

Deals, Dominance and Public Interest: The Evolving Shape of Merger Control in Kenya's Financial Services Sector

1. The shifting centre of merger control

Merger control has traditionally been understood, and frequently presented, as an exercise in competition economics. The analysis ordinarily begins with a familiar question: whether the proposed transaction is likely to result in a substantial lessening of competition in the relevant market. That inquiry is typically undertaken through established competition law tools, including market definition, concentration analysis, barriers to entry, pricing power and the degree of constraint exerted by existing or potential competitors.

That framework remains central. It continues to provide the formal analytical foundation upon which merger review is conducted. In Kenya, however, particularly in the financial services sector, it is no longer sufficient to explain how merger outcomes are reached in practice.

The difficulty lies not in the statutory architecture, which remains firmly rooted in competition law, but in the increasing importance of a second and distinct line of regulatory inquiry: the public interest. In a sector as economically sensitive and socially consequential as financial services, merger review is no longer confined to conventional antitrust concerns such as concentration, foreclosure or unilateral effects. It increasingly extends to questions of employment, financial inclusion, market access, institutional resilience and the wider policy consequences of consolidation.

That development is significant. It reflects a gradual but important shift in regulatory emphasis. Public interest considerations are no longer treated as incidental or residual matters to be addressed only after the competition analysis has been completed. They are becoming an integral part of the substantive assessment itself, and in some transactions they may materially shape both the review process and the ultimate conditions of approval.

For parties engaged in financial services transactions, the implication is straightforward. Merger control can no longer be approached as a narrow competition law exercise directed solely at market share, overlap and pricing power. It must be understood as a dual-limbed assessment in which public interest considerations increasingly carry real analytical and practical weight alongside traditional competition factors. The centre of gravity has not moved away from competition, but it is no longer located there alone.

2. The legal framework: a dual analytical structure

The Kenyan merger control regime, established under the Competition Act (Cap 504) and supplemented by subsidiary legislation and guidance, requires certain transactions to be notified to, and approved by, the Competition Authority of Kenya prior to implementation. That framework reflects a conventional model of pre-merger review.

In substance, however, the analysis is not confined to competition. The Authority applies two distinct,

though interconnected, inquiries. The first considers whether the transaction is likely to result in a substantial lessening of competition. The second addresses whether the transaction gives rise to public interest concerns.

Both limbs are embedded in the statutory framework. What is evolving is how they are applied. The competition analysis focuses on market structure, including concentration, market power and competitive constraint. The public interest inquiry introduces a broader set of considerations, including employment, access to services and wider economic policy.

The significance of the framework lies in this interaction. Public interest is no longer treated as incidental to the competition analysis. It is increasingly engaged as a substantive part of the assessment, capable of influencing both the outcome of the review and the conditions on which approval is granted.

3. The competition analysis: necessary but no longer sufficient

The competition test remains the starting point. At its core, the inquiry is whether the transaction materially alters market structure in a way that enables the merged entity to exercise market power, whether unilaterally or through a reduction in competitive constraint.

That assessment is well established. It begins with market definition, not as an abstract exercise, but as a way of identifying the competitive set within which the effects of the transaction are to be assessed. From there, the Authority considers the degree of concentration created by the transaction and whether that concentration is likely to translate into the ability to raise prices, reduce output or otherwise weaken competitive discipline. Barriers to entry and expansion are central to that analysis, as is the extent to which remaining competitors are capable of

constraining the merged entity in practice rather than in theory.

In financial services, the exercise is often more granular than it first appears. Competitive dynamics differ across products, from retail banking and payments to insurance and asset management, and the sources of competitive constraint may vary accordingly. Scale, access to funding, regulatory capital requirements and distribution networks can all influence how competition operates within a given segment. The result is that competition cannot be assessed at a single level of generality, but must be understood in the context of the specific markets in which the parties overlap.

Even where that analysis points to limited competitive harm, it does not conclude the review. In the Kenyan context, competition establishes the baseline, but it is not determinative of the outcome.

4. The public interest limb: increasing practical significance

The public interest limb introduces a broader, policy-oriented dimension to merger review, extending the analysis beyond market structure and into the wider economic consequences of the transaction.

In the financial services sector, that inquiry is necessarily contextual. Transactions are assessed not only by reference to their competitive effects, but by their impact on employment, access to financial services and the stability of the sector as a whole. There is often an inherent tension. Consolidation may strengthen capital positions, improve efficiency and enhance resilience, yet at the same time give rise to concerns around workforce reduction, branch rationalisation or reduced access in certain markets. The task for the Authority is not simply to identify these effects, but to weigh them.

Unlike competition analysis, which is grounded in established economic tools, the public interest

inquiry is inherently evaluative. It does not turn on market share thresholds or concentration indices, but on judgment as to how the transaction aligns with broader policy objectives. That introduces a degree of discretion which is less apparent in the competition limb, but often more influential in shaping outcomes.

It is through that discretion that public interest considerations become operational. In practice, concerns are rarely addressed by prohibiting a transaction outright. Instead, they are managed through conditions that calibrate how the transaction is implemented and how the merged entity operates post-completion. These may affect integration strategy, cost rationalisation or the pace at which synergies are realised. The significance of the public interest limb lies in this function. It is not simply an additional layer of review, but the point at which merger control moves from analysis to intervention, and where regulatory priorities are translated into concrete commercial obligations.

5. How the dual test operates in practice

In practice, the interaction between competition and public interest considerations rarely results in outright prohibition. The more common outcome is conditional approval.

In financial services transactions, those conditions are typically directed at mitigating the wider effects of consolidation. They may require the parties to maintain employment levels for a defined period, preserve service availability in particular regions or continue lending to specific sectors or customer segments. In some cases, they extend to constraints on post-completion restructuring, limiting the extent to which the merged entity can rationalise operations in the short term.

These measures are not merely formalities. They can have a direct bearing on the commercial rationale for the transaction. Commitments relating to employment or branch networks may affect

integration strategy, delay cost rationalisation and alter the timing or quantum of expected synergies. In that sense, regulatory approval does not simply permit the transaction to proceed, it shapes how its benefits are realised.

The practical effect is that the public interest limb operates as more than a regulatory safeguard. It functions as a mechanism through which the Authority influences post-completion conduct, translating policy considerations into binding commercial obligations.

6. Implications for transaction planning and execution

For transaction parties, the evolving balance between competition and public interest considerations has direct implications for how deals are structured and executed.

Merger control analysis must be approached as a genuinely two-dimensional exercise. It is no longer sufficient to demonstrate that a transaction does not materially lessen competition. Parties must also identify, at an early stage, the potential public interest issues that the transaction may raise and consider how those issues are likely to be addressed in the review process.

That assessment needs to be embedded in transaction structuring. Employment impacts, operational consolidation and the potential for regulatory conditions should be evaluated alongside more familiar considerations such as valuation and financing. In particular, parties should consider the extent to which possible conditions may affect integration planning, delay cost rationalisation or alter the timing of anticipated synergies. These factors should be reflected in transaction documentation, including the allocation of regulatory risk, the formulation of conditions precedent and the calibration of long-stop dates.

Engagement with the regulator also assumes greater importance in this context. Where public interest concerns are likely to arise, early and constructive engagement can assist in identifying areas of concern, shaping acceptable remedies and managing execution risk. In practice, this may be as significant as the underlying competition analysis in determining whether, and on what terms, the transaction proceeds.

7. Conclusion

Merger control in Kenya's financial services sector is undergoing a subtle but important shift. The competition test remains central, but it no longer operates alone. Public interest considerations now play an increasingly material role in shaping regulatory outcomes.

While this article has focused on financial services, the direction of travel is not sector-specific. The increasing prominence of public interest considerations reflects a broader feature of the Kenyan merger control regime, one that is likely to be relevant across a range of sectors where transactions engage wider economic or policy concerns.

For dealmakers, the implication is clear. Merger control can no longer be approached as a purely antitrust exercise. It requires navigating a dual framework in which competition analysis and public interest considerations operate alongside one another, and in which regulatory outcomes are shaped as much by policy as by market structure.

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