

AFRICAN COMPETITION FORUM

PROPOSED THRESHOLDS FOR MERGERS AND ACQUISITIONS NOTIFICATIONS AND DOMINANCE AT CONTINENTAL LEVEL

Competition Commission of South Africa (CCSA) and COMESA Competition
Commission (CCC)

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Introduction

- The African Continental Free Trade Agreement (AfCFTA) provides for State Parties to cooperate on competition policy.
- The AfCFTA Protocol on Competition Policy (the Protocol) was approved by the Council of Ministers in February 2023.
- The Protocol is an agreement by State Parties to ensure that competition contributes to trade, inclusive growth, industrialization, innovation and sustainable economic development in Africa.
- Reviews of mergers and acquisitions as well as abuse of dominance investigations by the Continental Competition Authority (CCA).
- The study identifies the key principles to underpin the determination of appropriate thresholds for merger notifications and dominance.

RELEVANT LEGAL PROVISIONS ON MERGERS AND ACQUISITIONS

- Article 3 of the AfCFTA Protocol on Competition Policy provides for the scope of application. The Protocol applies to :
 - All economic activities by persons or undertakings within or having significant effect on competition in the Market; and
 - Conduct with continental dimension and having significant effect on competition in the Market.
- Conduct with Continental Dimension under the Protocol means any conduct, practice, merger, or agreement that has significant effect on competition in a Market of at least two Member State that do not share the same jurisdiction of the existing regional economic communities.
- Article 10 of the Protocol applies to mergers and acquisitions with a continental dimension in the Market where:
 - both the acquiring undertaking and target undertaking or either the acquiring undertakings or target undertakings operate, directly or indirectly, in the Market; and
 - the combined annual turnover and/or assets of the undertakings concerned equals to or exceeds the thresholds to be determined by a Regulation.

BEST PRACTICES IN DETERMINING MERGER AND ACQUISITION NOTIFICATION THRESHOLDS

Approach

- International Competition Network- Setting notification thresholds for merger review.
- OECD- Local nexus and jurisdictional thresholds in merger control identifies the patterns that can be considered in the design of merger control thresholds for NCAs.
- Engagement with the European Commission to discuss the methodology that was used to determine their merger and abuse of dominance thresholds.
- CCC provided their authority experience.
- Participation from AFC State Parties.



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BEST PRACTICES IN DETERMINING MERGER AND ACQUISITION NOTIFICATION THRESHOLDS

Identify goals of reform

- Capturing those transactions that would raise competition concerns at a continental level
- Limit the notification of mergers to those that are of a certain economic significance that may potentially raise competitive concerns.
- Ensure procedural efficiency and minimizing administrative costs

Compare the thresholds used in other Jurisdictions

- We reviewed the merger notification thresholds among the ACF members.
- Focused on the merger notification thresholds of the three largest economies in Africa (Nigeria, Egypt, and South Africa) .
- Nigeria's merger notification threshold is a combined annual turnover of USD 1,301, 630 and the turnover of the target must be at least USD 650,815.
- Egypt's has both a world-wide and domestic merger notification threshold with the domestic value set at USD 29,131,398.
- South Africa has a two-tier notification with large mergers using a higher combined value of USD 353,218,866 and the target with at least USD 10,168,421 turnover or asset value, whereas intermediate mergers use a lower combined value of USD 32,110,806 with the target at least USD 5,351,801 turnover or asset value.



BEST PRACTICES IN DETERMINING MERGER AND ACQUISITION NOTIFICATION THRESHOLDS

Considering the types of thresholds

- Protocol states that the thresholds should be based on turnover or asset values.
- Include an additional criterion that sets a minimum threshold for the acquiring and target undertakings in the Member State that are not within the same REC.

The size of the economy

- GDP- During the period 2010-2022 Africa's GDP increased from USD 2 trillion to USD 2.9 trillion, an increase of 45%.
- The CCC is the most established regional authority on the continent, so we reviewed the value of the transactions notified to the CCC.
- Of the mergers that have been notified to CCC, the merger transactions that raised competition concerns were the companies that had an average turnover of just over USD 1 billion. Lowest turnover being about USD 500,000,000 and the highest being about USD 6,900,000,000.
- Revenue of the top 100 companies in Africa in 2022. Of the 100 firms, 80 of these firms had a revenue of over USD 1 billion.
- Some of the global firms that have been involved in mergers on the African continent had a revenue of over USD 1 billion.

Adjusting Thresholds should be a Continuous Process

- A review and adjustment of thresholds on a regular basis

CONSIDERATIONS FOR CCA MERGER AND ACQUISITIONS NOTIFICATION THRESHOLDS

Suggested combined turnover or asset value for the CCA merger notification can be the following:

- If the combined continental annual turnover or assets of the undertakings concerned equals to or exceeds USD 1 billion;
- If the annual turnover or value of assets of each of at least two of the undertakings concerned equals to or exceeds USD 250 million, and
- A CCA dimension is met if each of the firms achieves less than two thirds of its AfCFTA turnover within one REC and/or the same Member State.



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RELEVANT LEGAL PROVISIONS

Article 9 of the Protocol states that,

“The determination for dominance in a market may be based on:

- (a) market share to be determined in a regulation and level of concentration; or*
- (b) market power considerations including barriers to entry, countervailing power, the level of actual or potential competition in terms of number of competitors, production capacity and product demand or the history of competition and rivalry between competitors.”*



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BEST PRACTICES IN DETERMINING MARKET SHARE THRESHOLDS

- The market share for the ACF member states range between 25%- 50%.
- Considered the thresholds applied by the regional authorities such as the EC and COMESA.
- The EC has a higher threshold of 40% while the CCC threshold is lower at 30%.
- The OECD indicated that a market share of 35% and above requires further scrutiny.
- The CCA will have limited enforcement capability and as such, using a higher market share threshold (combined with the requirements of a continental dimension) will, initially, allow for the CCA to deal with conduct that truly warrants continental scrutiny.
- Therefore, for the market share criteria we suggest the following:
 - A firm is presumed dominant if it has a market share of at least 35% of the market (affecting two or more State Parties belonging to different RECs.).
 - The proposed market share threshold does not preclude the CCA from conducting investigations where a firm's market share is below 35% as this is in line with Article 9(1)(b) of the AfCFTA Protocol and is important for consideration of cases in digital markets.



COUNTRY COMMENTS

- We received comments from several ACF members: Kenya, Malawi, Mauritius, Namibia Seychelles, Zimbabwe, Zambia
- Mauritius and Zambia find the suggested thresholds to be high.
- Mauritius suggested USD 500 million would be more reasonable. Concerning individual turnover/assets, then it seems that USD 100 million would be reasonable.
- Zambia suggested a threshold of around USD112 million.



Thank You!



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