



**EIGHTY-SEVENTH ORDINARY SESSION OF THE COUNCIL OF MINISTERS**

Abuja, 9-10 December 2021

**REGULATION C/REG. 24/12/21 ON THE ERCA'S RULES OF PROCEDURE IN  
COMPETITION MATTERS**

**THE COUNCIL OF MINISTERS,**

**MINDFUL OF** Articles 10, 11 and 12 of the ECOWAS Treaty as amended, establishing the Council of Ministers and defining its composition and functions;

**MINDFUL OF** the Supplementary Act A/SA.01/12/08 adopting the Community Competition Rules and their implementing rules;

**MINDFUL OF** Supplementary Act A/SA.02/12/08 establishing the ECOWAS Regional Competition Authority, its powers and functions;

**MINDFUL OF** the Supplementary Act A/SA.03/12/08 adopting Community rules on investment and their implementation within ECOWAS;

**MINDFUL OF** the Supplementary Act A/SA.3/12/21 relating to the amendment of the Supplementary Act A/SA. 2/12/08 on the establishment, functions and operation of the ECOWAS Regional Competition Authority;

**CONSIDERING** that following its establishment, ERCA, in order to operate, needs the rules of procedure necessary for its operation;

**ANXIOUS** to define these rules of procedure relating to the institutional framework, investigations, offenses, sanctions and modalities and right of appeal of ERCA Council's decisions;

**DESIROUS** of adopting the rules of procedure of the ECOWAS Regional Competition Authority (ERCA);

**UPON RECOMMENDATION** of the meeting of Ministers in charge of Trade held on 25 November 2021 in Lomé, Togolese Republic;

**AFTER THE OPINION OF THE PARLIAMENT** at its Second Ordinary Session held in Abuja from 30<sup>th</sup> November to 18<sup>th</sup> December 2021;

## ENACTS:

### Chapter 1 - DEFINITIONS, PURPOSE AND SCOPE

#### Article 1: Definitions

For the purposes of this Regulation, the following definitions shall apply:

**"Acquiring company"**: means a company which exercises direct or indirect control over all or part of the business of another company or which, as a result of a merger or acquisition, acquires or establishes direct or indirect control over all or part of the business of another company;

**"Authority"**: means the ECOWAS Regional Competition Authority established under Article 1 of the Supplementary Act establishing the ERCA;

**"Regulation"**: means Regulation C/Reg. ....12/21 laying down the Rules of Procedure of the ERCA in Competition Matters;

**"Community Competition Rules"**: means the Supplementary Act A/SA.1/12/08 adopting the Community Competition Rules and their implementation within ECOWAS;

**"Community Court of Justice"** : means the Court of Justice established under Article 15 of the Revised Treaty of 29 July 1993;

**"Competent Authority"**: means the National Authorities in charge of competition;

**"Consultative Competition Committee"**: means the body of experts bearing the said designation, constituted in accordance with Article 13(4) of the Supplementary Act A/SA.1/12/08 adopting the Community Competition Rules;

**"Council"**: means the Council of Ministers of the Community established under Article 10 of the Revised Treaty;

**"Merger"**: means the acquisition of control or other business combinations provided for in Article 7 of the Supplementary Act A/SA.1/12/08 on the Community Competition Rules;

**"Merger notification"**: means the notification of a merger or acquisition

**"Serve"**: means to deliver a document to a person or to the Authority;

**"Target Company"**: means a company which:

- a. as a result of a merger, all or part of whose business will be controlled directly or indirectly by an acquiring company;
- b. as a result of a merger, directly or indirectly transfers control of all or part of its business to an acquiring company;

**"Calculation of the time limit"**: Where a time limit is provided for in relation to competition matters, the time limit runs from the day on which the fact or event occurred. The period also runs from the day on which the act was published or notified. Saturdays, Sundays and public holidays are not taken into account when calculating the time limits;

**"Instructions in the forms"** means all the information contained in a form to be filled in by the person concerned, together with other documents, where appropriate.

**"Units of Account (UA)"**: ECOWAS Units of Account;

#### **Article 2: Purpose**

The purpose of this Regulation is to lay down the Rules of Procedure of the ERCA in the context of the implementation of the Community competition law.

#### **Article 3: Scope**

This Regulation applies to the harmonisation of competition laws, procedures, cooperation in investigations, exchange of information, decision-making, enforcement, sanctions and compensation.

### **Chapter 2 – INSTITUTIONAL FRAMEWORK**

#### **Article 4 :Enforcement Authority**

- 1) The ECOWAS Regional Competition Authority, abbreviated to ERCA, is the regional body responsible for the enforcement of Community competition rules in the region.
- 2) Decisions of the Authority shall be binding on enterprises, governments and authorities of Member States.
- 3) Any directive issued by the Authority shall be implemented by the receiving party.

#### **Article 5:Legal Status of the ERCA**

The Authority shall be the ECOWAS specialised agency for competition matters

#### **Article 6:Seal of the ECOWAS Competition Authority**

- 1) The Authority shall have a seal comprising:
  - a. The logo or other appropriate insignia; and
  - b. The expression "ECOWAS Regional Competition Authority" in the three (3) working languages of the Community.
- 2) The seal of the Authority shall be affixed by the Executive Director of the ERCA. He may delegate this function.

#### **Article 7: The Executive Director**

- 1) The ERCA is headed by an Executive Director assisted by Directors.
- 2) The Executive Director is responsible for organising and coordinating all the activities of the Authority, including:
  - a. directing and supervising the staff of the Authority in the framework of administrative and technical management;
  - b. coordinating the implementation of the Authority's work programme and budget;
  - c. coordinating and supervising the development of funding strategies;
  - d. coordinating and supervising the mobilisation of resources with technical and financial partners;
  - e. coordinating and supervising the management and maintenance of the assets placed at the disposal of the Authority;
  - f. ensuring good visibility of the Authority through effective communication;
  - g. reporting on all its technical and administrative activities to the relevant Departments of the Commission;
  - h. dealing with the implementation of this Regulation;
  - i. submitting for adoption by the Council of Ministers an adjustment of the ERCA's organisational chart and staffing in collaboration with the ECOWAS Commission;
  - j. proposing to the President of the Commission any modification of the tasks and responsibilities of each Director, as well as the assignment of staff members of each Directorate;
  - k. reporting to the Consultative Competition Committee on its activities and implementing its recommendations;
  - l. presenting investigation reports and recommendations to the Council for final decision, sanction and compensation orders, as the Council may deem fit and appropriate to it;
  - m. enforcing the reasoned decisions of the Council in accordance with the Community Rules on enforcement;
  - n. submitting requests for advisory opinions to the competent authorities of the Member States on the investigation procedure;
  - o. proposing standards and protocols for cooperation with national and regional competition bodies.

#### **Article 8: Registry**

A Registry Department is established within the ERCA. The functioning of the Registry department is specified in an internal procedure manual.

### **Chapter 3: INVESTIGATIONS**

#### **Article 9: Pre-enquiry formalities**

- 1) Applications shall be registered with the Registry Department either physically, electronically or any other means as approved by the Authority.
- 2) Investigations by Complaint

- a. A person aggrieved by the conduct or action of a person who violates the Community Competition Rules may submit a Complaint to the ERCA in accordance with the Form designed by the Authority;
- b. The Complaint shall contain sufficient and necessary information for a preliminary assessment of the case by the ERCA. This information shall include a detailed description of the practice considered to infringe the Regulation, the geographical location and any supporting documentation, if applicable.
- c. An investigation may only be ordered if the alleged infringement falls within the competence of the Authority.
- d. The Authority's decision on a Complaint submitted to it shall be taken within 30 days of the date of receipt. If the Authority wishes to extend this period, it shall inform the Complainant. The extended period for taking a decision on the Complaint shall not exceed additional 45 days.
- e. The Authority's decision to open an investigation shall be notified in writing to the Complainant and the party under investigation in accordance with the Form designed by the ERCA.
- f. The investigation shall be completed within 180 calendar days from the date of receipt of the Complaint, unless extended by the Executive Director, which shall not exceed 90 days. The Executive Director shall so inform the parties.

### 3) Investigations at the initiative of the Authority

- a. The Executive Director may initiate an investigation upon a report from the Director of Investigation and Enforcement or if he believes that a person has acted in violation of the Community Competition Rules
- b. The competition authority of the Member State on whose territory the investigation is to be carried out and the Member State's representative on the Consultative Competition Committee shall assist in the investigation at the request of the ERCA.

## **Article 10: Formalities during the investigation**

### 1) Convening

- a. In the course of an investigation, the Authority may summon any person to appear before it to give evidence.
- b. The summons shall be signed by the Executive Director or his representative and sent by fax, post, e-mail or any other means, and shall bear the Authority's seal. It shall mention the date of appearance of the person summoned and the possibility of being assisted by counsel.
- b.
- c. Failure to comply with the summons shall be punishable by a fine ranging from UA 500 to UA 10,000 - ECOWAS Units of Account, for each continuing day of disobedient, without prejudice to the continuation of the procedure.

## 2) Investigation on Sectors of the Regional Economy

- a. Investigations into sectors of the economy shall focus on the evolution of trade between Member States, price movements, price rigidity or other circumstances suggesting that competition is restricted or distorted.
- b. The Authority may, under these conditions, require any company or association of companies in the economic sector concerned to supply it with any information, in particular all agreements, decisions, concerted practices and the structure of companies.

## 3) Communication and Transmission of Documents

- a. The Authority shall instruct, in the context of the investigation, any party involved to make available the required documents within fifteen (15) working days, under penalty of the fine provided for in Paragraph 1 c) of this Article.
- b. If the documents submitted are incomplete, the ERCA shall inform the competent authority of the Member State on whose territory they are to be submitted so that it can take the necessary measures.
- c. In any event, the ERCA shall indicate the legal basis and purpose of the request and the penalties provided for in this Regulation for supplying incorrect information.
- d. The Authority shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the head office of the company or association of companies is situated
- e. The documents may also be transmitted to other persons involved in the procedure.
- f. The staff and members of the ERCA Council, consultants and staff of the national authority are bound by professional secrecy.
- g. The parties involved in the investigation are bound by the confidentiality of the information they receive in the course of the procedure. The Council, upon recommendation of ERCA, shall impose appropriate sanction for breach of confidentiality.

## 4) Investigations in the Member States

- a. At the request of the Authority, the competent authorities of the Member States and the ERCA shall jointly undertake such investigations as the Authority considers necessary.
- b. The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers on presentation of an authorisation issued by the competent authority of the Member State on whose territory the investigations are to be conducted. This authorisation shall specify the object and purpose of the investigation.

- c. The rights of the defence shall be guaranteed during the investigation.

#### 5) Investigative Powers of the Authority

- a. In the exercise of its functions, the ERCA may carry out all necessary investigations in companies and associations of companies. To this end, the officials authorised by the Authority have all the necessary powers to access any place, documentation, equipment and documents of any kind that may help to establish the truth. It shall also conduct hearings.
- b. The ERCA officials authorised to carry out these investigations shall exercise their powers upon presentation of a written mandate specifying the object and purpose of the investigation and the sanctions provided for in this Regulation, in cases where the required books or other commercial records produced are incomplete. In good time before the investigation, the Authority shall inform the competent authority of the Member State in whose territory the investigation is to be carried out of the investigation and of the identity of the authorised officials
- c. Companies and associations of companies shall submit to investigations ordered by decision of the Authority. The mandate shall specify the object and purpose of the investigation, fix the date on which it is to begin and indicate the penalties incurred.

#### 6) Taking any other reasonable measures

The Authority may take any other reasonable measure necessary to conclude an investigation.

#### 7) Intervention by third parties affected by investigations

- a. Any person who believes that he or she will be affected by the investigation may request to be heard by the ERCA.
- b. The Authority may call any person whose evidence is necessary for the determination of the truth.

### **Article 11: Results of enquiry an Investigation**

At the end of an enquiry or investigation, the Executive Director shall take the following decision:

#### 1) Decision to close

Decision to close the case and notify parties where necessary. However a closed enquiry may be reopened. If new facts justify the reopening.

If the Executive Director considers that there are no grounds for an enquiry or investigation, he or she shall close the enquiry. However, a closed investigation may be reopened if new facts justify its reopening.

#### 2) Transmission to the ERCA Council

If the Executive Director considers that there has been an infringement of the Community competition rules, he will forward the file to the ERCA Council which will examine it and take a reasoned decision.

### **Article 12: Publication of ERCA Council Decisions**

All decisions of the ERCA Council must be notified to the parties and published in the Official Gazette of the Community.

## **Chapter 4 – INFRINGEMENTS-SANCTIONS-APPEAL**

### **Article 13: Infringements**

1) Any violation of the ECOWAS Community Competition Rules, in particular agreements, decisions and concerted practices described in Articles 4 and 5 of the Community Competition Rules and the abuse of a dominant market position within the meaning of Article 6 of the Supplementary Act A/SA.01/12/08, shall constitute an infringement.

2) At the request of a Complainant or on its own initiative, ERCA, after finding an infringement as defined in paragraph 1 above, shall recommend for sanction and/or compensation against companies or associations of companies concerned to bring such infringement to an end.

3) The persons entitled to lodge a Complaint are any Member State or any natural or legal person who is affected by the infringement or who may be affected by it.

#### **4) Authorisations or exemptions**

a. The ERCA has the power to grant authorisations or exemptions under Article 11 of the Community Competition Rules on request or on its own initiative.

b. Upon application by the companies or associations of companies concerned, the Authority may decide that, on the basis of the facts available to it, there are no grounds for it to intervene in the assessment of an alleged agreement or practice.

#### **5) Notification of existing agreements, decisions and concerted practices**

a. All agreements, decisions and concerted practices which are subject to authorisation or exemption are notified to the ERCA at the time of their entry into force. They shall be notified within twelve (12) months of the date of entry into force of this Regulation. Otherwise, they may not be the subject of any authorisation or exemption decision under Article 11 of the Supplementary Act A/SA. 1/12/08 on the Community Competition Rules and their implementation within ECOWAS.

b. Paragraph a) above shall not apply to agreements, decisions and concerted practices which have no impact on the regional market.

### **Article 14: Sanctions**

1) The ERCA Council shall impose financial penalties on companies that obstruct the proper conduct of the investigation or that are convicted of violating the Community Competition Rules.

2) The ERCA Council shall impose civil fines of up to 10% of the annual turnover of the company concerned.

3) These fines may be accompanied by periodic penalty payments ranging from UA 300,000 to UA 750,000.

4) The ERCA Council shall determine in its decision the date of collection and the modalities of implementation of the periodic penalty payments.

5) Compensation

- a. The Executive Director shall refer to the Council the request for compensation submitted by a person who has suffered damage as a result of anti-competitive behaviour.
- b. The Council may, after considering the application, order an enterprise or association of enterprises to pay compensation in accordance with Articles 7, 8 and 9 of the Act establishing the ERCA and Article 10 of the Community Competition Rules, where a loss has been suffered as a result of a prohibited act.
- c. Compensation shall, as far as possible, be proportionate to the loss suffered by the claimant, taking into account the economic situation prevailing at the time of the claim.
- d. The officials of the competent authority of the Member State in whose territory the company (ies) liable to pay compensation has its head office or residence shall assist in recovering the compensation from the company.

**Article 15: Appeals**

- 1) The Court of Justice of the Community shall have appellate jurisdiction to review decisions of the ERCA.
- 2) The appeal shall be lodged within thirty (30) days from the date of receipt of the decision of the ERCA Council.

**Chapter 5: FINAL PROVISIONS**

**Article 16: Entry into Force**

This Regulation C/REG/.24 /12/21 shall enter into force on the date of its signing by the Chairperson of the Council of Ministers.

**Article 17: Publication**

This Regulation C/REG/.24 /12/21 shall be published by the Commission in the Official Gazette of the Community within thirty (30) days of its signing.

It shall also be published by each Member State in its Official Journal, within thirty (30) days of notification by the Commission.

**DONE AT ABUJA, THIS 10<sup>TH</sup> DAY OF DECEMBER 2021**



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**H.E SHIRLEY AYORKOR BOTCHWEY**

**THE CHAIRPERSON**

**FOR THE COUNCIL**