



COMESA-EAC-SADC TRIPARTITE

**REPORT OF THE THIRD MEETING OF THE TECHNICAL WORKING
GROUP ON COMPETITION POLICY**

16 - 21 SEPTEMBER, 2019

NAIROBI, KENYA

HILTON HOTEL

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INTRODUCTION

1. The Third Meeting of the Tripartite Technical Working Group (TWG) on Competition Policy was held from 16th to 21st September, 2019 in Nairobi, Kenya. The objectives of the meeting were to consider the Situational Analysis Report which was intended to inform the Tripartite Protocol on Competition Policy ("Protocol") and to review the First draft of the Protocol in line with the observations of the Situation Analysis Report.
2. The Meeting was held in parallel with the 26th Meeting of the Technical Working Group (TWG) on Rules of Origin, 10th Meeting of the TWG on Technical Barriers to Trade, Sanitary and Phytosanitary Measures and Non-Tariff Barriers, the 11th Meeting of the TWG on Customs Cooperation, Documentation, Procedures and Transit Instruments and the 3rd Meeting of the TWG on Trade in Services.
3. The meeting was attended by the following Member/Partner States: Botswana, EAC, Egypt, Malawi, Namibia, South Africa and Zimbabwe. The meeting was also attended by officials from COMESA and EAC Secretariats. In attendance, there was also a representative of the COMESA Competition Commission. The list of participants is attached as **Annex I**.

CONSTITUTION OF THE BUREAU (*Agenda item 1*)

4. The Bureau of the meeting was constituted as follows:

Chairperson:	Kenya (Representing COMESA)
Vice Chairperson:	Rwanda (Representing EAC)
Rapporteur:	Namibia (Representing SADC)

WELCOME AND OPENING REMARKS (*Agenda Item 2*)

5. A joint opening session for the five parallel TWG meetings was held. The Tripartite Capacity Building Programme (TCBP) Coordinator, Dr Seth Gor, on behalf of the Tripartite Task Force, welcomed the delegates to the meetings. He informed the delegates that the TWG meetings were continuing from the meetings held in Zanzibar, Tanzania.
6. He said the aim of the meeting was to finalize guidelines and regulations for Submission to higher organs. He highlighted that the TWG on Competition Policy should ideally be able to finalize on the draft Protocol.
7. Further, Dr Gor highlighted that the deadline for the ratification of TFTA Agreement is 30th September 2019 and so far 5 Member/ Partner States which includes: Egypt, Uganda, Kenya, South Africa and Rwanda have ratified. He however noted that quite a number of Member/Partner States have advanced in the process of ratification.

8. Ms. Hellen Kenani from Ministry of Trade, Kenya also welcomed the delegates to Nairobi. She emphasized the need for experts participating in the TWGs to develop documents that would help higher organs to make decisions with the goal of operationalizing the annexes to the TFTA Agreement.

9. Following the joint plenary session, the meeting of the TWG on competition policy was convened.

10. The meeting was chaired by Mr. Raphael Mburu, Manager at the Competition Authority of Kenya. He welcomed the delegates to the meeting and highlighted that the third TWG meeting was to build on the progress made during the second TWG meeting in regard to the Protocol.

ADOPTION OF AGENDA AND ORGANISATION OF WORK (*Agenda item 3*)

11. The Meeting adopted the following Agenda:

1. Constitution of the Bureau (*Agenda item 1*)
2. Welcome and Opening Remarks (*Agenda item 2*)
3. Adoption of the Agenda (*Agenda item 3*)
4. Meeting of the Expert Task Team (*Agenda item 4*)
5. Regional Economic Communities Consultations (*Agenda Item 5*)
6. Matters arising from the Second Meeting of the TWG on Competition Policy (*Agenda item 6*)
7. Consideration of the Situation Analysis Report and Responses to Questionnaires (*Agenda item 7*)
8. Consideration of the First Draft Tripartite Protocol on Competition Policy (*Agenda item 8*)
9. Any Other Business (*Agenda item 9*)
10. Date and venue of Next Meeting (*Agenda item 10*)
11. Adoption of Report and closure of the Meeting (*Agenda item 11*)



MEETING OF THE EXPERT TASK TEAM (Agenda item 4)

12. The Expert Task Force held their meeting and finalized the draft Situational Analysis Report.

REGIONAL ECONOMIC COMMUNITIES CONSULTATIONS (Agenda Item 5)

13. The RECs consulted.

MATTERS ARISING FROM THE SECOND MEETING OF THE TWG ON COMPETITION POLICY (Agenda item 6)

14. The first and second TWG meetings had agreed that the letter and the questionnaires to guide the Situation Analysis Report would be sent to the Tripartite Member/Partner States and RECs by 7th August 2019. However due to unavoidable circumstances the questionnaires were sent on 21st August 2019 and deadline of submitting the completed questionnaires was extended to 2nd September, 2019.

CONSIDERATION OF THE SITUATION ANALYSIS REPORT AND RESPONSES TO QUESTIONNAIRES (Agenda item 7)

15. The Expert Taskforce charged with the responsibility of coming up with the Situation Analysis Report made the presentation and highlighted that out of 30 Member Partner States, more than half (17) submitted their responses namely: Botswana, the Democratic Republic of the Congo, Egypt, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, South Africa, Sudan, United Republic of Tanzania, Uganda, Zambia, and Zimbabwe. The COMESA and EAC regional competition authorities also provided submissions to the Questionnaire at REC level. 13 Member/Partner States did not respond to the Questionnaire.

16. The Taskforce thanked the Member/ Partner States for their cooperation in the submission of the completed questionnaires, and pointed out some of challenges encountered in the entire exercise namely:

- i. Delays in sending questionnaires to Member/ Partner States and submission of responses from Member/ Partner States;
- ii. Incomplete filled-in questionnaires.

17. The Report which aimed at clarifying and informing on issues contained in the first draft Protocol (consumer protection, treatment of public procurement, state aid, application of sanctions, public interests, and exceptions in the Regional Economic Communities) focussed on the following areas:

- i. Legislative and Institutional Framework;
- ii. Substantive Competition Provisions and Sanctions;
- iii. Consumer Protection;

- iv. Cooperation Mechanism between the RECs, and between the Member/Partner States and RECs; and
- v. Regional and International Comparators/Best Practices.

18. The meeting noted that the Report was sufficient for purposes of informing the Second Draft Protocol. However, the meeting recommended that the Report be improved further by soliciting comments and inputs from all the Tripartite Member/Partner States. It was agreed that the Member/Partner States would submit their inputs within one month from the date the Draft Report is sent by the TTF. The improved Situation Analysis Report will be considered for adoption at the next meeting of the TWG on Competition Policy. In addition, it was agreed that the improved Situation Analysis Report would be for future use by the Member/Partner States and RECs.

19. The Draft Situation Analysis Report is hereto attached as **Annex II**.

CONSIDERATION OF FIRST DRAFT ON THE TRIPARTITE PROTOCOL ON COMPETITION POLICY (Agenda item 8)

20. The meeting considered the First Draft of the Tripartite Protocol on Competition Policy which was developed by the Second TWG meeting. The First draft is attached hereto as **Annex III**.

21. During the consideration of the First draft, the meeting made the following observations:

Article on Public procurement

- (i) At the 2nd TWG meeting which was held in Zanzibar, Tanzania from 5th to 10th August 2019, it was agreed that Public Procurement was one of the issues to be informed by the Situation analysis Report in determining what aspects of competition policy affect Public procurement. Member/ Partner States agreed that there is a link between competition principles and procurement activities, and that the majority of competition laws in the TFTA, both at national and regional level, apply to public procurement through the express prohibition of bid rigging, or collusive tendering, in the competition laws. However, there was no consensus on the inclusion of Public Procurement provisions other than related to bid rigging/ collusive tendering in the Protocol, and the following submissions were made by the RECs:
 - a) EAC's position was that Public procurement need to be included in the Protocol on the basis that it exists in the EAC Competition law and that the spirit of the article is to prevent the issues of discrimination on the basis of national treatment. EAC also noted that the Protocol will gradually progress from a cooperation model to an enforcement instrument, hence the need to include a specific Public procurement

article to avoid a situation where the EAC provision may be in conflict with other Member/Partner States. They therefore proposed the following clause for inclusion:

["This Protocol shall not apply to provisions of public procurement as provided for in the national and REC laws (other than as provided for under Article 9(4) and Article 10 of this Protocol")]

- b) SACU's position was that there was no need to include public procurement in the Protocol considering that the said Protocol has adequately provided for competition concerns that could arise from this sector. Any other issues outside the competition concerns as already provided for in the Protocol are outside the scope of the Competition Policy. SACU was also of the view that public procurement in a broader sense, is a matter which is generally dealt with under the Trade Policies. South Africa further submitted that their Constitution has specific provisions on public procurement.
- c) COMESA Competition Commission's position: There is specific Council Regulation (COMESA Public Procurement Regulations) that deals with Public Procurement, and therefore public procurement should not fall under the Protocol. Public procurement falls under trade issues.


Article on State Aid/ Subsidies

- (ii) The 2nd TWG meeting agreed that State Aid/ Subsidies was also one of the issues to be informed by the Situation analysis Report in determining what aspects of competition policy affect State Aid/ Subsidies. The meeting agreed that State Aid/ Subsidies have the ability to affect or influence the process of competition in a market as it entails the grant of an economic advantage conferred upon an undertaking over its competitors. However, there was no consensus on the inclusion of State Aid/ Subsidies in the Protocol and the following submissions were made by the RECs:

- a) EAC position was that the provision on State aid/ Subsidies should be included in Protocol since EAC has the provision in its Competition law and there is a possibility of misuse of the clause in relation to national treatment if not captured in the Protocol. EAC proposed the following clause:

["This Protocol shall not apply to provisions of State Aid as provided for in the national and REC laws."]

- b) COMESA Competition Commission and SACU's positions were that the article on State Aid/ Subsidies should not be included in the Protocol in view of the fact that State Aid/ Subsidies is a purely trade issue, and hence would be better addressed under the trade policies.



SADC also noted that the TFTA Agreement provided for subsidies under Article 20 of the Agreement, which is a testament to the fact that State Aid/ Subsidies is a trade issue.

- c) COMESA Competition Commission shared that the issue of State Aid was also considered when COMESA Competition Regulations were being drafted, and it was rejected by the policy organs, as there were specific provisions relating to State Subsidies under the COMESA Treaty.
- (iii) Considering the different positions taken by Member/ Partner States on Public Procurement and State Aid/Subsidies, the meeting agreed to further discuss the two issues at the next meeting of the TWG meeting on Competition Policy.

Article 1 Definitions

- (iv) The meeting agreed to define an additional term:

“Consumer” in respect of any particular goods or services, means —

- i. a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;*
- ii. a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business;*
- iii. Where appropriate a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and,*
- iv. a franchisee in terms of a franchise agreement.*

Article 5 on Relationship with the National, Regional and Tripartite Laws

- (v) The meeting agreed to change the title of this article to read: *“Obligations of the National and Regional Laws”*, to better reflect the contents of the Article.
- (vi) Under sub article 2(b), the principle of *“independence in the investigations and decision-making”* was added. The rationale for this inclusion was to ensure that the national and REC laws will have provisions that will safeguard the integrity of their investigations and decision making processes to avoid undue interferences. .
- (vii) Under sub article 2(c), the following was added: *“judicial or quasi-judicial decisions”*, in order to qualify the legal status of the decisions issued by the competent authority.
- (viii) A new sub article (3) was introduced to give powers to the Tripartite Member/ Partner states and RECs to conduct investigations, to read as follows:

“Tripartite Member/Partner States shall ensure that their national and REC laws have provisions that provide for effective investigation powers to their respective competent authorities. These investigation powers include, inter alia:

- a. The power to request any information or data from any undertaking within the time set by the competent authority;*
- b. The power to conduct inspections on undertakings, including dawn raids in accordance with national and REC laws”.*

- (ix) Sub article 5 was introduced to provide for timelines for Member/ Partner States and RECs that already have competition and consumer protection laws to ensure that their respective laws meet the requirements set forth in the the Protocol. The new sub article reads as follows:

“Upon entry into force of the Agreement Establishing a Tripartite Free Trade Area, Tripartite Member/Partner States shall ensure that their national and REC laws are meeting the requirements set forth in the Protocol within a period of five years”

Article 6 on Cooperation on Competition and Consumer Protection

- (x) The meeting agreed to amend the title of Article 6 to read *“Establishment of the Tripartite Competition Policy and Consumer Protection Committee”* to separate the establishment of the Tripartite Competition Policy and Consumer Protection Committee from the cooperation activities, which would be provided under a new Article 7.
- (xi) Sub articles (1) and (2) were deleted from the First Draft and sub article (3) was amended to become the new sub article (1) to reflect the establishment and clear mandate of the Tripartite Competition Policy and Consumer Protection Committee. It reads as follows:
- “The Tripartite Member/Partner States shall establish a standing Committee to be known as the Tripartite Competition Policy and Consumer Protection Committee to implement “a mechanism of cooperation in the application of Tripartite Member/Partner States’ respective competition and consumer protection laws.”*
- (xii) The meeting deliberated on the inclusion of confidential clause to safeguard confidential information. However, the meeting agreed that this will be considered under the rules of procedures of the Committee as provided under the sub article (3) and article 8(2)(h).
- (xiii) Sub articles (6), (7) and (8) under Article 6 of the First Draft were moved to the new Article 7 entitled, *“Cooperation on Competition and Consumer Protection”*.

Article 7 on Cooperation on Competition and Consumer Protection

- (xiv) The meeting replaced the term “hard core cartels” with “*anti-competitive agreements*” in sub article (1).
- (xv) Sub article (3) was amended to reflect a cooperation model in the short run and an enforcement model in the long run to read as follows:

“Cooperation shall proceed in a gradual and phased approach with the ultimate aim of achieving “*alignment of the national and REC competition and consumer protection laws to this Protocol and establishing an appropriate enforcement model to regulate competition and consumer protection matters at a tripartite level.*”

Article 8 on Restrictive Business Practices

- (xvi) Article 8 was amended to read Article 9.
- (xvii) The meeting discussed the inclusion of a new sub article (5) to incorporate resale price maintenance as a prohibited restriction to read as:
“*[The Tripartite Member/Partner States shall ensure that any agreement between undertakings operating at different levels of the economic supply chain is per se prohibited where it results in fixing of minimum resale price maintenance (RPM).]*”
- (xviii) The meeting however noted divergent treatment of RPM under various laws as some treat it as *per se* violation and others use the ‘rule of reason’ to evaluate its anti-competitive effects. The meeting therefore agreed that there was no common understanding and that there is need to consult further on the treatment of RPM.
- (xix) The meeting also discussed whether restriction on passive sales could be considered as *per se* prohibitions. The meeting agreed that the effects could be looked at under a ‘rule of reason’.

Article 9 on Abuse of dominance

- (xx) Article 9 was amended to read Article 10.
- (xxi) In sub article (2)(c) ‘barriers to exit’ was added to read as “barriers to entry and exit”.

Article 10 on Mergers

- (xxii) Article 10 was amended to read Article 11.
- (xxiii) The meeting agreed to add the words *"where prescribed thresholds are met"* in sub article (1) to provide clarity on the merger notification regime.
- (xxiv) Sub article (3) that read: *"Tripartite Member/Partner States agree a merger shall be incompatible with the Protocol if it is likely to prevent, restrict or distort competition in the TFTA or a substantial part of it"* was deleted as it was deemed not applicable under the cooperation model envisaged.
- (xxv) Sub article (5) was made more comprehensive by adding the following: *"The competent Authority may approve a merger if it is satisfied that the merger is to fulfil an overriding public interest "that outweighs the anti-competitive effects resulting from the merger"*.

PART V on CONSUMER PROTECTION

Article 11 on General Principles

- (xxvi) Article 11 was amended to read Article 12.
- (xxvii) A chapeau was added immediately after the title to reflect the international best practices as stated in the United Nations Guidelines for consumer protection as follows:

"Tripartite Member/Partner States should develop, strengthen or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Member/Partner State must set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, and bearing in mind the costs and benefits of proposed measures"

- (xxviii) The meeting noted that there were repetitions under sub article (1), and the following revised text was adopted:
 - (a) *the protection of vulnerable and disadvantaged consumers;*
 - (b) *consumer information and education, including on the environmental, social and economic consequences of consumer choice;*
 - (c) *availability of effective consumer dispute resolution and redress;*



- (d) *freedom to form consumers and other relevant groups or organisations and the opportunity of such organisations to present their views in decision-making processes affecting them;*
- (e) *the promotion of sustainable consumption patterns;*
- (f) *Member/Partner States to work towards enhancing consumer confidence in electronic commerce by the continued development of transparent and effective consumer protection policies;*
- (g) *the protection of consumer privacy and data security.”*

Article 12 on False and Misleading Representation

- (xxix) Article 12 was amended to read Article 13.
- (xxx) The meeting agreed to include “*involve bait advertisement in the sale of goods and services*” under sub article (1)(f) and accordingly deleted this provision from the article on unconscionable conduct in consumer and business transactions.

Article 13 on Unconscionable Conduct in consumer and business transaction

- (xxxi) Article 13 was amended to read Article 14.
- (xxxii) The Meeting agreed to split the Article on unconscionable conduct into two articles to become “*Unconscionable Conduct in Consumer Transactions and Unconscionable Conduct in Business Transactions*” separately as Article 14 and Article 15 respectively. The rationale was that the suppliers need to minimise the risk of becoming a victim of unconscionable conduct, and to avoid engaging in such conduct towards other businesses or consumers especially through contractual obligations.

New Articles under Consumer Protection

- (xxxiii) The meeting agreed to add new articles aimed at safeguarding the consumer as follows:
 - a) *Article 16 on Obligation to make consumer aware of certain terms and conditions in contracts;*
 - b) *Article 17 on Financial services;*
 - c) *Article 19 on Warning Notice to the Public;*
 - d) *Article 20 on Liability in respect of Unsuitable goods or Services;*

- e) *Article 21 on Liability for Defective and Dangerous Goods or Services causing Injury and Loss; and*
- f) *Article 22 on Unidentified Manufacturer.*

(xxxiv) However, it was agreed that further consultations would be carried out by the Member/ Partner States on the new articles on consumer protection. It was agreed that Member/ Partner States would provide their submissions to TTF by 11th October 2019.

(xxxv) The meeting agreed to add the word 'services' to read goods "or services" where the term 'goods' was previously used in the Protocol.

Article 18 on Sanctions

(xxxvi) Article 18 was amended to read Article 25.

(xxxvii) The meeting agreed to add two sub articles (2) and (3) to provide for factors considered when determining sanctions and the aggravating/ mitigating factors for sanctions as follows:

(2) *In providing for sanctions in their respective laws, the Tripartite Member/Partner States and RECs shall have due consideration to the following:*

(a) *deterrent effects of the sanctions;*

(b) *local nexus consideration of the turnover and/or assets of the undertakings;*

(3) *In executing those sanctions, the Tripartite Member/Partner States and RECs shall have due consideration to the following:*

(a) *nature, duration, gravity and extent of the offence;*

(b) *any loss or damage suffered as a result of the offence;*

(c) *behaviour of the undertaking or person;*

(d) *market circumstances in which the offence took place, including whether and to what extent the offence had an impact on small businesses;*

(e) *the level of profits derived from the offence;*

(f) *the degree to which the undertaking cooperated with the competent authority;*

(g) whether the undertaking had previously been found in contravention of the national and REC competition and consumer protection laws.

Article 19 on Conflict of Provisions

(xxxviii) Article 19 was amended to Article 26.

(xxxix) The meeting proposed to add two sub articles (2) and (3) to provide for redress in case of any future conflicts between the Protocol and REC laws, and the Protocol and national laws, as follows:

(2) *[In the event of a conflict between this Protocol and the REC laws, this Protocol shall prevail.]*

(3) *[In the event of a conflict between this Protocol and the national laws, this Protocol shall prevail.]*

(xl) There was no common understanding on these two sub articles premised on the fact that some Member/ Partner States construed that the cooperation model envisaged under the Protocol should not have such clauses; whereas others opined that the Protocol, irrespective of whether it was a cooperation or enforcement model, was still a legal instrument under the TFTA Agreement, and as such it was important to provide for mechanism to address any potential future conflicts. Therefore, the meeting agreed that further consultation is required.

22. Having considered the First draft, the meeting developed the Second Draft Tripartite Protocol on Competition Policy, attached hereto as **Annex III**, for further consultations.

CONCLUSIONS

23. The meeting agreed:

- a) that the TTF will improve the Situation Analysis Report further before adoption by soliciting comments and inputs from the Member/Partner States and RECs. Member/Partner States and RECs will submit their inputs/ comments to TTF within one month from the date the Draft Situation Analysis Report will be sent to them;
- b) considering the different positions taken by Member/ Partner States on Public Procurement and State Aid/Subsidies, the meeting agreed to further discuss the two issues at the next TWG meeting;
- c) that Member/Partner States would undertake comprehensive consultations on the new articles included in the consumer protection provisions and make submissions to the TFF by 11th October 2019:



- i. *Article 16 on Obligation to make consumer aware of certain terms and conditions in contracts;*
 - ii. *Article 17 on Financial services;*
 - iii. *Article 19 on Warning Notice to the Public;*
 - iv. *Article 20 on Liability in respect of Unsuitable goods or Services;*
 - v. *Article 21 on Liability for Defective and Dangerous Goods or Services causing Injury and Loss; and*
 - vi. *Article 22 on Unidentified Manufacturer.*
- d) that Member/ Partner States would undertake further consultations on the following issues where there was no common understanding:
- i. Treatment of minimum Resale Price Maintenance under Article 10 of the Second Draft Protocol; and
 - ii. Conflict of Provisions under Article 26 of the Second Draft Protocol.

ANY OTHER BUSINESS (Agenda item 9)

24. The TTF invited Member/Partner States willing to host the next TWG meeting to engage bilaterally with the TTF.

25. It was proposed that the TTF should look into a possibility of capacity building sessions on e-commerce, big data, and digital economy issues during the next meeting, with a view to incorporate the same in the Draft Protocol.

26. It was proposed that Member/Partner States be encouraged to nominate representatives from the national competition and consumer protection authorities to attend the TWG meetings.

DATE AND VENUE OF NEXT MEETING (Agenda item 10)

27. The dates and venue of the next will be advised by TTF Chair.

ADOPTION OF THE REPORT AND CLOSURE OF THE MEETING (*Agenda item 11*)

28. The meeting ended at 1700 hours.

29. The report was adopted and signed by the Chairperson, Vice Chairperson and Rapporteur on 21st September 2019 as reflected here under.



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3RD TWG ON COMPETITION POLICY
16-21 SEPTEMBER 2019: NAIROBI, KENYA

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