



# Consumer Guide

*to the*

## *COMESA Competition Regulations*

December 2015

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# Consumer Guide to the COMESA Competition Regulations

## The Purpose of this Guide

**“ This booklet covers aspects of COMESA Regional Competition Policy and Regulations that will be of interest to consumer groups and individual consumers. ”**

Please note that this Guide is a summary designed to give the reader the basic information on the COMESA Competition Regulations (“the Regulations”). It does not cover all aspects of the Regulations and is not intended to be used in place of the Regulations themselves. If one is not sure how the Regulations apply in the context of a particular situation, they should seek legal advice or write to the COMESA Competition Commission (“the Commission”).

The Guide avoids legal language wherever possible, therefore, there may be some generalisation about the application of the Regulations. Please note that some of the provisions referred to have exceptions or important qualifications. In most cases, the circumstances in which the business conduct being complained of is occurring needs to be taken into account when determining the application of the Regulations to that conduct.

## How will consumers benefit from the Competition Regulations?

A market economy with a thriving business sector is the key to economic growth and long term sustainable increases in consumer welfare. However, market can fail because of anti-competitive business practices.

Because trade liberalisation removes government imposed barriers to regional trade, it allows producers to increase their efficiency through cheaper inputs. This allows them to compete more effectively on the domestic and

international markets, benefiting their customers and the economy as a whole.

Unfortunately, there is no guarantee that the full benefits will be achieved without a competition policy. Many goods and services cannot be traded internationally, and agreements between groups of businesses can distort competition. These private sector barriers can significantly reduce the benefits of trade liberalisation to ordinary consumers.

An effective competition law and policy will encourage the use of the most efficient methods of production, and will guide resources to the uses society values most highly. There will be continuing incentives for innovation to increase productivity, and consumers will

benefit from lower prices, better quality and a greater variety of goods and services. An effective competition policy and law can also add to general efficiency of markets through improved transparency of the rules that apply to business transactions.

***“The purpose of competition law is to facilitate competitive markets, so as to promote economic efficiency, thereby generate lower prices, increase choice and economic growth and thus enhance the welfare of the general community.”***

A number of COMESA Member States already have their own national competition laws and more are currently considering adopting such laws.

The objective of competition laws is to prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for inferior products and services. Some competition laws including the Regulations, also prohibit other practices that mislead or deceive consumers and contain provisions relating to product safety and product information and

unconscionable (or grossly unfair) conduct.

Businesses will have less incentive to trade fairly when competitors can obtain short-term advantage by misleading consumers, supplying unsafe goods or acting in a grossly unfair way. The costs of such short-term advantages will fall on both consumers and legitimate traders, often to the long-term detriment of consumers as the increased risks of doing business discourages changes to entrenched buying and investing behaviour.

***“The objective of competition Law is to protect the process of competition, thereby leading to economically efficient outcomes. Competition law is not concerned with protecting particular competitors in the market.”***

The COMESA Competition Regulations recognise that not all agreements between businesses harm competition. For example, both businesses and consumers may benefit if agreements between

competitors resulted in acceptable minimum standards of safety while allowing businesses to continue competing on factors such as price or quality. The Regulations have been drafted to include

sufficient flexibility so that beneficial agreements between companies are not prohibited.

Having an effective competition law does not mean that there will be no need for other consumer protection regulation. This is because governments have many policy objectives, hence there will always be other consumer

protection regulations. For example, a government may wish to ensure consumer protection welfare outcomes that will not be generated by competitive forces. Some consumer regulation will be too detailed or specialised to be included in a competition law of general application.

***“Market forces ensure goods that the consumer wants are produced in the quantities they want, using the most efficient production methods and marketed and distributed to the consumers who wish to purchase them in the most efficient means possible.”***

## How will the COMESA Competition Regulations be enforced?

The Regulations will be enforced by the Commission. The Commission has the power to:

- examine complaints from consumer groups, individual consumers and business and others;
- investigate possible contraventions of the

Regulations in conjunction with the relevant authorities of the member countries concerned;

- make determinations on the investigations conducted, including the imposition of penalties and remedies.

***“Decisions of the Commission may be appealed against to the COMESA Court of Justice.”***

The specified composition and procedures of the Commission and the Board will ensure that while accountability to the COMESA Council of Ministers (the Council) will be maintained, there will be an appropriate level of independence. Article 13 of the Regulations

provides that on recommendation of the COMESA Secretary General, the Council may appoint 9 to 13 Commissioners to the Board of Commissioners. Further, the Regulations specify appropriate qualifications for Commissioners. Pursuant to this provision, the

Commission is currently composed of 9 Commissioners at which most of them are representatives of national competition authorities.

Among the orders that the Commission or the Board may make are:

- the payment of damages to affected consumers;
- fines;
- stopping the offending conduct;
- a range of other orders designed to reduce the risk of the business re-offending and providing compliance education to other businesses in the same industry.

## What is the purpose of the Regulations?

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The purpose of the Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation

of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors.

## What types of business conduct will be covered by the Regulations?

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***“As the Regulations are a regional law they will only apply to conduct which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.”***

Where a business's conduct directly affects regional trading, the Regulations will apply to that business regardless of their ownership or control, including government-owned businesses and foreign-owned businesses.

Generally, the regional law will not apply to businesses that are trading wholly within only one member country or not trading within any COMESA Member State.

## Prohibitions

**“ In general, the Regulations prohibit all agreements between businesses which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. ”**

Broadly speaking, the Regulations prohibit the following anti-competitive business conduct:

### i) Agreements between competitors, including price fixing and market sharing.

Agreements between direct competitors (horizontal agreements) are anti-competitive since they either prevent or retard competition by restricting the ability of businesses to respond individually to new market conditions such as changing costs of production or distribution, or in consumer demand. Many horizontal agreements are prohibited absolutely ('per se') because they go to the heart of competition and deprive consumers of the ability to shop around for the best deal, for example, conduct such as price-fixing and market-sharing. Generally, these practices provide no beneficial effects to counter their adverse effect on competition. Absolutely 'per se' prohibited practices include:-

- collective action to enforce arrangements;
  - concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier;
  - collective denials of access to an arrangement or association which is crucial to competition.
- An example of price fixing would be when a group of traders selling similar products (for example soft drinks) met regularly to agree on a 'fair' price to charge consumers. The only fair price is the one set by the free market where each trader is able to decide his own prices.
- It is not price-fixing if most traders are charging more or less the same price because they all have similar costs of trading. If each trader decided his own selling price, there is no illegal agreement.
- Other types of agreements between competitors may have pro-
- agreements fixing prices;
  - collusive tendering and bid-rigging;
  - market or customer allocation agreements;
  - allocation by quota as to sales and production;

Other types of agreements between competitors may have pro-

competitive features. For example, joint activities of competitors may be competitively beneficial if they foster efficiencies, reduce risk and create new or improved products or methods of distribution. These

arrangements are not absolutely prohibited. Instead, they are only prohibited if they fail the '*rule of reason*' assessment that looks at the overall effects of such agreements.

## ii) Anticompetitive conduct between buyers and sellers, including anti-competitive exclusive dealing and resale price maintenance.

The Regulations also prohibit certain conduct between buyers and sellers (vertical arrangements) such as resale price maintenance and exclusive dealing that adversely affect competition. Consumers are harmed because businesses subject to such restrictions are unable to respond effectively to consumer demands and to compete effectively against competitors. Some examples of vertical agreements are; resale price maintenance and exclusive dealing

**Resale Price Maintenance** is when manufacturers or wholesalers tell a retailer they cannot discount

products below a set price.

**Exclusive Dealing** It is common for a business to decide only to sell to a limited number of other businesses or to impose strict conditions on their business relationships. In certain situations defined by the Regulations, exclusive dealing will be prohibited because it makes it difficult for other businesses to compete in the market. These arrangements are not prohibited absolutely. Instead they are only prohibited if they fail the '*rule of reason*' assessment that looks at the overall effects of such agreements.

## iii) Abuse of dominant position

**“ The Regulations prohibit a dominant business from misusing its power in ways that harm competitors or stop new businesses from starting. The Regulations do not prohibit a business achieving a dominant position where it can largely ignore its competitors.”**

The prohibition extends only to the conduct of a business in a dominant position when it has one or more of the following effects:

- restricting, or likely to restrict, the entry of any business into a market;
- preventing or deterring, or likely to prevent or deter, any business from engaging in



- competition in a market;
- eliminating or removing, or likely to eliminate or remove, any business from a market;
- directly or indirectly imposing unfair purchase or selling prices or other restrictive practices;
- limiting the production of goods and services for a market to the prejudice of consumers;
- as a party to an agreement, making 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;
- engaging 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.

***“ The Regulations do not prohibit businesses getting bigger simply because they have won increased market share through keeping consumers happy.”***

#### iv) Mergers which would have the effect or likely effect of substantially lessening competition in a substantial market

Sometimes, businesses increase their market share by buying a competitor. This will be good for consumers if the resulting bigger business sells goods more cheaply or invests in new and better goods and services. However, it will not be good for consumers if the resulting bigger business no longer faces effective competition from other businesses. If there is little remaining competition, the bigger business will have less incentive to keep consumers happy by selling goods cheaply or investing in new and better goods and services.

In other words, monopolies are not prohibited per se, but the Regulations prohibit businesses getting bigger through taking over competitors when the result will be significantly less competition to win consumers

Merger regulation is more effective if competition authorities can examine the merger proposals before they are put into action. The Regulations provide for this by requiring mergers **‘with a regional dimension’** and a value at or above a prescribed threshold to notify the Commission prior to the merger.

## v) Misleading and deceptive conduct, particularly in advertising and selling.

**“ The Regulations prohibit misleading and deceptive conduct, particularly in advertising and selling.”**

If consumers are to make informed purchasing decisions, information concerning goods and services must be accurate, relevant and useable. The Regulations do not create a general obligation to disclose all information about a transaction. This would unreasonably increase costs to businesses out of proportion to the benefits to consumers and it would be consumers who would ultimately pay for the cost of unnecessary disclosure through increased prices. However, the business should disclose additional information to customers or another business where it is likely that your other conduct has created a misleading impression, or where it is reasonable to expect that this information will be disclosed.

The prohibition on misleading conduct includes:

- lying to consumers;
- leading them to a wrong impression;
- creating a false impression; and
- making false or inaccurate claims.

When deciding whether a conduct is misleading or deceptive, or likely to mislead or deceive, consideration

will be on how behaviour of the business affect the audience's impression of a good or service. Determination of misleading or deceptive conduct also include considering the following:

- The circumstances - This means that all relevant circumstances and factors surrounding the conduct will be taken into consideration, such as the entire advertisement, product label or statements made by a sales representative. Fine print, contradictory statements and images that obscure or alter written statements are all taken into account.
- The audience - Whether any marketing and promotional activities are misleading or deceptive may depend on the audience that receives the message. Businesses must remember that the consumers targeted with advertising campaigns may be very different to the audience that actually receives the message. You should identify your potential audience as this will help you determine the impact of your message. For example, television or radio advertisements are likely to have a wider reach than claims made

by your sales staff.

The prohibitions in the Regulations reflect regional (and worldwide) experience about factors that affect consumers the most. Generally, consumers are most concerned about:

- (a) price - this includes:
- misrepresentations about 'discounts' or 'price reductions';
  - non-disclosure of unavoidable costs to the consumer over which the seller has control (such as mandatory delivery costs) or for which the seller is liable (such as taxes payable by the seller and associated with the use of the good or service that the consumer will

have to pay prior to the transaction being complete) and

- representations that disclose part of the full price but not the full price or total cost;

(b) quantity;

(c) standard, value, grade, composition, style or model;

(d) history (including whether goods are new or second hand), previous use or date of manufacture, place of origin, manufacturing process;

(e) the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Article 27 of the Regulations sets out the list of prohibited false or misleading conducts.

## vi) Unconscionable conduct in consumer

Unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience. In markets of most of COMESA Member States where there is great disparity in knowledge, relevant experience and skills, it is likely that unscrupulous persons will seek to exploit these differences to their advantage. Such conduct can cause financial loss to those involved and perhaps affect the ability of the perpetrator to repeat the conduct. On a larger scale the damage from such conduct is likely

to adversely affect the willingness of consumers to take the risk of using unfamiliar products or dealing with new traders.

In the Regulations, businesses are prohibited from engaging in unconscionable conduct, when dealing with other businesses or their customers. It would not be practical at the regional level to seek to prevent all 'unfair conduct'. What might seem unfair or a 'hard bargain' in some places may be seen as a normal part of trading in another.

**“ The Regulations’ unconscionable conduct provisions are directed towards prohibiting grossly unfair conduct. ”**

The Regulations include guidance as to what will be considered unconscionable so that the circumstance of the conduct can be taken into account. Separate guides are provided to reflect the difference between businesses dealing with other businesses and businesses dealing with consumers.

In considering whether a business’s behaviour towards a consumer is unacceptable, the Commission may examine:

- the relative strengths of the bargaining positions of the supplier and the consumer;
- whether, as a result of conduct by the supplier, the consumer was required to comply with conditions not reasonably necessary for the protection of the legitimate interests of the supplier;
- whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- whether any influence or pressure or any unfair tactics were used against the consumer or a person acting on behalf of the consumers; and
- the amount for which, the consumer could have bought identical or equivalent goods or services in similar

circumstances from another supplier.

When deciding whether conduct has been so unacceptable as to be ‘unconscionable’, the Competition Commission may take into account previous conduct and surrounding circumstances. It cannot take account of circumstances which could not have been foreseen.

To avoid being a victim of unconscionable conduct, consumers can use the following tips:

- ensure all commercial agreements entered into are in writing
- ensure that the agreements are written in clearly understandable language by both parties
- ensure that the terms of the agreement are fully understood by both parties before committing to sign
- seek the advice of independent professional experts to help you understand the document before signing
- Not conclude a transaction under pressure and allow time to understand all aspects of the transaction.
- Ensure that the deal offers room for negotiations to

ensure the outcome that suits the interests of both parties

- Be open minded and

prepared to discontinue the transaction that does not meet your expectations.

## **Product Safety and Product Information**

Safety has long been recognised as one of the basic rights of consumers. Unless consumers have no practical choice, few would knowingly accept unsafe goods or services. The disappearance or avoidance of unsafe products will be one of the long-term benefits of competitive markets. However, experience within the region and worldwide has shown that even in the most competitive markets, unsafe products can appear in the short run, and that the harm they cause will almost always be unacceptable to the affected

consumers, their communities and governments.

The Regulations empowers the Commission to:

- set safety standards to ensure a minimum safety requirements for particular goods
- set information standards to ensure a minimum disclosure requirements
- for particular goods issue warning notices to the public about dangerous goods; and recall dangerous goods.

### **Safety standards**

A supplier must not supply goods for public use if:

- they do not comply with a prescribed consumer product safety standard;
- there is a notice in force

declaring the goods unsafe or

- there is a notice in force imposing a permanent ban on the goods.

### **Product information Standards**

A supplier must only supply goods for use by consumers if they comply with required consumer product information standards. Consumer product information standards may include such requirements as are reasonably necessary to give those using the goods information as to the quantity, quality, nature or value

of the good by:

- providing information on the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; and

## Warning the Public

- the form and manner in which that information is to be provided on or with the goods.

If the Commission, decides to investigate a possible breach of the Regulations, the Commission must publish a notice in the Member States concerned containing one or both of the following:

- a statement that the goods are under investigation to determine

whether the goods will or may cause injury to any consumer;

- a warning of possible risks involved in the use of goods of a kind specified in the notice.

Once an investigation is complete, the Commission must publish a notice, in the Member States concerned, stating their findings and saying what action they propose to take.

## Compulsory Product Recall

Consumer goods must be taken off the market if the Commission has decided that the goods will or may cause injury. Such include where:

- the goods do not comply with prescribed consumer product safety standards;
- there is a prohibition already in force and the supplier has not taken satisfactory action to prevent the goods causing injury

By publishing a notice in the relevant Member States, the Commission may require the supplier to do one or more of the following:

- take action within the period specified in the notice to recall the goods;
- inform the public within the period specified in the notice about:

1. the nature of a defect in, or a dangerous characteristic of, the goods;

2. the circumstances, in which the use of the goods is dangerous; or

3. procedures for disposing of the goods;

- inform the public that within the period specified in the notice, he will do one or more of the following:

1. except where the goods are dangerous – repair the goods;

2. replace the goods;

3. give a refund of the price of the goods;

Before the notice is published, the Director of the Commission must tell the supplier in writing, giving

him the opportunity to explain why the notice should not be published. Within 10 days of that hearing, the Director must inform the supplier

## Defences

The Regulations provide some defences to avoid unfair application of obligations on suppliers. The following facts will be considered a defence in any liability action:

- the defect allegedly causing loss did not exist at the time of supply; or
- they had that defect only because there was compliance with a mandatory standard for them; or
- the state of scientific or technical knowledge at the time when they were supplied by their actual

of his decision. If the supplier disagrees, he may appeal to the Board of Commissioners.

manufacturer was not such as to enable that defect to be discovered; or

- if the defective goods were comprised in other goods (finished goods) - that defect is attributable only to:
  1. the design of the finished goods; or
  2. the markings on or accompanying the finished goods; or
  3. the instructions or warnings given by the manufacturer of the finished good

## Flexibility in the Competition Regulations Exemptions

The Regulations make exceptions in the case of agreements and practices that:

- contribute to improving the production of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting

benefits; and that do not:

- allow restrictions which are not necessary to these objectives, or
- make it possible to eliminate competition in a substantial market for the goods or services in question.

## Authorisations

The Regulations provide for businesses to apply for 'authorisation' in respect of some prohibited conduct where they can show that the 'public benefit' of the conduct outweighs the anti-competitive effects. Authorisation

means that the conduct is no longer illegal.

The process of deciding on an application for authorisation is a public one. Consumer groups can play an important role in assisting

the Commission and Board to determine whether the claimed

public benefits are real.

## What can consumer groups do to help ensure that the COMESA Competition Regulations are an effective tool in the advancement of consumer interests in the region?

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The endorsement of the Regulations and the administrative arrangements by consumer groups

will be an essential element of their success in increasing the welfare of consumers in the region.

### Consumer groups can:

- Educate their members about the Regulations. Ignorance of the Regulations can have two negative results:
  - (i) illegal conduct continuing to the detriment of both consumers and legitimate traders and
  - (ii) Competition Commission resources being wasted assessing misdirected or trivial complaints;
- pass legitimate complaints through to either the COMESA Competition Commission or to a national competition authority as appropriate;
- provide advice to the Commission on the consumer perspective. Sometimes, this advice will be sought by the Commission, while other times consumer groups may choose to take the initiative and approach the Commission;
- test the arguments of those who might seek to enlist the assistance of consumer groups in relation to individual investigations. Sometimes, those seeking to engage in illegal conduct will argue that such conduct is in the interest of consumers. The Competition Regulations provide the flexibility to test such claims and in some circumstances to allow otherwise illegal activity to continue where there is a long-term net benefit to consumers.



## What can individual consumers do to help?

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Consumers are the eyes and ears of any successful competition authority.

It is consumers who see the misleading advertisements or who buy the unsafe goods. It is individuals, as employees and consumers, who find out first about secret, price-fixing and bid-rigging conspiracies. For these reasons, the Commission will rely on complaints

and information from individual consumers.

If you know or suspect that competitors, suppliers or even an employer are violating the Regulations, you should alert the Commission so that it can determine whether the conduct is contrary to either the Regulations or a national competition law.

## Where can I get more information?

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This guide is just one of the guides and brochures available to explain various competition law issues.

A current list is available from the Commission's web site at - <http://www.comesacompetition.org/>.

The Commission is available to respond to your questions about the operation of the COMESA Competition Policy and

Regulations. Announcements and contact details will be available on the Commission's website.

If your country has a national competition authority, the Commission will be able to respond to your questions on your national law. A list of the national competition authorities is available from the Commission's website.

## Other COMESA Competition Policy and Regulations publications

A current list of publication is available at the Commission's website <http://www.comesacompetition.org/>.

1. The Treaty establishing the Common Market for Eastern and Southern Africa (Article 55);
2. COMESA Competition Regulations, December 2004;
3. COMESA Regional Competition Rules, December 2004;
4. Amendments to the Competition Rules, November 2012;
5. Rules on Revenue Sharing of Merger Filing Fees, November 2012;
7. COMESA Merger Assessment Guidelines, November 2014;
8. Amendment to the Rules on Merger Notification Threshold and Method of Calculation, March 2015; and
9. Amendment to the Competition Rules of 2004, March 2015.

## National Competition Authorities within the COMESA region

A current list of National Competition Authorities within the COMESA region is available at the Commission's web site <http://www.comesacompetition.org/>.

### EGYPT

Egyptian Competition Authority

B19, Smart Village,

28 KM Cairo - Alex Desert Road Cairo, Egypt

Tel: (+202) 3535 1900 or (+202) 3535 1951

Fax: (+202) 3537 0436

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### ETHIOPIA

Trade Practice and Consumer Protection Authority

Fana Broadcasting Building 5<sup>th</sup> Floor

Addis Ababa, Ethiopia

Phone number: [+251-118-963655](tel:+251-118-963655) / [+251-118-965836](tel:+251-118-965836)

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### KENYA

Competition Authority of Kenya

Kenya Railways Staff Retirement Benefit Scheme Block 'D', 1st Floor,

Haile Selassie Avenue.

P.O. Box 36265-00200,

Nairobi, Kenya

Direct Line: +254 20 2628233

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E-mail: [info@cak.go.ke](mailto:info@cak.go.ke)

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**ZAMBIA****Competition and Consumer Protection Commission****Cairo Road****P.O Box 34919, Lusaka, Zambia****Tel.: (260-1) 22 27 87/57/75****Fax: (260-1) 22 27 89; 22 66 73; 22 67 27****E-mail: zcomp@zamtel.zm****Website: www.zcc.com.zm**

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**ZIMBABWE****Competition and Tariff Commission****Block One, 2nd Floor, No. 1 Kwame Nkurumah****Private Bag 7774****Causeway****Harare - ZIMBABWE****Tel.: (2634) 775040/1/2/3/4/5****Fax: (2634) 770175/771123****E-mail: compcomm@mweb.co.zw**

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# National Competition Laws and Bills within the COMESA region

A current list of National Competition Laws within the COMESA region is as follows:

<b>Burundi:</b>	Loi No 1/06 Du 25 Mars 2010 Portant Regime Juridque De La Concurrence.
<b>Comoros:</b>	Loi N°13-014/AU Relative a la Concurrence en Union des Comores.
<b>Djibouti</b>	Loi n°28/AN/08/6ème L portant sur la protection, la répression de la fraude et la protection du consommateur.
<b>Egypt:</b>	The Law on the Protection of Competition and the Prevention of Monopolistic Practices, Law 3 of 2005, May 2005.
<b>Ethiopia:</b>	A Proclamation on Trade Competition and Consumer Protection.
<b>Kenya:</b>	Competition Act, 2011.
<b>Madagascar:</b>	Loi n° 2005-020 Sur La Concurrence.
<b>Malawi:</b>	Competition and Fair Trading Act, 1998.
<b>Mauritius:</b>	The Competition Act, 2007.
<b>Rwanda</b>	N° 36/2012 of 21/09/2012, Law Relating to Competition and Consumer Protection
<b>Seychelles:</b>	Fair Trading Commission Act, 2009.
<b>Sudan:</b>	The Competition (Organisation) and Monopoly (Prevention) Act, 2009
<b>Swaziland:</b>	The Competition Act, 2007.

**Zambia:**

The Competition and Consumer Protection Act, 2010.

**Zimbabwe:**

Competition Act, 1996.

