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Common Market for Eastern  
and Southern Africa

**Case File No. CCC/MER/06/24/2019**

**Decision<sup>1</sup> of the Sixty-Seventh (67<sup>th</sup>) Committee Responsible for Initial Determination Regarding the Acquisition of 100% Shareholding in Eaton Towers Holdings Limited by ATC Heston B.V.**

**ECONOMIC SECTOR: Telecommunications**

**22<sup>nd</sup> December 2019**

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<sup>1</sup> 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

A large, stylized handwritten signature in black ink, appearing to be a cursive or calligraphic name.

## **Information and Relevant Background**

1. On 26<sup>th</sup> June, 2019 the COMESA Competition Commission (hereinafter referred to as the “**Commission**”) received a notification on the proposed merger involving the acquisition of 100% shareholding in Eaton Towers Holdings Limited (“**ETHL**”) by ATC Heston B.V. (the “**acquirer**”).
2. The transaction was notified with the Commission under Article 24(1) of the COMESA Competition Regulations, 2004 (the “**Regulations**”). 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. The Committee Responsible for Initial Determination (the “**CID**”) established that the parties operate in more than one COMESA Member State and they meet the required prescribed merger notification thresholds. 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**

### **ATC Heston B.V. (the “Acquiring undertaking”)**

4. It was submitted that the acquiring undertaking, ATC Heston B.V. is incorporated under the Laws of Netherlands and it is a wholly owned subsidiary of the American Tower Corporation (“**ATC**”) which is publicly listed on the New York Stock Exchange. In COMESA, ATC indirectly controls ATC Operations Kenya Limited and ATC Uganda Limited. The ATC Group is involved in the operation and development of wireless telecommunications and broadcasting infrastructure; leasing of antenna space on its towers and other related services. The ATC Group has operations in two COMESA Member States namely: Kenya and Uganda.

### **ETHL (the “target undertakings”)**

5. It was submitted that the target undertaking, ETHL, is a private limited liability company established in Jersey, United States of America. In the Common Market, ETHL controls Eaton Towers Kenya Limited and Eaton Towers Uganda Limited. ETHL and its subsidiaries are a telecommunication infrastructure group and are primarily engaged in the management and construction of telecommunication towers for mobile telecommunications operators. ETHL has operations in two COMESA Member States namely: Kenya and Uganda.

## **Nature of the Transaction**

6. The parties submitted that the transaction entails the acquisition of 100% shareholding in ETHL by ATC Heston B.V of the Netherlands.

## Competition Analysis

7. The CID defined the relevant market as the market for the leasing of antenna space on towers and the provision of ancillary services in Kenya and Uganda.
8. The CID observed that the transaction would lead to an increase in market concentration in both Kenya and Uganda, as such it would result in a change in the market structure of the relevant markets. The CID observed that post-merger, the relevant market is likely to remain competitive in Kenya due to the continued presence of competitors with higher market shares than the merged entity. On the other hand, the CID observed that in Uganda, competition concerns are likely to emanate post-merger since the merged entity will hold a dominant position with a market share of 80%. As such, it is to foreclose the relevant market through unilateral conduct.
9. The CID further observed that countervailing power is likely to be limited or absent in Uganda given that the merged entity's market share of 80% reduces the likelihood of customers switching to alternative providers of telecommunication tower services.

## Determination

10. The CID determined that the merger is likely to substantially prevent or lessen competition in the relevant market in Uganda. The CID further determined that the transaction may have the effect of restricting trade between Member States and it would be incompatible to the Treaty objective of single market integration. To address the CID's concerns, the parties submitted undertakings.

The CID therefore approved the transaction with the undertakings submitted by the parties to address the Commission's competition concerns as follows:

“ 1. ATC **Heston B.V. (“ATC”)** hereby provides the following undertakings (the “Undertakings”).**with respect to Uganda** to the COMESA Competition Commission (the “Commission”) in order to address the competition concerns identified by the Commission in its assessment of the merger involving the proposed acquisition of 100% shareholding in Eaton Towers Holdings Limited by ATC Heston B.V (**“Transaction”**).

- a) Subject to satisfaction of all the conditions precedent and completion requirements set out or to be set out in the agreement for the purchase of shares, ATC shall procure that an affiliate of ATC shall acquire Mobile Telephone Networks (Netherlands) B.V.'s equity interests in Uganda Tower Interco B.V. within six (6) months from closure of the Transaction. ATC shall submit a progress report to the Commission within one (1) month of closure of the Transaction or such further period as may be approved by the Commission. Upon receipt of the progress report, the Commission shall confirm in writing that an ATC affiliate may proceed to acquire and implement Mobile Telephone Networks (Netherlands) B.V.'s equity interests in Uganda Tower Interco B.V.;
- b) ATC shall procure that upon closing of the Transaction, its operating entities in Uganda, including ATC Uganda Limited and Eaton Towers Uganda Limited (together, the “Uganda Operations Entities”) shall continue to honour the terms



of existing agreements in Uganda with customers for their duration, unless otherwise terminated for reasons not related to the Transaction;

- c) ATC shall procure that the Uganda Operating Entities shall not discriminate among mobile network operators (MNOs) in Uganda in the provision of leasing space on its telecommunication towers and roof tops or related services. The Uganda Operating Entities should develop an objective criterion to use when determining the MNOs it leases space to. The criteria should be submitted to the Commission for consideration within one (1) month from the date of approval of the Transaction;
- d) ATC shall procure that the Uganda Operating Entities shall ensure that the pricing for the provision of leasing space on its telecommunication towers and roof tops or related services are based on the existing indexation formula agreed upon by the parties to those agreements;
- e) ATC shall procure that each of the Uganda Operating Entities shall comply with all relevant laws in Uganda including remedies imposed by the Uganda Communications Commission in authorising the transaction; and
- f) ATC shall appoint a Monitoring Trustee within three (3) months of closing of the Transaction. The Monitoring Trustee shall be approved by the Commission and will have the duty to monitor the Uganda Operating Entities' compliance with the Undertakings. The Monitoring Trustee shall submit a written compliance report on an annual basis to the Commission on the anniversary of the closing of the Transaction for a period of up to three (3) years.
- g) After 3 years, the Commission shall review the Undertakings set forth in paragraphs 1.b. - 1.f. above to consider their continued relevance. If the Undertakings continue to be relevant, the Commission shall approve their continuation for a specified period of time depending on the prevailing market conditions in Uganda. The Commission shall inform ATC of its decision in writing within one (1) month of the expiry of the three (3) year period.

#### **Reporting on Compliance to the Undertakings**

- 2. ATC shall engage a Monitoring Trustee(s) that will submit a written compliance report to the Commission. The Monitoring Trustee (s) will describe in the report whether ATC is complying with the Undertakings.
- 3. The Monitoring Trustee (s) will submit written compliance reports to the Commission every year for a period of up to three (3) years.
- 4. ATC shall provide the Monitoring Trustee (s) with all the information reasonably necessary to enable the Monitoring Trustee (s) to assess ATC's compliance with the Undertakings.

#### **Monitoring Trustee**

- 5. The Monitoring Trustee will be responsible for informing the Commission about the implementation of and compliance with the Undertakings by ATC.
- 6. The appointment of the Monitoring Trustee shall be completed within six (6) months from the date of closing of the Transaction.



7. For the avoidance of doubt, the approval of the Monitoring Trustee (s) and its mandate by the Commission shall not delay the approval or consummation of the Transaction.

#### **Proposal of the Monitoring Trustee by ATC**

8. No later than three (3) months after closing of the Transaction, ATC shall submit to the Commission the name or names of one or more natural or legal persons whom ATC proposes to appoint as the Monitoring Trustee for the Commission's approval.
9. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the qualifications and shall include:
  - a) The full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Undertakings;
  - b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.

#### **Approval of the Monitoring Trustee by the Commission**

10. Within four (4) weeks following ATC's proposal on a Monitoring Trustee, the Commission shall have the discretion, acting reasonably, diligently and in good faith, to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations.
11. If only one name is approved, ATC shall appoint or cause to be appointed the person or persons concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, ATC shall be free to choose the Monitoring Trustee to be appointed from among the names approved.
12. The Monitoring Trustee shall be appointed within two weeks of the Commission's approval, in accordance with the mandate approved by the Commission

#### **New proposal by ATC**

13. If the Commission rejects all the Monitoring Trustees proposed by ATC, ATC shall submit the names of at least two more natural or legal persons within two weeks of being informed of the Commission's rejection. The Commission will then be able to approve or reject the proposed Monitoring Trustees within two weeks following ATC's proposal.

#### **Monitoring Trustee nominated by the Commission**

14. If the Commission rejects all further Monitoring Trustees proposed by ATC, within two weeks following such rejection, the Commission shall nominate a Monitoring Trustee, whom ATC shall appoint, or cause to be appointed, in accordance with a Monitoring Trustee mandate approved by the Commission.

#### **Appointment criteria for the Monitoring Trustee**

15. The Monitoring Trustee shall:
  - a. at the time of the appointment, be independent of ATC and Eaton Towers Holding Limited and their Affiliated Undertakings;
  - b. possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as a professional advisor including as a consultant, auditor, or economist; and
  - c. neither have nor acquire a Conflict of Interest.



16. The Monitoring Trustee shall be remunerated by ATC in a way that does not impede the independent and effective fulfilment of its mandate.

#### **Functions of the Monitoring Trustee**

17. The Monitoring Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or ATC, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the Undertakings.

#### **Duties and obligations of the Monitoring Trustee**

18. The Monitoring Trustee shall:
- a. propose to ATC such measures as the Monitoring Trustee considers necessary to ensure ATC's compliance with the Undertakings;
  - b. promptly report in writing to the Commission, sending ATC a copy at the same time, if it concludes on reasonable grounds that ATC is failing to comply with these Undertakings.

#### **Duties and obligations of ATC**

19. ATC shall provide the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks.
20. ATC shall indemnify the Monitoring Trustee and its employees and agents (each an "Indemnified Party") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to ATC for any liabilities arising out of the performance of the Monitoring Trustee's duties under the Undertakings, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.
21. ATC agrees that the Commission may share Confidential Information proprietary to it with the Monitoring Trustee. The Monitoring Trustee shall not disclose such information and shall be subject to a non-disclosure agreement (which will allow the Trustee to share information with the Commission only).

#### **Replacement, discharge and reappointment of the Monitoring Trustee**

22. If the Monitoring Trustee ceases to perform its functions or for any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest:
- a. the Commission may, after hearing the Monitoring Trustee and ATC, require ATC to replace the Monitoring Trustee; or
  - b. ATC may, with the prior approval of the Commission, replace the Monitoring Trustee.
23. If the Monitoring Trustee is removed pursuant to paragraph 22 above, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand-over of all relevant information.
24. The new Monitoring Trustee shall be appointed in accordance with the appointment procedure referred to in paragraphs 14 and 15 above.
25. Unless removed pursuant to paragraph 22 above, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the



Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented". (END OF QUOTE).

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

Dated this 22<sup>nd</sup> December, 2019



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Commissioner Brian M. Lingela (Chairperson)



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Commissioner Islam Tagelsir Ahmed Alhasan