



**OFFICIAL GAZETTE**

of the

**COMMON MARKET FOR EASTERN  
AND SOUTHERN AFRICA (COMESA)**

*Volume 17 No. 12*

*20 November 2012*

**COMESA COMPETITION REGULATIONS  
AS AT DECEMBER 2004**

## **COMESA Competition Regulations**

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### **PREAMBLE**

**HAVING REGARD TO** Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) (hereinafter referred to as “the Treaty”);

**RECOGNISING** that anti-competitive practices may constitute an obstacle to the achievement of economic growth, trade liberalisation and economic efficiency in the COMESA Member States;

**THAT** the continued growth in regionalisation of business activities correspondingly increases the likelihood that anti-competitive practices in one country may adversely affect competition in another country;

**THE NEED** for Member States to give effect to the principles of a Regional Competition Regulations and Rules and to use moderation and self-restraint in the interest of co-operation in the field of anti-competitive business practices;

**THE DESIRABILITY** of setting standards for procedures by which the regional competition agency can act as a forum for exchange of views, consultations and conciliation on matters related to anti-competitive practices affecting COMESA regional and international trade;

**THAT THE GROWTH** of foreign direct investment, trade, regional and sub-regional economic integration and co-operation have led to such restrictive business practices as price cartels, market sharing and other practices which adversely impact upon competition and therefore are inimical to consumer welfare;

**CONSIDERING** thereof that Member States should co-operate at regional level in the implementation of their respective national legislation in order to eliminate the harmful effects of anti-competitive practices;

**CONSIDERING** also that closer co-operation between COMESA

Member States in the form of notification, exchange of information, co-ordination of actions, consultation among Member States should be encouraged;

**CONSCIOUS** of the relative presence of national competition authorities in Member States and the desirability of establishing national competition authorities in all COMESA Member States;

### **THE MEMBER STATES HAVE AGREED AS FOLLOWS:**

## PART 1

### PRELIMINARY

#### Article 1

##### Definitions and Interpretation

In these Regulations, unless the context provides otherwise:

“**Anti-competitive**” means a conduct which appreciably restrains competition between the Member States and is not otherwise exempt by law or authorised in a manner required by the Regulations;

“**Arrangement**” includes a contract, agreement or understanding whether or not legally enforceable;

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

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

“**Commissioner**” means a member of the Board of Commissioners;

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

“**Competition**” means the striving or potential striving of two or more persons or organisations engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another which results in greater efficiency, high economic growth, increasing employment opportunities, lower prices and improved choice for consumers;

“**Concerted practice**” means an action planned and done in unison by a firm or combination of firms which is anti-competitive;

“**Consumer**” includes any person -

- (a) (a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale; and

(b) to whom a service is rendered;

“**Council**” means the Council of Ministers of the Common Market established by Article 7 of the “Treaty”;

“**Court**” means the Court of Justice of the Common Market established by Article 7 of the “Treaty”;

“**Dominant position**” means a dominant position as stipulated in Article 17 of these Regulations;

“**Goods**” when used with respect to particular goods, includes any other goods that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints;

“**Market**” means a market in the Common Market and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services;

“**Merger**” means merger as defined in Article 23 of these Regulations;

“**Member State**” means a Member State of the Common Market;

“**Person**” means a natural or legal person;

“**Respondent party**” means a “person” against whom a complaint of

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a prohibited practice has been initiated under these Regulations;

“**Secretary-General**” means the Secretary General of the Common Market;

“**Services**” includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;

“**Trade**” includes any business, industry, profession or occupation relating to the supply or acquisition of “goods” or “services”;

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

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

### Article 2

#### Purpose of the Regulations

1. The purpose of these 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.

### Article 3

#### Scope of Application

1. These 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 as set forth under Article 4.

2. These Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.
3. These Regulations shall have primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Parts 3 and 4 of these Regulations. This Article does not apply to conduct expressly exempted by national legislation.

### Article 4

#### Exclusions

1. These Regulations shall not apply to:
  - (a) Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
  - (b) Activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
  - (c) Activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public interest.
2. These Regulations do not derogate from the direct enjoyment of the privileges and protections conferred by other laws protecting intellectual property, including inventions, industrial models, trademarks and copyrights. They do apply to the use of such property in such a manner as to cause the anti-competitive effects prohibited herein.

**Article 5**

**Obligations of Member States**

1. Pursuant to Article 5(2)(b) of the Treaty, Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of these Regulations or resulting from action taken by the Commission under these Regulations. They shall facilitate the achievement of the objects of the Common Market. Member States shall abstain from taking any measure which could jeopardize the attainment of the objectives of these Regulations.

## **PART 2**

### **INSTITUTIONAL ARRANGEMENTS**

#### **Article 6**

##### **Establishment of the Commission**

1. There is hereby established the COMESA Competition Commission which shall enjoy international legal personality.
2. The Commission shall have in the territory of each Member State:
  - (a) the legal capacity required for the performance of its functions under the Treaty; and
  - (b) power to acquire or dispose of movable and immovable property in accordance with the laws and regulations in force in each Member State.

#### **Article 7**

##### **Functions of the Commission**

1. The Commission shall apply the provisions of these Regulations with regard to trade between Member States and be responsible for promoting competition within the Common Market.
2. In order to accomplish that which is set out in paragraph 1 above, the Commission shall:
  - (a) monitor and investigate anti-competitive practices of undertakings within the Common Market, and mediate disputes between Member States concerning anti-

competitive conduct;

- (b) regularly review regional competition policy so as to advise and make representations to the Council with a view to improving on the effectiveness of the Regulations;
- (c) help Member States promote national competition laws and institutions, with the objective of the harmonisation of those national laws with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market;
- (d) co-operate with competition authorities in Member States;
- (e) co-operate and assist Member States in the implementation of its decisions;
- (f) provide support to Member States in promoting and protecting consumer welfare;
- (g) facilitate the exchange of relevant information and expertise;
- (h) enter into such arrangements as will enhance its ability to monitor and investigate the impact of conduct outside the Common Market but which nevertheless has, or may have, an impact on trade between Member States;
- (i) be responsible for developing and disseminating information about competition policy and consumer protection policy; and
- (j) co-operate with other agencies that may be established or recognised by COMESA to monitor and regulate any specific sector.

## Article 8

### Powers of the Commission

1. The Commission may, in respect of trade between Member States, monitor, investigate, detect, make determinations or take action to prevent, inhibit and/or penalise undertakings.
2. 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.
3. Based on the findings of the investigation, the Commission may make 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.
4. The Commission shall, to the extent required to remedy or penalise 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 these 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 these

### Regulations;

- c) order payment of compensation to persons affected;
- d) impose fines for breaches of the provisions of these Regulations.

whose business activities appreciably restrains competition.

5. Any person who contravenes or fails to comply with any provision of these Regulations or any Rules made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under these Regulations or any Rules made hereunder, for which no penalty is provided shall be determined to have breached the Regulations and shall be liable pursuant to that determination to a fine (in an amount to be determined by Rules) and/or such other penalty as may be assessed.

6. The Commission may enter into such arrangements for the provision of goods and services as may be necessary for the efficient performance of its functions.

7. The Commission, pursuant to the provisions of Article 55 of the Treaty, may establish its own rules of procedure to effectively implement the Regulations.

8. The Commission may appoint, on such terms and conditions as it may determine, such other staff as it considers necessary for the performance of its functions under these Regulations.

## Article 9

### Appointment and Duties of Director

1. The Council shall appoint a citizen of a Member State to be the Director of the Commission.
2. The Director shall be responsible for administering the Commission's affairs, funds and property and for performing any other functions that may be conferred or imposed upon

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him/her by or under these Regulations or that the Commission may delegate or assign to him/her.

3. Commissioners shall not be eligible for appointment as the Director.
4. The Director shall have suitable qualifications and experience in law, economics, commerce, industry or public administration.
5. The terms and conditions of the Director's appointment shall be as fixed by the Board of Commissioners with the approval of the Council.
6. The Director shall hold office for a term of five years and shall be eligible for re- appointment only for one further term of five years.

### **Article 10**

#### **Removal of Director**

1. The Director shall not be removed from office except by the Council for stated misbehavior or for inability to perform the functions of his office due to infirmity of mind or body or as rendered appropriate by applicable law.
2. The Director, on three months' written notice addressed to the Council, may resign as Director.
3. The Council may remove the Director from office if that person becomes subject to any of the disqualifications referred to in Article 14 of these Regulations.

### **Article 11**

#### **Staff of the Commission**

1. The Director, with the approval of the Board, may

appoint one or more Deputy Director(s), Registrar and such other officers as may be necessary for the due administration of these Regulations.

### **Article 12**

#### **Board of Commissioners**

1. There is hereby established the Board of Commissioners which shall be the supreme policy body of the Commission.

### **Article 13**

#### **Composition of the Board of Commissioners**

1. The Board shall consist of not less than nine (9) and not more than thirteen (13) Commissioners appointed by the Council on the recommendation of the Secretary-General. The nominations of the Secretary-General shall reflect the regional character of the Common Market.
2. The Chairperson and the Vice-Chairperson shall be elected by the Board from among its members.
3. The persons to be recommended under paragraph 1 above shall be chosen for their ability and experience in competition law and policy, industry, commerce, public administration, labour, economics, law, consumer protection and small scale business matters. No person shall be recommended for appointment as a Commissioner unless he/she is a citizen of a Member State.
4. The Chairperson shall assign three of the Commissioners to be full-time members of the Board. The full-time Commissioners shall each have suitable qualifications and experience in law and economics and will form the committee responsible for initial determinations.

5. No member of the Board shall involve himself/herself in any way in the day to day administration of the Commission.

#### **Article 14**

##### **Tenure of Commissioners**

1. The Commissioners shall hold office for an initial term of three to five years.
2. No Commissioner may serve for more than two terms.
3. The office of a Commissioner shall become vacant:
  - (a) upon his/her death;
  - (b) if the Commissioner is absent without reasonable excuse from three consecutive meetings of the Board of which there has been due notice;
  - (c) if the Commissioner is lawfully detained or his/her freedom of movement is restricted for a period exceeding six months;
  - (d) if a Commissioner becomes an un-discharged bankrupt;
  - (e) if a Commissioner becomes of unsound mind or permanently incapacitated;
  - (f) if a Commissioner engages in any activity that may undermine the integrity of the Commission and/or the Board or amounting to serious misconduct; or
  - (g) ceases to be a citizen of any of a Member State.

#### **Article 15**

##### **Functions of the Board**

1. The Board may:
  - (a) issue determination on any conduct prohibited in terms of Part 3 of these Regulations;
  - (b) adjudicate on any other matter that may, in terms of these Regulations, be considered by it and make an order provided for in these Regulations;
  - (c) hear appeals from, or review any decision of, the Commission that may, in terms of these Regulations, be referred to it;
  - (d) hear appeals from initial determinations made by the committee responsible for determination;
  - (e) make any ruling or order necessary or incidental to the performance of its functions in terms of these Regulations; and
  - (f) delegate any of its functions to another COMESA agency established to co-ordinate and regulate a specific sector.
2. The Board may recommend to the Council Rules governing:
  - (a) anything which under these Regulations is required or permitted to be prescribed;
  - (b) any forms necessary or expedient for purposes of these Regulations;
  - (c) any fees payable in respect of any service provided by the Commission; or
  - (d) such other matters as are necessary or expedient for the better carrying out of the purposes of these Regulations.

## PART 3

### ANTI-COMPETITIVE BUSINESS PRACTICES AND CONDUCT

#### Article 16

##### Restrictive Business Practices

1. The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which:
  - (a) may affect trade between Member States; and
  - (b) have as their object or effect the prevention, restriction or distortion of competition within the Common Market.
2. Paragraph 1 applies only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market.
3. Any agreement or decision which is prohibited by paragraph 1 is void.
4. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
  - (a) any agreement or category thereof between undertakings;
  - (b) any decision by associations of undertakings;
  - (c) any concerted practice or category thereof -
    - which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- b. afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question.

#### Article 17

##### Determination of a Dominant Position

1. For the purposes of these Regulations:
  - (a) an undertaking holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors;
  - (b) any two companies shall be treated as interconnected companies if one of them is a subsidiary or associate of the other, or both of them are subsidiaries of the same parent company;
  - (c) a “dominant position” means an ability to influence unilaterally price or output in the Common Market or any part of it.

#### Article 18

##### Abuse of a Dominant Position

Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it

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shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States, if it:

- (a) restricts, or is likely to restrict, the entry of any undertaking into a market;
- (b) prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market; 1.
- (c) eliminates or removes, or is likely to eliminate or remove, any undertaking from a market;
- (d) directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;
- (e) limits the production of goods or services for a market to the prejudice of consumers; 2.
- (f) as a party to an agreement makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement; or
- (g) engages in any business activity that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market.

In determining whether an undertaking is in a dominant position, consideration shall be given to the:

- (a) relevant market defined in terms of the product and the geographic context;
- (b) level of actual or potential competition in terms of number of competitors, production capacity and product demand;
- (c) barriers to entry of competitors; and

- (d) history of competition and rivalry between competitors in the sector of activity.

### **Article 19**

#### **Prohibited Practices**

1. It shall be an offence for undertakings engaged in the market in rival or potentially rival activities to engage in the practices appearing in paragraph 3 provided that this paragraph shall not apply where undertakings are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.

2. This Article applies to formal, informal, written and unwritten agreements, arrangements and understandings.

3. For the purpose of paragraph 1, the following are prohibited:

- (a) agreements fixing prices, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
- (b) collusive tendering and bid-rigging;
- (c) market or customer allocation agreements;
- (d) allocation by quota as to sales and production;
- (e) collective action to enforce arrangements;
- (f) concerted refusals to supply goods or services to a potential

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purchaser, or to purchase goods or services from a potential supplier; or

- (g) collective denials of access to an arrangement or association which is crucial to competition.

### **Article 20**

#### **Request for Authorisation**

1. The Commission may, upon application by or on behalf of an undertaking, grant an authorisation to the undertaking to enter and/or give effect to contracts, arrangements or understandings even if they are anti-competitive, if the Commission determines that there are public benefits outweighing the anti-competitive detriment of the contract, arrangement or understanding:

- (a) while the authorisation remains in force no party to the contract, arrangement or understanding will be in breach of the applicable Articles of these Regulations by entering or giving effect to it;
- (b) authorisation may be granted to cover those who subsequently become parties to the contract, arrangement or understanding, as long as that is its expressed effect.

2. Where an application made to the Commission under this Article for an authorisation in relation to a particular contract or proposed contract is expressed as set out hereinabove, the application shall set out:

- (a) the names of the parties to each contract; and
- (b) the names of the parties to a proposed contract where those names are known to the applicant at the time when the

application is made.

3. If an authorisation is granted in respect of a proposed contract the names of the parties to which were not so known to the applicant, the authorisation shall, by force of this paragraph, be deemed to be expressed to be subject to a condition that any party to the contract will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract.

3. The undertaking concerned, or any other person with a substantial financial interest affected by a decision of the Commission in terms of this Article, may appeal that decision to the Board in the manner set forth in the Rules and Regulations.

### **Article 21**

#### **Determination of Anti-Competitive Conduct: Procedure of Commission on Request**

1. Any person may request an investigation referred to in Article 8 where he/she has reason to believe that activity by an undertaking located in a Member State has the effect, or is likely to have the effect, of restricting competition in the Common Market.

2. Any consumer organisation which has reason to believe that activities by an undertaking in the Common Market have the effect, or are likely to have the effect, of restricting competition in the Common Market, may request an investigation as referred to in Article 8.

3. Requests under paragraphs 1 and 2 above shall be in writing and shall disclose sufficient information for the Commission to make a preliminary assessment whether it should proceed with the investigation.

4. Upon receipt of a request mentioned in paragraph 3

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above, the Commission shall consult with the interested parties and shall determine on the basis of such consultations whether:

- (a) the investigation is within the jurisdiction of the Commission, and
- (b) the investigation is justified in all the circumstances of the case.

5. The consultations shall be concluded within 30 days of the date of receipt of the request for investigation, unless the Commission has determined that a longer period is necessary and has so notified the parties. In any event, that longer period shall not exceed 45 additional days from the date of notification from the Commission.

6. Where the Commission decides to conduct the investigation, the Commission shall:

- (a) notify the interested parties;
- (b) complete the investigation within 180 days from the date of receipt of the request for the investigation; and
- (c) where the circumstances so warrant, extend the time period for completion of the investigation and notify the interested parties.

7. Where the Commission decides, following an investigation, that there has been a breach of the Regulations, it shall notify the Respondent party and shall afford that party an opportunity to defend its interest.

8. If the respondent party avails itself of the opportunity to be heard and the hearing has been convened, within 30 days from that hearing, the Commission shall notify the interested parties as to its determination both as regards to the breach of the Regulations

and the sanctions to be imposed.

9. Within 10 days of the hearing mentioned in paragraph 8 above, the Commission will notify the interested parties of its determination.

10. The Commission may decide, based on its determination, that the party in breach should:

- (a) cease its conduct immediately, and/or
- (b) pay a fine in an amount to be determined by the Commission; and/or
- (c) take whatever action the Commission deems necessary to remove and/or diminish the effect of the illegal conduct.

11. Within 15 days of the Commission's notification, the affected party may appeal the Commission's determination in the manner set forth in the Regulations.

12. Where a specific course of action is required pursuant to paragraph 10 above, the undertaking concerned shall do as directed within 30 days of the date of notification unless the Commission determines otherwise.

13. If the undertaking concerned cannot comply, it shall so notify the Commission and request an extension.

14. If the undertaking cannot comply within the time period specified and fails to inform the Commission, the Commission may apply to the relevant national court for an appropriate order.

**Article 22**

**Determination of Anti-Competitive Conduct: Procedure of Commission on its own Initiative**

1. Where the Commission has reason to believe that business conduct by an undertaking restrains competition in the Common Market, the Commission will so notify the undertaking involved and will launch an investigation.
2. The Commission shall complete its investigation within 180 days of the notification mentioned in paragraph 1 above, unless it determines that a longer period is necessary.

**PART 4**

**MERGERS AND ACQUISITIONS**

**Article 23**

**Merger Control**

1. For the purpose of this Article, “merger” means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:
  - (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
  - (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
  - (c) any means other than as specified in sub-paragraph (a) or (b).

3. At the end of the investigation, the Commission shall notify the undertaking of its findings.
4. Within 20 days of the notification mentioned in paragraph 3 above, the undertaking in question may respond to the Commission to take issue with its findings.
5. If the undertaking fails to respond within the required time frame set out in paragraph 4 above, the Commission may proceed to assess sanctions pursuant to the process as set forth in paragraphs 8 to 13 of Article 21 of these Regulations.

2. For the purpose of this Article, “controlling interest”, in relation to:

- (a) any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking; and
- (b) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.

3. This Article shall apply where:
  - (a) both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States; and
  - (b) the threshold of combined annual turnover or assets provided for in paragraph 4 is exceeded.
4. The Board shall, subject to approval by Council, prescribe:
  - (a) a threshold of combined annual turnover or assets in the

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region, either in general or in relation to specific industries, at or above which this Article will apply with regard to mergers with a regional dimension;

(b) a method for the calculation of annual turnover and assets.

5. For the purposes of this Article:

(a) “notifiable merger” means a merger or proposed merger with a regional dimension with a value at or above the threshold prescribed in terms of paragraph 4;

(b) “non-notifiable merger” means a merger or proposed merger with a value below the threshold prescribed in terms of paragraph 4.

6. The Commission may require parties to a non-notifiable merger to notify the Commission of that merger if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest.

### Article 24

#### Notification of a Proposed Merger

1. A party to a notifiable merger shall notify the Commission in writing of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties’ decision to merge.

2. Any notifiable merger carried out in contravention of this part shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market.

3. Notification in terms of paragraph 1 shall be made in such

form and manner as may be prescribed and shall be accompanied by the prescribed fee and such information and particulars as may be prescribed or as the Commission may reasonably require.

4. The Commission in addition to the sanction under paragraph (1) may impose a penalty if the parties to a merger fail to give notice of the merger as required by paragraph 1.

5. A penalty imposed in terms of paragraph 3 may not exceed ten *per centum* of either or both of the merging parties’ annual turnover in the Common Market as reflected in the accounts of any party concerned for the preceding financial year.

6. When determining an appropriate penalty, the Commission shall consider the following factors:

- (a) the nature, duration, gravity and extent of the contravention;
- (b) any loss or damage suffered as a result of the contravention;
- (c) the behaviour of the parties concerned;
- (d) the market circumstances in which the contravention took place;
- (e) the level of benefits derived from the contravention;
- (f) the degree to which the parties have co-operated with the Commission; and
- (g) whether the parties have previously been found in contravention of competition Regulations in the region.

7. Civil proceedings for the recovery of any penalty imposed in terms of paragraph (3) may be brought against the party or parties concerned by the Commission.

8. A Member State having attained knowledge of a merger

notification submitted to the Commission may request the Commission to refer the merger for consideration under the Member State's national competition law if the Member State is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the Member State or any part of the Member State.

9. The Commission shall consider the request referred to in paragraph 7 and shall inform the concerned Member State in writing within 21 days of the receipt of the request that:

- (a) the Commission will deal with the case itself in order to maintain or restore effective competition on the market concerned and the region as a whole; or
- (b) the whole or part of the case will be referred to the competent authorities of the Member State concerned with a view to the application of that Member State's national competition law.

### **Article 25**

#### **Merger Proceedings**

1. The Commission shall examine a merger as soon as the notification is received and must make a decision on the notification within 120 days after receiving the notification:

- (a) Provided that if the notification is incomplete, the examination period begins on the day following receipt of complete information.

2. If, prior to the expiry of the 120-day period provided for in paragraph (1), the Commission has decided that a longer period is necessary, it shall so inform the parties and seek an extension from the Board.

### **Article 26**

#### **Consideration of a Merger**

1. Whenever called upon to consider a merger, the Commission shall initially determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the factors set out in paragraph 2, and if it appears that the merger is likely to substantially prevent or lessen competition, the Commission shall then determine:

- (a) whether the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition that may result or is likely to result from the merger and would not likely be obtained if the merger is prevented;
- (b) whether the merger can be justified on substantial public interest grounds by assessing the factors set out in paragraph 4.

2. When determining whether the merger would have the effect, or be likely to have the effect, of substantially lessening competition in the market, the following matters must be taken into account:

- (a) the actual and potential level of import competition in the market;
- (b) the ease of entry into the market, including tariff and regulatory barriers;
- (c) the level, trends of concentration and history of collusion in the market; the degree of countervailing power in the market;
- (d) the likelihood that the acquisition would result in the merged parties having market power;

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- (e) the dynamic characteristics of the market including growth, innovation and product differentiation;
  - (f) the nature and extent of vertical integration in the market;
  - (g) whether the business or part of the business of a party to the merger or proposed merger has failed or likely to fail; and
  - (h) whether the merger will result in the removal of efficient competition.
3. A merger shall be contrary to public interest if the Commission is satisfied that the merger:
- (a) has lessened substantially or is likely to lessen substantially the degree of competition in the Common Market or any part thereof; or
  - (b) has resulted, or is likely to result in, or strengthen a position of dominance which is or will be contrary to the public interest.
4. In order for the Commission to determine whether a merger is or will be contrary to the public interest, the Commission shall take into account all matters that it considers relevant in the circumstances and shall have regard to the desirability of:
- (a) maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;
  - (b) promoting the interests of consumers, purchasers, and other users in the region, in regard to the prices, quality and variety of such commodities and services;
  - (c) promoting through competition, the reduction of costs and the development of new commodities, and facilitating the entry of

new competitors into existing markets.

5. For the purposes of determining whether or not to approve any merger, the Commission may, where necessary, undertake any inquiry to ascertain any competition concerns.
6. Before embarking on an inquiry in terms of this Article, the Commission shall take all reasonable steps to notify all the relevant Member States. The notice shall include:
- (a) the nature of the proposed inquiry;
  - (b) calling upon any interested persons who wish to submit written representations to the Commission in regard to the subject matter of the proposed inquiry.
7. If the Commission is satisfied, having regard to the matters referred to in paragraph 4, that an actual or proposed merger will be contrary to the public interest, the Commission may make any one or more of the following orders:
- (a) declaring the merger unlawful, except to such extent and in such circumstance as may be provided by or under the order;
  - (b) prohibiting or restricting the acquisition by any person named in the order of the whole or part of an undertaking or the assets of an undertaking, or the doing by that person of anything which will or may result in such an acquisition if the acquisition is likely, in the Commission's opinion, to lead to a merger;
  - (c) requiring any person to take steps to secure the dissolution of any organisation, whether corporate or unincorporated, or the termination of any association where the Commission is satisfied that the person is concerned in or is a party to a merger;

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- (d) requiring that if any merger takes place, any party thereto who is named in the order shall observe such prohibitions or restrictions in regard to the manner in which he carries on business as are specified in the order;
  - (e) generally making such provisions as, in the opinion of the Commission, are reasonably necessary to terminate or prevent the merger or alleviate its effects.
8. An order made in respect of a merger may provide for any of the following matters:
- (a) the transfer or vesting of property, rights, liabilities or obligations;
  - (b) the adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise;
  - (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
  - (d) the formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.
9. An order shall be in writing and served on every person named therein:
- (a) Provided that, if the order applies to persons generally or if, in the Commission's opinion, it is impractical to serve it individually on all the persons to whom it applies, the Commission shall take all reasonable steps to appropriately inform the concerned Member States.
10. Before making an order under this Article, the Commission shall ensure that every person affected thereby is informed of the general content of the order it proposes to make and is given an adequate opportunity to make representations in the matter:
- (b) Provided that, if the proposed order will apply to persons generally or if, in the Commission's opinion, it is impractical to notify its terms to all the persons to whom it will apply, the Commission shall cause the general content of the proposed order to be published in the manner as the Commission considers will bring it to the attention of the persons to whom it will apply.
11. The Commission may amend or revoke an order at any time.
12. Any person aggrieved by the decision of the Commission, may appeal to the Board of Commissioners as prescribed by the Regulations.

**PART 5**  
**CONSUMER PROTECTION**

**Article 27**

**False or Misleading Representation**

1. A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

- (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- (b) falsely represent that services are of a particular standard, quality, value or grade;
- (c) falsely represent that goods are new;
- (d) falsely represent that a particular person has agreed to acquire goods or services;
- (e) falsely represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (f) represent that the person has a sponsorship, approval or affiliation it does not have;
- (g) make a false or misleading representation with respect to the price of goods or services;
- (h) make a false or misleading representation concerning the

availability of facilities for the repair of goods or of spare parts for goods;

- (i) make a false or misleading representation concerning the place of origin of goods;
- (j) make a false or misleading representation concerning the need for any goods or services; or
- (k) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

**Article 28**

**Unconscionable Conduct in Consumer Transactions**

1. A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

2. Without in any way limiting the matters to which the Commission may have regard for the purpose of determining whether a person has contravened paragraph 1 in connection with the supply or possible supply of goods or services to a person (in this paragraph referred to as the consumer), the Commission may have regard to:

- (a) the relative strengths of the bargaining positions of the person and the consumer;
- (b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or

services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

3. A person shall not be taken for the purposes of this Article to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the person institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

4. For the purpose of determining whether a person has contravened paragraph 1 in connection with the supply or possible supply of goods or services to a person:

(a) the Commission shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Commission may have regard to conduct engaged in, or circumstances existing, before the commencement of these Regulations.

5. A reference in this paragraph to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

6. A reference in this paragraph to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

## **Article 29**

### **Unconscionable Conduct in Business Transactions**

1. A person must not, in trade or commerce, in connection with:
  - (a) the supply or possible supply of goods or services to a person; or
  - (b) the acquisition or possible acquisition of goods or services from a person;
  - (c) engage in conduct that is, in all the circumstances, unconscionable.
  
2. Without in any way limiting the matters to which the Commission may have regard for the purpose of determining whether a person (the supplier) has contravened paragraph 1 in connection with the supply or possible supply of goods or services to a person (the business consumer), the Commission may have regard to:
  - (a) the relative strengths of the bargaining positions of the supplier and the business consumer;
  - (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;
  - (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in

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relation to the supply or possible supply of the goods or services;

- (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier;
- (f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- (g) the requirements of any applicable industry code;
- (h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code;
- (i) the extent to which the supplier unreasonably failed to disclose to the business consumer:
  - i. any intended conduct of the supplier that might affect the interests of the business consumer; and
  - ii. any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);
- (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and

- (k) the extent to which the supplier and the business consumer acted in good faith.

### **Article 30**

#### **Warning Notice to the Public**

1. The Commission shall publish a notice in the Member States concerned containing one or both of the following:
  - (a) a statement that goods of a kind specified in the notice are under investigation to determine whether the goods will or may cause injury to any person;
  - (b) a warning of possible risks involved in the use of goods of a kind specified in the notice.
2. Where an investigation referred to in paragraph 1 has been completed, the Commission shall, as soon as practicable, by notice in writing published in the Member States involved or concerned, announce the results of the investigation, and shall announce in the notice whether, and if so, what action is proposed to be taken in relation to the goods under these Regulations.

### **Article 31**

#### **Product Safety Standards and Unsafe Goods**

1. A person shall not, in trade or commerce, supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind:
  - (a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;

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- (b) in respect of which there is in force a notice under this Article declaring the goods to be unsafe goods; or
  - (c) in respect of which there is in force a notice under this Article imposing a permanent ban on the goods.
2. A person shall not export goods, the supply in the Common Market of which is prohibited by paragraph 1 unless the Commission has, by notice in writing given to the person, approval for the export of those goods.
3. Where the Commission denies a request for approval as mentioned in paragraph (2) the affected party may appeal to the Board pursuant to the procedures set out in the Regulations.
4. Where:
- (a) the supplying of goods by a person constitutes a contravention of this paragraph by reason that the goods do not comply with a prescribed consumer product safety standard;
  - (b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information in relation to the goods; and
  - (c) the person would not have suffered the loss or damage if the goods had complied with that standard;
  - (d) the person shall be deemed for the purposes of these Regulations to have suffered the loss or damage by the supplying of the goods.
5. Where:
- (a) the supplying of goods by a person constitutes a contravention of this Article by reason that there is in force a

notice under this Article declaring the goods to be unsafe goods or imposing a permanent ban on the goods; and

- (b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information as to a characteristic of the goods;
- (c) the person shall be deemed for the purposes of these Regulations to have suffered the loss or damage by the supplying of the goods.

### **Article 32**

#### **Product Information Standards**

1. A person shall not, in trade or commerce, supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the person has complied with that standard in relation to those goods.
2. The regulations may, in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to:
- (a) the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; and
  - (b) the form and manner in which that information is to be disclosed on or with the goods;
  - (c) are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the

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goods.

3. Paragraph (1) does not apply to goods that are intended to be used outside the Common Market.

4. If it is applied to goods - a statement that the goods are for export only; or

(a) a statement indicating by the use of words authorised by the Regulations to be used for the purposes of this Article that the goods are intended to be used outside the Common Market;

(b) it shall be presumed for the purposes of this paragraph, unless the contrary is established, that the goods are intended to be so used.

5. For the purposes of paragraph (4), a statement shall be deemed to be applied to goods if:

(a) the statement is woven in, impressed on, worked into or annexed or affixed to the goods; or

(b) the statement is applied to a covering, label, reel or thing in or with which the goods are supplied.

6. A reference in paragraph (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and a reference in that paragraph to a label includes a reference to a band or ticket.

7. The person shall be deemed, for the purposes of these Regulations, to have suffered the loss or damage by the supplying of the goods where:

(a) the supplying of goods by a person constitutes a contravention of this paragraph by reason that the person has not complied with a prescribed consumer product

information standard in relation to the goods;

(b) a person suffers loss or damage by reason of not having particular information in relation to the goods; and

(c) the person would not have suffered the loss or damage if the person had complied with that standard in relation to the goods.

### **Article 33**

#### **Compulsory Product Recall**

1. Where:

(a) a person (in this Article referred to as the “supplier”), in trade or commerce, supplies goods that are intended to be used, or are of a kind likely to be used, by a consumer;

(b) one of the following subparagraphs applies:

i. it appears to the Commission that the goods are goods of a kind which will or may cause injury to any person;

ii. the goods are goods of a kind in respect of which there is a prescribed consumer product safety standard and the goods do not comply with that standard;

iii. the goods are goods of a kind in relation to which there is in force a notice under Article 33.

c) it appears to the Commission that the supplier has not taken

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satisfactory action to prevent the goods causing injury to any person.

2. The Commission shall by appropriate notice in the Member States, require the supplier to do one or more of the following:

- (a) take action within the period specified in the notice to recall the goods;
  - (b) disclose to the public, or to a class of persons specified in the notice, in the matter and within the period specified in the notice, one or more of the following:
    - i. the nature of a defect in, or a dangerous characteristic of, the goods identified in the notice;
    - ii. the circumstances, being circumstances identified in the notice, in which the use of the goods is dangerous; or
    - iii. procedures for disposing of the goods specified in the notice;
  - (c) inform the public, or a class of persons specified in the notice, in the matter and within the period specified in the notice, that the supplier undertakes to do whichever of the following the supplier thinks is appropriate:
    - i. except where the notice identifies a dangerous characteristic of the goods - repair the goods;
    - ii. replace the goods;
    - iii. refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods -
- within the period specified in the notice.

3. Prior to the publication by the Commission of the notice

mentioned in paragraph 1 (c) above, the Director shall so notify the affected party and give him/her an opportunity to be heard as to why such notice should not be published. Within 10 days of that hearing, the Director must inform the party of the Commission's decision. If the party disagrees, he/she may appeal pursuant to the procedure set forth in the Regulations.

### **Article 34**

#### **Power of the Commission to declare Product Safety or Information Standards**

1. The Commission shall notify the public in the Member States concerned, that, in respect of goods of a kind specified in the notice, a particular standard, or a particular part of a standard, prepared or approved by a prescribed association or body, or such a standard or part of a standard with additions or variations specified in the notice, is a consumer product safety standard for the purposes of the Articles 31 and 32 of these Regulations.

2. Where a notice has been given, the standard, or the part of the standard, referred to in the notice, or the standard or part of a standard so referred to with additions or variations specified in the notice, as the case may be, shall be deemed to be a prescribed consumer product safety standard for the purposes of Articles 31 and 32, as the case may be.

**Article 35**

**Liability in respect of Unsuitable Goods**

1. Where:
  - (a) a person, in trade or commerce, supplies goods manufactured by the person to another person who acquires the goods for re-supply;
  - (b) a person (whether or not the person who acquired the goods from the Person) supplies the goods (otherwise than by way of sale by auction) to a consumer;
  - (c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the Person, either directly, or through the person from whom the consumer acquired the goods or a person by whom any prior negotiations in connection with the acquisition of the goods were conducted;
  - (d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied; and
  - (e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose -
    - the Person is liable to compensate the consumer or that other person for the loss or damage and the consumer or that person may recover the amount of the compensation by action against the corporation in a court of competent jurisdiction.
2. Paragraph 1 does not apply:
  - (a) if the goods are not reasonably fit for the purpose referred to in paragraph (1) by reason of:

- i) an act or default of any person (not being the corporation or a servant or agent of the Person); or
  - ii) a cause independent of human control;  
occurring after the goods have left the control of the Person; or
- (b) where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgement of the Person.

**Article 36**

**Liability for Defective Goods causing Injury and Loss**

1. If a Person, in trade or commerce, supplies goods manufactured by it; and the goods have a defect; and because of the defect, an individual suffers injuries or loss, then:
  - (a) the Person is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
  - (b) the individual may recover that amount by action against the Person; and
2. If the individual dies because of the injuries referred to in paragraph 1 above, a law of COMESA or of a Member State about liability in respect of the death of individuals applies as if:
  - (a) the action were an action under the law of

COMESA or of a Member State for damages in respect of the injuries; and

- (b) the defect were the person's wrongful act, neglect or default.

**Article 37**

**Unidentified Manufacturer**

1. If a person who wishes to institute a liability action does not know who manufactured the action goods, the person may serve on a supplier, or each supplier, of the action goods who is known to the person a written request to give the person particulars identifying:
  - (a) the person which manufactured the goods; or
  - (b) the supplier of the goods to the supplier requested.
2. If, 30 days after the person has made the request or requests, the person still does not know who manufactured the action goods, then the person, or each person, that is a supplier:
  - (a) to whom a request was made; and
  - (b) who did not comply with the request -

- is taken, for the purposes of the action, to have manufactured the action goods.

**Article 38**

**Defences**

1. In a liability action, it is a defence if it is established that:
  - (a) the defect in the action goods that is alleged to have caused the loss did not exist at the supply time; or
  - (b) they had that defect only because there was compliance with a mandatory standard for them; or
  - (c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered; or
  - (d) if they were comprised in other goods (finished goods) - that defect is attributable only to:
    - i. the design of the finished goods; or
    - ii. the markings on or accompanying the finished goods; or
    - iii. the instructions or warnings given by the manufacturer of the finished goods.

**Article 39**

**Rules**

The Board may make Rules which shall become effective upon approval by the Council.