

TP/TWG-CP/5/2022

DRAFT FOR ADOPTION



COMESA-EAC-SADC TRIPARTITE

REPORT OF THE FIFTH MEETING OF THE TRIPARTITE TECHNICAL WORKING
GROUP ON COMPETITION POLICY

28 – 29 MARCH 2022

VIRTUAL MEETING

REPORT

INTRODUCTION

1. The Fifth Meeting of the Tripartite Technical Working Group (TWG) on Competition Policy was held virtually on 28th to 29th March 2022. The objective of the Meeting was to consider additional comments submitted by Member/Partner States as reflected in the agenda.

2. The meeting was attended by delegates from Angola, Botswana, Democratic Republic of Congo (DRC), Egypt, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Namibia, Rwanda, Seychelles, South Africa, Uganda, Zambia, and Zimbabwe. Also attending as part of the Tripartite Task Force (TTF) were representatives of COMESA, EAC and SADC Secretariats. The list of participants is attached as *Annex I*.

3. The meeting was chaired by Dr. Mahamoud Momtaz from Egypt while Mr. Boniface Makongo from Kenya was the Vice-Chair and the Rapporteur was Ms. Noor Eydatoulah from Mauritius.

CONSTITUTION OF THE BUREAU (*Agenda item 1*)

4. In accordance with the Rules of Procedure, the Bureau was constituted as follows:

Chairperson	:	Egypt, representing COMESA
Vice-Chairperson	:	Kenya, representing EAC
Rapporteur	:	Mauritius, representing SADC

WELCOME AND OPENING REMARKS (*Agenda Item 2*)

5. The Chair welcomed all Participants in the meeting. In his opening remarks, the Chair pointed out that the meeting had important matters for consideration which would benefit the Tripartite Partner/Member States. He expressed hope that the Fifth Meeting of the Technical Working Group would consider and finalise the Tripartite Protocol on Competition Policy. He wished the meeting fruitful deliberations.

The EAC, on behalf of the TTF welcomed all delegates to the Fifth Meeting of the Technical Working Group on Competition Policy.

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

6. 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. Consideration of comments from South Africa and Mauritius on the Final Draft Tripartite Protocol on Competition Policy (*Agenda Item 4*)
5. Any Other Business (*Agenda item 5*)
6. Date and venue of Next Meeting (*Agenda item 6*)
7. Adoption of Report and closure of the Meeting (*Agenda item 7*)

CONSIDERATION OF COMMENTS FROM SOUTH AFRICA AND MAURITIUS ON THE FINAL DRAFT TRIPARTITE PROTOCOL ON COMPETITION POLICY (*Agenda Item 4*)

7. The meeting recalled that the 19th Meeting of the Tripartite Trade Negotiation Forum (TTNF) held on 21-22 June 2021 considered the report of the Fourth meeting of the Tripartite TWG on Competition Policy and noted that it finalised and agreed on the Final Draft Tripartite Protocol on Competition Policy for submission to the TTNF for consideration and adoption. The TTNF noted that Member/Partner States were requested to assess the compatibility of the draft Tripartite Protocol to their national and RECs laws on Competition Policy and submit their reports to the TTF by 31st May 2021, but no comments were submitted by the set deadline.

8. Cognizance of the above, the TTNF took note of the Draft Tripartite Protocol on Competition Policy and recommended that Member/Partner States undertake national consultations and submit written comments to the TTF by 30th September 2021.

9. The TCSO noted that some Member/Partner States had submitted their comments to the TTF and the TTF had consolidated all the comments for consideration by the 20th Meeting of the TTNF.

10. The TCSO noted that South Africa submitted comments regarding Article 28 on Signature, Ratification and Entry into Force and Mauritius submitted comments regarding Articles 9 (4), 10, 11(1), 11(6) and Part V of the draft Tripartite Competition protocol.

11. The TCSO considered the comments submitted by Member/Partner States, and noted that they were quite substantial, and agreed to refer the draft Tripartite Protocol on Competition Policy back to the TWG on Competition Policy for further technical consultations.

12. The TWG considered the following comments submitted by Mauritius and South Africa.

Mauritius comments:

Article (1)(j) of the Draft Protocol on the Competition Policy regarding definitions

Mauritius proposed to improve the definition of “merger” by adding the term “material influence.” It was noted that the concept of ‘material influence’ is a lower threshold than ‘controlling interest’ or decisive influence’ and the rationale is to capture transactions involving minority interests which can result in shareholders having material influence on business decisions.

The meeting agreed on the amendment.

Article (9)(4) of the draft protocol on Competition Policy in regard to Restrictive Business Practices

Mauritius proposed deletion of the term “*per se*” because it is not compatible with the Mauritian Competition Law. Mauritius’s main argument was that the term was not flexible enough to allow a case-by-case evaluation and could possibly shut the door for parties involved in the conduct under consideration to provide justifications.

The other Partner/Member States were of the view that the term “*per se*” should be maintained for emphasis purposes and would also give the Protocol more teeth as well as send a clear message that hard-core agreements are not tolerable. The COMESA Competition Commission and South Africa shared their experiences regarding the challenges they were facing because their provisions do not include the term “*per se*” prohibited and lawyers and courts have a different interpretation than the competition authority. The COMESA Competition Commission shared that it is currently reviewing its regulations and it is intended that Article 19 of the COMESA Competition Regulations will be amended to include the term “*per se*” in order to overcome the challenges they were facing.

The meeting noted that the inclusion or exclusion of the term “*per se*” does not change the substance of the provisions, and therefore agreed to maintain the term in the Protocol.

Mauritius did not have any major concerns regarding Article (10) Abuse of dominance, Article (11) Mergers, and Article (11)(6) Public interest considerations.

In general discussion, the meeting noted and concluded that the concept of "Public Interest/Benefits" is dynamic and would be handled by each Partner/Member State in accordance with its provisions and unique circumstances.

South Africa Comments:

The meeting noted that the comments in regard to Article 28 submitted by South Africa were procedural matters which could also be dealt with at scrubbing stage. However, the meeting agreed to consider the comments. In considering the comments the meeting was guided by the Main Tripartite Agreement.

Article (28) of the draft Protocol on competition Policy in regard to Signature, Ratification and Entry into Force

The meeting agreed to maintain the original title but amended sub-para (3) to read; "This Protocol shall enter into force on the Thirtieth day after the deposit of the fourteenth instrument of ratification by Member/Partner States of COMESA, EAC and SADC."

Article (29) Accession

The meeting agreed to create a new Article on Accession to read "This Protocol shall remain open for accession by any Member/Partner State of COMESA, EAC or SADC."

Conclusion

13. The 5th TWG meeting considered and finalised the Draft Tripartite Protocol on Competition Policy and agreed to submit it to the 21st TTNF for consideration.

Recommendation

14. The TWG on Competition Policy;

- (i) recommends the TTNF to consider and adopt the Draft Tripartite Protocol on Competition Policy; and
- (ii) recommends TTNF to direct TTF to convene the 6th TWG Meeting to develop Regulations and Guidelines to operationalize the Tripartite Protocol on Competition Policy.

ANY OTHER BUSINESS (*Agenda item 5*)

15. The meeting agreed that Guidelines be developed to elaborate the treatment of prohibitions.

16. The meeting noted that negotiations under the Competition Policy under the AfCFTA will begin on 11 April 2022 and agreed that the developments at the AfCFTA level should be synchronised with the Tripartite process considering that the issues are similar.

17. The meeting agreed that the RECs Secretariats should facilitate consultations among Partner/Member States towards the attainment of the realisation of the Competition Protocols under the Tripartite and the AfCFTA.

DATE AND VENUE OF NEXT MEETING (*Agenda item 6*)

18. The date and venue of the next meeting of the TWG will be communicated by the Tripartite Task Force.

ADOPTION OF REPORT AND CLOSURE OF THE MEETING (*Agenda item 7*)

19. The report was adopted and signed by the Bureau.



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