



**THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA,
COMESA**



**DRAFT COMESA COMPETITION COMMISSION
GUIDELINES ON SETTLEMENT
PROCEDURES, 2021**

SEPTEMBER, 2021

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

DISCLAIMER

This COMESA Competition Commission Guidelines on Settlement Procedures is only for general guidance on the procedure followed by the COMESA Competition Commission (“the Commission”) when dealing with settlements for any breach of the COMESA Competition Regulations (the “Regulations”). This procedure is not a substitute of the Regulations and should be read together with the Regulations and Rules made pursuant thereto. Stakeholders are encouraged to seek legal advice should they have any doubt about how the Settlement Notice applies 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 Treaty”), laid the legal basis for the regulation of competition by requiring Member States to prohibit any practice which negates the objective of free and liberalized trade within the Common Market. 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;
- (B) RECALLING that 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;
- (C) REALIZING that in order to achieve the objectives of the COMESA Treaty and the Regulations in addressing anti-competitive business practices within the Common Market, adoption of Competition Policy is instrumental. In addition, Competition Policy is also one of the key tools for trade liberalization and development for the COMESA regional economic integration agenda;
- (D) CONSIDERING that the Regulations in turn established the COMESA Competition Commission (the “Commission”) and conferred upon it the powers, in respect of trade between Member States, to monitor, investigate, detect, make determinations or take action to prevent, inhibit and/or penalize undertakings whose business appreciably restrains competition within the Common Market. Hence, in exercising its powers, the Commission has to ensure the achievement of the COMESA Treaty objective in relation to competition to the effect that it should not be prevented, restricted or distorted in a way that is inimical to free and liberalized trade which is the hallmark of the single market imperative;
- (E) FURTHER REALIZING the power of the Commission under Articles 8(3) and (4) of the Regulations to remedy or penalize anti-competitive activity where, after the findings of its investigations, it makes a determination that there has been a breach

of the Regulations in that the conduct at issue has or is likely to have an appreciable negative competitive impact and is inconsistent with the objectives of the Common Market;

- (F) FURTHER REALIZING the need to provide a transparent and predictable procedure for concerned parties to make acknowledgement of their liability and willingness to settle the liabilities emanating from breaches of the Treaty, the Regulations and the Rules in terms of anti-competitive business practices in the Common Market;

The Commission hereby adopts the following Guideline on Settlement Procedures:

SECTION 1 CITATION

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

SECTION 2 INTERPRETATION

(1) In these Settlement Guidelines, unless the context otherwise indicates:

“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; and

“Regulations” means the COMESA Competition Regulations, 2004;

“Rules” means the COMESA Competition Rules, 2004; and

“settlement” means the process through which parties which are subject to proceedings under Part III of the Regulations may be prepared to acknowledge their participation in conduct violating the Regulations and their liability in respect of such participation, if they can reasonably anticipate the Commission’s envisaged findings as regards their participation in the infringement and the level of potential fines and agree with those findings in order to bring those proceedings to an end without having to follow the lengthy standard procedures.

- (2) In these Settlement Guidelines, any word or expression to which a meaning has been ascribed in the Regulations bears the same meaning as in the said Regulations unless the context indicates otherwise.

SECTION 3

PURPOSE AND SCOPE OF APPLICATION

- (1) The purpose of these Settlement Guidelines is to set out the procedure for pursuing settlements as provided under the Regulations read together with the Rules and apply to the extent that they are not inconsistent with the Regulations and Rules.
- (2) In accordance with Article 8(4) of the Regulations, the Commission shall, to the extent required to remedy or penalize anti-competitive activity:
- (a) order the termination or nullification, as the case may require, of agreements, conduct, activities or decisions prohibited by Part 3 of [the] Regulations;
 - (b) direct the enterprise to cease and desist from anti-competitive conduct and to take such steps as it believes may be necessary to overcome the effects of abuse of its dominant position in the market, or any other business conduct inconsistent with the principles as set out in [the] Regulations;
 - (c) order payment of compensation to persons affected; or
 - (d) impose fines for breaches of the provisions of [the] Regulations.
- (3) In terms of Rules 33(3) and 49(1) of the Rules, the Commission shall give undertakings concerned the opportunity to be heard on the matters to which it has taken objection. This is consistent with the provisions of Article 6 of the COMESA Treaty which obliges Member States to recognize, promote and protect human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.
- (4) Specifically, Article 7(1) of the African Charter on Human and Peoples' Rights provides the following rights in relation:
- (a) the right to be presumed innocent until proven guilty by a competent court or tribunal [which is provided for in article 7(2) of the Charter];
 - (b) the right to defence, including the right to be defended by counsel of his choice [which is provided for in article 7(3) of the Charter]; and
 - (c) the right to be tried within a reasonable time by an impartial court or tribunal [which is provided for in article 7(1)(d) of the Charter].

- (5) These Settlement Guidelines, therefore, gives guidance on the process that the Commission will undertake in its efforts to bring conduct to an end, while fully recognizing undertakings' rights to be heard, and rights to defence.
- (6) The effective enforcement of the Regulations is compatible with full respect for the parties' rights of defence, which constitutes a fundamental principle of law to be respected in all circumstances, and in particular, violations under the Regulations which may give rise to penalties. It follows that the rules established to conduct the Commission's proceedings to enforce the Regulations should ensure that parties are afforded the opportunity effectively to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission throughout the administrative procedure.
- (7) These Settlement Guidelines are meant to guide parties who might be interested in settling before or after having sight of the Commission's case. Therefore, the Settlement Guidelines give the Commission and the parties an opportunity to resolve matters expeditiously.
- (8) In terms of jurisprudence, this procedure has considered principles and approaches taken in other jurisdictions in pursuing settlement negotiations. Specifically, the settlement procedure is guided by the European Union's "Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003", and the Zambia "Competition and Consumer Protection Commission Settlement Procedure Guidelines 2016".

SECTION 4 JUSTIFICATION

- (1) The Commission recognized that there are two possible proceedings under which parties can settle with the Commission; application for authorization under Article 20, and investigations in accordance with other provisions of the Regulations.
- (2) The Commission is of the view that an admission of liability should not be required in the settlement proceedings for Article 20 proceedings, in line with the COMESA Guidelines on restrictive business practices. However, parties entering into settlement negotiations with the Commission under Articles 18, Article 21 or Article 22 investigations must be required to admit liability. These proceedings are treated separately under this Settlement Notice.
- (3) In line with the Commission's practice to submit all assessment reports to the three Board members/Commissioners who form the Committee Responsible for Initial Determination ("the Committee") for determination, settlement agreements must

be confirmed and ratified by the Committee. However, rejection should be in cases where there is blatant and unfair settlement terms.

SECTION 5 PROCEDURE FOR INITIATION OF SETTLEMENT

- (1) The Commission may engage in settlement discussions either upon the written request of the parties concerned or upon the Commission's own initiative. The Commission may:
 - (a) engage in settlement discussions with parties;
 - (b) discontinue settlement discussions that have already commenced; or
 - (c) conclude a settlement agreement with parties.
- (2) The Commission can exercise its discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as decide to engage in them or discontinue them, or to definitely settle. The Commission may take account of the probability of reaching a common understanding regarding the scope of the potential concerns with the parties involved within a reasonable timeframe. In this regard, the Commission may take into account several factors including the following:
 - (a) the number of parties involved;
 - (b) the extent to which the facts are contested; and
 - (c) the possible conflicts arising on the attribution of liability, as the case may be.
- (3) The Commission will take into account the prospect of achieving procedural efficiency with respect to the progress made during the settlement negotiations, as well as the possibility of setting a precedent. Should the Commission consider it suitable to explore the parties' interest to engage in settlement discussion, it will set a time-limit of no less than twenty-one (21) days within which parties to the same proceedings should declare in writing whether they envisage engaging in settlement negotiations at a later stage.
- (4)

SECTION 6 SETTLEMENT SUBMISSIONS

- (1) Parties opting for a settlement procedure must introduce a formal request to settle in the form of a written settlement submission. The settlement submission should contain the following:

- (a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;
 - (b) commitment from the parties to pay the fines to be imposed by the Commission and /or the remedies, which the parties accept in the framework of a settlement procedure;
 - (c) the parties' confirmation that they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;
 - (d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their submissions in the statement of concerns.
- (2) The acknowledgements and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgements and confirmations are conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.
 - (3) Settlement submissions can be withdrawn upon submission of notice by either of the parties which have provided them.
 - (4) The preliminary investigation findings report(s) would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in subsection (1)(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should include a commitment from the parties to pay the fines to be imposed by the Commission as indicated in 1(b) above.
 - (5) Upon the parties' replies to the preliminary investigation findings report confirming their commitment to settle, the Commission can proceed, without any other procedural step, to submit its recommendations to the Committee. In particular, this implies that no oral hearing or access to file may be requested by those parties once their settlement submissions have been reflected by the statement of concerns.
 - (6) The Commission retains the right to adopt a final position which departs from its preliminary position expressed in the preliminary investigation findings report

endorsing the parties' settlement submissions, either in view of the opinion provided by the Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Commission. However, should the Commission opt to follow that course, it will inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure. It follows that the parties will then be entitled to have access to the file, request an oral hearing and to reply to the statement of objections. The acknowledgements provided by the parties in the settlement submissions will be disregarded by the Commission and will not be used in evidence against any of the parties to the proceedings.

- (7) Access to the settlement submissions is only granted to those addressees of the preliminary investigation findings report who have not requested settlement, provided that they commit – together with the legal counsel getting access on their behalf – not to make any copy by mechanical or electronic means of any information in the settlement submissions to which access is being granted and to ensure that the information to be obtained from the settlement submission will solely be used for the purposes of judicial or administrative proceedings for the application of competition rules in the related proceedings. Other parties such as complainants will not be granted access to settlement submissions.
- (8) Settlement submissions will be transmitted to the competition authorities of Member States and shall ensure that the level of protection against disclosure awarded by receiving competition authority is equivalent to the one conferred by the Commission.
- (9) Upon the applicant's request, the Commission may accept the settlement submissions be provided orally in addition to the written submission. Oral settlement submissions will be recorded and transcribed by the Commission. Parties making oral settlement submissions will be granted the opportunity to check the technical accuracy of the recording. The Commission will not at any time transmit settlement submissions to national courts for use in actions for damages for breaches of the Regulations.

SECTION 7

COMMITMENTS SUBMITTED UNDER APPLICATION FOR AUTHORISATION

- (1) With respect to proceedings under Article 20 of the Regulations, the Commission may engage in settlement negotiations with the applicants any time before the Director of the Commission makes a decision pursuant to Rule 62. The Commission shall address its concerns to the applicants and invite the applicants to negotiations to bring the likely anti-competitive harm to an end. In this regard, either the Commission, or the applicants may propose undertakings to remedy the likely harm.
- (2) The applicants must make full disclosure in a timely fashion as required by the Commission. The Commission shall determine whether the proposed undertakings are sufficient to address the likely competitive harm. The possible remedies to the likely harm may consist of a combination of structural and behavioural remedies as required on a case by case basis. On conclusion of the settlement negotiations, the applicants shall furnish the Commission with the proposed remedies in the form of a signed Settlement Agreement.
- (3) The Commission shall submit a report to the Director of the Commission detailing the assessment in accordance with Article 20 of the Regulations and attach thereto the proposed Settlement Agreement for his consideration. The Director of the Commission may make a determination as provided for under the Rule 62.
- (4) Pursuant to the COMESA Guidelines on Restrictive Business Practices, the conclusion of settlement negotiations under Article 20 of the Regulations shall be without prejudice to the applicants' rights under any action by third parties. In this regard, the settlement agreement shall not be construed to be an admission of breach of the Regulations by the applicants.

SECTION 8

SETTLEMENT NEGOTIATIONS INSTITUTED IN ACCORDANCE WITH INVESTIGATIONS

- (1) With respect to proceedings instituted in accordance with the Regulations, the Commission may engage in settlement discussions at any time before the Committee makes a determination, at any of the following stages:
 - (a) when a respondent, in response to a Notice of Investigation, expresses in writing its interest to commence settlement negotiations with the Commission;
 - (b) during the investigation period but before the submission of an investigation report to the Committee.

- (2) During the course of an investigation, the respondents may indicate their interest to commence settlement negotiations with the Commission. In this regard, the respondents shall make full disclosure of information as required by the Commission in a timely fashion.
- (3) Full disclosure by the respondents shall inform the Commission of the essential elements of the case including, but not limited to, the following:
 - (a) the facts of the conduct;
 - (b) evidence relevant to the conduct;
 - (c) the duration of the conduct; and
 - (d) attribution of liability.
- (4) In order to commence settlement negotiations, the respondents shall be required to:
 - (a) submit an admission of liability in relation to the nature, scope and duration of the infringement. The scope of the infringement shall include, among others, the material facts of the infringement, its legal characterization, the respondents' role in the infringement, and the duration of their participation;
 - (b) cease the infringement immediately the settlement negotiations commence; and
 - (c) refrain from engaging in the same or similar conduct.
- (5) An admission of facts alone will not be sufficient to constitute an admission of liability; the admission must also include facts of any actual implementation of the infringement.
- (6) The respondents may propose undertakings to remedy the harm arising from the conduct. The undertakings may consist of a combination of structural and behavioural remedies. The Commission is not obliged to proceed with the settlement negotiations if it considers that the information provided is not sufficient to bring the investigation of the anti-competitive conduct to an end. The closure of the investigation should ensure that the anti-competitive conduct comes to an end.
- (7) During settlement negotiations, the respondents shall not disclose to any third party in any jurisdiction the contents of the discussions or of the documents which they have had access to in view of the settlement, unless they have prior explicit authorization from the Commission. Any breach in this regard may lead the Commission to disregard the respondents' request to engage in settlement negotiations. Moreover, in the computation of appropriate fines and/or penalties,

such disclosure may constitute an aggravating circumstance and may be regarded as lack of cooperation.

- (8) The Commission shall submit a report to the Committee detailing the assessment in accordance with the relevant provisions of the Regulations and attach thereto the proposed Settlement Agreement for the Committee's determination.
- (9) The conclusion of settlement negotiations under the Regulations shall apply only when the respondents are prepared to admit that they have breached the Regulations.

SECTION 9

SETTLEMENT NEGOTIATIONS INVOLVING TWO (2) OR MORE UNDERTAKINGS WITHIN THE SAME ECONOMIC UNIT

- (1) Whenever the Commission initiates proceedings against two or more parties within the same undertaking, it will inform each of the parties of the other economic entities which it identifies within the same undertaking and which are also concerned by the proceedings. Should the concerned parties wish to engage in settlement discussions, they must appoint joint representatives fully empowered to act on their behalf. The appointment of joint representatives aims solely to facilitate the settlement discussions and it does not prejudice in any way the attribution of liability for the infringement amongst the different parties.
- (2) The Commission retains discretion to determine the appropriateness and the pace of bilateral settlement discussions with each party. This includes determining, in view of the progress made overall in the settlement procedure, the order and sequence of the bilateral settlement discussions as well as the timing of the disclosure of information, including evidence in the Commission file used to establish the envisaged objections and the potential fine. Upon request by a party, the Commission will also grant it access to non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as this is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other aspect of the conduct in question.
- (3) When the progress made during the settlement discussion leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be achieved in view of the progress made overall, the Commission may grant a time-limit within which the undertaking shall produce the final settlement submission.

SECTION 10

DECISIONS BY THE COMMITTEE

- (1) Upon receiving undertakings and confirming that they are satisfactory to address the likely competition harm, the Commission shall submit a Settlement Agreement to the Committee for confirmation and issuance of an appropriate order. The effect of a Settlement will be the resolution of a matter by the parties to an investigation.
- (2) The Committee may upon receipt of the Settlement Agreement:
 - (a) give or withhold its confirmation. However, withholding confirmation should be in cases where there is blatant and unfair settlement terms.; or
 - (b) return the matter to the Commission with an indication of any changes that need to be made to the Settlement Agreement before the Committee confirms it; or
 - (c) make any other determination as necessary given the circumstances.

SECTION 11

PROCEDURE FOR SETTLEMENT NEGOTIATIONS BEFORE THE COMMITTEE

Where a party whose case is before the Committee for a hearing or initial determination requests for settlement discussions, the Committee shall order the Commission to enter into settlement negotiations as provided for under these Settlement Guidelines. The Committee shall give the Commission and the parties a reasonable time frame, not exceeding thirty (30) days, within which to finalize the settlement discussions and submit a Settlement Agreement for its consideration.

SECTION 12

INCENTIVES FOR SETTLEMENT

- (1) There are a number of incentives that guided the Commission in adopting the Settlement Procedures and these include:
 - (a) **efficiency:** efficiency is generated by the reduced drafting work for both sides. In settlement the written character of the standard procedure is largely replaced by more targeted oral communication. Gains in drafting can be shown by a simple comparison with traditional cartel cases where statements of objections and decisions can amount to several hundreds of pages, whereas settlements have less pages;
 - (b) **absence of subsequent litigation:** the absence or very small likelihood of subsequent litigation in well-established jurisdictions like the European Courts has also been recognized as an important benefit both for the Commission as well as for the companies; and

- (c) **savings on resources:** in addition, the Commission and the undertakings are able to move on after the case is settled in a more focused manner. They are able to concentrate on their business and other activities instead of spending resources on lengthy and expensive litigation. The reduction in fines for settling undertakings is also a huge incentive.

SECTION 13 REVIEW OF THE SETTLEMENT GUIDELINES

These Settlement Guidelines may be reviewed with the approval of the Board from time to time to reflect changing market circumstances and the law governing their implementation.

SECTION 14 ENTRY INTO FORCE

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

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