



**Common Market for Eastern  
and Southern Africa**

**COMESA COMPETITION COMMISSION**

**REQUEST FOR TECHNICAL AND FINANCIAL PROPOSALS**

**CONSULTANCY SERVICES FOR DRAFTING THE LEGAL FRAMEWORK FOR A  
FUNCTIONAL COOPERATION MECHANISM IN CROSS-BORDER ENFORCEMENT  
BETWEEN COMESA COMPETITION COMMISSION AND THE COMPETITION  
COMMISSION OF MAURITIUS**

**RFP Ref: CCC/RFP/09/02/2021**

**SEPTEMBER 2021**

## BACKGROUND

1. The COMESA Competition Commission (“the **Commission**”) is a regional body established in terms of Article 6 of the COMESA Competition Regulations of 2004 (“the **Regulations**”) with the core mandate of enforcing the provisions of the Regulations with regard to trade between Member States and promoting competition within the Common Market through monitoring and investigating anti-competitive practices of undertakings within the Common Market and mediating disputes between Member States concerning anti-competitive conduct.
2. The Regulations were enacted with the purpose of promoting and encouraging 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. The Regulations are intended to apply to all economic activities conducted by private or public persons within, or having an effect within, the Common Market and which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.
3. The Republic of Mauritius is one of the 21 COMESA Member States which has been actively supporting the Commission in ensuring the effective enforcement of the Regulations within its territory and the Common Market at large. Enforcement cooperation between the Commission and the Competition Commission (Mauritius) (the ‘**CC**’) (together referred to as the **Authorities**) has, to-date, occurred principally through the CC providing informal information-gathering assistance to Commission’s investigations on notified mergers or agreements which involve parties having some form of economic or jurisdictional nexus with Mauritius. Such informal assistance eventually culminated into the signing of a Memorandum of Understanding (‘MoU’) between the Authorities in March 2017.
4. The MoU represents an important milestone in setting out the broad and general precepts of comity, joint consultation, coordinative enforcement, and information sharing between the Authorities to the extent compatible with each authority’s competition laws without however, detailing the explicit legal basis of, nor the form, manner, and processes to be applied in pursuit of the collaboration, notwithstanding the binding nature of the provisions of the COMESA Treaty and the Regulations on the Member States.
5. The Authorities’ collaborative experience thus far has demonstrated that notwithstanding the conclusion of an MoU and the best endeavours of the respective Authorities, real and effective enforcement cooperation is likely to face important limits. This is in circumstances when such co-operation would require activities, which are likely to be restricted under national law such as the provision of formal investigative assistance to; the exercise of statutory evidence-gathering powers on behalf of; or the exchange of confidential case information with the CCC for the purposes of its enforcement activities.

6. Premised on the foregoing, the CC and the Commission seek to formalise and strengthen the cooperation existing between them for improved enforcement of their competition laws against regional restrictive business practices, mergers and acquisitions, and other forms of anti-competitive concerns affecting the Common Market for Eastern and Southern Africa (referred interchangeably to the '**Common Market**' or the '**COMESA**').
7. The Commission is seeking to engage an International Consultant to assist the CC in putting in place the requisite legal and procedural framework underpinning a sound, effective and functional cooperation mechanism between the Authorities in cross-border enforcement, and in so doing, to assist the CC in fulfilling its obligations under the COMESA Competition Regulations, including the enforcement of the Commission's decisions at national level pursuant to existing COMESA legal instruments, vis-à-vis the Commission in the latter's enforcement activities. The Terms of Reference for the International Consultant which outline the Consultancy's objectives, scope, deliverables, expected duration and conditions are hereto annexed as Annex 7.

### **SCOPE OF CONSULTANCY SERVICES**

8. In view of achieving the above-stated objectives, the Consultant shall:
  - a. map out and report to the Authorities on the procedural and substantive requirements of each Authority's competition legislation relating to investigative/information-gathering and enforcement powers; differences in their investigative and enforcement regime applicable to restrictive business practices, mergers and acquisitions, and other forms of anti-competitive concerns; enforcement cooperation requirements; confidentiality obligations; information disclosure avenues including for sharing of confidential information in view of situating the level of convergence or otherwise divergence across the Authorities' legal regimes and enforcement practices, which facilitate or otherwise hinder effective enforcement;
  - b. carry out and report to the Authorities on a literature review of:
    - a. cross- border enforcement cooperation provisions in enabling instruments of other regional networks such as the European Competition Network, the ASEAN, among others in conjunction with proven bilateral or multilateral mutual assistance and cooperation instruments on competition between competition authorities/jurisdictions, and
    - b. latest recommended best practices on cross-border, competition enforcement cooperation endorsed by authorities in competition law and policy such as the OECD, ICN, UNCTAD, among others;
    - c. hold consultative meeting(s) (whether in-person or virtually) with the Authorities and, where deemed relevant, with specified stakeholders in order to gather their preliminary views on the features and procedures that are intended to or otherwise ought to make up the intended enforcement cooperation framework between the Authorities;

- d. draft the substantive and procedural rules embodying the requisite provisions, features, and tools in view of establishing an effective and functional enforcement cooperation mechanism between the Authorities. The Consultant's proposal should at a minimum but without limitation address the following questions:
  - a. the form and manner in which the Authorities will collaborate and coordinate with one another in the conduct of the Commission's investigation, joint, and parallel investigations;
  - b. the form and manner in which the CC is to render investigative assistance to, undertake investigations and use its investigative powers (pursuant to the provisions of its Competition Act 2007) on behalf of the Commission in the context of the latter's enforcement activity;
  - c. more particularly, the procedural requirements and scope of inspection (entry, search and seizure) powers (with or without in-person assistance from Commission officials) across premises located within the CC's jurisdiction, and the use and issuance of information requests (simple, informal requests for information and formal, compulsory requests for information) to persons located in Mauritius;
  - d. treatment of information gathered by the Authorities in the course of their investigations, including the treatment of confidential information, leniency information and settlement information, and the form and manner in which such information may be exchanged with one another (so called 'information gateways');
  - e. to ensure ensure that the proposed cooperation framework (substantive and procedural rules) has an explicit legal basis; is procedurally and legally sound to withstand legal challenges/objections from investigated parties including in judicial proceedings before competent courts in Mauritius and at COMESA level; comprehensively covers and practically implements the CC's enforcement cooperation obligations towards the Commission in pursuance of its legal requirements under relevant COMESA legal instruments; incorporates, to the extent possible, recommended best practices/features of cross-border, competition enforcement cooperation mechanisms – as endorsed by recognized authorities in competition law and policy; and is in accordance with the provisions of the Competition Act 2007 and the CC's own rules/practices on afore-identified principles (see Section II, point (d));
  - f. assess, discuss with the Authorities, and address (as the Authorities and the Consultant will deem appropriate) any comment, view, feedback received from stakeholders following round of public consultation on the draft proposal;
  - g. participate (whether in-person or virtually) in any validation workshop that may be organized by the CC/Authorities for the purposes of presenting and validating the final proposal in the presence of relevant stakeholders;
  - h. draft the Guidance Note intended to advocate the finalized procedural rules to facilitate understanding of the business community and stakeholders; and

- i. draft the Internal Guide (for use by Authorities) to assist in the practical application of the proposed enforcement cooperation framework by enforcement officials of the Authorities in the course of their collaborative enforcement activities.

## **DELIVERABLES**

9. The following are the expected deliverables on the part of the Consultant:
  - a. submit an inception report to the Authorities identifying the similarities/differences across the Authorities' competition laws on relevant aspects, which either facilitate or hinder effective enforcement cooperation between the Authorities;
  - b. submit a report on the literature review of the cross-border enforcement cooperation provisions in other regional networks and recommend best practices on cross-border, competition enforcement cooperation to be endorsed by the Authorities;
  - c. develop and make presentation(s) during (in person or virtual) consultative meetings with the Authorities and, where deemed relevant, with specified stakeholders;
  - d. present to the Authorities the views gathered by the Consultant from the first round of consultative meetings held with identified stakeholders on the Project proposal and to provide his/her feedback thereon;
  - e. prepare a first draft of the substantive and procedural rules together with relevant forms/ confidentiality waiver / information request template / any other template document, in line with the aforementioned objectives, for discussion with the Authorities;
  - f. to address the Authorities' comments and finalise a first draft of the substantive and procedural rules together with relevant forms/ confidentiality waiver / information request template / any other template document for issuance to relevant stakeholders during ensuing rounds of public consultation processes;
  - g. prepare and submit a first draft Guidance Note and first draft Internal Guide for the Authorities' review;
  - h. upon receiving comments from the various stakeholders during the public consultation process, prepare and submit a report to the Authorities containing stakeholder responses, the Consultant's counterviews, and any proposed amendment / addition to Consultant's initial draft in view of addressing comments;
  - i. prepare and submit final substantive and procedural rules (together with relevant forms/confidentiality waiver template/ information request template / any other template document) based on determinations made by the Authorities out of the comments received from the consultation process. At this stage, a final version of the Guidance Note and of the Internal Guide should also be submitted to the Authorities;

- j. present (whether in person or virtually) to local stakeholders the final substantive and procedural rules during the validation workshop to be organized by the CC/Authorities; and
- k. submit final procedural rules (together with relevant forms/ confidentiality waiver template/ information request template / any other template document) and Guidance Note to the CC<sup>1</sup> for publication/ prescription/ gazetting purposes together with the final Internal Guide for enforcement officials of the Authorities.

### **EXPERIENCE AND QUALIFICATIONS**

- 10. The Commission wishes to obtain the services of a firm or individual Consultant with the requisite legal and legislative drafting skills and experience in competition and consumer protection law to assist with the drafting of the required substantive rules and procedures to be gazetted in Mauritius. Proof of having undertaken similar assignments is critical.

### **SUPERVISION AND PAYMENTS**

- 11. The Consultant will report to the Director of the Commission.

Bidders are advised to indicate their payment terms and conditions.

### **Pricing**

- 12. All prices MUST be indicated in USD.
- 13. There will be a no price variation contract after signing of contract except upon a mutual written agreement between the Commission and the successful bidder.
- 14. The price quoted shall be considered to be for all the services required by the Commission as contained in this Request for Proposal.
- 15. Prices must be exclusive of all taxes within Malawi and Mauritius.

### **CRITERIA FOR EVALUATION OF BIDS**

- 16. Bidders must provide both Technical and Financial proposals. The evaluation shall be based on the following attributes:
  - a. The overall responsiveness and quality of the proposal clearly stating an understanding of the work to be performed;
  - b. Technical ability of the proposer to perform the required services;
  - c. The experience and reputation of the proposer as represented in the response and the quality of references;
  - d. Cost of services. Fees and expenses will be particularly important factor when all other evaluation criteria are relatively equal.

The technical proposal will be assigned a weight of 80% and the financial proposal will be weighted at 20%.

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<sup>1</sup> For the avoidance of doubt, the procedural rules are to be gazette in Mauritius.

The proposed team should consist of a minimum of three Experts [ with the requisite legal and legislative drafting skills and experience in competition and consumer protection law to assist with the drafting of the required substantive rules

Evaluation Attribute	Percentage Points
Firm's understanding of the Commission's requirements	15
Approach and methodology	30
Specific Experience in carrying out similar assignments. Evidence in the form of reference letters, offer letters, orders or copies of contracts should be presented	30
Qualifications and Experience of proposed team: Team Leader – 15 Support Experts – 10	25
Total	100

17. A proposal shall be considered unsuitable and shall be rejected at the technical stage if it does not respond to important aspects of the Terms of Reference and/or **it fails to achieve a minimum technical score of 70%.**

#### **Financial Proposal – Standard Bidding Form**

18. Bidders are advised to use the standard tender Form below as a sample format and modify it to cover all relevant costs or charges.

There will be no price variation tender.

Bidders are advised to disclose any other relevant information on a separate sheet of paper.

#### **Amendments of Proposal documents**

19. At any time prior to the deadline for submission of Bids, the Commission may, for any reason, modify the Proposal Documents by issuing an addendum.

#### **BID SUBMISSION**

20. Bidders are advised to include in their bids the following standard tender Forms attached to this tender document and marked Annexes 1-6:

- a. Bid Submission Sheet;
- b. Bidder's references;
- c. Comments and suggestions on the Scope of Work;
- d. Description of the methodology for performing the assignment;
- e. Team Composition and Tasks assignment; and
- f. Proposed fees.

21. The proposals must be submitted with a covering letter containing a confirmation and a description of how you have understood the Terms of Reference for the assignment. The bidders should also confirm and provide evidence that:

- a. they have the legal capacity to enter into the contract

- b. they are not insolvent, in receivership, bankrupt or being wound up. Their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;
- c. they have fulfilled their obligations to pay taxes and social security contributions, and for that purpose, documentary evidence to be provided by the relevant authorities to demonstrate that the bidders have met their obligations;
- d. that their servants, or agents have not offered any inducement to any employees of the Commission.

#### **Cost of Tender**

22. The Bidder shall bear all costs associated with the preparation and submission of the bid. The Commission will in no case be responsible or liable for those costs, regardless of the conduct and outcome of the tender.

#### **Cancellation of the Tender**

23. In the event of cancellation of the tender, bidders will be notified in writing of the cancellation by the Commission and informed of the reasons for cancellation.

#### **Ownership of Tenders**

24. The Commission retains ownership of all tenders received under this Request for Bids. Consequently, bidders have no right to have their tenders returned to them.

#### **Negotiation and Finalization**

25. After the selection of the best bid and notification to the selected party, the Commission will commence negotiations with that party for purposes of concluding an agreement.

#### **Award of Contract**

26. Prior to expiration of the period of bid validity, the Procurement Committee will award the contract to the qualified Bidder whose Bid after being evaluated is considered to be the most responsive to the needs of the organization and activity concerned.

The Commission reserves the right to wholly or partially reject or award the contract to any bidder and has no obligation to award this tender to the highest ranked bidder.

The Commission also reserves the right to annul the Bid process and reject all Bids at any time prior to award of contract, without thereby incurring any liability to the affected Bidder(s).

#### **Signing of the Contract**

27. Within 14 days of receipt of the contract the successful Bidder shall sign and date the contract and return it to the Commission.



### **Period of execution**

28. The period of execution of the contract starts from the date of the signing of the contract and is estimated to take thirty-two (32) weeks from date of contract signing by the last party.

### **Confidentiality**

29. Information relating to evaluation of bids and recommendations concerning awards, shall NOT be disclosed to the Bidders who submitted the bids or to other persons not officially concerned with the process, until the winning firm has been notified that it has been awarded the contract.

### **Corrupt or Fraudulent Practices**

30. The Commission requires that Bidders observe the highest standard of ethics during the procurement and executions of contracts.

31. For the purposes of this provision, COMESA defines the terms set forth below as follows:

- e. "corrupt practice" means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract execution: and
- f. "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the COMESA, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive COMESA of the benefits of free and open competition.

### **FORMAT AND SEALING OF BIDS**

32. The bidder shall submit the proposal in **one envelope containing two sealed envelopes** by the closing date set forth below through courier services or hand delivery to the following address.

Chairperson - Procurement Committee,  
 COMESA Competition Commission,  
 5th Floor-West Wing, Kang'ombe House  
 P.O. Box 30742  
 Lilongwe 3, Malawi  
 Attention: Procurement Unit

33. An electronic copy of the proposal shall be submitted by the closing date to the following email address: [compcom@comesa.int](mailto:compcom@comesa.int).

34. The outer envelope should be clearly marked at the top right-hand corner [TENDER REFERENCE AND TITLE].

35. The first internal sealed envelope shall be clearly marked “Technical Proposal” and must contain two (2) hard copies of the technical proposal with one marked ‘original’ and the other marked ‘copy’. The second internal envelope shall be marked “Financial Proposal” and must contain two hard copies of the financial proposal with one marked ‘original’ and the other marked ‘copy’. In the event of any discrepancy between the original and the copy, the original shall govern.
36. **NOTE:** If the envelopes are not sealed and marked as per the instructions in this clause, the Commission will not assume responsibility for the proposal’s misplacement or premature opening and may – at its discretion – reject the proposal.

#### **Deadline for Submission of Proposals**

37. The deadline for the submission of proposals is **13h30 Malawi Time on TUESDAY, 21<sup>st</sup> September 2021**. Bidders or their authorised representative are invited to attend the virtual opening of bids scheduled to be held on **TUESDAY, 21<sup>st</sup> September at 15h30 Malawi Time**.
38. The Commission does not bind itself to accept any bid and reserves the right to accept the whole or part of any of the submitted bids.

#### **TECHNICAL QUERIES**

39. For any technical queries related to specifications of work or Terms of Reference, kindly contact Ms. Stellah Onyancha Manager, Enforcement and Exemptions on the following email address: [sonyancha@comesa.int](mailto:sonyancha@comesa.int) .

**ANNEX 1: BID SUBMISSION SHEET**

*[This Bid Submission Sheet should be on the letterhead of the Bidder and should be signed by a person with the proper authority to sign documents that are binding on the Bidder.]*

Date: [insert date (as day, month and year) of bid submission]

Reference No: [insert Reference number]

To: The Chairman of the Procurement Committee

We, the undersigned, declare that:

We have examined and have no reservations to the Bidding Document;

We offer to provide the services in conformity with the Bidding Document for the [insert a brief description of the Services];

We hereby submit our bid which includes the following (to state the documents included);

Our bid shall be valid for a period of six months from the date fixed for the bid submission deadline in accordance with the Bidding Document, and it shall remain binding upon us and may be accepted at any time before the expiration of that period;

We are not participating, as Bidders, in more than one bid in this bidding process;

We do not have any conflict of interest and have not participated in the preparation of the project document for the COMESA Competition Commission;

Our Proposal is binding upon us, subject to modifications agreed during any contract negotiations, and we undertake to negotiate on the basis of the staff proposed in our Bid;

We understand that this Bid, together with your written acceptance thereof included in your Letter of Bid Acceptance, shall NOT constitute a binding contract between us, until a formal letter of engagement is prepared and executed; and

We understand that you are not bound to accept the lowest bid or any other bid that you may receive.

Name: [insert complete name of person signing the Bid]

In the capacity of [insert legal capacity of person signing the bid]

Signed: [signature of person whose name and capacity are shown above]

Duly authorized to sign the bid for and on behalf of: [insert complete name of Bidder]

Dated on \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ [insert date of signing]

**ANNEX 2: BIDDER'S REFERENCES****Relevant Services Carried Out in the Last Five Years That Best Illustrate Experience**

Using the format below, provide information on each assignment for which the Bidder, either individually as a corporate entity or as one of the major firms within an association, was legally contracted.

Bidder's Name:

Assignment Name:		Country:	
Location within Country:		Professional Staff Provided by Bidder (profiles):	
Name of Client:		Nº of Staff:	
Address:		Nº of Staff-Months; Duration of Assignment:	
Start (Month/Year):	Date	Completion (Month/Year):	Date
		Approx. Value of Services (in Current US\$):	
Name of Associated Consultants, If Any:		Nº of Months of Professional Staff Provided by Associated Consultants:	
Name of Senior Staff (Project Director/Coordinator, Team Leader) Involved and Functions Performed:			
Narrative Description of Project:			
Description of Actual Services Provided by the Staff:			

**ANNEX 3: COMMENTS AND SUGGESTIONS ON THE SCOPE OF WORK**

The bidder is required to give his comments and suggestions on the scope of work as follows

Scope of work	Comments and Suggestions

**ANNEX 4: DESCRIPTION OF THE METHODOLOGY FOR PERFORMING THE ASSIGNMENT**

Scope of work	Methodology for performing the Assignment

**ANNEX 5: TEAM COMPOSITION AND TASK ASSIGNMENTS**

<b>1. Technical/Managerial Staff</b>		
<b>Name</b>	<b>Position</b>	<b>Task(s)</b>



**ANNEX 6: PROPOSED FEES**

The bidder is required to state his proposed fees for the various financial statements to be audited as follows:

<b>Level of Service</b>	<b>Rate Per hour</b>	<b>Estimated Hours</b>	<b>Amount</b>
<b>Expert 1</b>			
Expert 2			
Expert 3 etc			

## ANNEX 7: TERMS OF REFERENCE OF THE INTERNATIONAL CONSULTANT

### Background

40. Article 5 of the Regulations and Rule 5 of the COMESA Competition Rules ('Rules') provide the overarching legal framework within which to situate Member States and their competent authorities' obligations vis-a-vis the Commission in order to ensure fulfilment of the objectives arising out of the Regulations and the Commission's actions. In addition to general administrative assistance which a competent authority may from time to time be called upon to provide to the Commission such as effecting service of documents on Commission's behalf to persons located within the competent authority's jurisdiction; the Rules further spell out specific enforcement assistance obligations of competent authorities in the context of Commission's investigations. Examples thereof arise from the provisions of Articles 7 and 8 of the Regulations and Rules 41, 43 and 44 of the Rules, viz., but not limited to
- a. to respond to Commission's requests for information as and when issued in view of carrying out its assigned functions under Article 7 of the Regulations;
  - b. to undertake investigations, which the Commission considers to be necessary, or which it has ordered by decision pursuant to Rule 44 of the Rules;
  - c. to exercise such investigative powers as are vested in the competent authority (under national competition legislation) in the conduct of investigations, on Commission's behalf;
  - d. to consult with the Commission on any intended inspection decision under Rule 44 of the Rules;
  - e. to assist officials of the Commission in executing any such inspection exercise (entry, search and seizure) at national level, and afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation in the event that the undertaking(s) concerned oppose(s) the investigation; and
  - f. to assist the Commission in the enforcement of its decisions affecting or likely to affect Mauritius.
41. The Authorities share the common view that effective cooperative enforcement in a regional enforcement setting should offer them the opportunity to run more effective competition investigation(s) whether coordinated or in parallel and to generate efficiencies by making best use of each other's enforcement resources, investigative skills and experience in the course thereof. Insofar as Mauritius is a COMESA Member State and the CC is the competent authority to enforce its national competition legislation i.e. the Competition Act 2007, and cognizant of Mauritius and the CC's obligations pursuant to the COMESA legal instruments in force, in particular, Article 5 of the Treaty, Article 5 of the Regulations and Rule 5 of the Rules; the CC wishes to translate its regional enforcement assistance obligations into concrete and result-oriented actions.

42. To this effect, the CC wishes to establish a sound, effective and functional cooperation mechanism supported by an explicit legal basis and embodying relevant features and tools, as per recommended international/regional best practices, to better enable it in practically implementing such obligations arising out of the COMESA Competition Regulations and Rules with the ultimate objective of supporting regional competition enforcement.
43. The CC, with the support of the Commission, is therefore desirous of appointing a Consultant to assist the CC in this process by *inter alia* establishing the relevant legal and procedural framework underpinning the intended enforcement cooperation mechanism between the Authorities and which is adapted to the specificities of conducting investigations into the different enforcement areas viz., cartels, abuse of dominance, mergers and acquisitions, and other forms of restrictive business practices for more resilient and legally sound competition enforcement at COMESA level.
44. In the longer term, the Authorities are hopeful that the deliverables of this Project will set the tone for similar initiatives from national competition authorities of other COMESA Member States and be used as a basis for implementing a multilateral cross-border cooperation mechanism involving Commission and all other authorities as well.

#### **Objectives of the Consultancy Project**

45. The general objective of the Consultancy Project (hereinafter 'Consultancy') is to assist the CC in putting in place the requisite legal and procedural framework underpinning a sound, effective and functional cooperation mechanism between the Authorities in cross-border enforcement, and in so doing, to assist the CC in fulfilling its obligations, including the enforcement of the Commission's decisions at national level pursuant to existing COMESA legal instruments, vis-à-vis the Commission in the latter's enforcement activity.
46. In pursuit of the above, the specific objectives of the Consultancy are to:
- a. Undertake an analysis of each Authority's competition legislation relating to the exercise of their: investigative/information-gathering and enforcement powers; differences in their investigative and enforcement regime applicable to RBPs and Mergers, cooperation requirements in particular those of the CC pursuant to its legal obligations under the Treaty, the Regulations and the Rules; confidentiality obligations; information disclosure avenues including for sharing of confidential information;
  - b. propose and design an appropriate and enabling legal framework, in the form of substantive and procedural rules made pursuant to section 38 of the Competition Act 2007 and relevant provisions of the COMESA legal instruments, that takes into consideration and adapts to the investigative specificities of handling RBP and Merger investigations and which will be applied by the CC for the purposes of assisting the Commission's enforcement activity involving Mauritius;

- c. propose and design all related forms and template documents including information requests, confidentiality waivers (from information givers), which typically apply in the context of cross-border cooperation in competition enforcement matters regarding the nature, specificities and context of the desired enforcement cooperation between the Authorities;
- d. ensure that the proposed cooperation framework (both substantive and procedural aspects) is legally and procedurally sound to withstand legal challenges in judicial proceedings before competent Courts in Mauritius and at COMESA level. In particular, it is expected that the proposed cooperation framework shall be in conformity with rules of natural justice, the statutory safeguards in the Competition Act 2007 on investigated party's due process rights, principles governing privileges, protection of informers, as well as the CC's own rules or practices on treatment of information received from a leniency or immunity applicant pursuant to the CC's Leniency Programme or an applicant under settlement procedures;
- e. prepare an accompanying document, in the form of a Guidance Note, to serve as explanatory material for and assist local stakeholders/business community in better understanding the new cooperation framework (substantive and procedural rules) put in place including the circumstances, form, and manner, in which the Authorities will collaborate with one another for competition enforcement purposes;
- f. prepare an accompanying manual, in the form of an Internal Guide for enforcement officials of the Authorities, to serve as an internal working tool intended to give practical guidance to the Authorities' enforcement staff on how to implement the substantive and procedural aspects of the proposed cooperation framework; and
- g. undertake an analysis of the provisions of the Regulations and the Rules which may not be clear on the exact nature of cooperation which can be requested from the Member States pursuant to Rules 43 and 44 of the Rules, i.e., an analysis of whether the Member States have power to apply the Regulations pursuant to Rules 43 and 44 and recommend the necessary review or changes to the COMESA legal framework to support changes in the legal framework at national level to allow Member States to apply the Regulations and Rules

### **Scope of Consultancy Services**

47. In view of achieving the above-stated objectives, the Consultant shall:

- h. map out and report to the Authorities on the procedural and substantive requirements of each Authority's competition legislation relating to investigative/information-gathering and enforcement powers; differences in their investigative and enforcement regime applicable to restrictive business practices, mergers and acquisitions, and other forms of anti-competitive concerns; enforcement cooperation requirements; confidentiality obligations; information disclosure avenues including for sharing of confidential information in view of situating the level of convergence or otherwise divergence across the Authorities'

legal regimes and enforcement practices, which facilitate or otherwise hinder effective enforcement;

- i. carry out and report to the Authorities on a literature review of:
  - a. cross- border enforcement cooperation provisions in enabling instruments of other regional networks such as the European Competition Network, the ASEAN, among others in conjunction with proven bilateral or multilateral mutual assistance and cooperation instruments on competition between competition authorities/jurisdictions, and
  - b. latest recommended best practices on cross-border, competition enforcement cooperation endorsed by authorities in competition law and policy such as the OECD, ICN, UNCTAD, among others;
- j. hold consultative meeting(s) (whether in-person or virtually) with the Authorities and, where deemed relevant, with specified stakeholders in order to gather their preliminary views on the features and procedures that are intended to or otherwise ought to make up the intended enforcement cooperation framework between the Authorities;
- k. draft the substantive and procedural rules embodying the requisite provisions, features, and tools in view of establishing an effective and functional enforcement cooperation mechanism between the Authorities. The Consultant's proposal should at a minimum but without limitation address the following questions:
  - a. the form and manner in which the Authorities will collaborate and coordinate with one another in the conduct of the Commission's investigation, joint, and parallel investigations;
  - b. the form and manner in which the CC is to render investigative assistance to, undertake investigations and use its investigative powers (pursuant to the provisions of its Competition Act 2007) on behalf of the Commission in the context of the latter's enforcement activity;
  - c. more particularly, the procedural requirements and scope of inspection (entry, search and seizure) powers (with or without in-person assistance from Commission officials) across premises located within the CC's jurisdiction, and the use and issuance of information requests (simple, informal requests for information and formal, compulsory requests for information) to persons located in Mauritius;
  - d. treatment of information gathered by the Authorities in the course of their investigations, including the treatment of confidential information, leniency information and settlement information, and the form and manner in which such information may be exchanged with one another (so called 'information gateways');
- l. to ensure ensure that the proposed cooperation framework (substantive and procedural rules) has an explicit legal basis; is procedurally and legally sound to withstand legal challenges/objections from investigated parties including in judicial proceedings before competent courts in Mauritius and at COMESA level;

comprehensively covers and practically implements the CC's enforcement cooperation obligations towards the Commission in pursuance of its legal requirements under relevant COMESA legal instruments; incorporates, to the extent possible, recommended best practices/features of cross-border, competition enforcement cooperation mechanisms – as endorsed by recognized authorities in competition law and policy; and is in accordance with the provisions of the Competition Act 2007 and the CC's own rules/practices on afore-identified principles (see Section II, point (d));

- m. assess, discuss with the Authorities, and address (as the Authorities and the Consultant will deem appropriate) any comment, view, feedback received from stakeholders following round of public consultation on the draft proposal;
- n. participate (whether in-person or virtually) in any validation workshop that may be organized by the CC/Authorities for the purposes of presenting and validating the final proposal in the presence of relevant stakeholders;
- o. draft the Guidance Note intended to advocate the finalized procedural rules to facilitate understanding of the business community and stakeholders; and
- p. draft the Internal Guide (for use by Authorities) to assist in the practical application of the proposed enforcement cooperation framework by enforcement officials of the Authorities in the course of their collaborative enforcement activities.

### **Proposed Project Deliverables**

48. The following are the expected deliverables on the part of the Consultant:

- a. submit an inception report to the Authorities identifying the similarities/differences across the Authorities' competition laws on relevant aspects, which either facilitate or hinder effective enforcement cooperation between the Authorities;
- b. submit a report on the literature review of the cross-border enforcement cooperation provisions in other regional networks and recommend best practices on cross-border, competition enforcement cooperation to be endorsed by the Authorities;
- c. develop and make presentation(s) during (in person or virtual) consultative meetings with the Authorities and, where deemed relevant, with specified stakeholders;
- d. present to the Authorities the views gathered by the Consultant from the first round of consultative meetings held with identified stakeholders on the Project proposal and to provide his/her feedback thereon;
- e. prepare a first draft of the substantive and procedural rules together with relevant forms/ confidentiality waiver / information request template / any other template document, in line with the aforementioned objectives, for discussion with the Authorities;
- f. to address the Authorities' comments and finalise a first draft of the substantive and procedural rules together with relevant forms/ confidentiality waiver /

information request template / any other template document for issuance to relevant stakeholders during ensuing rounds of public consultation processes;

- g. prepare and submit a first draft Guidance Note and first draft Internal Guide for the Authorities' review;
- h. upon receiving comments from the various stakeholders during the public consultation process, prepare and submit a report to the Authorities containing stakeholder responses, the Consultant's counterviews, and any proposed amendment / addition to Consultant's initial draft in view of addressing comments;
- i. prepare and submit final substantive and procedural rules (together with relevant forms/confidentiality waiver template/ information request template / any other template document) based on determinations made by the Authorities out of the comments received from the consultation process. At this stage, a final version of the Guidance Note and of the Internal Guide should also be submitted to the Authorities;
- j. present (whether in person or virtually) to local stakeholders the final substantive and procedural rules during the validation workshop to be organized by the CC/Authorities; and
- k. submit final procedural rules (together with relevant forms/ confidentiality waiver template/ information request template / any other template document) and Guidance Note to the CC<sup>2</sup> for publication/ prescription/ gazetting purposes together with the final Internal Guide for enforcement officials of the Authorities.

### Expected project Duration

49. It is expected that this assignment will be completed within thirty-two (32) weeks from the date of commencement.

50. The reporting requirements and time schedule for the afore-expected deliverables are projected to follow the ensuing timeline:

Nature of Consultant Report / Deliverable	Time of submission	Review Period for the Authorities
Inception Report	No later than [2] weeks after start of contract implementation	[2] weeks
Consultative meetings with stakeholders and Brief on outcome of meetings	No later than [7] weeks after start of contract implementation	[2] weeks
First Substantive Draft (Rules + templates)	No later than [12] weeks after start of contract implementation	[3] weeks
<i>Vetting by Internal Legal Division of Commission</i> +	Between week 12 – 15	

<sup>2</sup> For the avoidance of doubt, the procedural rules are to be gazette in Mauritius.

<i>CC's engagement with Legal counsel/ Parent Ministry / State Law Office (SLO)</i>		
Public consultation	Between week 15 - 19	
Report on Consultation process	No later than [21] weeks after start of contract implementation	[2] weeks
First draft Guidance Note & Internal Guide	No later than [23] weeks after start of contract implementation	[2] weeks
Finalised Substantive Draft + Guidance Note + Internal Guide	No later than [27] weeks after start of contract implementation	[2] weeks
Internal legal counsel vetting / SLO	Between week 27 - 29	
<i>Participation to Validation Workshop</i>	During week 30	
Final Rules + templates + Guidance Note + Internal Guide	No later than [32] weeks after start of contract implementation	N/A

### Conditions of Consultancy

51. The remuneration of the appointed Consultant under the present Consultancy shall consist of an all-inclusive fee<sup>3</sup>.
52. During the Consultancy period, an **Independent Local Legal Expert** will be appointed to review and vet the substantive and procedural rules and related deliverables for their compatibility with Mauritian laws, customs, and established legal principles.
53. The Independent Local Legal Expert will neither be involved in research, preparatory, drafting works nor in holding consultative meetings with identified stakeholders and reporting thereupon to the Authorities.
54. The requirement of legal vetting by the Independent Local Legal Expert intervenes on at least two occasions;
- firstly, upon submission of the First Draft (Rules and templates); and
  - secondly, in the process of finalizing the Rules, related templates, Guidance Note and Internal Guide.
55. To this effect, the International Consultant will be expected to periodically participate in meetings with the Independent Local Legal Expert, facilitated by

<sup>3</sup> For avoidance of doubt, all inclusive fee means that the Consultant will be responsible for all its costs related to this Project save for air travel and accommodation costs as specified in the present Terms of Reference.



CC, in view of addressing relevant comments, views and feedback from the Independent Legal Expert.

56. Persons interested in submitting their proposals in response to the Commission's call for Consultancy proposals are **not** expected to engage the services of a legal expert in Mauritius to be eligible for participation thereto.
57. The Consultant shall make himself/herself available for meeting(s) with the CC and/or Commission by way of telephone, e-mail and/or via the Internet and/or via video conferences and he/she shall periodically update the Authorities on progress made on the Project.

### **Confidentiality Statement**

All data and information received from the Commission for the purpose of this assignment are to be treated confidentially and are only to be used in connection with the execution of these Terms of Reference. All intellectual property rights arising from the execution of these Terms of Reference are assigned to Commission. The contents of written materials obtained and used in this assignment may not be disclosed to any third parties without the expressed advance written authorization of the Commission.