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Common Market for Eastern and Southern Africa

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Decision[1] of the Twenty Fifth Meeting of the Committee Responsible for Initial Determination Regarding the Proposed Acquisition of Blue Nile Cigarette Company by British American Tobacco Middle East DMCC

ECONOMIC SECTOR: Agriculture

29th September 2016 – Johannesburg, South Africa

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Information and Relevant Background

1. On 16th June 2016, the COMESA Competition Commission (hereinafter referred to as "the Commission") received a notification regarding the acquisition of Blue Nile Cigarette Company (hereinafter referred to as "BNCC") by British American Tobacco Middle East DMCC (hereinafter referred to as "BAT Middle East").

2. The transaction was notified with the Commission under Article 24(1) of the COMESA Competition Regulations (hereinafter referred to as "the Regulations"). Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the proposed transaction 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 Commission has jurisdiction on the transaction because it has a regional dimension in accordance with Article 23 of the Regulations.

The Parties

BAT Middle East

4. BAT Middle East is a company incorporated in the United Arab Emirates and is a wholly-owned subsidiary of the BAT group. The BAT group is a global tobacco group which manufactures, markets and sells primarily cigarettes and, to a lesser extent, other tobacco products, including cigars, pipe and roll-your-own tobacco, in Europe, the Americas, Asia and other territories throughout the world. The group's main brands which include *inter alia* Dunhill, Benson & Hedges, and Lucky Strike, are sold throughout the Common Market.

5. BAT Middle East markets and distributes the brands of the BAT group across the Middle East, notably in Bahrain, Islamic Republic of Iran, Iraq, Jordan, the Kingdom of Saudi Arabia, Kuwait, Lebanon, Oman, Palestine, Qatar, Syria, the United Arab Emirates and Yemen. Prior to this transaction, the BAT group was not directly active in Sudan. However, it had granted a manufacturing license agreement to BNCC, pursuant to which BNCC manufactured and distributed cigarette sticks in its own name, under the trademark Benson & Hedges, in the Sudanese market.

BNCC

6. BNCC is a company active in the manufacturing and sale of tobacco products in Sudan. It does not have any activities outside the Sudanese territory. BNCC is controlled solely by Mr Guy Bittar ("the Seller").

Nature of the Transaction

7. The notified transaction involves the acquisition by BAT Middle East of 100% of the share capital of BNCC.

Competition Analysis

8. The CID defined the relevant markets as the supply of Factory Manufactured Cigarettes (FMC) and wholesale distribution of tobacco products in Sudan and South Sudan.

9. The CID observed that the FMC market in Sudan is highly concentrated pre-merger with an HHI of above 6000 and the merger will bring about an increase of 138 points in the concentration level. The CID contended that for horizontal mergers in highly concentrated markets, a change of below 150 points is unlikely to raise significant competition concerns.

10. Notwithstanding the high market concentration levels, the CID noted that the merged entity would still face competitive pressure from Japan Tobacco International (JTI) whose market share is greater than that of the merged entity in the relevant market. It was submitted that JTI's success in the relevant market is anchored on its best-selling brand 'Bringi' which accounts for 80% of its sales of cigarettes in volume. The transaction may have an effect to strengthen competition as it will reinforce the ability of the merged entity to effectively compete with the dominant player, Japan Tobacco International.

Consideration of ancillary restraints

11. The CID noted that the Sale and Purchase Agreement (the "SPA") concluded between BAT Middle East and the Seller on 11th November 2015 prevents any potential source of competition from the Seller.

12. The CID opined that one of the most significant factors which determine the proportionality of the non-competition covenant is its duration. The protection of the buyer's legitimate interests must be limited to the period required by an active competitive buyer for him to take over undiminished the enterprise's market position such as it was at the time of transfer.

13. The CID noted that the relevant market is not a new market for the BAT group because its products were already manufactured and distributed by the target undertaking prior to the transaction. The established experience of the BAT group in relation to the manufacture of tobacco products and the popularity of its brands, coupled with the restricted tobacco manufacturing licence regime prevailing in the relevant market which would limit competition from the Seller even in the absence of the non-compete clauses, suggest that the protection of competition for a period of three years as provided under the non-compete

covenant might not be reasonably proportionate to the achievement of the desired result.

14. In view of the foregoing, the CID decided to reduce the duration of the non-compete clause to a period of two years as this would be sufficient for the BAT Group to consolidate already existing business relations with customers and establish itself effectively on the market.

Determination

15. The CID determined that the merger is likely to raise some competition concerns if the non-compete clause in the SPA is for three years. To address this concern the CID approved the merger on condition that the duration of the non-compete clause is restricted to a period of two years.

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

Dated this 29th day of September, 2016.

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Commissioner Matthews Chikankheni (Chairman)

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Commissioner Thabisile Langa (Member)

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Commissioner Chilufya Sampa (Member)