

COMESA COMPETITION COMMISSION (APPEALS BOARD PROCEDURE) RULES, 2017

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PART 1 - PRELIMINARY

Article 1

Citation

These Rules may be cited as the COMESA Competition Commission (Appeals Board Procedure) Rules, 2017.

Article 2

Interpretation

In these Rules, unless the context provides otherwise-

“Appeals Board” means the Board of Commissioners when exercising the powers to hear appeals under these Rules;

“Appellant” means a person who, in accordance with these Rules, initiates an appeal to the Appeals Board;

“Board” means the Board of Commissioners of the Commission as established by Article 12 of the Regulations;

“Commission” means the COMESA Competition Commission established by Article 6 of the Regulations;

“Common Market” means the Common Market for Eastern and Southern Africa (COMESA) established by Article 1 of the COMESA Treaty;

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

“Court” means the Court of Justice of the Common Market established by article 7 of the Treaty”

“day” means a working day;

“file” means to deposit documents with the Registrar in accordance with Rule 6 of these Rules;

“parties” include the appellant, the Commission, and any other person to whom the Appeals Board has given standing to appear as a party to the appeal;

“proceedings” includes appeals and related applications brought before the Appeals Board;

“record” means the record of the decision under appeal.

“Registrar” means an officer of the Commission appointed under Article 11 of the Regulations;
and

“Regulations” means the COMESA Competition Regulations of 2004;

Article 3

Application

1. These Rules prescribe the procedure for the conduct of appeals brought before Appeals Board.
2. In applying these Rules, the Appeals Board shall-
 - (a) ensure the just, efficient and expeditious resolution of proceedings; and
 - (b) insofar as it appears appropriate, avoid strict formalities that may delay its proceedings.
3. Where procedure is not provided for in these Rules, the Appeals Board may provide directions in order to effectively determine the matter before it. These directions shall not be in contravention of the Regulations or any other law governing the Common Market.

Article 4

Composition of the Appeals Board

At the hearing of an appeal, the Appeals Board shall be constituted by a minimum of five (5) members of the Board, but in no case shall it be an even number. The members who constituted the Committee which made the decision under appeal shall in no circumstance form part of the Appeals Board.

Article 5

Secretary of the Appeals Board

The Registrar shall serve as the Secretary to the Appeals Board.

Article 6

Filing Of Notices And Computation Of Time

All notices, applications and other documents required to be filed with the Appeals Board, shall be filed with the Registrar at an address to be determined by the Commission, in the official languages.

Where a period of time prescribed under these Rules expires on a Saturday or Sunday or on a public holiday or on a day on which the office of the Registrar is closed, such period shall be extended to the next working day.

Documents shall only be considered as filed with the Appeals Board on a given day if delivery is made during the Registrar's business hours and the full filing fees have been paid.

The office of the Registrar shall be open for business on every day, other than a Saturday, Sunday, public holiday or any other day that is observed as a public holiday by the host country. The working hours shall be from 09:00-12:00 and 15:00-16:00 hours.

PART II - POWERS OF THE APPEALS BOARD

Article 7

Scope of appeals before the Appeals Board

The Appeals Board shall hear appeals initiated by an appellant in any of the following circumstances-

- (a) appeals against a decision of the Commission as may be referred to the Board in terms of Article 15 of the Regulations;
- (b) appeals from initial determinations made by the committee responsible for determination in terms of Article 15 of the Regulations;
- (c) appeals made by an undertaking, or any other person concerned, with a substantial financial interest and affected by a decision of the Commission or the Committee to grant authorization in terms of Article 20 of the Regulations.
- (d) appeals against a decision of the Commission or the Committee relating to mergers in terms of Article 26 of the Regulations;
- (e) appeals against a decision of the Commission or the Committee denying a request for approval for the export of goods in terms of Article 31 of the Regulations;
- (f) appeals against a decision of the Commission or the Committee in relation to compulsory recall of products in terms of Article 33 of the Regulations; or
- (g) any other decision of the Commission or the Committee made in terms of the Regulations or any rules made under the said Regulations.

Article 8

Stay of Decisions Pending Appeal and Interim orders

1. A decision subject to appeal is automatically stayed upon the filing of a Notice of Appeal unless the Appeals Board order otherwise.
2. Once a Notice of Appeal has been filed, and on application by either of the parties, in case of urgency, the Appeals Board may make interim orders, or give directions granting an interim relief sought, on such conditions as it considers appropriate.
3. Provided that in no case shall such interim orders or directions be made without hearing the Commission and to the other parties to the application.
4. Where a party fails to make an appearance to be heard after 14 days of receipt of proper notice, the Appeals Board may proceed to determine the application for the interim order in the absence of that party.
5. Where the Appeals Board has made an interim order, the order shall subsist until the Appeals Board has determined the appeal or may cease at an earlier date as the Appeals Board may determine.

PART III - COMMENCEMENT OF APPEAL PROCESS

Article 9

Notice of Appeal

A person directly affected by a decision of the Commission or the Committee that is subject to appeal to the Appeals Board may appeal against the decision by filing a Notice of Appeal with the Registrar within sixty days after the receipt of the decision.

Article 10

Form and content of a Notice of Appeal

1. A Notice of Appeal shall be in the form prescribed in Form 1 set out in the Schedule to these Rules and shall contain the following information-
 - (a) the name and address of the appellant;
 - (b) the name and address of the appellant's legal representative, if any;
 - (c) the appellant's physical address for service in its domicile, and in the event that the appellant is willing to accept service electronically, the appellant's e-mail, facsimile, or other suitable communications technology;
 - (d) a copy of the disputed decision;
 - (e) the grounds for the appeal;
 - (f) the relief sought by the appellant, including whether the appellant is seeking a stay of the decision pending the appeal;
 - (g) the grounds and urgency for relief sought; and
 - (h) the name or names of the Respondent(s) and the address for service in its or their domicile.
2. A Notice of Appeal shall be signed and dated by the appellant or the appellant's duly authorised officer or legal representative.
3. A Notice of Appeal shall be translated into all official languages of COMESA. The cost of translation shall be borne by the appellant.

Article 11

Filing fee

A Notice of Appeal shall-

- (a) be accompanied by a non-refundable filing fee of the equivalent of COM\$ 10 000, at the prevailing official exchange rate; and
- (b) not be considered as filed with the Appeals Board unless the above prescribed non-refundable filing fee has been paid.

Article 12

Service of Notice of Appeal on Respondent

An appellant shall serve a copy of the Notice of Appeal on the Respondent, and other interested parties within 14 days of filing the Notice of Appeal.

PART IV - PRE-HEARING PROCEDURES

Article 13

Pre-appeal conference on procedural directions

The Appeals Board, on its own motion or on application by a party, may give procedural directions in writing or in a pre-appeal conference concerning any matter related to the conduct of the appeal.

Article 14

Notification of procedural directions

The Registrar, after consultation with the parties and the Appeals Board, shall notify the parties in writing of the procedural directions given.

Article 15

Absence of a party at a pre-appeal conference

15. If a party fails to attend a pre-appeal conference for which it has received proper notice, the Appeals Board may continue with the pre-appeal conference in the absence of that party.

Article 16

Record of proceedings being appealed against

1. Within 30 days of receiving the Notice of Appeal, the Commission shall-
 - (a) prepare and file the record of the proceedings, in the official languages of COMESA, being appealed against with the Registrar and shall supply ten (10) copies of the record; and
 - (b) provide a copy of the record to the appellant.
2. The record shall include the decision, any documentary evidence, transcript of any oral evidence, and written submissions or record of oral submissions, which were considered by the Commission or the Committee in making the decision.

Article 17

Statement of appeal

Within 14 days of receiving the record, the appellant shall file with the Registrar a statement of appeal as prescribed in Form 2 of the Schedule to these Rules.

Article 18

Statement of response

Within 30 days of receiving a statement of appeal, the Respondent shall file a statement of response as prescribed in Form 3 of the Schedule to these Rules.

Article 19

Scheduling the date for appeal hearing

Once the record, the appellant's statement of appeal and the Respondent's statement of response and any other document required to be filed by these Rules have been filed, the Registrar shall schedule a date for hearing of the appeal after consultation with the Appeals Board and the parties.

Where any of the parties to an appeal fails to cooperate, the Registrar shall proceed to set a date for the appeal hearing without further consultations with the uncooperative party.

Article 20

Notice of time, date and place of hearing

The Registrar shall give notice of the time, date and place of the hearing to each party and publish this notice on the Commission's website.

PART V - HEARING AND CONCLUSION OF THE APPEAL

Article 21

Place of hearing and manner of proceedings

1. Subject to sub-rule (2), every oral hearing of an application or appeal shall take place at the Secretariat of the Commission or such other place within the Common Market as the Appeals Board may determine.
2. The Appeals Board may hold an oral hearing of an application or appeal by video link or telephone conference which the participants, including the members of Appeals Board, may attend whether or not they are physically present in the member state hosting the Secretariat of the Commission.
3. The Appeals Board may dispense with an oral hearing of an application or of an appeal and make its decision on written submissions and evidence.
4. Hearing of an appeal shall proceed as follows-
 - (a) the appellant shall present its case first, justifying why the decision under appeal is wrong and why the appeal should be allowed;
 - (b) the Respondent shall present its case next, justifying the decision under appeal and why the appeal should not succeed;
 - (c) the appellant shall then be given an opportunity to reply to the Respondent's case; and
 - (d) the Respondent shall be given an opportunity for a final reply.

Article 22

Confidentiality of Hearing Proceedings

The Appeals Board shall, on the application of a party or on its own motion, determine whether the hearing of proceedings shall be conducted in camera or be accessible to the public.

The Appeals Board may, on the application of a party or on its own motion, order that part or

all of the information in the proceedings brought before it be treated as confidential and not disclosed publicly.

An application under this rule shall state the grounds for objection to public hearing or public disclosure of information and, where applicable, shall be accompanied by a sealed copy of the information for which confidential treatment is sought.

In determining an application for confidential treatment, the Appeals Board shall consider, in so far as it is practicable-

- (a) whether the disclosure of information would, in its opinion, be contrary to the public interest;
- (b) whether the disclosure of information which is of a commercial nature would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates;
- (c) whether the disclosure of information relating to the private affairs of an individual would, or might, in its opinion, significantly harm the person's interests;
- (d) the extent to which any such disclosure is necessary for the purpose of explaining the reasons for the decision; and
- (e) any other matter which the Appeals Board may consider relevant.

Pending the determination of an application for confidential treatment:

- (a) transcripts, interim orders, including an initial decision, if any, and other materials in connection with the application shall be for the confidential use of the Appeals Board and parties to the proceedings and their counsel only; and
- (b) shall be made available to the public only in accordance with orders of Appeals Board.

Article 23

No new evidence

The Appeals Board will not receive new evidence when hearing an appeal except in exceptional circumstances where such evidence was not available to both parties at the time the decision being appealed against was made.

Article 24

Electronic documents

The Appeals Board may permit parties to produce documents in electronic form.

Article 25

Telephone or Video conference

The Appeals Board may allow parties to appear by way of telephone or video conference when presenting their cases on such conditions as the Appeals Board considers appropriate.

Article 26

Findings and decisions of the Appeals Board

1. The Appeals Board may determine all questions of fact and law that arise in an appeal.
2. Findings of fact shall be determined on a balance of probabilities.
3. Subject to sub-rule (5), at the conclusion of the appeal, the Appeals Board shall deliver its decision in writing, and the Registrar shall serve the decision on the parties within 10 days of the date of the decision.
4. The Appeals Board shall deliver one decision which shall be the decision of the Board reached in private by majority verdict.
5. In the event that the Appeals Board delivers its decision orally, the decision and the reasons for the decision shall be reduced to writing within 30 days and availed to all parties within 10 days.
6. The Appeals Board shall issue its decision and reasons as soon as it is practicable and not later than thirty (30) days after the conclusion of the hearing of the appeal.
7. A copy of the decision and the reasons for the decision shall be published on the Commission's website subject to the confidentiality provisions under these Rules or the Regulations.
8. In rendering its decision, the Appeals Board shall consider the principles of the Treaty establishing the Common Market, the Regulations, the COMESA Competition Rules, and directives and decisions of COMESA Policy Organs .
9. A party aggrieved by the decision of the Appeals Board may refer the matter to the COMESA Court of Justice within 60 days of the decision being made, failing which the decision of the Appeals Board shall be final and binding.

PART VI-SUMMARY DISPOSAL

Article 27

Power to strike out

1. The Appeals Board may, on its own initiative or on the application of a party, after giving the parties an opportunity to be heard, strike out in whole or in part an appeal at any stage of the proceedings if—
 - (a) it forms the view that the Appeals Board has no jurisdiction to hear or determine the appeal;
 - (b) it determines that there are no reasonable grounds for making the appeal;
 - (c) it is satisfied that the appellant has habitually and persistently and without any reasonable ground—
 - (i) made vexatious applications in any proceedings before the Commission; or
 - i. (ii) fails to comply with any rule, practice direction issued under these Rules or any order or direction of the Appeals Board.

2. When the Appeals Board strikes out an appeal, it may make any other consequential order it considers appropriate.

Article 28

Summary judgment

1. The Appeals Board may, on its own initiative or on the application of a party, after giving the parties an opportunity to be heard, give summary judgment against an appellant or respondent on the whole of the appeal or on a particular issue if—
 - (a) it considers that—
 - (i) the appellant has no real prospect of succeeding on the appeal or issue; or
 - (ii) the respondent has no real prospect of successfully defending the decision appealed against or issue; and
 - (b) there is no other compelling reason why the appeal or issue should be disposed of at a substantive hearing.
2. The Appeals Board may give any directions it considers appropriate for dealing with an application under this rule.
- (3) Upon giving summary judgment, the Appeals Board may make any consequential order it considers appropriate.

PART VII - GENERAL

Article 29

Filing and service of documents

1. A document which is required under these Rules to be served on any person other than the Registrar may be –
 - (a) delivered personally to the person's physical address for service;
 - (b) sent to the person's physical address for service by registered post;
 - (c) sent to the person electronically to any e-mail address which the person has provided as an address for service;
 - (d) sent to the person by facsimile at any facsimile address which the person has provided as an address for service; or
 - (e) sent to the lawyer representing the person.
2. A document shall be treated as having been sent at the time when, having regard to all the circumstances, including the method of sending and the incidence of non-working days, the document should in the ordinary course have come to the notice of the intended recipient.
3. The Appeals Board may dispense with the filing or sending of a document if the interests of justice so require and shall give written reasons for so doing.

Article 30

Representation by Lawyers

Parties to an appeal may be represented by a lawyer qualified to practise in any of the Member States of the Common Market. Where a lawyer is acting for a party, documents may be served on the party by delivering them to the lawyer.

Article 31

Withdrawal of Appeal

1. An Appellant may withdraw an appeal, and the Respondent may withdraw its opposition to the appeal, prior to Appeals Board commencing the hearing by filing a notice to that effect.
2. A party that withdraws its appeal shall not be refunded the fees which were paid on filing its documents.
3. An appeal may be withdrawn during the hearing of the appeal with the permission of the Appeals Board.
4. The Appeals Board may dismiss an appeal if the appellant has not filed all or any documents required under these Rules or in accordance with any directions given by the Appeals Board.

Article 32

Costs

1. The Appeals Board shall make such order as is appropriate in respect of costs.
2. When making awards for costs, the Appeals Board shall as much as possible consider the merits of the appeal before it and the nature of the issues comprising the appeal.

Article 33

Conflict of interest

1. Any member of the Appeals Board who is assigned to hear any matter in which he or she has an interest or may have an interest, shall-
 - (a) disclose to the Chairperson of the Board of Commissioners such interest as soon as is practicable upon being assigned the matter; and
 - (b) not take part in any consideration of, any question touching on such matter.
2. For purposes of this rule, "interest" includes the involvement of the member of the Appeals Board in the determination being appealed against at the Committee stage.
3. Notwithstanding sub-rule (1), a party may request for the recusal of a member of the Appeals Board in any proceedings in which the impartiality of that member might reasonably be questioned. Such application shall be made in writing disclosing sufficient grounds in support.

Article 34

Immaterial Omissions

In the event of any omission to adhere to these Rules which does not prejudice any of the parties, the Appeals Board may give any directions it considers appropriate to cure the omission.

Article 35

Correction of clerical mistakes

Clerical mistakes or errors arising from any inadvertent error or omission in any document recording a decision of the Appeals Board may be corrected by Appeals Board by a certificate signed by the Chairperson of the Appeals Board.

Article 36.

Extension or Abridgement of time

The Appeals Board may on its own motion or at the request of a party extend or abridge the time for doing any act under these Rules where there is sufficient justification.

Article 37

Practice Directions

The Appeals Board may issue Practice Directions relating to the procedures governed by these Rules.

Article 38

Entry into Force

These Rules shall enter into force upon adoption by Council.

SCHEDULE

APPEALS BOARD FORM 1

(Rule. 10(1))

NOTICE OF APPEAL

COMESA COMPETITION COMMISSION APPEALS BOARD
Appeal No. ...of 20....
IN THE MATTER OF [insert the name of the appellant(s) i.e., the entity or institution(s) appealing the decision, here]
AND
[Insert the name of the Respondent]
NOTICE OF APPEAL
TAKE NOTICE that [put the name of the appellant (s) here] hereby appeals against the decision of the Committee of Initial Determinations made on [date of decision], [here briefly describe the decision of the Committee].

The grounds of appeal are –

[List the grounds of appeal]

--

State how you are affected by the decision here.

--

The relief sought is -

[Here state what you want the Appeals Board to do. (Quash, reverse, vary, modify, direct, etc., the decision)

If you want Appeals Board to stay the decision under appeal (i.e. stop the decision from going into effect) ask for a stay order and describe the grounds and urgency for the stay here.

State the address of the appellant.

State the name and address of the appellant's legal representative, if any.

State the appellant's physical address for service. (This is where you have agreed that documents concerning the appeal can be sent to you).

State the Respondent's name and physical address for service. (This is where you will serve the documents concerning the appeal).

If the appellant is willing to accept service electronically, state the appellant's e-mail or facsimile address of service.

Signed by [type name of appellant or appellant's duly authorized officer or legal representative]

On: [date]

Signature:

Further instructions

You must attach a copy of the written decision you want to appeal to your Notice of Appeal.

You must file your Notice of Appeal with the Registrar at this address-

Note: You must pay a filing fee of equivalent of COM\$ 50 000 when you file your Notice of Appeal. If you do not pay the filing fee, your Notice of Appeal shall not be considered as filed. You must serve a copy of your Notice of Appeal on the Respondent within ten (10) days of filing your Notice of Appeal.

APPEALS BOARD FORM 2 (Rule 17)

CONTENTS OF A STATEMENT OF APPEAL

COMESA COMPETITION COMMISSION APPEALS BOARD

Appeal No. ... of 20...

IN THE MATTER OF [put the name of the appellant i.e., the entity or institution appealing the decision, here]

AND

[Insert the name of the Respondent]

STATEMENT OF APPEAL

TAKE NOTE THAT following the Notice of Appeal filed by the Appellant herein on the..... day of.....20... Appellant filed on.....day of, 20_, the following details shall constitute the Statement of Appeal-

- (a) A summary of the facts and the law relied upon by the appellant:
- (c) any other documents that the appellant may want to rely upon.

Signed by [type name of appellant or appellant's duly authorized officer or legal representative]

On: [date]

Signature:

APPEALS BOARD FORM 3 (Rule. 18)

CONTENTS OF A STATEMENT OF RESPONSE

COMESA COMPETITION COMMISSION APPEALS BOARD

Appeal No. ... of 20...

IN THE MATTER OF [put the name of the appellant i.e., the entity or institution appealing the decision, here]

AND

[Insert name of the Respondent]

STATEMENT OF RESPONSE

TAKE NOTE THAT following the Statement of Appeal filed by the Appellant on.....day of, 20_, the following details shall constitute the Statement of Response by the Respondent-

(a) the Respondent shall rely on the following facts and law:

.....
.....

(b) the Respondent intends to rely on the following copies of documents:

.....
.....

Signed by [type name of Respondent or the Respondent’s duly authorized officer or legal representative]

On: [date]

Signature: