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**Common Market for Eastern
and Southern Africa**

Case File No. CCC/MER/05/14/2021

Decision¹ of the Seventy-Eighth (78th) Committee Responsible for Initial Determination Regarding the Proposed Acquisition by Helios Towers Ltd of shares of Madagascar Towers S.A. and Malawi Towers Limited

ECONOMIC SECTOR: Telecommunication

3rd September 2021

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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

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Introduction and Relevant Background

1. On 2nd July 2021, the COMESA Competition Commission (the “**Commission**”) received a notification for approval of the proposed acquisition by Helios Towers Ltd (“**Helios Towers**”) of shares of Madagascar Towers S.A. (“**Madagascar Towers**”) and Malawi Towers Limited (“**Malawi Towers**”), pursuant to Article 24(1) of the COMESA Competition Regulations of 2004 (the “**Regulations**”).
2. The Committee Responsible for Initial Determinations, referred to as the CID, is established pursuant to Article 13(4) of the Regulations. The decision of the CID is set out below.

The Parties

Helios Towers (the acquirer)

3. Helios Towers is a limited liability company incorporated under the laws of Mauritius with Trade and Companies registry of Mauritius number 092064 and having its registered office at level 3, Alexander House, 35 Cyber City, Ebene, Mauritius. It is a leading independent telecommunications infrastructure company in Africa with a large presence in Ghana, Congo Brazzaville, Democratic Republic of Congo (“**DRC**”), Tanzania, Senegal and South Africa. It has established one of the continent's most extensive tower portfolio with over 7,300 towers across these countries. It builds, owns and operates telecommunication passive infrastructure (towers) and provides services to mobile network operators.
4. Helios Towers Malawi Limited and Helios Towers Madagascar Limited which are the primary acquiring undertakings are subsidiaries of Helios Towers, established for purposes of the merger transactions. In the Common Market, Helios Towers only operates in DRC through its subsidiary company trading as HT DRC Infraco S.A.R.L.

Malawi Towers & Madagascar Towers (the target undertakings)

5. The parties submitted that Malawi Towers is a company incorporated in Malawi with its main business consisting of the provision of passive infrastructure shared services. Malawi Towers is a subsidiary of Bharti Airtel Malawi Holdings B.V. which is a wholly owned subsidiary of Bharti Airtel Africa B.V. Malawi Towers owns certain passive telecommunication infrastructure assets which are used mainly by Airtel Malawi plc, its affiliate company, to provide mobile telecommunication services to the latter's end-customers in Malawi. Madagascar Towers is a company incorporated in Madagascar and it is a subsidiary of Airtel Madagascar (“**AM**”). Madagascar Towers owns certain passive telecommunication infrastructure assets, which are used mainly by AM to provide mobile telecommunications services to the latter's end-customers.

Jurisdiction of the Commission

6. 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*".
7. Article 24 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).
8. 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*".
9. Article 24(3) of the Regulations provides that, "*Notification in terms of paragraph 1 shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee and such information and particulars as may be prescribed or as the Commission may reasonable require*".
10. 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.*"
11. 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."

12. The CID noted that the merging parties have operations in more than two COMESA Member States given that 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.

Details of the Merger

13. The proposed transaction concerns the following:

- i. Helios Towers Malawi Limited, Bharti Airtel Malawi Holdings B.V. ("Bharti Airtel") and Helios Towers who signed a share sale agreement dated 23rd March 2021 under which Bharti Airtel agreed to sell and Helios Towers Malawi Limited agreed to acquire 100% of Bharti Airtel's 10,000,000 shares representing 100% of the issued share capital in Malawi Towers; and
- ii. Helios Towers Madagascar Limited, AM and Helios Towers who signed a share sale agreement dated 23rd March 2021 under which AM agreed to sell and Helios Towers Madagascar Limited agreed to acquire 100% of AM's 772 shares, representing 100% of the issued share capital in Madagascar Towers.

Compliance with Article 24(1) of the Regulations

14. The CID observed that the Share Sale and Purchase Agreement for the proposed merger was signed on 23rd March 2021, but the proposed merger was notified to the Commission on 2nd July 2021 following the Commission's intervention on 4th May 2021 regarding the non-notification of the merger.
15. The CID observed that a decision to merge was executed on 23rd March 2021 and therefore the parties were required to complete the merger notification on 22nd April 2021 in accordance with Article 24(1) of the Regulations. The CID therefore concluded that the merger notification was filed to the Commission more than 30 days after they executed the decision to merge.
16. In view of the foregoing, the CID concluded that the parties breached Article 24(1) of the Regulations.
17. The CID noted that Article 24(4) of the Regulations confers jurisdiction upon the Commission to impose penalties where parties to a merger fail to give notice of the merger as required by Article 24(1) of the Regulations. The CID also noted that Article 24(5) of the Regulations provides that "*A penalty imposed in terms of paragraph 4 may not exceed ten per centum of either or 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".

18. The CID noted that the primary objective of administrative penalties is deterrence against future violations by undertakings that have contravened the Regulations and as a general deterrent to other firms that may be contemplating engaging in similar breaches.
19. The CID observed that while the maximum penalty of 10% provided for under Article 24(5) guides on the amount of the fine the Commission may impose, it is not applicable in the current scenario given the nature of the contravention. The CID further observed that in determining the amount of a fine, the factors stipulated under Article 24(6) of the Regulations should be considered.
20. The CID considered the parties' contention that (i) the breach was not intentional; (ii) the breach did not result in any harm on the market, (iii) they cooperated with the Commission following their initial engagement; (iv) they have not been found in contravention of the Regulations; and (v) there is no discernible advantage gained by them from the delay in submitting the merger notification.
21. In view of the foregoing, the CID noted that the breach is not likely to have resulted in any loss or damage on the market. The CID observed that the parties cooperated with the Commission from the time they were engaged leading to the merger being notified on 2nd July 2021. The CID also observed that the parties have no previous record of contravention of the Regulations.
22. The above notwithstanding, the CID determined that a fine should still be imposed for the parties' failure to comply with their obligations under the Regulations.
23. The CID therefore considered that a fine of 0.05% of the parties' combined turnover in the Common Market be imposed, which would be sufficient to achieve the desired deterrence effect, while not imposing a disproportionate burden on the parties relative to the breach.

Conclusion

24. The CID concluded that the parties failed in their obligation to notify the transaction under the prescribed timelines. In particular, the parties breached Article 24(1) of the Regulations by failing to submit the merger notification within 30 days from the conclusion of the Share Sale Agreement which signifies the parties' decision to merge.
25. The CID therefore determined to impose a fine of 0.05% of the parties' combined turnover in the Common Market in the financial year 2020, amounting to **USD 102,101.765**, for breaching Article 24(1) of the Regulations.

26. The CID concluded that if the parties are aggrieved by its determination, they may appeal to the full Board of Commissioners in accordance with Article 15(1)(d) of the Regulations as read together with Rule 24(e) of the COMESA Competition Rules of 2004.

Dated this 3rd day of September 2021



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Commissioner Brian M. Lingela (Chairperson)



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Commissioner Ellen Ruparanganda