Public Interest Considerations under the EAC Merger Control

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EAC | Public Interest Considerations under EAC Merger Control Regime
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The 2025 East African Community (EAC) Competition Act requires the EAC Competition Authority (Authority) to consider public interest concerns as part of their assessment of notified transactions. While public interest considerations existed within the EAC competition regime prior to the most recent change, the new Regulation expanded their role. These changes align with general trends across Africa with relevant regional regimes such as the COMESA and ECOWAS merger control regimes expanding the role of public interest considerations in merger control review.

Inn their assessment of transactions the Authority shall primarily assess whether transactions substantially lessens competition within the Common Market. In doing so the Authority considers a range of competition-focused factors, including market structure, barriers to entry, countervailing buyer power, and efficiencies arising from the transaction. Public interest considerations do not form part of this substantive assessment. Instead, they serve as a corrective. Where a transaction is found to be anti-competitive, the Council of Ministers may nevertheless approve the transaction if they are satisfied that it fulfils an overriding public interest. The EAC Competition Act therefore appears to treat public interest as an override mechanism rather than an independent basis upon which mergers are assessed. Whether public interest considerations in the reverse case may warrant closer scrutiny of a transaction that has no negative impact on competition due to negative implications for public interest is unclear thus far.

The regulation sets out a exhaustive list of public interest factors the Authority may consider. These are (i) the effect of the transaction on a particular Member State, sector or region; (ii) its effect on employment in the Common Market; (iii) its effect on the ability of small and medium-sized enterprises to access or remain competitive in the market; (iv) the ability of domestic industries to compete in international markets; and (v) the capacity of a Member State to respond to a sector-specific crisis.

The EAC's approach to public interest concerns aligns with that of COMESA merger control framework. As in under the EAC regime the COMESA Competition and Consumer Commission (CCCC) primarily focuses on competition matters and only includes public interest considerations as a corrective. Still, under the COEMSA regime it is clear that negative implications for public interest will influence the CCCC's decision on transactions that pose no competition issues. While the CCCC made clear that they would not object to a transaction on public interest grounds alone, negative public interest implications may necessitate remedies. Also, while the public interest considerations applied by both regimes are largely similar, the COMESA regime explicitly also acknowledges environmental impacts as a valid public interest concern.

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