

Competition Law

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SOUTH AFRICA

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Extensive changes to COMESA competition laws out for comment

Changes to the existing regulations governing the enforcement of competition law in the Common Market for Eastern and Southern Africa (COMESA) have been proposed and shared for comment by the COMESA Competition Commission (CCC). The proposed changes are extensive and were apparently prompted by challenges experienced by the CCC arising from the existing 2004 regulations.

The proposed amendments that are important to note from a competition law perspective are:

- **Introduction of market inquiries** (Article 24): Under the revised draft regulations, the CCC will have the power to initiate and conduct market inquiries. Any person who receives a request from the CCC is obligated to furnish information. The CCC can initiate investigations (which could lead to prosecution), agree on remedies to identified concerns with the relevant undertaking, make recommendations to policy change, or perform any act within its power on the basis of its market inquiry findings.
- **Introduction of dawn raids** (Article 25): The proposed amendments give the CCC the power to conduct a search on the premises of a undertaking when there is a reasonable belief that information relevant to an investigation is being kept at those premises. Upon entry, the CCC can inspect and make copies of any document, as well as interrogate any representative or employee of the undertaking under investigation. The proposals do not include a requirement for a search warrant to be obtained.
- **Settlements and commitments** (Articles 26 and 27): The amendments propose enabling the CCC to enter into settlement agreements with parties under investigation, provided that the parties admit to liability and contravening the regulations. The revised draft regulations also offer a separate methodology for settlement, which are referred to as a “commitment”. With a commitment, a party can offer the CCC remedies to address identified concerns and acknowledge its participation in the conduct without admitting they have contravened the regulations.
- **Leniency programme** (Article 35): The revised draft regulations introduce a leniency programme for practices prohibited under Article 30. The revised draft regulations provide that the decision of the CCC to grant or refuse leniency will be binding on the applicant, government of any member state, and state courts, thus a national competition authority cannot prosecute an applicant undertaking that has been granted leniency under the programme. The proposed amendments envisage developing guidelines for the implementation of this programme.
- **Anti-competitive agreements** (Article 29): The revised draft regulations propose the consideration of public interest factors (including effect on employment; ability of small and medium enterprises to be competitive; the ability to compete against international markets; and environmental protection/sustainability factors) when determining whether an agreement is anti-competitive. It is not clear whether public interest harms will be able to outweigh the competition effects assessment.



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- **Per se prohibited practices** (Article 30): “Per se” prohibited conduct is conduct that cannot be justified or defended on the basis of its effects in a market. The revised draft regulations propose adding “*absolute territorial protections*”, “*passive sales*”, and “*minimum resale price maintenance*” as practices that cannot be entered into between competing or potentially competing entities. “*Absolute territorial protections*” may relate to territorial market division between competitors, but reading in, it appears the CCC is intending to prohibit certain vertical arrangements (between suppliers and customers), particularly the imposition of territorial restraints and minimum pricing restraints. The prohibition on passive sales is difficult to interpret, as authorities typically prefer to allow distributors the ability to make passive sales even where there may be territorial restrictions placed on them by suppliers. (Passive sales involve unsolicited sales to customers outside of the territory allocated by a supplier.)
- **Determination of dominant position and abuse thereof** (Articles 31 and 32): The revised draft regulations remove the previous definition of dominance and replace it with a presumption that a undertaking with a market share of 30% is dominant, together with other criteria (including, amongst others, barriers to entry and concentration and, in the case of digital markets, data quantity, accessibility and control and network effects). The definition does not remedy

the previous gap of defining when collective dominance is exercised, although abuses of dominance can, under Article 32, be exercised by one or more undertakings. The amendments also propose including a prohibition on discrimination, which will particularly apply to dissimilar condition in equivalent transactions resulting in one party being competitively disadvantaged.

- **Abuse of economic dependence** (Article 33): The proposals introduce the concept of “*economic dependence*” which is specifically differentiated from “*dominance*” and is said to occur whether one person to a transaction is in a position of relative strength to another. The prohibition seems to relate only to an abuse of such position by “*gatekeepers*”, if the conduct substantially affects competition in the Common Market. There is, however, no definition of gatekeepers.
- **Authorisations** (Article 34): The revised draft regulations introduce factors to be considered by the CCC when assessing an authorisation (similar to an exemption) application. The 2004 regulations provide that where a party that was not included in an exemption application but subsequently becomes a party to an agreement that is the subject of an exemption, that party will, upon joining the agreement, be exempt from the prohibited conduct. This falls away with the revised draft regulations, suggesting that a new exemption will have to be sought.



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- **Mergers**
 - *Suspensory regime* (Articles 37 and 38): A major change in the revised draft regulations is the proposal to change the COMESA regime from a non-suspensory to a suspensory regime, whereby merger notification must be made, and approval obtained prior to the implementation of any notifiable merger
 - *Merger control* (Article 36): The revised draft regulations provide that a “merger” (which requires notification to the CCC) must result in a change of control on a “lasting basis”. This is said to exclude transactions where a change of control originates from liquidation, insolvency, or winding up of the target. The amendments also provide that a merger can be achieved as a result of joint ventures if they perform as an autonomous economic entity on a lasting basis. These concepts are borrowed from EU merger control.
 - *Thresholds*: We may see some revisions to the CCC merger thresholds, as the revised draft regulations provide for the determination of merger thresholds on an industry-specific basis.
- *Merger timelines* (Article 39): The draft revised regulations propose that the CCC can stop the clock on its 120-day period for merger investigation if the merger parties do not respond to requests for information within the stipulated time. Currently, the 120 days is extendable, but the period of extension was not clear – the amendments clarify that the 120 days can be extended for a further cumulative period of 90 days, maximum.
- *Referrals by the CCC* (Article 41): The proposals enable the CCC to refer a merger to a national competition authority of a member state for determination if the merger is likely to reduce competition to a material extent disproportionately in that state.
- *Consideration of mergers* (Article 42): The revised draft regulations provide that the CCC is to develop public interest guidelines and will be required to determine the likely effect of a merger on both competition and the public interest while placing greater weight on the test for substantial lessening or prevention of competition.



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Albert Aukema ranked by
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in Band 5: Competition/Antitrust.

Lara Granville ranked by
Chambers Global 2022 - 2023
in Band 5: Competition/Antitrust.

Orders of the CCC

The revised draft regulations also propose to empower the CCC to:

- Impose a fine of up to 10% of the turnover of each relevant undertaking in the Common Market for the obstruction of an investigation; a failure to comply with an order, determination, or decision of the CCC; the supply of incomplete, incorrect information or misleading information; the failure to supply information within the time limit specified by the CCC; and the failure to apply for an authorisation when called upon to do so by the CCC. Some of these kinds of contraventions may be minor misdemeanours, for which a 10% of turnover penalty (or any turnover percentage basis) seems disproportionate. The amendments also introduce some clarity in specifying that a maximum of 10% of turnover penalty applies to contraventions of the articles dealing with anticompetitive agreements and *per se* prohibitions, whereas the earlier regulations provided for penalties to be determined in accordance with COMESA's rules.

- The amendments also impose an interim order directing a undertaking, pending the outcome of its investigation, to cease and desist from where the CCC has reasonable grounds to believe constitutes a contravention of the regulations.

Comments on the draft revised regulations are due by 13 March 2024.

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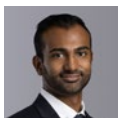
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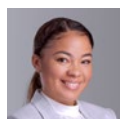
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