COMESA Competition Commission
Kang'ombe House, 5th Floor
P.O. Box 30742
Lilongwe 3, Malawi
Tel: +265 1 772 466
Email- compcom@comesa.int

Common Market for Eastern and Southern Africa

Case File No. CCC/MER/08/38/2022

Decision[1] of the Ninety-First (91st) Committee Responsible for Initial Determinations Regarding the Contravention of Article 24(1) of the COMESA Competition Regulations by SABIC Agri-Nutrients Company and ETG Inputs Holdco Limited

10 February 2023

[1] In the published version of this decision, some information has been omitted pursuant to Rule 73 of the COMESA Competition Rules concerning non-disclosure of business secrets and other confidential information. Where possible, the information omitted has been replaced by ranges of figures or a general description.

The Committee Responsible for Initial Determinations,

Cognisant of Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the "**COMESA Treaty**");

Having regard to the COMESA Competition Regulations of 2004 (the "**Regulations**"), and in particular Part 4 thereof;

Mindful of the COMESA Competition Rules of 2004, as amended by the COMESA Competition [Amendment] Rules, 2014 (the "**Rules**");

Conscious of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation of 2015;

Recalling the overriding need to establish a Common Market;

Recognising that anti-competitive mergers may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA Member States;

Considering that the continued growth in regionalization of business activities correspondingly increases the likelihood that anti-competitive mergers in one Member State may adversely affect competition in another Member State;

Desirability of the overriding COMESA Treaty objective of strengthening and achieving convergence of COMESA Member States' economies through the attainment of full market integration;

Having regard to the COMESA Merger Assessment Guidelines of 2014;

determines as follows:

Introduction and Relevant Background

1. On 7 September 2022, the COMESA Competition Commission (the "**Commission**") received a notification for approval of a merger involving SABIC Agri-Nutrients Company ("**SABIC AN**") as the acquirer and ETG Inputs Holdco Limited ("**EIHL**") as the target.

2. The transaction was notified on the Commission's instructions. SABIC entered into a share purchase agreement with ETG World on 24 January 2022 to acquire a 49% stake in EIHL. The Commission became aware of the transaction following a concern submitted by a third party. The Commission has submitted that the parties failed to notify the transaction within the time period prescribed under the Regulations and are therefore in contravention of the Regulations. The parties, on the other hand, dispute the Commission's allegation that they contravened the Regulations.

3. Pursuant to Article 13(4) of the Regulations, there is established a Committee Responsible for Initial Determinations, referred to as the CID. The decision of the CID on the alleged breach of Article 24(1) of the Regulations is set out below.

The Parties

SABIC AN (the acquiring firm)

4. SABIC AN is incorporated in the Kingdom of Saudi Arabia (**KSA**). SABIC AN is the primary acquiring firm in this transaction. It is controlled by Saudi Basic Industries Corporation ("**SABIC**"), which is in controlled by Saudi Arabian Oil Company ("**Saudi Aramco**", which together with its subsidiaries is further referred to as the "**Acquiring Group**").

5. SABIC AN is a global fertiliser producer, whose portfolio includes urea, ammonia, phosphate, and specialised products. SABIC is active in various sectors, including petroleum and natural gas, raw material inputs for agricultural fertilisers (through SABIC AN), commodity chemicals, metals and specialties. Saudi Aramco, on the other hand, is primarily engaged in prospecting, exploring, drilling and extracting hydrocarbon substances and processing, manufacturing, refining, and marketing these substances.

6. In the Common Market, the acquiring group is active in the Democratic Republic of Congo ("**DRC**"), Djibouti, Egypt, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe.

EIHL (the target firm)

7. The primary target firm relates to 49% shareholding of EIHL, a company incorporated and registered in accordance with the laws of the United Arab Emirates.

8. EIHL owns more than 350 distribution centres across Sub-Saharan Africa and specialises in distribution and blending of specialised fertilisers and agro-chemicals. With its network of agents and agronomists, EIHL has positioned itself to cater to commercial and smallholder farmer requirements across the African continent, including the most rural areas where opportunity is scarce. EIHL is, *inter alia*, involved in the import, blending, and distribution of fertiliser commodities.

9. In the Common Market, the target is active in Burundi, DRC, Djibouti, Ethiopia, Kenya, Madagascar, Malawi, Rwanda, Seychelles, Uganda, Zambia, and Zimbabwe.

Legal Framework

10. Article 24(1) of the Regulations provides that *"A party to a notifiable merger shall notify the Commission in writing of the proposed merger as soon as it is practicable by in no event later than 30 days of the parties' decision to merger".*

11. Article 24(4) of the Regulations also provides that the Commission may impose sanctions on undertakings for contravening Article 24(1). Further, in addition to the sanctions the Commission may impose a penalty if the parties fail to give notice of the merger as required under Article 24(1).

12. Article 24(5) of the Regulations further states that *"A penalty imposed in terms of paragraph 4 may not exceed ten per centum of either of both of the merging parties' annual turnover in the Common Market as reflected in the accounts of any party concerned for the preceding financial year".*

13. Article 24(6) of the Regulations provides that *"When determining an appropriate penalty, the Commission shall consider the following factors:*

    a) *The nature, duration, gravity and extent of the contravention;*

    b) *Any loss or damage suffered as a result of the contravention;*

    c) *The behaviour of the parties concerned;*

    d) *The market circumstances in which the contravention took place;*

    e) *The level of benefits derived from the contravention;*

    f) *The degree to which the parties have co-operated with the Commission; and*

    g) *Whether the parties have previously been found in contravention of competition Regulations in the region."*

14. Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the "**Merger Notification Thresholds Rules**") provides that:

    "Any merger, where both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, shall be notifiable if:

    a) *the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM$ 50 million; and*

    b) *the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM$ 10 million, unless each of the parties to a merger*

achieves at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State."

15. The CID noted that the merging parties have operations in more than two COMESA Member States. Further, the parties' combined turnover in the Common Market exceeds the threshold of USD 50 million and they each derive turnover of more than USD 10 million in the Common Market. In addition, the merging parties do not achieve more than two-thirds of their respective COMESA-wide turnover within one and the same Member State. The notified transaction is therefore notifiable to the Commission within the meaning of Article 23(5)(a) of the Regulations.

Compliance with Article 24(1) of the Regulations

Submissions by the Commission

16. The Commission became aware around 19 May 2022 of the announcement made by SABIC on 27 January 2022 in relation to the signing of a share purchase agreement with ETG World on 24 January 2022 to acquire a 49% stake in EIHL. Having regard to the presence of both merging parties in the Common Market and noting that the 30-day period for notification had elapsed, the parties were engaged to establish whether the transaction constituted a notifiable merger. On 30 May 2022, the parties informed the Commission of their position that the signing of the proposed transaction does not constitute a "decision to merge", noting that the proposed transaction is wholly dependent and conditional upon a preliminary step involving a related transaction (the Preliminary Step) which requires ETG World to purchase PIC's 49% shareholding in EIHL for immediate on-sale to SABIC AN. The parties submitted, *inter alia*, that once the Preliminary Step is agreed and implemented, the Parties would fully intend to notify the Commission of the Proposed Transaction (compositely with the Preliminary Step) at the appropriate time and, in any event, by no later than 30 calendar days from signature, unless extended by the Commission on request.

17. **The Commission submitted that the parties breached Article 24(1) of the Regulations, for the following reasons:**

    i. The signing of the share purchase agreement between SABIC AN and ETG on 24 January 2022 constitutes a decision to merge within the meaning of the Regulations and in particular, Section 5.1 of the COMESA Merger Assessment Guidelines (the "**Guidelines**") which provides that:

    "The Commission considers that a decision to merge must either be (i) a joint decision taken by the merging parties and so comprise the conclusion of a definitive, legally binding agreement to carry out the merger (which

may or may not be subject to conditions precedent), or (ii) the announcement of a public bid in the case of publicly traded securities."

ii. The Guidelines are clear that a definitive agreement may or may not contain conditions precedent. The presence of conditions precedent, which is common practice in merger agreements, does not affect the intention of the parties' decision to merge, but may affect the implementation of the transaction.

iii. Further, the fact that the press statements issued by the parties to the Transaction do not provide any caveat on this condition precedent is testament to the fact that the parties do not anticipate serious concerns with the completion of the condition precedent. In fact, it is noted that a statement released by ETG states that '***ETG welcomes SABIC Agri-Nutrients Co. as a 49% shareholder in EIHL***'[2], further highlighting that:

> "***[t]he introduction of SABIC AN as 49% Shareholder in EIHL will strengthen ETG's efforts to further penetrate the Agricultural inputs markets globally, extending beyond Africa;***
>
> ***ETG and SABIC AN have a long-standing commercial relationship that has grown over the years to a partnership of mutual respect and a shared vision.***
>
> ***The conjoint desire to create sustainable impact on farming communities globally is one of the fundamentals of this alliance***".

iv. The press statements are clear and unequivocal in the firm and definitive intention of the parties to conclude the transaction.

v. It is further noted that the Commission has adopted a pragmatic approach to the notification process being undertaken within 30 days of the decision to merge. Notice No. 4 of 2020 - 'Notice of Interim Measures in Merger Review of the COMESA Competition Commission due to the Covid-19 Pandemic'[3] is instructive. The notice states that the parties may engage the Commission on the prospective merger within 30 days of their decision to merge and this shall be construed as the beginning of the notification process. Notification should be completed within a reasonable period of time thereafter. The parties omitted or neglected to pursue this approach which could have triggered the notification process pending its finalisation within a reasonable period of time.

---

[2] https://www.etgworld.com/sabic-an.html

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

vi. Despite the parties' arguments of the uncertainty surrounding the PIC transaction, this particular condition precedent has not been disclosed in the financial statements of the acquiring group issued in 2022:

- SABIC Board of Directors Report (Performance and Activities of the Company for the Fiscal Year 2021)[4]

"*The company also signed a binding agreement to acquire (49%) of the capital of ETG Inputs Holdco Limited on 21/06/1443 corresponding to 24//01/2022, for a total value of (320) million dollars. US, equivalent to (1.2) billion Saudi riyals on the basis of excluding cash and debt balances and the change in the value of working capital, which will be determined upon completion of the transaction.*

Whereas, ETG Inputs Holdco Limited is a limited liability company that works in the field of mixing and distributing agricultural fertilizers "Agri-nutrients", as its sales are concentrated to farmers and the final customer in a number of African countries, and this step comes within the company's strategic directions in the integration of its operations to include distribution and blending of Agri-nutrients in global markets and access to farmers and the end customer, thus expanding its activities and taking advantage of growth opportunities to cope with the expected developments and place it in a leading position on the map of the global Agri-nutrients industry" (emphasis added).

- Saudi Aramco Second Quarter Report 2022[5]:

On January 24, 2022, [SABIC AN], a subsidiary of SABIC, signed a binding agreement to acquire 49% of the share capital of ETG Inputs. The transaction is subject to obtaining the required regulatory approvals and other terms and conditions of the acquisition agreement (emphasis added).

vii. A condition precedent prior to closing is a condition that must be satisfied by a party to a transaction, failing which the other party is not bound to close the transaction. A condition precedent is thus a contractual condition that must be fulfilled before a right or obligation arises. A condition precedent seeks to ensure that the transaction realizes in line with the will of the parties and to prevent the performance of the transaction in case of a situation contrary to the will of the

---

SABIC Agri-Nutrients Company, Board Annual Report 2022, page 19. Accessed at: https://www.sabic-agrinutrients.com/en/Images/Board%20Annual%20Report%202022_ENG_v2_tcm1039-33346.pdf on 1 October 2022.

[5] Saudi Aramco, Second quarter interim report for the three months and half year ended June 30, 2022, page 32. Accessed at: https://www.aramco.com/-/media/publications/corporate-reports/saudi-aramco-h1-2022-interim-report-english.pdf on 1 October 2022.

parties. Whilst conditions precedent are important contractual instruments, however, they speak to the validity and closing of the agreement; the inclusion of conditions precedent in a merger agreement does not render the parties' intention to merge less binding. A party that acts in bad faith in the achievement of a condition precedent could face litigation by the other parties to the transaction.

viii. The parties appear to conflate the implementation of the merger, with a decision to merge. The Commission agrees that the transaction could only be materialised following the PIC transaction. However, this does not alter the fact that on 24 January 2022, the parties signed a 'binding agreement' to acquire certain shares. The additional step involving PIC relates to the implementation steps, which are not uncommon in merger transactions whereby restructurings, carve-outs, or additional acquisitions or transfers form part of the processes.

ix. Further, while the parties have submitted that they could not "have "decided" to merge when they did not have the ability or "alternative" to do so", this appears to run contrary to their actions as they were able to sign a share purchase agreement and publicly announced the transaction on their website and in their annual reports.

x. A 'decision to merge' should go beyond a mere speculation that the transaction may proceed. The ICN Recommended Practices For Merger Notification And Review Procedures (2018) recommends that parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction. Jurisdictions should permit filing before the parties conclude a definitive agreement, on the basis of, e.g., a letter of intent, agreement in principle, certification of good faith intention to consummate the transaction, or public announcement of the intention to make a tender offer. For non-suspensory regimes, the ICN further recommends that such jurisdictions have a legitimate basis for requiring a filing within a time frame that will permit the competition agency to conduct a timely review. The triggering event for purposes of calculating the filing deadline should be clearly defined to permit the parties to determine the timing of their notification obligation. The triggering event should also be defined to avoid requiring notification of transactions that are merely speculative. To that effect, some jurisdictions may also require an express certification by the notifying party or parties of a good faith intention to consummate the notified transaction.

xi. In the current case, the actions by the parties confirmed that there was a firm intention to merge, subject to conditions precedent which include the PIC transaction. It is also noted that approvals by competition authorities are also typically listed as conditions precedent; this does not however mean that a

decision to merge can only be established after the approval has been received, despite this being a matter which is outside the control of the parties.

18. **The Commission recommended that the CID imposes a fine, not exceeding 0.05% of the parties' combined turnover in the Common Market, on the parties for failure to notify the transaction within the prescribed time period under the Regulations.**

Submissions by the Merging Parties

19. The merging parties submitted that there was **no breach of the Regulations**, having regard to, *inter alia*, the following considerations:

i. The position of the Commission in the Statement of Concerns (**SOC**) is that the 30-day notification period started to run at the moment the SABIC AN-ETG World Agreement was signed in January 2022. However, at the time it was entered into in January 2022, the SABIC AN-ETG World Agreement was not of a form or nature that could be "*carried out*" (in the words of the Guidelines). Indeed, the SABIC AN-ETG World Agreement could only be legally effected following the conclusion of the PIC-ETG World Agreement in November 2022. The fact that the Parties signed a binding agreement on 24 January 2022 does not detract from the fact that they could not have carried-out the agreement before the signing of the PIC-ETG World Agreement.

ii. Indeed, one cannot sell what one does not own, and no one can transfer more rights than they hold. This is a general tenet of the law of contract applicable across COMESA member states. The very subject matter of the SABIC AN-ETG World Agreement, the PIC's 49% shareholding in EIHL, necessitated the signing of the PIC-ETG World Agreement and was therefore subject to the will and independent decision of the PIC to sell its shares in EIHL to ETG World, an event wholly outside the auspices, will and control of the Parties. This is reflected in the fact that it took the PIC a considerable amount of time to take a decision on an agreement regarding the sale of the shares (nearly ten months after the signing of the SABIC AN-ETG World Agreement). The SOC fails to deal with these facts - which are not disputed by the Commission. Indeed, in the SOC, the Commission explicitly states that: "*The Commission agrees that the transaction could only be materialised following the PIC transaction*".

iii. Put differently, the Parties were not able, as a question of fact, legal and practical consequence, to decide to carry out the merger as contemplated by Article 24(1) of the Regulations until after the PIC had independently decided to dispose of the shares, which occurred on 9 November 2022 – and did not attract an obligation under Article 24(1) of the Regulations until that date. The

Parties were, prior to the PIC's decision, not in any position to achieve the outcomes envisaged by the SABIC AN-ETG World Agreement.

iv. In this regard, the requirement in the SABIC AN-ETG World Agreement that the PIC-ETG World Agreement be signed and entered into is not of the nature of a condition ordinarily found in agreements of sale. Notably, conditions precedent in sale agreements refer to events or outcomes within the auspices, domain and control of the parties to the agreement in question – as opposed to requirements within the election or volition of an independent and unrelated third party (in this case the PIC). Examples of ordinary conditions precedent include the requirement that a party provide confirmation as to the suitability or ownership of assets, valuations of property, submit necessary applications and actively take steps to obtain necessary regulatory approvals and the like – all events that the merging parties may take meaningful and reasonable steps to achieve.

v. The condition or requirement regarding the PIC-ETG World transaction is not a mere procedural formality (such as the obtaining of a regulatory approval). Rather it goes to the fundamental ability of Parties to give effect to the obligations under the contract (i.e. the legal sale of the PIC shares). In this sense, a two-step transaction, as the one in this case, is not standard and does not constitute a typical condition precedent.

vi. Importantly, SABIC AN also did not carry the economic risk of the uncertainty around the signing of the PIC-ETG World Agreement. It only paid the purchase price after the closing of the second step (the SABIC AN-ETG World Agreement), which required the PIC-ETG World Agreement to have been signed and concluded. Put differently, if the PIC-ETG World Agreement was not signed, SABIC AN could have walked away from the Transaction.

vii. The European Commission (**EC**) has previously considered this an important factor to consider when assessing two-step transactions. For example, in *Canon / Toshiba*, Toshiba decided to sell its wholly owned medical business, TMSC. Toshiba organised an accelerated bidding process in which Canon acquired TMSC through a two-step warehousing transaction. The EC concluded that Canon closed the transaction prematurely, crucially finding that it had irreversibly paid the full purchase price for the acquisition of TMSC to Toshiba at Step one. As such, Canon bore the economic risk of the overall transaction at Step one. This is different to the present case. Thus, the SOC is in contradiction with leading international precedent on this topic.

viii. The Parties had no guarantee or assurance that the PIC-ETG World Agreement would be signed and agreed to by the PIC on terms that the Parties considered acceptable – and/or that the SABIC AN-ETG World

Agreement would then become implementable or able to be carried out (again in the words of the Guidelines). It was always solely within the volition of the PIC to enter into and conclude the PIC-ETG World Agreement (or not), as a separate and distinguishable agreement.

ix. Under paragraph 5.1 of the Guidelines, a "decision to merge" requires a **definitive agreement to carry out** the merger. Prior to the PIC-ETG World Agreement, there was no certainty that the SABIC AN-ETG World Agreement would close, and the latter was consequently not a definitive agreement able to be carried out.

x. The Commission has elevated the contents of press releases and/or public announcements to override the facts as reflected in the ordinary meaning of the Agreement to infer an obligation under Article 24(1) of the Regulations. The Commission has the onus to consider all the facts relevant to the matter. In any case, the contents of the announcements referenced in the SOC do not detract from, nor contradict, the submissions set out above because, irrespective of the binding nature of the SABIC AN-ETG World Agreement or the Parties' intention at the time of entering into the SABIC AN-ETG World Agreement, it is common cause and not disputed that the SABIC AN-ETG World Agreement could not be carried out until the date of signing of the PIC-ETG World Agreement.

xi. The provisions of Article 24(1) of the Regulations in the case at hand only apply from the date of the signing of the PIC-ETG World Agreement. The Parties notified the Transaction (without conceding an obligation to do so in the interest of good faith co-operation with the Commission) on 15 August 2022. As such, the Parties had already complied with the provisions of Article 24(1) of the Regulations before they accrued a duty or obligation to do so under law.

20. The merging parties submitted that **to the extent that the CID determines that a breach of Article 24(1) has nonetheless occurred, the circumstances of this matter do not warrant the imposition of a penalty or fine**. The parties bring the following arguments in this regard.

i. First, given the legal uncertainty and good faith co-operation, this is not a suitable case for the imposition of a fine.

ii. Second, in circumstances of legal uncertainty, the *Lactalis* decision is a more appropriate precedent for this case than the CID's *Airtel/Helios* decision, meaning a warning would be the appropriate sanction in this case.

21. In the alternative, **to the extent that CID considers that a fine should nonetheless be imposed, in the calculation of the fine, neither the turnover of Saudi Aramco, the ultimate owner of SABIC AN, nor the turnover of**

SABIC, the direct parent company of SABIC AN, should be taken into account.

22. The parties submitted that they derived no discernible advantage from the late submission of the merger notification. If the Parties would have believed that the signing of the SABIC AN-ETG World Agreement sufficed to trigger the filing deadline, they would have made every effort to do so as soon as possible thereafter in order to receive clearance.

23. In conclusion, there was no harm suffered, neither any benefit gained by the Parties because of the alleged infringement. In addition, the Parties have not closed the Transaction before receiving the Commission's clearance, thereby providing the Commission plenty of time to consider the impact of the Transaction on competition. The Parties respectfully submit that these factors should be taken into account to assess the proportionality of the fine.

24. Under EU competition law, a parent company may be held liable for antitrust violations committed by its subsidiary, where the parent company exercises decisive influence over the subsidiary. Specifically, the parent company can be liable for its subsidiary's violations when it "*does not determine its own* conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially, organizational and legal links between those two legal entities".

25. It is not sufficient that the parent company has the ability to exercise decisive influence, it must also be shown that it actually did exercise that decisive influence. This is a different standard than applied under the EU Merger Regulation to determine whether a transaction needs to be notified. Under EU merger control rules, the ability to exercise decisive influence is sufficient to establish whether notification thresholds are met. As such, EU competition law recognises a higher standard and, as a result, burden of proof on the regulator exists when attributing liability for infringements to parent companies.

26. SABIC AN also functions independently from SABIC and Saudi Aramco. As such, Saudi Aramco and SABIC did not exercise any influence over the actions of SABIC AN in relation to the filing procedure before the Commission.

Assessment

27. The CID analysed the provisions of the Guidelines and whether the PIC transaction implied that the decision to merge would only come into force once the PIC transaction is completed, or whether it related to the implementation steps as part of the transaction. The CID considered whether once the PIC shares were sold to ETG World, there would have been another decision entered into between the merging parties for the on-sale of the PIC shares to SABIC AN. The merging parties confirmed that the only decision that took place was the first

decision which was signed on 24 January 2022, which would be conditioned on the sale of the PIC shares to ETG and other regulatory approvals.

28. The CID noted that Article 24(1) of the Regulations clearly identify the triggering event for a notification to be made to the Commission, being a 'decision to merge', which is clearly defined in the Guidelines as the ***conclusion of a definitive legally binding agreement to carry out the merger which may or may not be subject to conditions precedent***. The CID considered that the signing of a binding agreement between the merging parties, i.e. SABIC AN and ETG, for the acquisition of shares in EIHL on 24 January 2022 satisfied the definition of a 'decision to merge' as set out in the Guidelines.

29. The CID also noted that if the parties were in doubt of when the 'decision to merge' date would be triggered under the Regulations, they had the option to engage the Commission pursuant to the Notice No. 4 of 2020 - 'Notice of Interim Measures in Merger Review of the Commission due to the Covid-19 Pandemic' which provided an avenue for parties to engage with the Commission on prospective mergers without incurring any costs.

30. With regards to the parties' submissions that the notification of the transaction was only made to other jurisdictions following the completion of the PIC transaction, the CID observed that the COMESA merger control regime is different from other regimes in that it requires the notification of a transaction within 30 days of making a 'decision' to merge. Therefore, the notification to other jurisdictions is irrelevant to the circumstances of this case in regards to the COMESA merger control regime.

31. The CID considered the parties' request for a warning in lieu of a fine should the CID reach a conclusion that a breach has occurred, referring to the CID's decision in the *Lactalis/Greenland* case, and not the precedent set by the Airtel/Helios case. The CID observed that the parties confused the facts of the *Airtel/Helios* case with that of Eaton/ATC; whereas in the latter the CID had imposed a fine for failure to comply with a merger order, in the former, the parties were fined for failing to notify within the 30-days period. The CID, in this regard, believes that each case has its own circumstances and should be analysed and/or sanctioned on its own merits.

32. The CID also noted the parties' submissions that the parent companies' turnover should only be regarded in the fine computation where it is established that the parent companies exercise decisive influence over the subsidiary. The CID agrees with the principle that fines should only be imposed on the parent company where it has been established that the parent company exercised decisive influence in the actions taken by its subsidiary which resulted in the infringement of the Regulations. The CID notes that Secretariat did not establish

in its submissions that the parent companies had any involvement in the failure to notify the transaction.

33. The CID concurred with the parties that the relevant turnover to be considered should be limited to the direct acquiring undertaking and the target as Secretariat did not prove otherwise.

34. The CID observed that the parties cooperated with the Commission from the time they were engaged and submitted the merger notification within the timeline requested by the Commission. The CID noted that the Secretariat's submissions to fine the parties 0.05% of their combined turnover was based on the CID decision in the *Airtel/Helios* case. The CID is not bound by the percentage recommended by Secretariat as each case has its own circumstances to take into account such as aggravating and mitigating factors of the case.

Determination

35. Based on the foregoing reasons, the CID determined that the decision to merge occurred on 24 January 2022, being the date of the signing of the binding agreement between SABIC AN and ETG for the acquisition of 49% shares in EIHL. The CID thus determined that the merging parties breached Article 24(1) of the Regulations by failing to notify the transaction within the prescribed 30-days period.

36. Based on the facts and circumstances surrounding the case, it is apparent that the parties collaborated with the Commission and there was no harm identified on the market as a result of the contravention. Further, the merging parties have not previously been found in breach of the Regulations.

37. Having established that the parties were in breach of Article 24(1) of the Regulations, the CID considered that a fine was warranted to deter the occurrence of similar breaches.

38. The CID has thus resolved to impose a fine of 0.05% of the merging parties' combined turnover in the Common Market, amounting to **USD 314,913.56** for breaching Article 24(1) of the Regulations.

39. This decision is adopted in accordance with Article 26 of the Regulations.

Dated this 10th day of February 2023

Commissioner Mahmoud Momtaz (Chairperson)

Commissioner Lloyds Vincent Nkhoma **Commissioner Islam Tagelsir Ahmed Alhasan**