



CO-OPERATION FRAMEWORK AGREEMENT BETWEEN

THE COMESA COMPETITION COMMISSION

AND

THE COMPETITION AUTHORITY OF KENYA

**REGARDING COOPERATION IN THE APPLICATION AND
ENFORCEMENT OF THE COMESA COMPETITION REGULATIONS**

APRIL, 2016

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This Framework Co-operation Agreement (hereinafter "Agreement") is made on this ^{27th} day of April, 2016 between COMESA Competition Commission (hereinafter "the Commission") an Regional Competition Agency established by the COMESA Competition Regulations which were issued in the COMESA Official Gazette Vol. 9 No.2 as Decision No. 43 of Notice No 2 of 2004 and whose address of service is care of Kang'ombe House 5th Floor West Wing P.O Box 30742 Lilongwe 3, Malawi, on one hand and Competition Authority of Kenya(CAK), (hereinafter "the Authority") a national Competition Authority established under the Kenya Competition Act No.12 of and whose address of service for purposes of this agreement is care of Kenya Railways Headquarters, Block D, P.O Box 36265-00200,Nairobi, on the other hand, (collectively referred to as the "Parties").

RECOGNISING:

The provisions of Article 55(3) of the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) under which the COMESA Competition Regulations ("the Regulations") are promulgated;

The provisions of Article 6 of the Regulations establishing the Commission and Article 7(1) of the Regulations which mandates the Commission to apply the provisions of the Regulations with regard to trade between Member States and be responsible for promoting competition within the Common Market;

The provisions of Article 7(2) of the Regulations which empowers the Commission among others to: monitor and investigate anti-competitive practices within the Common Market and mediate disputes between Member States; initiate cooperation with competition authorities of Member States; help Member States promote national competition laws and institutions with the objective of harmonization with the Regulations and ensure uniform application of the same; assist Member States in the implementation of its decisions; support to Member States in promoting and protecting consumer welfare; facilitate the exchange of relevant information and expertise;

That Kenya is one of the nineteen (19) member States of the Common Market for Eastern and Southern Africa Economic block whose objective is to promote regional economic integration through trade and investment.

That Competition Authority of Kenya is established by section 7 of the Competition Act No.12 of 2010 and mandated to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct.

That it is imperative that COMESA Member States give effect to the principles of 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 conciliations on matters relating to anti-competitive practices affecting COMESA regional and international trade;

The provisions of Articles 24(8) and 26(6) of the COMESA Competition Regulations which provides for the referral of a merger application for consideration under the Member State's national competition law, and for the Commission to work with the relevant Member States in conducting merger enquiries, respectively;

The provisions of Rule 40 of the COMESA Competition Rules ("the Rules") which provides for close and constant liaison between the Commission and the competition authorities of the Member States in establishing the existence of infringements of Articles 16 or 18 of the Regulations in the applications and notifications by undertakings;

The provisions of Rules 41(1), 43(1) and 44 of the Rules which mandates the Commission to: obtain all necessary information from the Governments and competition authorities of the Member States and from undertakings and association of undertakings; to request competition authorities of Member States to undertake investigations which the Commission deems to be necessary; and for officials of the Commission to carry out investigations in Member States in consultation with the competent authorities of Member States in whose territory the investigation is to be made, respectively;

CONSIDERING:

The desirability of Member States to cooperate at regional level in the implementation of their respective regional and national competition and consumer legislation in order to eliminate the harmful effects of anti-competitive practices;

That closer cooperation between the Commission and competition authorities of COMESA Member States in the form of notification, exchange of information, coordination of actions, and consultation among Member States should be encouraged;

CONSCIOUS OF:

Article 7(2) (d) of the Regulations which mandates the Commission to cooperate with competition authorities of Member States in order to accomplish the mandate of promoting competition in the Common Market and section 9 (m) of the Competition Act empowers the Authority to liaise with regulatory bodies and other public bodies in all matters relating to competition and consumer welfare

Now, therefore, the Parties agree as follows:

Article 1

Definitions

In this Agreement;

1. **"Anti-competitive"** means a conduct which appreciably restrains competition between the Member States and is not otherwise exempt by law or authorized in a manner required by the Regulations; .
2. **"COMESA"** means the Common Market for Eastern and Southern Africa established by Article 1 of the Treaty
3. **"Competition authorities"** means:
 - a. for COMESA, the COMESA Competition Commission established by Article 6 of the Regulations, and
 - b. Competition Authority of Kenya
4. **"Competition law(s)"** means:
 - a. for the Commission, the Regulations promulgated under Article 55 (3) of the Treaty establishing the Common Market,
 - b. Kenyan Competition Act No.12 of 2010 and

- c. for both the Commission and the Kenya Competition Authority, any such other regional laws or regulations as the Parties shall jointly agree to be a "competition law" for the purpose of this Agreement
5. "Enforcement activities" means any application of competition law by way of investigation or proceedings conducted by the competition authority of a Party.
6. "Member State" means Kenya.
7. "Regional Dimension" means conduct or practice affecting two or more Member States
8. "Territory" means:
 - a. For COMESA, the Common Market; and
 - b. Kenyan territory.
9. "Treaty" means the Treaty establishing the Common Market for Eastern and Southern Africa

Article 2

Purpose of this Agreement

"The Purpose of this agreement is to promote and facilitate coordination and coordination between Parties in the harmonization of regional and national laws and policies of Member States and lessen the possibilities or impact of difference."

Article 3

Notification

1. Each Party shall notify the other Party in writing whenever it becomes aware that its enforcement activities may affect important interests of the other Party.
2. Enforcement activities as to which notification generally will be appropriate include those that:
 - a) Are relevant to enforcement activities of the competition authority;
 - b) Involve anticompetitive activities (other than a merger or acquisition) carried out in whole or significant part of the Common Market;
 - c) Involve conduct believed to have been required, encouraged or approved by a Party; or
 - d) Involve remedies that would, in significant respects, require or prohibit conduct affecting the Common Market.

3. With respect to mergers or acquisitions, each Party will notify the other Party with any significant information that comes to its attention regarding mergers with a regional dimension that it believes is relevant to, or may warrant, enforcement activity by the Commission.
4. Each Party shall notify the other Party whenever it intervenes or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the interests of the other Party.
5. Notifications shall be made as soon as possible and shall include the nature of the activities under investigation and the legal provisions concerned and will be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the activities on its territory.

Article 4

Exchange of Information

1. The Parties acknowledge that it is in their interest to cooperate in the detection of anticompetitive practices to the extent compatible with Article 55 of the Treaty and important interests, and within their reasonable available resources. The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of the Regulations and promote better understanding of each other's enforcement policies and activities.
2. Each Party will provide the other Party with any information that comes to its attention regarding anti-competitive business practices that the Party believes is relevant to, or may warrant, enforcement activity by the other Party.
3. The information shared between the Parties shall be used solely for the purpose of implementing this Agreement.

Article 5

Coordination of Enforcement Activities

1. The Parties shall render assistance to each other in their enforcement activities, to the extent compatible with their respective competition laws and the respective interests, and within the reasonably available resources.
2. The Parties shall cooperate in the enforcement of the competition laws and share information which will facilitate effective implementation of the respective laws.
3. The Parties shall, in this regard, assist each other in the enforcement of the competition laws through:
 - a. assisting the Party, upon request, in locating and securing evidence and voluntary compliance with requests for information from undertakings or natural persons within the respective jurisdiction
 - b. assisting the requesting Party with such information within the other Party's possession as the requesting Party may specify as relevant to the enforcement of the Regulations
 - c. assisting the Party with any information that comes to the attention of the other Party about anti-competitive activities that may be relevant to or may warrant enforcement activity of the beneficiary Party
4. A Party may notify the other Party and may request that the other Party initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anti-competitive activities and their effects on its territory.
5. Upon receipt of a notification, the notified Party shall advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party shall advise the notifying Party of their outcome and, to the extent possible, of interim developments.
6. The requested Party shall assist in the investigations which the requesting Party considers to be necessary. Such investigations shall be carried out with the assistance of officials of the requesting Party, upon request, in accordance with the respective Party's laws.

7. In cases where the Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:
 - a. the opportunity to make more efficient use of their resources devoted to the enforcement activities;
 - b. the relative abilities of the Parties to obtain information necessary to conduct the enforcement activities;
 - c. the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and
 - d. the possibility of reducing costs incurred by persons subject to the enforcement activities.
8. In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of their respective competition laws.
9. The Parties shall carry out the investigations expeditiously and consistent with their relevant laws and shall take into account the enforcement objectives of the respective laws and the deadlines stipulated in their respective competition laws.
10. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anti-competitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.

Article 6

Avoidance of Conflicts over Enforcement Activities

1. The Parties agree that it is in their common interest to minimize any potentially adverse effects of their enforcement activities in as far as the application of the respective competition laws are concerned.
2. Each Party shall seek, at all stages in its enforcement activities, to take into account the important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate.
3. Any divergent views arising out of the enforcement of the respective competition laws will be addressed in a timely and practicable manner as circumstances may permit.

Article 7

Consultation

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions
2. Any request for consultations shall include the reasons thereof and shall state whether procedural time limits or other considerations require that the consultations to be expedited. These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.
3. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

4. A Party shall as soon as is practical, inform the other Party of any amendment made to its competition laws as well as any change in the enforcement practice of its competition authority that may affect the operation of this Agreement. Upon request of either Party, the Parties shall hold consultations in order to assess the specific implications of such amendments or changes for this Agreement, and in particular to determine whether this Agreement should be amended pursuant to paragraph 3 of Article 14.
5. The Parties shall meet at the appropriate level, at the request of either Party to among others:
 - (a) update each other on their current enforcement efforts and priorities in relation to the competition laws of each Party;
 - (b) exchange views on economic sectors of common interest;
 - (c) discuss policy issues of mutual interest; and
 - (d) discuss other matters of mutual interest relating to the application of the competition laws of each Party.

Article 8

Technical Assistance and Capacity Building

1. The Parties shall pursue technical assistance and capacity building programs through integrated strategies that incorporate economic, social, cultural, environmental and institutional elements that are unique to each Party. In this context and within the framework of development policies and reforms pursued by the Parties; the Parties' cooperation framework and orientation shall take into account the different levels of development as well as the economic needs of each Party and the difficulties faced in meeting their obligations under this Agreement.
2. The technical assistance and capacity building programs shall pay systematic attention to institutional aspects and in this context shall support the efforts of either Party to develop and strengthen structures, institutions and procedures that help to enhance the effective enforcement of the competition laws and policies in their respective territories. In this context, the Parties shall:

- a) jointly mobilize resources for capacity building aimed at assisting the Parties in the establishment and/or strengthening of the respective competition laws and enforcement agencies.
- b) jointly facilitate and develop competition and consumer protection advocacy programmes involving the sensitisation of policy makers, parliamentarians, the judiciary, the business community, and the general public about the role of competition and consumer laws and policies;
- c) jointly facilitate the establishment of a mechanism to enable the Parties to take the necessary steps to adopt, strengthen and implement the necessary competition and consumer protection laws in their respective territories.

Article 9

Confidentiality of Information

1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party is prohibited by the law of the Party possessing the information, or would be incompatible with important interests of the Party possessing the information.
2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of significant information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

Article 10

Communication under this Agreement

1. Communications under this Agreement shall be made in any of the preferred of the COMESA official languages.
2. Communications under this Agreement shall be carried out in writing and by direct communication among the Parties.

3. Each Party shall designate a Desk Officer for the purpose of liaison with each other in the enforcement of the respective competition laws.

Article 11

Existing Law

1. Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the competition laws of the Parties.

Article 12

Entry into Force, Termination and Review

1. This Agreement shall enter into force upon signature by the Parties.
2. This Agreement will remain in force in respect of both Parties until 60 days after the date on which any Party notifies the other in writing that it wishes to terminate it.
3. The Parties shall, at any time feasible but not earlier than 24 months after entry into force, review this Agreement with a view to adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of the respective competition laws

Article 13

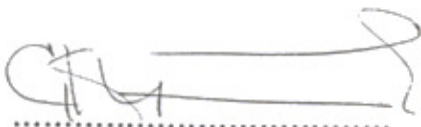
Existing Law

1. This MOU shall be a public document

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Co-operation Framework Agreement.

The COMESA Competition Commission

The Competition Authority of Kenya




Mr. George Lipimile
Director General

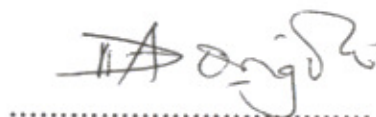


Mr. Wang'ombe Kariuki
Director General

Witnessed by:



Mary Gurure
Manager Legal Services



Mr. David Ong'olo
Chairman