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Common Market for
Eastern and Southern Africa

Staff Paper No. 2018/07/01

Decision¹ of the Thirty Sixth Committee Responsible for Initial Determination on the Application for Authorisation of the Merger involving Vivo Energy Holding B.V. and Engen International Holdings (Mauritius) Limited

ECONOMIC SECTOR: Petroleum

5th July 2018

Case File No. CCC/MER/01/03/2018

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¹ In the published version of this decision, some information may have 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

Introduction and Relevant Background

1. On 9th February 2018, the Commission received a notification for approval of a merger from Anjarwalla and Khanna, on behalf of its clients Vivo Energy Holding B.V. ("Vivo Energy") and Engen International Holdings (Mauritius) Limited ("EIHL"), pursuant to Article 24(1) of the Regulations.
2. The transaction was notified with the Commission under Article 24(1) of the COMESA Competition Regulations, 2004 (hereinafter referred to as the "Regulations"). Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the proposed 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. The Committee Responsible for Initial Determination (hereinafter referred to as "the CID") established that the parties operate in more than one COMESA Member State. This therefore means that the regional dimension requirement under Article 23(3) of the Regulations is satisfied and asserts jurisdiction on the Commission to assess the transaction.

The Parties

Vivo Energy (the Acquirer)

4. Vivo Energy is a private company with limited liability incorporated on 12 January 2011 under the laws of The Netherlands, having its official seat in The Hague, The Netherlands. The primary operations of Vivo Energy include marketing and distribution of Shell branded fuels and products at retail service stations and commercial customers in the aviation, construction, manufacturing, marine, power and road transport segments. Vivo Energy has operation in the following COMESA Member States: Kenya, Uganda, Madagascar, Mauritius, and Zambia.

EIHL (the Target)

5. EIHL is controlled as to 100% by Engen Holdings Proprietary Limited ("Engen Holdings") a company registered in South Africa. In the context of this notified transaction, the Engen Holdings is the direct holding company of and seller of shares in EIHL. EIHL is a holding company incorporated in Mauritius which does not itself have any activities or provide any good/service. EIHL does, however, have various subsidiaries which operate in COMESA as 'Oil Marketing Companies' engaged in importing, trading, storing, distributing, marketing and supplying petroleum products - such as fuel and lubricants - in the following COMESA Member States: the Democratic Republic of Congo ("DRC"), Kenya, Malawi, Rwanda, Zambia and Zimbabwe. EIHL's various subsidiaries ultimately sell fuel and lubricants on a retail basis (through a network of retail outlets i.e. service stations) as well as on a commercial/ wholesale basis (i.e. non-retail basis) to various commercial and industrial customers.

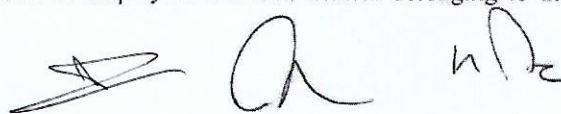


Nature of the Transaction

6. The transaction notified entails an acquisition by Vivo Energy of the shares held by Engen Holdings in different entities including EIHL (the "Proposed Transaction"). Upon completion of this transaction, nine new countries will be added to Vivo Energy's network. The new markets for Vivo Energy included in the transaction are DRC, Zimbabwe, Réunion, Zambia, Gabon, Rwanda, Mozambique, Tanzania and Malawi. EIHL's Kenya operations (where Vivo Energy already operates) are also part of this transaction. Engen Holdings will retain its interest in Engen Petroleum Limited (the South Africa business and refinery) and Engen's businesses in Mauritius, Botswana, Ghana, Namibia, Swaziland and Lesotho, which are not part of this transaction.
7. As part of the Proposed Transaction, Engen Holdings will also acquire a minority interest of 13% in Vivo Energy.

Competition Analysis

8. The CID identified the relevant markets as:
 - (i) Retail supply of automotive fuels on a national basis;
 - (ii) Non-retail supply of automotive fuels on a national basis
 - (iii) Non-retail supply of jet fuel on a national basis;
 - (iv) Supply of automotive lubricants in the Common Market; and
 - (v) Supply of industrial lubricants in the Common Market.
9. The CID observed that the merging parties had overlapping activities in Kenya, and the the Proposed Transaction would lead to competition concerns in the downstream retail of petroleum products in Parklands and Enterprise Roads. The CID noted that on 19th June 2018, the Competition Authority of Kenya granted approval to the transaction on condition that the merged entity:
 - i. Sell off all the assets of the Parklands retail station within 36 months from the date of the Notice of Determination;
 - ii. Does not renew the current dealership contract with the Enterprise Road retail station either when it expires in two (2) years or if the dealer terminates the contract before the end of the remaining contract period;
 - iii. Honour all the existing contracts with small and medium-sized enterprises namely; Vesha, Safe Gas, Live Ad, Chomba Petroleum, Flame Flavours, Fine Touch, Café Candy, Motriz Drug Store, Rose Wambui Suyianka, Payless, Charles Muhuthu Gichuki and Kamau Mweri; and
 - iv. Retains all the twenty-six employees of the target.
10. The CID observed that the Share Purchase Agreement contained restrictions on competition and solicitation of employees between entities belonging to the Seller,


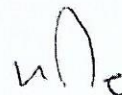
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and the acquiring group for a period of four (4) years in Kenya, the DRC, Malawi, Rwanda, Zambia, and Zimbabwe. The CID considered that the period of four years was not justified in view of the established experience of the acquiring group in relation to the supply of petroleum fuels and lubricants.

11. The CID observed several agreements entered between the Seller and the target entities in relation to the supply of lubricants are operational for an initial period of twelve months, which shall upon expiry of the twelve months continue for an indefinite period. The CID considered that such contracts are necessary in order to reducing the negative effects of disruption of traditional lines of internal supply, for a transitional period following the acquisition. However, the CID considered that there was no objective need for the lubricants supply contracts to be of an indefinite duration.
12. The CID observed that in Zambia, the acquirer operated through sales to an independent distributor, Spectra Oil Corporation Limited, which competed with the target. The CID raised concerns that post-merger, the merged entity could an incentive to foreclose Spectra from the downstream market for lubricants.

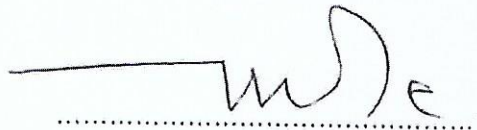
Determination

13. In order to address the identified concerns, the parties submitted the following undertakings:
 - i. The duration of the restriction on competition and solicitation of employees as per clause 11 of the Share Purchase Agreement should be limited to a period of two years in Kenya, from the date of the merger clearance decision,
 - ii. The duration of the restriction on competition and solicitation of employees as per clause 11 of the Share Purchase Agreement should be limited to a period of three years in the DRC, Malawi, Rwanda, Zambia, and Zimbabwe, from the date of the merger clearance decision;
 - iii. The duration of the lubricants supply contracts concluded between Engen Petroleum Limited and the target Engen entities in the DRC, Kenya, Malawi, Rwanda, Zambia, and Zimbabwe should be limited to a finite period of ten years, from the date of the merger clearance decision. If the parties intend to renew the supply contracts after expiry of the ten-year period, the parties shall notify the supply agreements to the Commission pursuant to Article 20 of the Regulation;
 - iv. Vivo Energy commits to continue to supply lubricants to Spectra Oil Corporation Limited as per the practice prevailing pre-merger, on a non-discriminatory and non-exclusive basis (subject to any changes in economic circumstances unrelated to the transaction), for a period of five years starting from the date of the Commission's decision; and

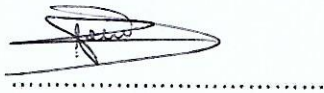
 

- v. The merging parties commit to submit, within thirty (30) days of each anniversary of the merger clearance decision of the Commission, for the next five years, a comprehensive report detailing compliance with the above conditions.
14. The CID considered the above undertakings and is satisfied that they would maintain competition at the level existing pre-merger, while permitting the realisation of relevant merger benefits. The CID therefore approved the transaction on condition that the merging parties comply with the above conditions.
15. Failure to observe these undertakings shall render the transaction null and void and the Commission may invoke the relevant provisions of the Regulations to address the violation.
16. This decision does not relieve the merging parties from their obligation to comply with other applicable laws.
17. This decision is adopted in accordance with Article 26 of the Regulations.

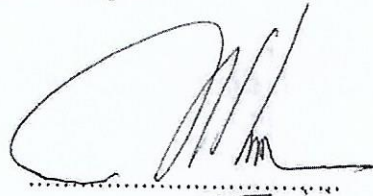
Dated this 5th of July 2018



Commissioner Patrick Okilangole



Commissioner Trudon Nzembela



Commissioner Deshmuk Kowlessur