COMESA Competition Commission

COMESA Competition Commission
Kang'ombe House, 5th Floor-West Wing
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/05/14/2021

Decision[1] 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**

23rd 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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. Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the transaction between the parties would or is likely to have the effect of substantially preventing or lessening competition or would be contrary to public interest in the Common Market.

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 is set out below.

The Parties

Helios Towers (the "acquirer")

4. 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.

5. 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 transaction. 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")

6. 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.

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Jurisdiction of the Commission

7. Article 24(1) of the Regulations requires 'notifiable mergers' to be notified to the Commission. 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."

8. The merging parties have operations in more than two COMESA Member States. 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

9. 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.

10. The Commission considered the two transactions as a single merger filing on the basis that there is a common acquiring undertaking who is purchasing target undertakings that are both operating in the same sector and from the same shareholder. Further, it was considered that the transactions are inter-related and are being implemented within the same time.

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Relevant Market

Relevant Product Market

11. The activities of the merging parties overlap in relation to the provision of passive telecommunications infrastructure services. The acquiring group is active in the provision of passive telecommunication infrastructure services to mobile network operators and broadcasting service providers in the Democratic Republic of Congo[2]. Similarly, the target entities, Malawi Towers and Madagascar Towers are active in the provision of passive telecommunications infrastructure services to mobile network operators who use the services to provide mobile telecommunications services to their end-customers in Malawi and Madagascar, respectively.

12. Thus, the CID observed that both parties were active in the provision of passive telecommunications infrastructure services as such categorised the proposed transaction a horizontal merger and considered the relevant market as follows:

Provision of Telecommunications Infrastructure Services

13. Telecommunication infrastructure is categorised into two types namely, passive and active infrastructure. Passive infrastructure accounts for a large part of the cost of building telecommunication networks and represents a very large portion of the sunk costs for network installation[3].

14. Within the cellular industry, passive infrastructure encompasses all the non-electronic elements required at a cell site and includes towers, buildings or shelter, air conditioning plant, security, electricity generation capability for back-up, an electrical supply, technical premises and pylons[4]. On the other hand, active infrastructure refers to electronic infrastructure and facility of a telecom tower required by a cell site which includes base transceiver station/node B, spectrum, antenna, feeder cable, radio access network, microwave radio equipment, and base station controller/radio network controller.[5]

15. Mobile network operators and broadcasting service providers deploy their active connectivity and communications infrastructure on the passive telecommunication network infrastructure to transmit their digital information to end consumers. Passive infrastructure is used to enable the operation of active infrastructure through hosting the antenna to pre-determined and technically viable heights for optimum coverage of cellular network. On the other hand, active infrastructure includes the core elements of cellular electronic infrastructure used to support mobile network operators in the provision of telecommunication services.

16. In view of the above, the CID considered that the two types of telecommunication infrastructure can be seen as different on the basis on the unique and distinguished end uses that each intends to

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[2] The acquirer is not operational in Malawi and Madagascar but only incorporated for purposes of the transaction.
[3] OECD and IDB (2016), *Broadband Policies for Latin America and the Caribbean: A Digital Economy Toolkit*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264251823-en accessed on 24th July 2021
[4] Sumit Infra Services, http://sumitinfra.com/passive-active-infrastructure-o&m.php accessed on 24th July 2021
[5] https://www.lawinsider.com/dictionary/active-infrastructure accessed on 24th July 2021

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achieve. While passive infrastructure plays the supportive role to the use and operation of active infrastructure, the two cannot be said to be substitutable.

17. In its previous review of the ***Eaton/ATC*** merger, the CID considered that passive and active infrastructure constitute distinct markets[6] for the reason that "*passive infrastructure only seeks to provide a platform where different mobile network operators can setup their various telecommunication equipment, and active infrastructure is unique to a particular mobile network operator and is key to ensure that actual transmission of telecommunication services is possible*".

18. In the merger, the CID pointed out that passive telecommunication infrastructure is often built, operated, and maintained by tower companies and used by mobile network operators through leasing the infrastructure and payment of wholesale price for the use.

19. The CID observed that from a demand perspective, passive telecommunication infrastructure services may be distinguished according to the manner in which it is provided. It noted that mobile network operators have difference options through which to access passive infrastructure services. For instance, in addition to access through towers owned by tower companies, mobile network operators may also own passive infrastructure and provide the service to itself as is the case in the current transaction where pre-merger the Airtel Malawi Networks Limited and Airtel Madagascar are self-providing these services through their own tower companies which are the subject of the acquisition. Further, structures such as high-rise buildings, air-conditioning plants, pylons can also be used as spaces on which active telecommunication infrastructure can be installed in order to provide telecommunication services to end-users.

20. In this respect, the CID observed that the market can be fragmented according to who provides the service and how the service is provided. However, the CID considered that such further fragmentation was not necessary given that the transaction was unlikely to raise competition concerns under narrower market definition. This approach was similarly adopted in the CID's review of the ***ATC/Eaton*** merger[7] where the CID noted that "*MNO can opt to engage a tower company to provide tower services in a particular location and at the same time a MNO can self-provide these services by building their own towers or setting up passive telecommunication infrastructure equipment on other suitable rented spaces*".

21. The CID noted the possibility of segmenting the telecommunication passive infrastructure according to customer types such as mobile network operators and broadcasting service providers given that towers can be used by either category. However, the CID considered that a further segmentation by customer type was not necessary given that tower companies lease their antenna space to both the MNOs and broadcasting service providers so long as space is available. The CID observed that such segmentation was not necessary given that it was unlikely to affect the assessment of the transaction.

[6] Case File No. CCC/MER/06/24/2019

[7] *ibid*

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22. **On the basis of the foregoing discussion, the CID construed the relevant product market as the provision of passive telecommunication infrastructure services.**

Relevant Geographic Market

23. The CID considered that licensing and regulatory requirements for the provision of passive telecommunication infrastructure services for mobile network operators are confined to specific country. The CID also considered that a country's unique national security interest may be another limiting factor confining tower companies to operate within the national boundaries of one country. The CID also noted that from a supply side perspective, installing passive telecommunication infrastructure requires regulatory approvals related to compliance with environmental acts, communication acts, safety standards, approvals from the state or local governing authorities for the proposed site which would also limit the geographic scope to national.

24. The CID therefore considered that it is unlikely that a tower company can provide its tower space leasing services being located in one Member State to customers located in another Member State. Similarly, the building and installation of passive telecommunication infrastructure towers is capital intensive hence costly and it is unlikely that a tower company can swiftly shift between countries in a timely manner given an increase in the price tower space leasing in the latter. The CID noted that it is likely that conditions of competition are heterogenous across countries on account of different regulatory requirements, tariffs and exchange rate differences. CID further noted that the inputs for the construction and installation of infrastructure tend to be imported and the varying purchasing power of currencies across Member States affects product pricing strategies leading to the final product price to end consumers varying across Member States.

25. The CID also noted that from the demand perspective, it is unlikely that a mobile network operator or broadcasting service provider will easily switch to a tower company located in other Member State to lease tower space in response to a small but significant non-transitory increase in price of the tower space leasing in their national markets. It was also be noted that the market for telecommunication services is generally a national market whose competition dynamics are limited to national borders. MNOs set up their business and get regulatory approval to serve customers within a country. Therefore, it is unlikely that an MNO would consider foreign providers of passive telecommunication tower services as such a strategy would not be practical.

26. In light of the above, the CID noted that the geographic market for telecommunication tower leasing is likely to be national and pertain to Malawi and Madagascar, where the target undertakings operate. The CID observed that sub-regional markets could exist within national markets, as the distance of the towers used to deploy the active data transmitting infrastructure is determined by the service quality to the end consumers. However, the CID considered that a further segmentation was not necessary and would not affect the assessment of the transaction, as the acquirer is not active in the same geographic markets as the target and thus there would be no change in the market structure

27. **In view of the foregoing, the CID construed the relevant geographic market as national and pertains to Malawi and Madagascar.**

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28. For the purposes of this competitive assessment and without prejudice to the future cases, the CID defined the relevant markets as follows:

   a. **The provision of telecommunication tower services in Malawi; and**

   b. **The provision of telecommunication tower services in Madagascar.**

Competitive Assessment

29. The parties submitted that the market shares of Malawi Towers and Madagascar Towers and their competitors are as follows:

Table 1: Market shares for the Madagascar Towers and its competitors

Company	Market Shares	
	Pre-merger	Post-merger
Telecom Malagasy (TELMA) S.A.	51%	51%
Orange Madagascar S.A.	25%	25%
Madagascar Towers S.A.	***20%***	***20%***
Gulfsat Madagascar, Sarl	N/A	N/A
Total Market Share	**96%**	**96%**

Table 2: Market shares for the Malawi Towers and its competitors

Company	Market Share	
	Pere-merger	Post-merger
Malawi Towers Limited	***48.6%***	***48.6%***
Telecom Networks Malawi plc	43.1%	43.1%
Malawi Telecommunications Limited	7.3%	7.3%
Access Communications Limited	0.9%	0.9%
Total Market Share	**99.9%**	**99.9%**

30. The CID observed that the structure of the relevant market in both Madagascar and Malawi will not change as a result of the proposed transaction given that the acquiring undertaking does not operate in Madagascar and Malawi, pre-merger. The CID therefore concluded that the proposed transaction is not likely to raise any competition concerns through the strengthening of market power of the merged entity. The CID also observed that the merged entity will continue to face competition from the existing players in the relevant market.

31. The CID noted that the relevant market of passive telecommunication infrastructure is capital intensive and this may act as a barrier to potential entrants. However, the CID observed that despite the presence of barriers to entry, the pre- and post-merger structure will remain the same and as

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such, the barriers to entry in the market are unlikely to act as an incentive for the merged entity to adopt an anti-competitive strategy on the market.

32. In view of the absence of likely competition concerns and any foreclosure concerns, the CID concluded that the transaction will not frustrate trade between Member States.

Third-Party Views

33. Submissions were received from the Competition and Fair Trading Commission of Malawi and the Conseil de la Concurrence de Madagascar. The third party submissions were consistent with the CID's conclusion that the transaction was unlikely to raise competition concerns in the relevant markets.

Conclusion

34. Based on the foregoing reasons, the CID determined that the merger is not likely to substantially prevent or lessen competition in the Common Market or a substantial part of it, nor be contrary to public interest. The CID further determined that the transaction is unlikely to negatively affect trade between Member States.

35. The CID therefore approved this transaction. This decision is adopted in accordance with Article 26 of the Regulations.

Dated this 23rd September 2021

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Commissioner Brian M. Lingela (Chairperson)

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Commissioner Ellen Ruparanganda