



Common Market for Eastern
and Southern Africa

**COMESA COMPETITION COMMISSION
HEARING PROCEDURES GUIDELINES, 2021**

JULY 2021

**PREPARED IN ACCORDANCE WITH THE COMESA COMPETITION REGULATIONS
2004 AND THE COMESA COMPETITION RULES 2004**

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DISCLAIMER

These Guidelines are for general guidance on the implementation of article 8 of the COMESA Competition Regulations, 2004 and rules 24, 29 and 49 of the COMESA Competition Rules, 2004 dealing with hearings by the Committee of Initial Determination as it executes its mandate to conduct investigations on alleged anti-competitive business practices within the Common Market as prohibited under Article 55 of the COMESA Treaty. These Guidelines do not constitute legal advice and should not be relied upon as a statement of law relating to the Regulations. The Guidelines are not a substitute of the Regulations and Rules but should be read in the context of the provisions thereof. Stakeholders are encouraged to seek legal advice should they have any doubt about how the Guidelines apply in the context of a particular case.

PREAMBLE

- (A) WHEREAS Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (“COMESA”), laid the legal basis for the regulation of competition when the Member States agreed that any practice which negates the objective of free and liberalized trade shall be prohibited. To this end, the Member States agreed to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market. The Member States also mandated the COMESA Council of Ministers to make regulations to regulate competition within the Common Market. The COMESA Competition Regulations (the “Regulations”) were thus adopted in 2004;
- (B) WHEREAS the Regulations prohibit certain restrictive business practices which are considered incompatible with the objectives of the Common Market. According to Article 2 of the Regulations, the purpose of the Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market and to protect consumers against offensive conduct by market actors;
- (C) IN PURSUANCE of Article 3 of the Regulations, the Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities that are excluded pursuant to Article 4 of the Regulations;
- (D) CONSIDERING that the COMESA Competition Commission (the “Commission”) is the institution responsible for applying the provisions of the Regulations with regard to trade between Member States and promoting competition within the Common Market and that Article 8 of the Regulations empowers the Commission to monitor, investigate, detect and make determinations or take action to prevent, inhibit or penalize undertakings whose business appreciably restrains competition within the Common Market. And that in carrying out its investigations in accordance with the Regulations, which include conducting hearings, the Commission is expected to respect the principles of natural justice;

The Commission hereby adopts the following Guidelines on Hearing Procedures:

SECTION 1 CITATION

These Guidelines shall be cited as the COMESA Competition Commission Guidelines on Hearing Procedures, 2021 (“Hearing Guidelines”).

SECTION 2 INTERPRETATION

(1) In these Hearing Guidelines, unless the context otherwise requires-

“Commission” means the COMESA Competition Commission established under article 6 of the COMESA Competition Regulations;

“Committee” means the Committee assigned by the Chairperson of the Board of Commissioners responsible for initial determinations pursuant to article 13(4) of the Regulations;

“hearing” means the process whereby the Commission or the Committee hears the concerned parties when investigating and making initial determination of cases on alleged breach of provisions of the Treaty, the Regulations and the Rules by persons, undertakings or association of undertakings within the Common Market;

“Regulations” means the COMESA Competition Regulations, 2004;

“Rules” means the COMESA Competition Rules, 2004;

“third party(or third person)” means a natural or legal person who is deemed necessary by the Commission as person to be heard in addition to undertakings or associations against which the Commission is about to decide in accordance with the Rules or Regulations.

(2) In these Guidelines, any word or expression to which a meaning has been ascribed in the Treaty, Regulations or the Rules, shall bear the said meaning as in the Treaty, Regulations or the Rules unless the context otherwise indicates.

SECTION 3 PURPOSE

These Guidelines set out the procedure for conducting hearings as provided for under the Regulations as read together with the Rules.

SECTION 4 UNDERLYING PRINCIPLES

(1) These Guidelines have considered international best principles and various approaches from different jurisdictions.

(2) When enforcing the Regulations and Rules, the Commission and the Board shall take into account the need to respect parties’ rights to be heard, which

constitutes a fundamental principle of natural justice and shall be adhered to at all times. Both the Commission and the Board in conducting their hearings and making recommendations and/or determinations shall give the undertaking(s), which are the subject of the proceedings the opportunity of being heard as provided under the Regulations.

SECTION 5 LEGAL BASIS FOR HEARINGS

(1) The need to hold hearings is provided for under Article 8 and 33 of the Regulations and rules 24, 29 and 49 of the Rules as outlined below:

(a) Investigations

Article 8(2) of the Regulations (on the powers of the Commission) provides that:

In conducting its investigations, the Commission may, in accordance with the applicable provisions of these Regulations and in keeping with the principles of natural justice:

- (a) order any person to appear before it to give evidence;*
- (b) require the discovery or production of any document or part thereof; and*
- (c) take any other reasonable action which may be necessary in furtherance of the investigation.*

(b) Initial determinations

Rule 24 of the Rules (which stipulates the procedure for making an initial determination) provides that:

- (a) the Director shall in writing notify the Chairperson of the Board that he or she believes there has been a breach of the Regulations;*
- (b) the Chairperson shall then convene a Committee to hear the matter and notify the respondent party of the date and time of the hearing;*
- (c) at the hearing, the respondent party may be represented by an Attorney, and the Commission shall be represented at that time;*
- (d) after hearing the case in full, the relevant Committee of the Board shall make a determination as to whether or not the Regulations have been breached;*

- (e) *if the respondent party is dissatisfied with the initial determination made by the Committee, the respondent party may appeal to the full Board of Commissioners. The full Board hearing the matter will not include the three (3) Commissioners who made the initial determination;*
- (f) *the request for an appeal must be made within thirty (30) days from the date of receipt of notification; and*
- (g) *the appeal shall be made in accordance with prescribed Form.*

(c) Hearings

(i) Under Rule 29 of the Rules which specifically provides for power of the Commission to conduct Hearings, it is states that:

1. *Both the Commission and the Board in conducting their hearings and making recommendations and/or determinations shall give the undertaking(s) which are the subject of the proceedings the opportunity of being heard. Recommendations and/or decisions shall be only based on matters on which the parties concerned have been able to comment.*
2. *The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the file, subject to the legitimate interests of undertakings in the protection of their business secrets. That legitimate interest may not constitute an obstacle to the disclosure and use of information necessary to prove an infringement.*
3. *The right to access to the file shall not extend to confidential information and internal documents of the Commission and/or the Board.; and*

- (ii) Under article 33(3) of the Regulations** which requires the Director of the Commission to hear an affected party (supplier of goods) by showing cause why the Commission should not proceed to publish a notice of compulsory product recall in respect goods which are deemed injurious to persons or not adhering to consumer product safety standards.

(d) Hearing of the Parties and of Third Persons

Rule 49 of the Rules provides for the Hearing of the Parties and of Third Persons as follows:

1. *Before taking decisions as provided for in Rules 32[negative clearance], 33[termination of infringement], 36[decisions pursuant to article 16(4) of the Regulations], 37[special provision in respect of existing agreements, decisions and practices], 38[duration and revocation of a decision under Article 16(4) of the Regulations], 45 [fines] and 46[periodic penalty payments], the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.*
2. *If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.*
3. *Where the Commission intends to give negative clearance pursuant to Rule 32 or take a decision in application of Article 16 (4) of the Regulations, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than thirty (30) working days. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.*

(2) Based on the foregoing provisions of the Regulations and the Rules, there are three stages of hearings, namely:

- (a) the hearings during the investigations process,
- (b) hearing by the Director before publication of notice of compulsory recall of defective goods, and
- (c) hearing before the Committee for the initial determination of cases.

- (3) The procedure for the hearings before the Committee are not intended to be a major source of basic information relating to the investigation since information gathering is primarily a matter to be addressed through responses to the Notice of Investigation against an undertaking which is subject of the investigation for suspected restraint of competition under Articles 21 (6)(a) and 22(1) of the Regulations.
- (4) The hearings, according to Rule 49 of the Rules, are before the Committee which is appointed by the Chairperson of the Board of Commissioners pursuant to Rule 24(b) upon receipt of a notification from the Director of the Commission in terms of Rule 24(a) of the Rules to the effect that there has been a breach of the Regulations.
- (5) Upon receipt of the final submissions by the respondents based on the preliminary investigation findings report, the Commission shall, within 14 days, prepare the final report and present to the Committee.

SECTION 6 CONDUCT OF HEARINGS

When to hold Hearings

- (1) By virtue of the provisions of Articles 8 and 33(3) of the Regulations and Rules 24, 29 and 49 of the Rules, the Commission:
 - (a) may hold hearings at any time during the investigations;
 - (b) shall hold a hearing before making recommendations or taking decisions under the Regulations or the Rules; or
 - (c) before the Commission publishes a notice of compulsory product recall in respect of goods which, if supplied to consumers, may cause injury to the consumers or do not meet the prescribed consumer product safety standards.
- (2) The hearings may be held at the request of a party under investigation and the request for such hearing shall be addressed to the Director of the Commission or the Chairperson of the Board of the Commissioners depending on the stage at which the hearing is to be held.

Notice of Date of Hearing

- (3) When the Commission decides that a hearing is to be held, the Director shall:
- (a) give at least fifteen (15) working days' notice, physically and/or electronically, in advance of the date scheduled for the hearing to the parties under investigation and to any third party who will be required, by virtue of the provisions of the Regulations and Rules, to attend and to also produce specified documents or other material; and
 - (b) publish a notice announcing the hearing and inviting other interested parties to indicate if they wish to appear at the hearing.

Notice of Main Issues

- (4) The Committee shall give the parties under investigation ten (10) working days notice of-
- (a) the main issues that have been identified as a result of the evidence and information gathered during the investigation; and
 - (b) the main questions that the Committee anticipate they will wish to raise.
- (5) There is no limitation on the questions that may be put at the hearing, as long as the questions are reasonably related to the matter under investigation.

Testing of evidence

- (6) The hearing provides an opportunity for the Committee to test the evidence presented by third parties where applicable and to interrogate the Commission investigation team and the undertaking(s) under investigation about salient aspects of the case; and gives the undertakings under investigation the opportunity to:
- (a) clarify and develop the evidence it has given to investigators;
 - (b) comment on and rebut evidence and information supplied by other parties, and
 - (c) make further representations which may, in relevant cases, address the question of whether a practice has public benefits that may offset any adverse effects on competition.

Conduct of Proceedings for Hearings

- (7) Upon the Board Chairperson convening the Committee to hear the matter and notifying the respondent party of the date and time of the hearing, the Chairperson

of the Committee shall give twenty-one (21) days' notice in advance of the date scheduled for the hearing to the respondents under investigation in accordance with Rule 24 and 49 of the Competition Rules and to the persons who will be required by virtue of the relevant provisions of the Competition Rules to attend the hearing.

- (8) The Committee may hold a pre-hearing with all parties to consider any application to be determined by the Committee.
- (9) The parties can request a pre-hearing conference with the Registrar of the Commission on matters such as:
 - a. making sure all parties have received all the documentation they will be relying upon at the hearing; or,
 - b. to confirm all parties who will attend the hearing.
- (10) The structure of the hearing may vary on a case-by-case basis, although it should include the following stages:
 - i. Introduction of the hearing by the Committee Chairperson and introduction of the attendees;
 - ii. Presentation of the facts surrounding the case by the Commission and the findings of the investigation;
 - iii. Presentation of the facts and arguments by the respondents in response;
 - iv. Response by the Commission to the arguments raised by the respondents;
 - v. Final response by the respondents to the response of the Commission;
 - vi. Responses by both parties relating to the questions put forward by the Committee at the hearing; and
 - vii. The Committee shall thereafter make a determination within forty-five (**45**) days.
- (11) The principles to guide the conduct of the hearing proceedings shall include the following:
 - i. every party is heard in the presence of all other parties to the hearing, unless they are exempted by the Committee to preserve that party's legitimate interests to confidentiality or exempted for any other legitimate reason.
 - ii. No new evidence shall be allowed to be presented during the hearing without prior application to the Committee to do so, as this will prejudice all the parties to the proceedings who will be denied a proper right of reply.

- iii. The hearing can be conducted in private or in public in either of the following manners:
 - a. video-conference, or
 - b. physical attendance, or
 - c. both.
 - iv. Where a party fails to appear at the hearing, after receiving the required notice of the hearing, the hearing will proceed without further recourse to them.
 - v. Where the Committee has made an order of breach, in appropriate circumstances, parties may be directed by the Committee to discuss the remedy. Where an agreement on the remedy is reached, the parties will submit such agreement to the Committee, for the Committee to issue an appropriate order. Where the parties fail to reach an agreement on the remedy, the Committee will proceed to issue an appropriate order without further recourse to the parties.
- (12) The Committee shall make a determination within forty-five (**45**) days from the date of hearing. Any party aggrieved shall have a right of appeal to the Board of Commissioners in accordance with Rule 24 (d), (e) and (f).
- (13) The determination of the Committee shall be published in its official publication in terms of Rule 28 of the Competition Rules unless there is an objection based on legitimate business interests from the parties.
- (14) Where there is an objection based on legitimate business interests from the parties, the Commission shall review the objection and where the legitimacy of business interests is verified, a redacted version of the determination of the Committee will be published.

SECTION 7

REVIEW OF THE GUIDELINES

These Guidelines may be reviewed from time to time to reflect changing market circumstances and the law governing their implementation. The amendment to these Guidelines shall be approved by the Board.

SECTION 8

ENTRY INTO FORCE

These Guidelines shall enter into force upon approval by the Board.

APPROVED by the Board at on the.....day
of....., 2021.

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