



THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA, COMESA



**COMESA COMPETITION COMMISSION GUIDELINES ON SETTLEMENT AND
COMMITMENT PROCEDURES**

AUGUST 2022

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

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DISCLAIMER

These COMESA Competition Commission Guidelines on Settlement and Commitment Procedures is only for general guidance on the procedure to be followed by the COMESA Competition Commission with respect to Settlements and commitments for any breach of the COMESA Competition Regulations. The Guidelines are not a substitute of the COMESA Competition Regulations and the COMESA Competition Rules, and where there is a conflict between them, the latter will prevail. Stakeholders are encouraged to seek legal advice should they have any doubt about how these 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 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 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 and mergers, and unfair trade practices within the Common Market, adoption of Competition and Consumer Protection Policy is instrumental. In addition, Competition and Consumer Protection Policy is also one of the key tools for trade liberalization and development for the achievement of the COMESA regional economic integration agenda and enhancement of consumer welfare;
- (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, efficient and predictable procedure for concerned parties to settle proceedings and offer commitments concerning their liabilities emanating from breaches of the Regulations and the Rules in terms of anti-competitive and unfair trade practices in the Common Market;

The Commission hereby adopts the following Guidelines on Settlement and Commitment Procedures:

PART I: PRELIMINARY

SECTION 1- CITATION

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

SECTION 2- INTERPRETATION

1. In these Settlement and Commitment 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 COMESA Competition Regulations;

“Regulations” means the COMESA Competition Regulations, 2004;

“Rules” means the COMESA Competition Rules, 2004;

“Settlement” means the process through which parties, subject to proceedings under 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;

“Treaty” means the Treaty establishing the Common Market for Eastern and Southern Africa; and

“Undertaking” includes any “person”, public or private, involved in the production of, or the trade in goods, or the provision of services.

2. In these Settlement and Commitment 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 and Commitment Guidelines is to set out the procedure for pursuing settlements and commitments as provided under the Regulations as read together with the Rules. These Guidelines 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; and/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 which provides the following rights:
 - a) **Article 7 (2)**; the right to be presumed innocent until proven guilty by a competent court or tribunal;
 - b) **Article 7 (3)**; the right to defence, including the right to be defended by counsel of his; and
 - c) **Article 7 (1) (d)**; the right to be tried within a reasonable time by an impartial court or tribunal.
5. These Settlement and Commitment 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' right to be heard, and right to defence.
6. The effective enforcement of the Regulations is compatible with full respect for the parties' right 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 on the conduct of the the Commission's proceedings to enforce the Regulations should ensure that parties are afforded the opportunity to effectively 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 and Commitment Guidelines are meant to guide parties who might be interested in offering commitments or settling before or after having sight of the Commission's case. Therefore, the Settlement and Commitment 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 and international best practices in pursuing settlement negotiations and adopting commitment decisions..

SECTION 4- JUSTIFICATION

1. The Commission recognizes that in carrying out its investigations for any proceedings under the Regulations, parties can approach the Commission to request to settle or offer commitments.
2. The admission of liability should not be required in case of commitment decisions. Admission of liability shall be required for settlement agreements. These proceedings are treated separately under these Guidelines.
3. In line with the Commission's practice to submit all assessment reports to the Committee for determination, commitment decisions must be confirmed or ratified by the Committee, as applicable under the Regulations and the settlement agreements must be considered and determined by the Committee.

SECTION 5- DISCRETIONARY POWERS OF THE COMMISSION

1. The Commission does not impose a settlement or commitment on parties. The parties have the right to enter or not to enter into Settlement or Commitment Agreements.
2. The Commission has the discretionary power to:
 - a) engage in settlement or commitment discussions with parties;
 - b) discontinue settlement or commitment discussions that have already commenced; or
 - c) conclude a settlement or commitment agreement with parties.
3. The Commission can exercise its discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement or commitment 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.
4. The Commission will take into account the prospect of achieving procedural efficiency with respect to the progress made during the settlement or commitment negotiations, as well as the possibility of setting a precedent.

PART II: SETTLEMENT PROCEDURES

SECTION 6-INITIATION OF SETTLEMENT DISCUSSIONS

1. The Commission may engage in settlement discussions either upon the written request of the parties concerned or upon the Commission's own initiative.
2. Before initiation of settlement proceedings, the parties may approach the Commission for consultations on the procedures for settlement. Such consultations may take place in person or by any other means which the Commission determines to be appropriate.

SECTION 7- SETTLEMENT NEGOTIATIONS

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, where the respondents indicate their interest to commence settlement negotiations with the Commission, the Commission may decide to pursue the settlement proceedings and may make early disclosure of information as requested by the respondents to enable the parties to make an informed decision on whether or not to settle.
3. Early disclosure by the Commission may inform the respondents of the essential elements of the case including, but not limited to, the following:
 - a) the facts of the conduct;
 - b) the Commission's objections to their behaviours;

- c) evidence relevant to the conduct and used to determine those objections;
 - d) the findings relevant to the conduct; or
 - e) attribution of liability and range of potential fines.
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) confirm that the infringement has ceased ; 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.
8. 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 8- SETTLEMENT REQUEST

1. Parties opting for a settlement procedure and indicating their interest to commence settlement negotiations as provided under Section 7 must submit a formal request to settle in writing.

2. Should the Commission consider it suitable to explore the parties' interest to engage in settlement negotiations, 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. The time limit may be extended following a reasoned request.
3. The formal request to settle 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 parties' 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 in accordance with Section 7(2) and 7(3) and that they have been given sufficient opportunity to make their views known to the Commission; and
 - 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.
4. 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.
5. Upon the applicant's request, the Commission may accept that the settlement submissions be provided orally on condition that the proposals be communicated formally in writing to the Commission. 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.
6. Settlement submissions can be withdrawn upon submission of notice by either of the parties which have provided them. Parties may withdraw from settlement discussions at any time before confirming in writing its acceptance of the settlement. Following the completion of successful settlement discussions, the

Commission will retain the right to withdraw from the settlement procedure if the parties do not follow the requirements for settlement.

SECTION 9- DECISION OF THE COMMISSION

1. During the investigation period but before the submission of an investigation report to the Committee, parties may submit a settlement submission. The Commission, upon receipt of the settlement submission, will send a revised preliminary report to the parties, which takes into account the views of the parties as contained in their settlement submission.
2. The preliminary investigation report(s) would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in Section 8 (3)(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 Section 8(3)(b) above.
3. Upon the parties' replies to the preliminary investigation 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. If parties fail to confirm their commitment within a period of time fixed by the Commission, the case will continue under the standard investigative procedure.
4. The Commission retains the right to adopt a final position which departs from its preliminary position expressed in the preliminary investigation 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 through 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.
5. Access to the settlement submissions is only granted to those addressees of the preliminary investigation 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.

SECTION 10- COLLAPSE OF SETTLEMENT NEGOTIATIONS

The settlement negotiations shall be deemed to have collapsed where;

- a) the prescribed period for settlement after commencement of the settlement lapses;
- b) the parties to the settlement fail to reach an agreement;
- c) there are reasonable grounds for suspecting that information which led to the acceptance of the binding commitments was materially incomplete, false or misleading; or
- d) any other matter arises which is sufficient to cause the collapse.

SECTION 11- SETTLEMENT NEGOTIATIONS INVOLVING TWO (2) OR MORE UNDERTAKINGS WITHIN THE SAME ECONOMIC UNIT

1. The Commission may initiate settlement negotiations with one or more Undertakings belonging to the same economic unit. Should the concerned Undertakings within the economic unit 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 12-INCENTIVE FOR SETTLEMENT

Should the Commission decide to incentivize a party for settlement in the framework of this Guidelines, it will reduce the amount of the fine as determined under the Fines and Administrative Penalties Guidelines.

PART III: COMMITMENT PROCEDURES

SECTION 13-COMMITMENT PROCEDURES: ACCEPTANCE OF COMMITMENTS

1. Where the Commission intends to adopt a decision requiring that an infringement or a potential infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.
2. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
3. The Commission is not obliged to accept commitments. The Commission has a discretionary power in relation to acceptance of commitments.

SECTION 14- CRITERIA FOR ACCEPTANCE OF COMMITMENTS

1. The Commission may consider the following criteria when deciding whether to accept a Commitment:
 - a) the nature of the suspected infringement;
 - b) the nature and ability of the Commitments offered to quickly and effectively solve the concerns; and
 - c) ensuring sufficient deterrence in the future.
2. Adopting Commitment decisions may not be appropriate where the Commission intends to impose a fine on the alleged infringement.

SECTION 15-PROCEDURES FOR COMMITMENTS

1. It is the responsibility of the undertakings concerned to approach the Commission to discuss the possibility of entering into commitments. However, the proceeding could also be initiated by the Commission.
2. Where the parties under investigation are willing to offer commitments which could remove the Commission's initial concerns, the Commission will send to the parties

concerned, a preliminary assessment of its case which does not have to be a detailed statement of objection.

3. The Commission, in sending its preliminary assessment, will give the parties a period of twenty (21) days within which to respond to the Commission's concerns and to offer draft commitments.
4. The parties shall propose commitments to remedy the harm arising from the conduct. The commitments may consist of a combination of structural and behavioural remedies.
5. The proposed commitments must be unambiguous and self-executing.

SECTION 16-COMMITMENTS SUBMITTED UNDER APPLICATION FOR AUTHORISATION

1. With respect to proceedings under Article 20 of the Regulations, the Commission may engage in commitment 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 commitment 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 commitment decision 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 commitment 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 commitment decision shall not be construed to be an admission of breach of the Regulations by the applicants.

PART IV: DECISIONS BY COMMITTEE ON COMMITMENTS AND SETTLEMENTS

SECTION 17- DECISIONS BY THE COMMITTEE

1. The Commission shall submit the investigation report to the Committee detailing the assessment in accordance with the relevant provisions of the Regulations and attach thereto the proposed Settlement Agreement or Commitment Decisions, as the case may be, for the Committee's determination.
2. Upon considering the settlement or commitment submissions and confirming that they are satisfactory to address the likely competition harm, the Commission shall submit a Settlement Agreement or Commitment Decisions to the Committee for confirmation or consideration or issuance of an appropriate order. The effect of a Settlement or Commitment will be the resolution of a matter by the parties to an investigation.
3. The Committee may upon receipt of the Settlement Agreement or Commitment decision:
 - a. give or withhold its confirmation. However, withholding confirmation should be in cases where there are blatant and unfair settlement or commitment terms.; or
 - b. return the matter to the Commission with an indication of any changes that need to be made to the Settlement Agreement or Commitment Decision before the Committee confirms it; or
 - c. make any other determination as necessary given the circumstances.

SECTION 18-PROCEDURE FOR SETTLEMENTNEGOTIATIONS BEFORE THE COMMITTEE

1. Where a party whose case is before the Committee for a hearing or initial determination requests for settlement discussions, the Committee may order the Commission to enter into settlement negotiations as provided for under these Guidelines. The Committee shall give the Commission and the parties a reasonable time frame, not exceeding ninety (90) days, within which to finalize the settlement discussions and submit a Settlement Agreement for its consideration.
2. If the parties fail to reach an agreement, the matter will revert back to the Committee and proceed for hearing and determination as the case may be.

PART V: GENERAL

SECTION 19- REOPENING OF PROCEEDINGS

The Commission may, upon request or on its own initiative, reopen the proceedings, including but not limited to:

- a) where there has been a material change in any of the facts on which the decision was based; or
- b) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

SECTION 20- FINES

A fine of up to 10% of the annual turnover in the Common Market for the preceding financial year shall be imposed on parties who fail to comply with a commitment, pursuant to Article 8(5) of the Regulations.

SECTION 21-REVIEW OF THE SETTLEMENT AND COMMITMENT GUIDELINES

These Settlement and Commitment 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 22- ENTRY INTO FORCE

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

APPROVED by the Board at LUSAKA on the 24th day of August, 2022.