024 with the swearing-in of the ECOWAS Regional Competition Authority (ERCA) Council before the ECOWAS Court of Justice. The legal architecture governing merger control within the common market rests on Supplementary Act A/SA.1/12/08 adopting the Community Competition Rules (CCR), as implemented by Regulation C/REG.23/12/21 on the rules of procedure for mergers and acquisitions in ECOWAS and the Enabling Rule PC/REX.1/01/24 on ERCA's Procedural Manual. The ERCA Guidelines on Mergers and Acquisitions published in 2024 provide an additional analytical and procedural reference layer.

The regime is mandatory and suspensory, requiring prior notification and clearance before implementation of qualifying transactions where the parties operate in at least two ECOWAS Member States and cross the applicable financial thresholds. Within this framework, the substantive assessment of a notifiable transaction proceeds on two analytically distinct tracks. The competition track examines whether the transaction is likely to substantially reduce competition within the Common Market. The public interest track empowers the ERCA Council to authorize transactions that, despite raising competition concerns, serve a compelling public interest or confer significant benefits on the ECOWAS community.

*Legal basis*

The public interest assessment in ECOWAS merger control is founded in Art. 7(3) Community Competition Rules. This provision empowers the ERCA to authorize or exempt mergers, acquisitions, and other concentrations that serve public interest. Read in conjunction with Art. 4(2) Supplementary Act A/SA.2/12/08, which charges the ERCA with reviewing concentrations considering competition concerns, this provision establishes that the ERCA's review mandate is not limited to a binary competitive harm assessment. The ERCA is explicitly empowered to consider whether a transaction advances public interest as part of its clearance or exemption determination.

The language of Art. 7(3) Community Competition Rules draws an important structural distinction. An authorization or exemption under the public interest track is relevant where the transaction would otherwise be prohibited—that is, where the merger substantially reduces competition within the ECOWAS region. The public interest override is thus properly understood as a remedial mechanism: it provides the ERCA Council with the legal basis to sanction transactions that fail the competition test but are nonetheless deemed sufficiently beneficial to the ECOWAS community to warrant clearance, potentially subject to conditions.

*Procedural structure*

Understanding when and how public interest considerations enter the merger review process requires mapping them onto the two-phase review structure established by the ECOWAS merger control regime. In phase 1, the Executive

Director of the ERCA has 60 working days—extendable by a maximum of 30 working days upon a request for additional information—to review the notification and formulate a recommendation on whether to authorize the transaction. If no competition concerns arise in phase 1, clearance will typically follow at this stage, and the public interest track will not be engaged in any meaningful way.

Where the Executive Director identifies competition concerns that warrant deeper scrutiny, the matter proceeds to phase 2. Following the conclusion of phase 2—expected to be completed within 30 calendar days of the Executive Director's submission of the phase 2 recommendation to the Council—the ERCA Council has 30 working days, extendable by a further 15 working days upon a request for supplementary information, to take a decision. It is at this stage that the public interest assessment becomes most consequential. The ERCA Council may approve the transaction outright, approve it subject to conditions, or reject it by reasoned decision. Notwithstanding a finding of substantial competitive harm, the Council may approve an otherwise anti-competitive merger—either at the request of the merging parties or on its own initiative—if it determines that the transaction serves a compelling public interest.

This procedural design places the public interest determination squarely in the hands of the Council rather than the Executive Director. The Executive Director's role is to investigate and recommend; the Council's role is to decide. The public interest exemption is accordingly a Council-level prerogative and not one that can be resolved at the preliminary or investigative stage of the process.

*The standard ”clear and demonstrable" public interest:*

The Community Competition Rules and the ERCA's procedural instruments articulate a meaningful threshold for the public interest exemption. To grant clearance on public interest grounds for an otherwise anti-competitive merger, the ERCA Council must be satisfied that a clear and demonstrable public interest exists, or that the merger would confer significant benefits on the ECOWAS Community. The conjunctive or disjunctive framing of these two limbs leaves open the possibility that either demonstrable public interest or significant community benefits, standing alone, may be sufficient to justify approval. However, the adjective "clear and demonstrable" is significant: it signals that the public interest invoked must be capable of concrete articulation and substantiation, not merely asserted at a high level of generality.

The Community Competition Rules does not provide an exhaustive definition of what constitutes "public interest" for these purposes, and the ERCA has not to date published dedicated guidelines on the public interest assessment methodology. What the legal framework and supporting instruments do make clear is that the analysis is intended to be substantive rather than perfunctory. Factors that are broadly recognised within the ECOWAS regulatory context as relevant to the public interest inquiry include the promotion of socio-economic development across the common market, the protection and expansion of access for small and medium-sized enterprises (SMEs), the encouragement of technical and economic progress that may benefit consumers without constituting a hindrance to competition, the fostering of regional economic integration, and the effects of the transaction on the welfare of consumers and the interests of the populations of member states. The ERCA is also specifically mandated to consider the potential for a transaction to expand opportunities for domestic enterprises in member states to participate in international markets, a factor that situates the public interest assessment within ECOWAS’s

broader trade and integration objectives.

The ECOWAS approach notably draws on a developmental philosophy of competition law that has become increasingly prominent across the African continent. Rather than treating competition enforcement as an end in itself, the framework positions it as one instrument among several for advancing the economic and social goals of regional integration. The public interest override is the clearest expression of that philosophy within the merger control context.

*The role of national competition authorities*

One of the procedurally distinctive features of the ECOWAS public interest framework is the explicit acknowledgment of national competition authorities as potential inputs into the Council's deliberations. The ERCA Council may consider any special representations made by a national competition authority within the ECOWAS Community as part of its public interest determination. This provision creates a formal channel through which member state-level concerns—whether economic, industrial, or social—can be injected into a supranational merger review process.

The significance of this mechanism should not be overstated. ERCA operates as a one-stop shop for transactions with a regional dimension that meet the notification thresholds, and the Community Competition Rules affirms the primacy of ERCA's jurisdiction over conduct likely to influence trade within ECOWAS. National competition laws do not apply in parallel to mergers caught by the ECOWAS regime, as they lack extraterritorial jurisdiction over cross-border transactions.

However, the provision for national authority representations in the public interest context preserves a degree of subsidiarity. Where a member state's government or competition authority has a view on whether a particular transaction advances or undermines the national or regional public interest, that view has a recognized procedural vehicle through which to be heard.

This channel is likely to be most relevant for large transactions touching sensitive sectors—telecoms, energy, financial services, or media—where member state governments may have distinct industrial policy perspectives that they wish the Council to consider. It also raises practical questions about coordination: parties to transactions that may attract national authority representations would be well advised to engage with relevant national regulators early, both to anticipate the substance of any representations and to consider whether proactive commitments addressing public interest concerns at the national level might forestall or shape representations made to the ERCA Council.

*The Canal+/MultiChoice decision*

The first conditional approval issued by the ERCA Council, delivered on 8 August 2025 in the acquisition of MultiChoice Group Limited by Canal+ Group SAS, provides the most concrete illustration to date of how the ERCA approaches the non-competitive dimensions of its merger review. Canal+ notified the transaction on 24 March 2025, with the notification deemed complete on 2 May 2025 after all procedural requirements were satisfied. The transaction involved Canal+ increasing its shareholding in MultiChoice from an existing minority position of approximately 45.2 percent to full control.

The ERCA's substantive assessment found that the transaction would result in a combined market share exceeding 60 percent at the community level in audiovisual services across the ECOWAS region, with an estimated Herfindahl-Hirschman Index above 3,500, indicating a highly concentrated market. Notwithstanding these findings, the ERCA Council approved the transaction subject to a set of behavioral conditions that bear directly on

public interest considerations rather than pure competition remedies. Canal+ was required to maintain a diverse range of audiovisual content for both French-speaking and English-speaking audiences within the ECOWAS region; to preserve existing distribution networks accessible to subscribers across member states; and to comply strictly with the Community Competition Rules on an ongoing basis, including an obligation to report annually to the Authority and to notify the ERCA of any price changes to facilitate effective market monitoring.

The conditions imposed by the ERCA Council reflect a substantive engagement with access, cultural diversity, and affordability as public interest considerations. The obligation to maintain content diversity for both language communities addresses what might be characterized as a linguistic equity dimension of the public interest, ensuring that the transaction does not result in a contraction of services to Anglophone or Francophone audiences. The preservation of distribution networks reflects a concern for continuity of access across member states, including those where MultiChoice's infrastructure may be a primary or critical channel for audiovisual content delivery. The price monitoring obligation, while also serving a competition function, is best understood in the Canal+/MultiChoice context as a measure to protect consumer welfare—a recognised element of the public interest framework under the Community Competition Rules—given the post-merger dominance that the transaction would generate.

*Comparison with the South African approach*

The structure of the ECOWAS public interest framework has drawn comparisons to South Africa's Competition Act, which has long been considered the most developed example of public interest integration into merger control on the African continent. Section 12A(3) South African Competition Act requires that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission and Competition Tribunal must consider the effect of the merger on a particular industrial sector or region, on employment, on the ability of small and medium-sized businesses to participate in the market, on the ability of national industries to compete internationally, and on the promotion of a greater spread of ownership. These criteria are codified, judicially interpreted, and supplemented by detailed guidelines published by the Competition Commission.

The ECOWAS framework is structurally similar in its intent — both systems embed public interest as a counterweight to a purely competition-based assessment—but differs in several important respects. First, the South African criteria are statutory and exhaustive in their enumeration, whereas the ECOWAS framework operates at a higher level of generality, leaving considerable discretion to the ERCA Council to determine what qualifies as a "clear and demonstrable" public interest. Second, the South African system applies public interest considerations to all notifiable mergers as a parallel track of analysis, not only as a remedial override for otherwise prohibited transactions. In ECOWAS, by contrast, the public interest exemption under Article 7(3) Community Competition Rules is most directly engaged where the competition assessment has already identified substantial harm. Third, the ECOWAS framework lacks the South African jurisprudential depth: there is yet no body of reasoned decisions interpreting the public interest criteria, and no guidelines comparable to South Africa's revised public interest merger guidelines of 2024 that map out how the authority will approach common scenarios. This gap is likely to be narrowed as the ERCA's caseload develops, but for now, parties cannot rely on precedent to predict how the Council will weigh specific public interest arguments.

Despite these differences, the

Canal+/MultiChoice decision signals that the ERCA is moving in a direction consistent with the broader African trend. Across the continent — in Botswana, Malawi, Namibia, Zimbabwe, and South Africa — clearance decisions have increasingly been conditioned on public interest commitments relating to employment security, local participation, SME access, and citizen ownership. The ERCA's focus on Canal+/MultiChoice on content diversity, distribution access, and price monitoring is aligned with this trajectory, even if the specific criteria reflect the particularities of the audiovisual sector and the ECOWAS region's linguistic geography.

*Practical implications for Parties:*

The role of public interest in ECOWAS merger control has several concrete implications for parties contemplating transactions with a regional dimension. The most fundamental is that the merger review process should be approached as a dual-track exercise from the outset, even where the primary concern is whether the transaction raises competition issues. Parties whose transactions generate significant combined market shares or operate in sectors of strategic importance to the region — energy, telecoms, financial services, media, agriculture — should assess early whether public interest arguments can be marshalled in support of clearance, and whether proactive commitments on public interest matters would be advisable as a deal structuring or negotiation strategy.

The indeterminacy of the public interest standard under the current ECOWAS framework is both a risk and an opportunity. Because the ERCA Council retains broad discretion to define what constitutes a "clear and demonstrable" public interest, parties have some latitude to shape the interest, parties have some latitude to shape the terms of the public interest debate in their notifications and in any phase 2 submissions. A transaction that promotes regional economic integration, expands access for local enterprises, transfers technology, or preserves employment across member states may carry persuasive force even in the absence of explicit statutory criteria encoding those considerations. The absence of defined benchmarks, however, also means that the Council's assessment may be less predictable than in a more codified system, and parties should be cautious about relying on public interest arguments as a fallback in lieu of robust competition analysis.

The provision for national competition authority representations is a particular variable that parties should factor into their transaction planning. In sectors where member state governments are likely to have views — whether because the target is a domestically significant player, the transaction involves a foreign acquiror, or the affected market is of strategic national importance — early stakeholder engagement at the national level can help parties anticipate the character of any representations to the ERCA Council and consider whether voluntary commitments at the national level would address the concerns that might otherwise be raised. Failure to engage on this dimension could result in public interest representations that complicate and lengthen the review process.

Finally, the Canal+/MultiChoice decision makes clear that even where a transaction clears the public interest threshold, the conditions imposed may be substantive and operationally significant. The obligation to report annually to the ERCA and notify price changes introduces an ongoing compliance dimension that parties must factor into their post-closing integration planning. As the ERCA's practice develops, we expect conditions of this kind to become increasingly detailed and sector-specific, and parties should model the operational implications of plausible public interest conditions as part of their pre-notification assessment.

*Way forward*

The public interest dimension of ECOWAS merger control is still in its formative stages. The ERCA has now issued its first conditional approval and has a growing caseload of notified transactions—including approvals in Liberia throughout late 2025—that will provide the raw material for a developing body of practice. Still, the absence of published public interest guidelines, the novelty of the Council's institutional practice, and the lack of a detailed jurisprudential record mean that parties cannot yet rely on established precedent to chart a predictable path through the public interest assessment.

What is already clear is that the ERCA Council takes its public interest mandate seriously, and that conditions of a non-competitive character — touching on content diversity, access, price monitoring, and, prospectively, employment and SME participation — are a realistic outcome for transactions in concentrated or strategically sensitive sectors. Companies and investors with engagements across the ECOWAS region should build public interest analysis into their deal-planning from the earliest stage, engage with national competition authorities where appropriate, and monitor the evolution of ERCA's published practice as the authority matures. Those that do so will be better positioned to navigate a review process that, unlike purely competition-focused regimes, is explicitly designed to serve the broader developmental ambitions of the ECOWAS common market.

## WALAAE MAHNAOUI

**Associate**

walaae.mahnaoui@bremerlf.com

Walaae is an associate of the region law firm BREMER and part of the firm's Antitrust & Merger Control team. She represents PE firms and corporates in antitrust investigations and advises them on merger control review in Morocco and handles merger control filings under the COMESA and ECOWAS merger control regimes. She works in English, French, and Arabic languages.

## NICOLAS BREMER

**Partner**

nicolas.bremer@bremerlf.com

Nicolas is a partner and attorney with the regional law firm BREMER where he heads the firm's Antitrust & Merger Control team. He oversees the firm's Riyadh and Cairo representations and has extensive experience in advising international and domestic clients on merger control and antitrust matters as well as broader regulatory M&A matters in Saudi Arabia, the UAE, Egypt and the wider Near and Middle East. He works in English, Arabic and German languages.