Nigeria-ECOWAS Cross Border Mergers: The ECOWAS Competition Regulator's Jurisdiction

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Introduction

In spite of the lines and borders dividing African states, trade and commerce continue to bind African economies together, as countries grow beyond the resources within their borders and ideas thirst for expansion and application on a global scale. Integral to this economic cooperation are bodies geared at facilitating regional collaboration, promoting market access, and harmonizing regulations, one of which is the Economic Community of West African States ("**ECOWAS**"). ECOWAS plays a pivotal role in fostering economic unity, promoting free trade, and ensuring a unified approach to cross-border trade across its Member States,[1] thereby enabling seamless economic interactions and reducing barriers to market entry.

Central to this goal of economic cooperation is the regulation of cross-border mergers and acquisitions between vehicles with incorporation, bases, or operations in more than one Member State. ECOWAS has an organ for regulating anti-competitive conduct in respect of mergers, acquisitions, and trade practices. That organ is the ECOWAS Regional Competition Authority ("**ERCA**").

In this article, we evaluate the jurisdiction of the ERCA on mergers and acquisitions transactions ("**mergers**") involving Nigeria and other Member States. We examine the regulatory framework governing these transactions, focusing on how ERCA reviews cross-border mergers, the financial thresholds that trigger its jurisdiction, and the potential overlaps or conflicts with national competition authorities, particularly the Federal Competition and Consumer Protection Commission ("**FCCPC**") in Nigeria.

We establish below that, under Nigerian law, ERCA actually lacks jurisdiction over cross-border mergers involving Nigerian entities, and that this legal gap introduces uncertainties and risks to parties engaging in such mergers. We also examine the prospect of establishing a mutual notification system between ERCA and FCCPC. Such a system could simplify filings and reduce compliance costs for Nigerian businesses operating across multiple jurisdictions. Similarly, the domestication of ECOWAS competition rules could clarify ERCA's authority while preserving FCCPC's oversight to prevent jurisdictional conflicts. Other important considerations include the potential for flexible, public interest-based exemptions for mergers that may promote regional economic development; enhanced collaboration between ERCA and local authorities through joint investigations, shared enforcement, and harmonized guidelines to streamline enforcement; and capacity-building initiatives for ERCA.

Cross-border Mergers

By a "cross-border merger" we mean in this paper a merger or acquisition involving at least one of two features. One is the combination under a single vehicle of the assets of two or more companies each with different nationality. The other is the vesting of control over one vehicle in another vehicle that has a different nationality.[2] Cross-border mergers have the potential to influence competition across multiple economies. These mergers can reshape regional or global industries by altering market shares, creating new dominant entities, or consolidating business operations across borders.

Given the economic impact that such transactions can have, cross-border mergers are subject to stringent regulatory scrutiny. ECOWAS seeks to provide this oversight for Member States through the enactment of its competition laws and the establishment of **ERCA**.[3] Despite this regional mechanism, national competition laws remain in force across Member States, including Nigeria. This creates the challenge of determining how ECOWAS competition laws interact with national regulations, particularly where jurisdictional overlaps occur, and how these boundaries are navigated in the context of cross-border mergers.

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[1] Member States (including Nigeria, Ghana, Cote d'ivoire and Senegal) are members of ECOWAS (Article 2, paragraph 2 of the ECOWAS Revised Treaty).

[2] Only the former set of features appears to be contemplated by Chunlai Chen and Christopher Findlay, "A Review of Cross-Border Merger & Acquisitions in APEC", Pacific Economic Cooperation Council (PECC) for the APEC Investment Experts Group (IEG) (July 2002), available at https://www.apec.org/docs/default-source/publications/2002/7/a-review-of-crossborder-mergers-and-acquisitions-in-apec-2002/02_cti_ieg_ma.pdf, accessed October 23, 2024.

[3] The ERCA was established on December 19, 2008.

Regulating Cross-Border Mergers with Nigerian and ECOWAS Elements: The Framework

ERCA

The regulations governing mergers under ECOWAS law include the: **(a)** Supplementary Act A/SA.1/12/08 adopting Community Competition Rules and the Modalities of their Application within ECOWAS (the "**Competition Rules**"); **(b)** Regulation C/REG.23/12/21 Rules of Procedures for Mergers and Acquisitions in ECOWAS (the "**Merger Procedure Rules**"); and **(c)** Enabling Rule PC/REX.1/01/24 Manual of Threshold for Mergers and Acquisitions and Threshold Indicating a Dominant and Monopolistic Position (the "**Threshold Manual**") (together, the "**ERCA Competition Rules**").

By Article 4(1) of the Competition Rules, the Competition Rules apply to mergers in, and actions by Member States that are likely to affect trade within, more than one Member State. Specifically, Article 7(1) of the Competition Rules prohibits any "merger, takeover, joint venture, or business combination" that is attributable to any good, service, line of commerce, or activity "affecting commerce", that "results in the abuse of a dominant market position or substantially reduces competition" within the ECOWAS common market.

Regardless of this provision, Article 7(3) of the Competition Rules provides for the possibility of authorizing or exempting such mergers, where the transaction is deemed to be in the "public interest." What amounts to transactions in the public interest or how they will be determined was not stated in the Competition Rules. ERCA is responsible for considering applications seeking authorizations for mergers, acquisitions, or business combinations.

The Threshold Manual mandate that undertakings operating in Member States engaging in cross-border mergers exceeding a certain threshold must seek authorization from ERCA. A merger exceeds this threshold and would fall within ERCA's jurisdiction if in the financial year preceding the merger or notification: **(a)** the combined aggregate turnover or relevant balance sheet item, whichever is higher, of all the merging companies is more than UA[4] 20 Million;[5] or **(b)** the aggregate common market-wide turnover or balance sheet item, whichever is higher, of at least two (2) of the merging companies is more than UA 5 Million.[6] Article 5 of the Threshold Manual.

In seeking authorization, the Merger Procedure Rules provides that the concerned undertaking shall submit a notification/application to the ERCA containing the contact details of the merging companies, director(s)' identities, share capital, balance sheet, turnover, and profit and loss accounts, market shares amongst others.[7] An application fee, calculated at 0.1% of the combined annual turnover or the combined value of the assets of the merging companies (whichever is higher) shall be paid to ERCA. ERCA shall publish such notification in the official gazette of the ECOWAS and the newspapers of the Member States and shall make its decision (authorization or rejection) within sixty (60) days from the date of the receipt of the notification.[8] The period may be extended by thirty (30) days.

After a decision has been made, the executive director of the ERCA will submit their findings and recommendations to the ERCA Council. The Council shall, within a period of thirty (30) days from the date of receiving the recommendation, either authorise the merger with or without conditions, reject the merger by a reasoned decision, or request ERCA to continue and complete the investigations to enable it to take a final decision.[9]

FCCPA

The FCCPA is the chief legislation regulating mergers and acquisitions (including cross-border ones) under Nigerian domestic law. Section 2(1) of the FCCPA provides that the FCCPA governs commercial activities occurring or having effect within Nigeria**.** This means that even if the transaction takes place

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[4] Unit of Accounts is a standard currency used by the African Development Bank and other international organizations for financial reporting and transactions.

[5] Approximately NGN 43billion (USD27million).

[6] Approximately NGN 10billion (USD6.5million).

[7] Article 2(1), Merger Procedure Rules.

[8] Article 2(2), Merger Procedure Rules.

[9] Article 3, Merger Procedure Rules.

outside Nigeria, the FCCPA will apply so long as the transaction will have a substantial effect on trade or economic activity within the country.

Section 2(3) further expounds on the FCCPA's jurisdiction by incorporating certain extraterritorial provisions. By the section, the FCCPA applies to: **(a)** Nigerian citizens or persons ordinarily resident in Nigeria; **(b)** corporate entities incorporated in Nigeria or conducting business within the country; **(c)** any person involved in the supply or acquisition of goods or services into or within Nigeria; and **(d)** any person in relation to the acquisition of shares or other assets outside Nigeria, leading to a change in control of a business, part of a business, or any asset of a business in Nigeria (foreign-to-foreign merger). Thus, mergers involving Nigerian entities must comply with Nigerian law, even if they also have a cross-border dimension.

Regulation 1 of the Notice of Threshold for Merger Notification Pursuant to Section 93(4) of the FCCPA sets the notification thresholds for mergers in Nigeria. According to Regulation 1, the threshold is crossed where, in the financial year preceding the merger: **(a)** the combined annual turnover of the acquiring and target undertaking in, into or from Nigeria equals or exceeds ₦1,000,000,000 (One Billion Naira); or **(b)** the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds ₦500,000,000 (Five Hundred Billion Naira). These thresholds are significantly lower than the thresholds set by the ERCA.[10]

Other Sectoral Oversight

Depending on the sector of the economy where the entity that is involved in the cross-border merger operates, the transaction may be subject to other, sector-specific, sectoral oversight. For instance, if the Nigerian entity involved is regulated by the Nigerian Communications Commission ("**NCC**"), it will require the approval of the NCC which is a requirement under the Nigerian Communications Act - Competition Practices Regulations 2007.[11] Where the entity involved is a public company, the entity will also need to notify the Security and Exchange Commission (SEC),[12] and, where its shares are listed, the bourse on which those shares are listed.

Challenges Facing ERCA Claims to Jurisdiction Over Cross-Border Mergers Touching Nigeria

One major challenge is whether the ERCA Competition Rules can be enforced against Nigerian companies without the Rules being domesticated in Nigeria. Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the "**Constitution**") provides that *"no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."*

This means that international agreements, regulations, or treaties must be brought into force under Nigerian law by the National Assembly before they can be applied to Nigerian entities by the Nigerian courts. This position was affirmed by the Court in *Abacha v Fawehinmi*[13] where the Court held that *"If such a [international] treaty is not incorporated into the municipal law, our domestic courts would have no jurisdiction to construe or apply it. Its provisions cannot therefore have any effect upon citizens' right and duties."* See also, *A.G. Federation v. Anuebunwa* (2022) 14 NWLR (Pt. 1850) 211.

Notwithstanding the Nigerian Constitution, ECOWAS law intends supplementary acts (such as the Competition Rules) to have a higher binding force than other ECOWAS regulations (such as the Merger Procedure Rules and Threshold Manual). It is implicit in ECOWAS law that supplementary acts do not require domestication by national parliaments, unlike directives or regulations, which might need specific local legislation for implementation. Although the Economic Community of West African State Revised Treaty 1993 ("**ECOWAS Revised Treaty**") and other applicable regulations do not explicitly

[10] See note 5 & 6 above.
[11] Part IV Paragraph 26 – 32 of Nigerian Communication Acts – Competition Practices Regulations 2007.
[12] Securities and Exchange Commission Rules and Regulations, 2013 rule 422.
[13] (2000) 6 NWLR (Pt. 660) 228.

mention this point, it may be inferred by the procedure outlined in the ERCA Competition Rules for the entry into force of the supplementary acts.

Specifically, Articles 15 & 16 of the Competition Rules provide that upon publication in the official journal of the ECOWAS, the supplementary acts are to be published by each Member State in its National Gazette within thirty (30) days of notification by ERCA. Additionally, Article 16 of the Competition Rules provides that the supplementary acts enter into force upon their publication.

In the Nigerian courts, the divergence between ECOWAS law and Nigerian constitutional law must be resolved in favour of the Nigerian Constitution. This creates a conundrum as a matter of practice: while under ECOWAS law, supplementary acts become immediately binding upon publication, Nigerian laws demand legislative action before such acts can be enforced against Nigerian entities. This discrepancy could pose a problem, particularly where one Member State recognizes ERCA's oversight, and the other does not. In such cases, it is advisable that the party facing greater risk from non-compliance should consider notifying ERCA of the merger to manage the risk of potential liabilities for violating ECOWAS law. For example, implementation of a merger or acquisition without authorization from ERCA will be penalized with a fine of UA 500,000[14] per working day that the violations subsist.[15]

Another issue ERCA may face when trying to assert its jurisdiction over a cross-border M&A transaction is enforcing compliance across Member States. ERCA to enforce its rulings relies on the cooperation of national authorities, which may have competing priorities and legal interpretations at variance with ERCA's. For instance, if ERCA imposes conditions on mergers that are not aligned with Nigerian law, enforcement may be problematic.

Additionally, businesses may challenge ERCA's jurisdiction or decisions in national courts, leading to further delays in the implementation of cross-border mergers. Moreover, ERCA is a relatively new institution. It has not yet developed detailed regulations on, and the capacity to effectively regulate, cross-border mergers. Building the necessary expertise and resources to handle complex mergers involving large multinational companies is crucial for ERCA's success in the long run.

Prospects

Given the complexities of ERCA's jurisdiction over cross-border mergers involving Nigeria and other Member States, we propose for consideration the following (to harmonize the regulatory regimes, reduce compliance burdens and enhance regional economic integration).

1. ***Streamlined Notification and Approval Process***: ERCA in collaboration with the FCCPC may consider a mutual notification system whereby a Nigerian company filing for cross-border merger approval is automatically deemed notified by ERCA where the transaction is an ERCA notifiable one, and *vice versa*. This could take the form of a "one-stop-shop" mechanism for ECOWAS, where cross-border merger applications in any Member State are simultaneously reviewed by ERCA. Such a system would simplify compliance, especially for Nigerian companies, by reducing redundant processes and compliance costs. To operationalize this, the FCCPC can, further to their powers in Section 17 (b) of the FCCPA issue a regulation on this.
2. ***Domestication in Nigeria***: Per Section 12 of the Constitution, ECOWAS supplementary acts need to be domesticated to be enforceable within Nigeria. Therefore, the National Assembly could enact legislation that directly incorporates key provisions of the ERCA Competition Rules into Nigerian law. This legislation could specify that ERCA's rules apply to cross-border mergers with significant ECOWAS-wide impact while retaining FCCPC oversight of domestic and cross-border mergers affecting the Nigerian market. This domestication would not only clarify ERCA's authority within Nigeria but also prevent future jurisdictional conflicts and establish clear expectations for companies involved in cross-border mergers.

[14] Approximately NGN 1.1million (USD 700,000).
[15] ERCA Manual of Scale of Fines and Compensation, 2024, annex 1.

3. ***"Public Interest" Exemptions***: Recognizing the potential economic benefits of certain cross-border mergers, ERCA and FCCPC should adopt flexible, public interest-based exemptions for transactions that contribute to regional economic development or promote competitive efficiencies. Article 7(3) of the Competition Rules already provides for exemptions in cases where a merger is deemed to serve the "public interest." This provision could be developed to include explicit criteria for cross-border mergers benefiting multiple ECOWAS countries, such as investments in underdeveloped industries or essential infrastructure. For example, exemptions could prioritize sectors like energy, telecommunications, and transport—areas critical to regional integration.
4. ***Collaboration with local competition authorities***: ERCA and FCCPC should collaborate closely to establish a cohesive regulatory approach to enforcing cross-border mergers. This collaboration should include joint investigations, shared decision-making on jurisdictional overlap, coordinated enforcement actions, and knowledge-sharing initiatives, including the exchange of best practices to harmonize enforcement standards. By integrating key enforcement principles, ERCA and the FCCPC can minimize jurisdictional conflicts, enable effective enforcement of the competition laws and reduce compliance burdens for businesses operating within ECOWAS.
5. ***Capacity Building***: In addition, ERCA needs to strengthen its capacity to regulate cross-border mergers effectively. This includes but is not limited to investing in training for ERCA's personnel, developing more detailed guidelines for merger reviews, and increasing awareness of ERCA's mandate among states participants, business and legal practitioners.

We fully appreciate that the implications of the above measures include the possibility that Nigeria may need to give up elements of its sovereignty to other ECOWAS Member States to the extent that ECOWAS law gets to govern Nigerian-centered deals. There is also the risk that the ERCA Rules may, on balance, come to be both burdensome in volume and less favourable in tendency to larger Nigerian businesses, relative to smaller businesses from other Member States.

These are significant concerns. Unfortunately, but understandably, they are likely in practice to slow down the adoption of these measures. For now, as a practical matter, and out of the abundance of caution, a Nigerian company engaging in a cross-border merger that the ECOWAS regime purports to govern should consider notifying ERCA and otherwise complying with the rules of that regime although Nigerian law does not insist that it does.

Conclusion

Cross-border mergers involving more than one ECOWAS country offer significant economic potential but also present legal and regulatory challenges, particularly when multiple jurisdictions seek to assert regulatory oversight over the same transaction. The dual compliance burden for Nigerian companies, compounded by the requirement to domesticate ECOWAS rules under Nigerian law, necessitates strategic reform. Harmonizing regulatory frameworks, creating streamlined processes, and adopting public interest exemptions are crucial steps to ensure that ERCA and the FCCPC effectively support cross-border mergers that benefit the region. By prioritizing cooperation and alignment between Nigerian and ECOWAS competition rules, ECOWAS Member States can maintain a competitive, integrated market, strong enough to attract foreign investment and drive economic growth within West Africa.

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