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**Lessons Learned from the Pandemic,
Particularly in Socially Important Markets –
Challenges and Opportunities for an Effective Response During the Pandemic
and Economic Recovery in the Post-Pandemic Period**

Contribution

*Dr. Willard Mwemba,
Director & Chief Executive Officer
The COMESA Competition Commission*

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COMESA Competition Commission

Kang'ombe House, 5th Floor

P.O. Box 30742

Lilongwe 3, Malawi

Tel: +265(0)1 772466

+265 (0) 999 970 269

Email- compcom@comesa.int



**Common Market for Eastern
and Southern Africa**

**COMESA COMPETITION COMMISSION WRITTEN CONTRIBUTION
ON RETHINKING COMPETITION LAW ENFORCEMENT: LESSONS
LEARNED FROM THE PANDEMIC, PARTICULARLY IN SOCIALLY
IMPORTANT MARKETS – CHALLENGES AND OPPORTUNITIES FOR
AN EFFECTIVE RESPONSE DURING THE PANDEMIC AND
ECONOMIC RECOVERY IN THE POST-PANDEMIC PERIOD**

**PAPER SUBMITTED TO THE UNITED NATIONS CONFERENCE FOR
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* Dr. Willard Mwemba is the Director & Chief Executive Officer of the COMESA Competition Commission

Background

1. The COMESA Competition Commission (the “**Commission**”) is a regional competition authority mandated to enforce competition and consumer protection law in the Common Market for Eastern and Southern Africa (the “**Common Market**”). The Common Market comprises 21 Member States making it the largest regional economic block in Africa[†]. The Commission is established pursuant to the COMESA Competition Regulations (the “**Regulations**”), which is the regional competition law regulating competition in the Common Market. It enjoys an international legal personality and may acquire, hold and dispose of property and assets. It may sue and be sued in its corporate name. The Regulations are a creation of the Treaty establishing the Common Market for Eastern and Southern Africa and are binding on undertakings, governments of Member States and State Courts.
2. Like most competition authorities across the globe, the Commission is mandated to promote and encourage competition by detecting, preventing and prohibiting restrictive business practices 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 Commission enforces three (3) aspects of the Regulations namely: Restrictive Business Practices and Conduct (Anti-competitive horizontal and vertical agreements, Abuse of Dominance and Cartels); Mergers and Acquisitions; and Consumer Protection.
3. The enforcement of the Regulations entails strict adherence to statutory timelines and obligations which fall upon both the Commission and undertakings with business operations in the Common Market. For instance, some of the obligations with respect to mergers and acquisitions include the following:
 - a) An obligation on parties to a notifiable merger transaction to notify the Commission as soon as possible but in no event later than thirty (30) days of the parties’ decision to merger. Failure to notify in this manner is a breach of the Regulations and sanctions including a fine of up to 10% of the parties’ turnover in the Common Market may apply; and
 - b) An obligation on the Commission to issue decisions on notified mergers within one-hundred and twenty (120) days following receipt of a complete merger notification. Further, to ensure speedy review of notified merger transactions, the COMESA Merger Assessment Guidelines have provided for a phase 1 and phase 2 approach to review of merger transaction [‡]. The Regulations have imposed similar time

[†] The Member States of COMESA are the following: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe.

[‡] Phase 1 commences at the start of the 120 days for 45 days within which a merger transaction may be cleared by the Director & Chief Executive Officer on grounds that the transaction is not likely to raise a substantial prevention

obligations on the Commission on matters involving restrictive business practice investigations. The Commission is obliged to investigate restrictive business practices within 180 days after notifying the undertakings concerned unless it determines that a longer period is necessary.

Enforcement of the Regulations during the COVID-19 Period

4. The advent of COVID-19 caused an upset on the very fabric of society. The operations of competition authorities, governments and businesses were not spared. The pandemic made competition authorities rethink the approach to enforcing their respective competition laws and the Commission was no exception. To ensure the continuation of effective service delivery and compliance with the Regulations and to assist undertakings cope with the effects of the pandemic, the Commission implemented measures to ameliorate these effects and risks.
5. The Commission was cognizant of the fact that undertakings were finding it difficult to collect and submit the required information within the statutory periods provided for under the Regulations due to limitations posed by COVID-19 pandemic. For instance, lockdowns were common which resulted into employees in most businesses to work from home and the operations of courier services were also disrupted leading to delays in the transmission of documents. In the case of regional mergers, on which the Commission has jurisdiction, the challenge was more daunting given that parties collate information required for merger filings from multiple jurisdictions before submitting to the Commission. Therefore, the lockdowns imposed by most countries resulted in delays in the process of collating information by the parties for submission to the Commission.
6. The Commission's review of mergers was also affected by lockdowns resulting from delays in the receipt of third-party views on notified merger transactions. Article 26(6) of the Regulations requires the Commission to notify all relevant Member States of notified merger transactions and seek their views on the likely competition and public interest concerns that the transaction may raise in their markets.
7. While the Commission could not immediately revise the Regulations to facilitate enforcement during the COVID-19 pandemic, it adopted an expansive interpretation of the relevant parts of the Regulations to ensure that the parties comply with the statutory time obligations. Anything short of this would have resulted in the Commission's actions being *ultra vires* the Regulations and ultimately making the parties transgress the law. The pandemic affected the Commission's approach to various aspects of implementing the Regulations as follows:

and lessening of competition. Phase 2 applies to transactions that the Commission deems are likely to raise substantial prevention and lessening of competition and whose review period is beyond 45 days but within the 120 days for the Commission to issue a Decision

Mergers and acquisitions

8. The Commission issued a Notice on Interim Measures for the Review of Mergers during the COVID-19 Pandemic which addressed the following areas[§]:

a. Receipt of the Merger Filings

9. Parties to notifiable mergers notify the Commission by completing and submitting a Merger Notification Form 12 together with relevant supporting documents. Parties are required to submit one (1) original Form 12 and original supporting documents or certified copies of the originals. The COMESA Merger Assessment Guidelines of October 2014 (the “**Merger Assessment Guidelines**”) further guides the parties to submit a merger filing via email and thereafter submit the original hard copy filing within 7 days from the email filing.

10. Recognizing the delays likely to be encountered by parties in submitting hard copy filings, the Parties were encouraged to submit all notifications and mergers filing electronically including certified copies of filings. This meant the parties were not expected to submit the hard copies within the specified 7 days under the Merger Assessment Guidelines, albeit hard copies were still expected to be submitted within a reasonable period. What amounted to a reasonable period of time depended on a number of factors such as the nature of the transaction, the volume of information required, the Member States and other jurisdictions involved, the state of COVID-19 prevalence and restrictions prevailing in different countries, among others.

b. Merger Notification Following a Decision to Merge

11. Article 24(1) of the Regulations stipulates that, “**A party to a notifiable merger shall notify the Commission in writing of the proposed merger as soon as practicable but in no event later than 30 days of the parties’ decision to merge**”. The Commission took note that because of restrictions of movements, working from home measures and lockdowns in most countries due to the COVID-19 Pandemic, Parties to notifiable mergers were not able to gather all the information to enable them to complete the notification within the 30 days of Decision to merge as required under Article 24(1)**. In order to facilitate merger filings, the Commission adopted an interim and temporary approach of considering the initial engagement with the Parties as the beginning of the notification process which would be deemed complete once all the information is submitted and a payment of the merger notification fee is made. The Commission considered that as long as the Parties initially engaged the Commission

[§] <https://www.comesacompetition.org/notice-of-interim-measures-in-merger-review-of-the-comesa-competition-commission-due-to-the-covid-19-pandemic/>

^{**} Article 24(3) of the COMESA Competition Regulations provides that a notification shall entail submission of information as prescribed under the Regulations which shall be accompanied by a prescribed notification fees and any other information as may be required.

on the notification process, they would not be penalized for failure to submit a complete merger notification within 30 days of the parties' decision to merge which is an offense under the Regulations. This was inspired by the Merger Assessment Guidelines which make reference to incomplete and complete merger notifications. The Commission therefore construed all merger transactions on which the parties had generally engaged it, for example by phone or email as the beginning of the notification period which was subject to completion within a reasonable period of time. The Commission took a very pragmatic approach that even just a mention of the merger transaction that was unfolding amounted to the beginning of the notification process.

c. Physical Consultations and Meetings

12. The Commission suspended onsite consultations, investigations and face-to-face meetings with regard to merger investigations. As an alternative, and in order to avoid disruption of merger review, the Commission continued with consultations and meetings through teleconferencing facilities during the time of the pandemic. With regard to onsite investigations, the Commission's approach posed a serious challenge as it now largely relied on the parties' submissions in instances where evidence could be obtained effectively through onsite presence. Nevertheless, to reduce the risk of materially wrong information submitted by the parties, the Commission reminded the parties of the seriously consequences of submitting materially wrong or misleading information taking advantage of the pandemic situation. A kind of self-policing mechanism was therefore implicitly established.

d. Merger investigation period of 120 days

13. Article 25(1) of the Regulations provides that, "...**The Commission shall examine a merger as soon as the notification is received and must make a decision on the notification with 120 days after receiving the notification...**". Further, Article 25(2) of the Regulations provides that, "...**if prior to the expiry of the 120-day period provided for in paragraph 1 the Commission has decided that a longer period is necessary, it shall so inform the parties and seek an extension from the Board...**".
14. The Commission observed that during the pandemic, it could not in some instances be able to complete its assessment of notified mergers in accordance with the 120 days stipulated under Article 25 (1) of the Regulations. Such delays would be due to travel bans and lockdowns in most Member States which affected the Commission's engagements with various relevant stakeholders who are essential in the consultative process adopted by the Commission pursuant to Article 26 of the Regulations. The Commission therefore took the approach of informing the merging parties that the 120 days investigation period may be extended where necessary pursuant to Article 25 (2) of the Regulations as it may not be practicable to complete the assessment within 120

days under the circumstances. Ironically, the Commission made sure that it never exceeded the 120 days required to finalise the consideration of the merger. The Commission was mindful that businesses were already struggling to survive in the market place and to comply with various regulatory requirements at the height of the COVID-19 pandemic. The Commission was therefore determined not to add any more burden to the merging parties and resolved that all cases will be considered as expeditiously as is practicable. This was achieved through a dedicated work staff who committed to putting in extra effort and remained in office throughout the challenging pandemic period. The Commission observed that the system of working from home was an experiment whose repercussions could be disastrous if not well handled on the merging parties and indeed the competition landscape in the Common Market. The Commission therefore elected to enhance COVID-19 preventive measures at the office through frequent testing, staying home whenever one had flu like symptoms, regular temperature checks, frequent sanitization points within the Commission and decongestion of work stations, among other measures.

Restrictive Business Practices and Conduct

15. The Regulations have curious provisions with regard to the time period for investigating restrictive business practices. The Regulations impose a maximum period of 180 days within which investigations should conclude. This seemingly odd approach in the Regulations has unintended challenges for the Commission in that usually, it is difficult to conclude investigations on restrictive business practices due to many factors, *inter alia*, due processes, gathering admissible evidence and parties' challenge to the Commission's finding. Fortunately, the Regulations have a safeguard that where a longer period is required to conclude the investigations, the Commission shall extend the time period within which to conclude the investigations. To prevent administrative *mala fide*, the Commission does not arbitrarily extend such a time period. It seeks this extension from its Board of Commissioners upon a demonstration of justifiable reasons why such an extension should be granted. Before this application to the Board, the Commission is obliged to inform the parties of its intention to seek an extension from the Board. Therefore, Commission sought approvals from its Board of Commissioners to extend the timeline within which to conclude investigations. This was to ensure that investigations were undertaken and concluded effectively and efficiently without being frustrated by challenges of information requirements which faced delay due to lockdowns effected across the Common Market. Longer than 180 days period of investigating restrictive business practices meant that sub-optimal determinations were avoided. The Commission further took the approach of issuing Practice Notes to guide Parties on its operations and approaches during the pandemic.

Measures to Protect Staff from the Risks of COVID-19 Pandemic

16. While most authorities resorted to working from home the Commission was mindful that although this was a great initiative given the risks posed by COVID-19, it could also present a challenge in the short run as institutions transform and get familiar with this working model. The Commission therefore took a bold approach and decision and continued to work from the offices full time and at full capacity. This was important to ensure continued and undisrupted service delivery to businesses. The Commission's mantra during the pandemic was, "**facilitate business, do not frustrate it**".
17. The Commission further took the approach of investing in Information Technology equipment and facilities to support its operations and to ensure that its adjudicative meetings, decisions and other operations were not disrupted and that it could still deliver efficient and effective products, the pandemic notwithstanding.
18. However, the Commission was not blind to the risks posed by the pandemic on its Staff. Therefore, the Commission implemented strict measures to prevent COVID-19 at the workplace. These measures included: provision of personal protective equipment to staff and the adoption of a strict policy on the wearing of masks and regular hand sanitization; frequent thorough disinfection of offices; decongestion of offices and expansions of work space; encouraged regular COVID-19 testing; implementing a **Stay at Home Policy** in cases where Staff develop flu like symptoms; encouraged Staff to be transparent and disclosure any symptoms associated with COVID-19 or when in contact with COVID-19 patient; regular temperature checks at the work place; encouraged social distancing and frequent hand washing; encouraged staff to take vaccination which saw the Commission achieved 100% vaccination rate within a month. It was a great risk taken but the rewards were impressive in that service to our client's was not interrupted in any manner whatsoever. It was also relieving in that the COVID-19 measures that were implemented were so effective such that there was no work place COVID-19 related case at the height of the pandemic.

Investigations on COVID-19 related cases

19. The economic consequences of the COVID-19 pandemic required exceptional measures, swift, strong actions and decisions from the competition authorities on the national and international levels to keep normal functioning of markets. It is a fact that the Covid-19 pandemic increased the opportunities for businesses to engage in anti-competitive practices, which made the intervention of national and regional competition authorities a necessity to protect the consumers and the competition process.
20. This situation threatened markets into plunging in concentrations of economic power, exploitation of consumers and indeed suffocating democratic markets, the very outcomes anti-trust laws seek to prevent. In the case of COMESA, the durability of the

regional integration agenda was threatened as undertakings' incentives to resort to foreclosure tendencies grew.

21. With all these challenges, the Commission needed to work even extra hard to ensure that they are prevented and demonstrate the importance of competitive and democratic markets even in these troubled and anxious times. The Commission therefore commenced, and in some cases concluded, investigations on COVID-19 cases from both competition and consumer perspectives.

Opportunities and Lessons Learnt

22. Although COVID-19 had devastating effects on the operation of institutions and businesses at large, it gave the world a lesson on the importance of the digital economy and the use of digital platforms to support business. While travel restrictions and lockdowns negatively affected most businesses, some businesses relying on digital platforms experienced a surge in their operations. Within the context of the Common Market, digital platforms proved to be critical in sustaining the operation of businesses. For instance, businesses capitalized on already existing mobile money payment systems to circumvent the need to physically go to the bank to make payments or draw money for payments. The region also saw the prominence of door-to-door delivery services, connecting customers and suppliers without the physical contact between the two. In addition to businesses adopting internet-based platforms to facilitate staff working from home, students with internet access at their homes also began attending class remotely.
