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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/3/6/2023

Decision[1] of the Ninety-Sixth (96th) Meeting of the Committee Responsible for Initial Determinations Regarding the Proposed Vitol Emerald Bidco (Pty) Ltd and Engen Limited

ECONOMIC SECTOR: Energy and Petroleum

28 August 2023

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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

The Committee Responsible for Initial Determinations,

Cognisant of Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the "**COMESA Treaty**");

Having regard to the COMESA Competition Regulations of 2004 (the "**Regulations**"), and in particular Part 4 thereof;

Mindful of the COMESA Competition Rules of 2004, as amended by the COMESA Competition [Amendment] Rules, 2014 (the "**Rules**");

Conscious of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation of 2015;

Recalling the overriding need to establish a Common Market;

Recognising that anti-competitive mergers may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA Member States;

Considering that the continued growth in regionalization of business activities correspondingly increases the likelihood that anti-competitive mergers in one Member State may adversely affect competition in another Member State,

Desirability of the overriding COMESA Treaty objective of strengthening and achieving convergence of COMESA Member States' economies through the attainment of full market integration,

Having regard to the COMESA Merger Assessment Guidelines of 2014,

Determines as follows:

Introduction and Relevant Background

1. On 9 May 2023, the COMESA Competition Commission (the "**Commission**") received a notification for approval of the merger involving Vitol Emerald Bidco (Pty) Ltd (**VEB**) and Engen Limited (**Engen**), pursuant to Article 24(1) of 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.

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The Parties

VEB (the acquirer)

4. VEB is a company incorporated in accordance with the laws of South Africa. VEB is a newly formed company established for purposes of the Proposed Transaction. VEB is currently a subsidiary of Vitol Africa B.V. However, before the closing of the Proposed Transaction the shares held by Vitol Africa B.V. in VEB will be transferred to Vivo Energy Emerald Holding B.V. This company is ultimately controlled by Vivo Energy Limited. Vivo Energy and its subsidiaries are referred to collectively as "**Vivo Energy**".

5. Both VEB and Vivo Energy are ultimately controlled by Vitol Holding II SA ("**Vitol Holding**") from a competition law perspective. Vitol Holding and its subsidiaries and affiliates are referred to as the "**Vitol Group**"[2].

6. In the Common Market, the Vitol Group is primarily engaged in the trading, import and upstream (bulk) supply of crude oil, diesel (also known as gasoil), gasoline (also known as petrol), bitumen, ethanol, jet fuel and liquefied petroleum gas ("**LPG**") to the Vitol Group's downstream group companies as well as to other customers.

7. Through Vivo Energy, the Vitol Group is also involved in the downstream supply of:

    a) Diesel, gasoline, jet fuel, kerosene (for non-aviation purposes), bunker fuel and lubricants to commercial customers; and

    b) Diesel, gasoline and lubricants through a dealer operated network of Shell or Engen-branded retail service stations.

8. The Vitol Group is active (i.e., generates turnover) in 14 Member States, namely Democratic Republic of Congo (**DRC**), Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Tunisia, Uganda, Zambia and Zimbabwe. The Vitol Group's activities per COMESA Member State in the preceding financial year are set out below:

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[2] The Vitol Group acquired control of Vivo Energy in 2022. The transaction was approved unconditionally by the Commission on 29 May 2022.

Table 1 - Activities of the Acquiring Group in the Common Market

Member State	Acquiring Group activity/ies
DRC	• Trading of gasoline, gasoil and jet fuel • The supply of gasoline, gasoil and lubricants to commercial customers
Djibouti	• Trading of refined petroleum products (gasoline, gasoil, and LPG)
Egypt	• Trading of refined petroleum products (bitumen, gasoline, gasoil). The Vitol Group supplies the national oil company (Egyptian General Petroleum Corporation (EGPC)) under tender and also supplies a small number of other companies in Egypt on a spot basis that then themselves supply EGPC.
Kenya	• Trading of refined petroleum products (gasoline, gasoil, bioethanol and jet fuel) • The supply of fuel storage capacity (via VTTI) • The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers • The supply of LPG to retail and commercial customers • The supply of lubricants to retail and commercial customers • The supply of aviation fuel to commercial customers • The supply of ethanol to commercial and retail customers
Libya	• Trading of refined petroleum products (gasoline and gasoil). The Vitol Group supplies the national oil company (**NOC**) under tender and term basis, and also supplies a limited number of other companies in Libya on a spot basis that then themselves supply NOC.
Madagascar	• The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers • The supply of lubricants to retail and commercial customers
Malawi	• The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers • The supply of lubricants to retail and commercial customers
Mauritius	• The retail supply of gasoline, gasoil and lubricants to retail customers • The supply of gasoline, gasoil, jet fuel, bunker fuel and lubricants to commercial customers • The supply of LPG to commercial customers
Rwanda	• The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers • The supply of lubricants to retail and commercial customers
Sudan	• Trading of refined petroleum products (gasoline, gasoil and LPG)

Tunisia	• Trading of refined petroleum products (crude and gasoline) • The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers • The supply of LPG to commercial customers • The supply of lubricants to retail and commercial customers
Uganda	• Trading of refined petroleum products (gasoil, gasoline and jet fuel) • The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers • The supply of LPG to commercial customers • The supply of lubricants to retail and commercial customers • The supply of aviation fuel to commercial customers
Zambia	• Trading of refined petroleum products (gasoline and gasoil) • The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers • The supply of lubricants to retail and commercial customers
Zimbabwe	• Trading of refined petroleum products (gasoline and gasoil) • The retail supply of motor fuels (i.e., gasoline and gasoil) • The supply of fuels to commercial customers

Engen (the target)

9. The target firm is Engen, a company incorporated in accordance with the laws of South Africa. The Engen Group is an African-based energy group focused on the marketing, supply and distribution of petroleum products (including petrol, diesel and lubricants) through an extensive network of approximately 1,300 service stations and numerous commercial clients across seven countries in sub-Saharan Africa and the Indian Ocean Islands.

10. The Engen Group is active (i.e., generates turnover) in 3 COMESA Member States, namely the DRC, Mauritius and Eswatini. The Engen Group's activities per COMESA Member State in the preceding financial year are set out below:

DRC

i. In the DRC, the Engen Group has a controlling interest in Engen DRC S.A., which is involved in (a) the supply of (diesel and gasoline) through dealer operated service stations, and (b) the supply of certain refined fuel products (diesel, gasoline and jet fuel) to commercial customers. The Engen Group also supplies lubricants to commercial and retail customers, as well as distributors.

ii. Engen DRC owns and operates for its own use two large fuel storage depots, one in Kinshasa to service the western part of the DRC and the other in Lubumbashi to service the eastern part of the DRC. Engen DRC also owns and operates for its own use a number of smaller fuel depots across the DRC, namely in Ingongo, Kisangani, Kindu, Bakavu, Bunia and Goma, and a lubricant depot in Kinshasa. Engen also holds a non-controlling interest in Service des Entreprises Petrolieres Congolaises (**SEP Congo**). SEP Congo's main operations centre around its ownership and management of a large proportion of the storage facilities in the DRC. Additionally, SEP Congo provides logistics and customs support to firms active in the local refined fuels supply chain.

Eswatini

iii. The Engen Group supplies gasoline, diesel and lubricants to commercial customers in Eswatini. In addition, Engen's retail operations in Eswatini comprise a network of retail dealer operated service stations, which supply retail customers with gasoline, diesel and lubricants.

iv. Engen also owns and operates for its own use a fuel storage depot and a lubricant warehouse in the same premises in Matsapha.

Mauritius

v. The Engen Group is involved in (a) the supply of certain refined fuel products (diesel and gasoline) though dealer operated service stations, and (b) the supply of certain refined fuel products (diesel, gasoline, jet fuel, kerosene (for non-aviation purposes) and bunker fuel (being diesel for marine use)) to commercial customers. The Engen Group also supplies lubricants to commercial and retail customers, and distributors.

vi. Engen also owns and operates for its own use a fuel storage depot and a lubricants depot in Port Louis. It also has a non-controlling interest in the Mer Rouge Oil Storage Terminal. Engen also forms part of a joint venture that owns a jet fuel storage facility at the Sir Seewoosagur Ramgoolam International Airport.

Jurisdiction of the Commission

11. 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:

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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 USD 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 USD 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 undertakings concerned together have operations in two or more Member States. The undertakings concerned have a combined turnover in excess of the threshold of USD 50 million in the Common Market. In addition, the parties each derived turnover of more than USD 10 million in the Common Market and they did not derive 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.

Referral to Member States

13. Article 24(8) of the Regulations provides that a Member State may request the Commission to refer a merger to a competent authority of the Member State for consideration under the Member State's national competition law if such Member State is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in such Member State or any part of such Member State.

14. On 2 June 2023, the Competition Commission of Mauritius ("**CC**") submitted a request for referral of the merger on the grounds, *inter alia*, that:

i. The merger was a complex transaction involving potentially several markets in Mauritius, which may include supply of storage facilities for jet fuel, uploading of jet fuel, storage and distribution logistics of marine fuel, franchising of fuel station, supply of lubricants and services related to supply of petroleum products among others. In most of those markets the post-merger market share of the parties would be significant.

ii. The merger would result in 3 players from 4 in most sectors and could result in significant concentration, and various players at the national level expressed concerns with the transaction.

iii. Petroleum products and liquid petroleum gas were products of strategic importance to the country, affecting several other sectors and the economy at large.

15. The CC further submitted that the scope of the exclusion of petroleum products under the Mauritian Competition Act was to be interpreted narrowly and accordingly, the CC had jurisdiction on the products and services under consideration.

16. On 23 June 2023, on the basis of the submissions of the CC's jurisdiction on petroleum related products and services and noting the significant operations of the merging parties in Mauritius, and the national character of several potentially affected markets, pursuant to Article 24(9)(b) of the Regulations, the part of the transaction relating to the Mauritian markets was referred to the CC, with the Commission retaining jurisdiction over the parts of the transaction relating to markets outside Mauritius.

Details of the Merger

17. The notification concerns the proposed transaction in terms of which VEB intends to acquire, via a share purchase agreement, 74% of the entire issued and to be issued share capital of Engen from PETRONAS.

COMPETITION ASSESSMENT

Consideration of the Relevant Markets

18. The merging parties are active in petroleum industry. Specifically, they are both active in the retail and wholesale supply of diesel, petrol, lubricants, jet fuel and bunker fuel. In addition, the acquiring group is also active in the trading, import, and bulk supply of crude oil, diesel, petrol, bitumen, jet fuel, and LPG to downstream customers. The merging parties are also involved in tank-terminal storage in the Common Market. The transaction thus gives rise to potential horizontal and vertical effects.

Relevant Product Market

19. Paragraph 7 of the Commission's Guidelines on Market Definition states that a *"relevant* product *market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer/customer, by reason of the products' characteristics, their prices and their intended use".*

20. The oil industry generally consists of the following activities:

    i. Oil exploration, extraction and transportation;

    ii. The production, refining, storage and transportation of petroleum products produced from crude oil, coal and/or natural gas;

    iii. The import and distribution of refined fuel products (particularly in markets without sufficient domestic production to meet local demand); and

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iv. The retail and non-retail marketing, distribution and sale of refined fuel products to customers.

21. The transaction does not raise competition concerns in the markets for exploration, development and production of crude oil, given that neither of the merging parties are active at that level. These activities can be distinguished from the trading and sale of petroleum products as they require distinct equipment for drilling and extraction, licenses for exploration, development of infrastructure for production (such as oil platforms, pipelines and terminals). In view of the foregoing, the assessment is limited to the trade and distribution markets where the parties operate.

22. The supply of refined fuel products can be grouped into two broad categories, the first consisting of the refining, transportation and bulk supply of refined fuels (including gasoline, diesel and jet fuel) (i.e., the upstream market), and the second consisting of the retail marketing and distribution of these products to retail and commercial (large industrial) customers (i.e., the downstream market).

Upstream Supply of Refined Fuels

23. Ex-refinery sales of refined fuel products constitute a primary level of distribution whereby large cargo volumes are sold by refiners directly at the refinery gate or delivered by primary transport (i.e., generally by rail, pipeline, ship or barge) to customers' terminals or storage facilities. The customers are wholesalers, traders or large resellers.

24. Trading activities generally include (i) offtake agreements with oil producers and refineries for purchase of refined fuels; (ii) storage of petroleum products tankage around the globe; and (iii) delivery to customers via barge, trucks, rail, pipeline or vessel. It is noted that these activities can be provided as a package by vertically integrated companies or separately by independent players.

25. The contractual terms and conditions applied at ex-refinery level are likely to differ from the downstream sales channels in view of expected higher volumes off-taken ex-refinery, compared to volumes offered via the non-retail channel at the downstream level[3]. The non-retail market encompasses sales made to smaller resellers as well as retail sales made to large industrial and commercial consumers.

26. Ex-refinery sales of fuel products should be segmented by product type into sale of gasoline, diesel, crude oil, jet fuel and LPG. At this level, it is not possible to aggregate the different types of fuels into one category from a supply perspective. The different fuels are supplied for different uses to different types of customers. There are also

[3] Decision of the European Commission (**EC**) in Case No COMP/M.7311 - MOL / ENI CESKA / ENI ROMANIA / ENI SLOVENSKO, dated 24/09/2014, at paragraph 13. Accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m7311_20140924_20310_3893113_EN.pdf

differences in physical specifications such as viscosity, sulphur and metal content which can influence the transportation and storage facilities required. In the light of the above, each refined fuel product will be construed as a relevant product market.

Downstream Supply of Refined Fuels

27. The merging parties are both engaged in the retail and non-retail supply of petroleum products. In line with the CID's previous decisions in the petroleum and petrochemical sector[4], the retail channel has been distinguished from the non-retail-channel:

i. Retail Supply of Automotive Fuels

28. The retail supply for automotive fuels involves providing automotive fuels to individual customers through retail service stations. The products sold are predominantly gasoline and gasoil. From a demand perspective, it is not possible to aggregate gasoline and gasoil into one category. For instance, although they are both intended to fuel motor vehicles, the two are not substitutable as they must be used according to the type of engine of the buyer's car. Gasoil is purchased by users of diesel-powered cars while petrol is purchased by petrol engine cars. Gasoline pumped through the fuel system of a diesel vehicle can cause serious damage to the engine. Per litre, gasoil is said to contain more energy than gasoline and the vehicle's engine combustion process is more efficient, adding up to higher fuel efficiency and lower CO^2 emissions when using gasoil[5].

29. Nonetheless, from the supply side, there is substitutability as the same players tend to be active in both types of fuels (e.g., Puma, Shell, Total). At the distribution level, both products are typically available at the same point of sales. In the event of a small but significant increase in price of diesel for instance, the oil marketing companies supplying petrol to the filing stations would be able to also start supplying diesel with relative ease and no significant risks. For purposes of this case, the relevant market was identified as the broad market for the retail supply of motor fuels.

ii. Supply of Lubricants

30. Lubricants are blends of base oils and a number of chemical additives, each contributing their specific properties to the finished products[6]. The base oils used to formulate lubricants are, generally, mineral oils produced by oil refiners from the residue of crude oil left after separation of the other major oil products. Base oils have

[4] CID decision in ***VIP II Blue B.V./Vivo Energy Plc,*** accessed at: https://comesacompetition.org/wp-content/uploads/2023/05/CID-Decision-VIVO-ENERGY-VIP-II-BLU.pdf, and ***Trafigura Group/ Puma Energy Holdings***, accessed at https://comesacompetition.org/wp-content/uploads/2021/05/CID-Decision-Trafigura-Puma-Redacted.pdf

[5] See at https://www.acea.auto/fact/differences-between-diesel-and-petrol

[6] Decision of the EC in Case COMP M.1891 ***BP Amoco/Castrol***, paragraph 11. Accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m1891_en.pdf; COMP M.2208 - ***Chevron/Texaco***, paragraph 14. Accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m2208_en.pdf .

various performance capabilities due to their different chemical/physical compositions resulting from different crude feedstocks and refinery processes and are classified on the basis of their inherent characteristics.

31. Automotive lubricants have traditionally been distinguished from other types of lubricants[7] (for instance, jet lubricants, industrial lubricants or marine lubricants).

i. **Automotive lubricants** are either engine oils or transmission oils. As these are substitutable from the supply side and as the range of products is fairly limited, they cannot sensibly be further divided. Industrial lubricants cover a vast number of specific products for different uses but customers demand the full range of lubricants for their operations rather than sourcing individual lubricants from different suppliers. In ***BP/Mobil***, it was held that this range effect, combined with the very strong supply side substitutability would seem to indicate a single market for industrial lubricants.

ii. **International marine lubricants** are used to lubricate marine diesel engines of deep draft vessels running on heavy fuel (with high sulphur content) and are specially formulated to cope with the extreme conditions encountered in the engines of ocean-going vessels. These lubricants require approvals from Original Equipment Manufacturers (OEMs).

iii. **Aviation lubricants** are highly specialised products that are made to customer specifications and require approvals from relevant organisations including OEMs and the relevant military authorities. It seems relevant to distinguish jet lubricants from lubricants for piston driven aircraft (as used in light aircraft). The former are high performance ester-based turbine lubricants, while the latter are mineral based and usually less sophisticated than even some automotive lubricants. Mineral based lubricants can only obtain approval for the use in piston driven aircraft and the cost of obtaining these approvals is much lower than for turbine oils. Thus, both demand- and supply considerations tend to indicate that lubricants for piston engine aircraft do not fall within the same product market as turbine oils.

32. While there is very limited demand side substitutability, there is a certain degree of supply-side substitutability between the different types of lubricants, *albeit* in different degrees. In blending plants, base oils can be blended with different additives to manufacture different types of lubricants. Switching between different types of industrial or different types of automotive lubricants is reported to be a relatively simple operation, as it appears possible to switch between industrial and automotive lubricant

[7] CID decision in ***VIP II Blue B.V./Vivo Energy Plc*** of 31 May 2022, paragraph 21. Accessed at: https://comesacompetition.org/wp-content/uploads/2023/05/CID-Decision-VIVO-ENERGY-VIP-II-BLU.pdf See also EC Exxon/Mobil Case No. IV/M.1383, paragraph 806. Accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m1383_en.pdf.

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production using the same equipment, though it generally takes longer to clean out the system to ensure that there is no contamination between products[8].

33. In view of the foregoing, in this case, it is appropriate to assess automotive lubricants, industrial lubricants and international marine lubricants separately.

iii. Non-Retail Supply of Fuel Products

34. The non-retail supply involves providing fuels to commercial size or bulk customers. Usually, these customers have on-site storage facilities such as small to medium sized tanks and require direct delivery of petroleum to their on-site operations. More often than not, the storage facility is leased to the customer as part of the delivery service and is branded by the oil marketing company. Due to the size and trend of purchases, commercial customers tend to be able to negotiate discounted rates with oil marketing companies.

35. Similar to the ex-refinery market, there is both limited demand and supply side substitutability for the various types of refined fuel products. The distribution channels and infrastructural set-up differ significantly, for example, the provision of petrol to a transport fleet operator will differ from the supply of marine fuel at ports. In the light of the above, in the non-retail channel, each refined fuel product (gasoil, gasoline, jet fuel, bunker fuel, LPG) constitutes a relevant product market.

i. The **jet fuel** market comprises supply of jet fuel at the airport under contract with the airlines, and arrangements with servicing companies that operate the airport fuelling infrastructure and perform the actual into plane fuelling services with tank trucks to the plane for a fee paid by the suppliers[9]. The CID has previously held that the market for non-retail sale of jet fuel is a distinct market from automotive fuels having regard to limited demand and supply substitutability.

ii. **Marine (bunker) fuels** are used in marine engines which power marine vessels.[10] They are residual heavy fuels constituting bottom draw from the refinery, remaining at the end of the refining process after cleaner and higher value fuels such as diesel and petrol have been refined. They are viscous and high in contaminants and need to be heated before combustion in marine diesels. Marine fuels are also sold for consumption in marine type diesels used on-shore, e.g. for small scale power generation. Marine fuels are a commodity product for which technical specifications are the same worldwide and are classified in different viscosities; they are bought and [redacted]. The CID

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[8] EC decision in Case No IV/M.727 - ***BP / Mobil***, paragraphs 29 to 32. Accessed at: https://ec.europa.eu/competition/mergers/cases/decisions/m727_en.pdf

[9] See EC decision in Exxon/Mobil Case No. IV/M.1383 (para 806)

[10] EC decision in Case No COMP/M.6697 - O.W. BUNKER/ BERGEN BUNKERS, paragraph 8.

has previously considered the sale of bunker fuels as a market separate from other residual (industrial) fuels.

iii. **LPG** is flammable hydrocarbon gas liquefied through pressurisation. LPG comes from natural gas processing and oil refining. LPG is used for cooking, hot water production, heating or cooling in the residential sector and the commercial sector, for the heating of greenhouses, weeding and heating of breeding places in the agricultural sector as well as for industrial food production, ceramics, and welding asphalt treatment. The overall LPG market can be further segmented into (i) LPG sold in cylinders of different dimensions, mostly for domestic and light commercial use, and (ii) bulk LPG for industrial use. The above notwithstanding, given that the target was not involved in the LPG market pre-merger, and the transaction would thus not change the dynamics of the LPG market, the CID has not further considered this market in its assessment.

iv. Storage of fuel products

36. Storage depots for petroleum products serve both a logistic and strategic function. They are used for the collection and distribution of refined products by different petroleum operators. The availability of storage capacity within the petroleum depots allows operators to build reserves of refined products, more or less lasting and able to satisfy downstream demand, as well as to protect themselves against price fluctuations of petroleum products. The availability of such logistic infrastructures constitutes a prerequisite for the access to the markets for the final distribution of refined products. Owning storage assets in Africa is essential to control costs, guarantee supply and manage product quality[11]. In view of the foregoing, a separate market was identified for provision of storage facilities to third parties.

37. Both parties' storage tanks are designed for gasoline and gasoil[12]. Bulk liquid storage markets can be segmented by type of product (e.g., chemicals, petroleum, edible oils). The tanks used are different in their technical characteristics, size, and side-equipment (pipeline connections, berths, jetties, etc.)[13]. Some of these differences are due to different regulatory requirements that apply to particular products. For instance, since 'edible oils' are neither flammable nor explosive, they can be stored in tanks which are located at short distance from each other. However, other liquids such as crude oil, petroleum and chemicals, for safety reasons, must be stored in tanks which

[11] https://investors.vivoenergy.com/~/media/Files/V/Vivo-Energy-IR/reports-and-presentations/2019/Company%20Presentation%20-%20October%20-%20Final.pdf, accessed on 16 April 2022.
[12] https://www.vtti.com/terminal/vtti-kenya-mombasa/#:~:text=VTTI%20Kenya%20is%20one%20of,Kipevu%2C%20Changamwe; https://www.vivoenergy.com/News/tabid/1368/entryid/7049/vivo-energy-kenya-opens-a-23-million-litre-diesel-storage-tank-in-mombasa.aspx.
[13] EC decision in COMP/M. 4532 Lukoil /ConocoPhillips, paragraph 14, IV/M.1621 – Pakhoed / Van Ommeren (II), paragraph 8-11.

are further apart. Furthermore, being edible materials, edible oils cannot be stored in tanks used previously for the storage of, for instance, petroleum. Edible oils also typically require less storage capacity than petroleum products, which would make switching tanks ineffective and uneconomical. Therefore, the relevant product market is construed as the market for the storage of petroleum products.

38. From the above analysis, the following product markets have been determined:

a) Upstream trading and supply of refined fuels segmented by type of fuel (gasoil, gasoline, and jet fuel)

b) Non-retail supply of refined fuels segmented by type of fuel (gasoil, gasoline, bunker fuel, and jet fuel)

c) Retail supply of automotive fuels

d) Supply of lubricants segmented by type of lubricant (automotive, international marine and industrial lubricants), and

e) Storage of petroleum products.

Relevant Geographic Market

39. The Commission's Guidelines on Market Definition define the relevant geographic market as follows:

"The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas"[14].

<u>*Ex-refinery market*</u>

40. The acquiring group sources fuel products [redacted]. For the Western parts of the DRC sourcing takes place globally, although generally from [redacted] For the Eastern parts of the DRC sourcing happens from [redacted] Sourcing for Mauritius takes place from [redacted]

41. Energy traders operate on a global basis and the orders placed for the sale and purchase of crude oil and refined petroleum products occur internationally and are not limited to a particular geographic region. Since these transactions typically involve big quantities of refined products which can travel long distances given the relatively low transport costs, cargo market prices around the world track each other closely. For

[14] Paragraph 8.

these reasons, the CID has in its past decisions identified a global market for ex-refinery sales[15].

42. Having regard to the fact that fuels are imported into the Common Market, the absence of restrictions on the source of origin of fuel, and the global operations of the Vitol Group, the CID considered that the geographic market for ex-refinery sales is likely to be at least COMESA-wide and possibly global in scale.

Non-retail and retail markets for gasoline and gasoil

43. The geographic markets for retail and non-retail supply of automotive fuels are likely to be national in scope as the petroleum sector is heavily regulated in most Member States[16] and maximum prices and/or price fluctuations range tend to be fixed by regulatory bodies[17].

44. It is noted that the parties' activities in the non-retail supply of automotive fuels overlap in Mauritius and the DRC. Given that the part of the transaction relating to Mauritius has been referred to the CC, the focus of the competitive assessment is limited to DRC.

45. Having regard to the expansive surface area of the DRC markets, the CID considered narrower local areas within the DRC for purposes of constructing the relevant geographic markets. The importation of fuel into each of the east and south of the DRC is slightly different to that in the west of the DRC. In the west of the DRC, imports are organised by a centralised import committee which consists of representatives from the DRC Government, oil product traders, owners of storage and local distributors and marketers. Imported gasoline, diesel and jet fuel arrives by ship to

[15] CID decision in ***VIP II Blue B.V./Vivo Energy Plc*** , and ***Trafigura Group/ Puma Energy Holdings***.

[16] For example, in DRC - the market is open and prices are regulated by the energy ministry; in Kenya - a monthly Open Tender System (OTS) is adopted with the price of gasoil and gasoline (as well as a specific type of kerosene) regulated by the energy ministry; in Rwanda - the market is open and prices are regulated by the Rwanda Utilities Regulatory Authority (RURA) in collaboration with the Ministry of Trade and Industry; in Tunisia - the market is regulated and imports of petroleum products operate under a state monopoly, in Mauritius - the State Trading Corporation is the state monopoly buyer which institutes an annual tender process and prices are regulated by the energy ministry in respect of gasoil, gasoline and jet fuel; in Uganda - the market is open, however it is linked to the Kenyan OTS system in terms of pipeline access and prices are regulated by the energy ministry; in Zambia - the market was previously a state monopoly with the energy ministry importing products via a tender process, the market is presently moving to a hybrid model of private imports and tenders, with prices being regulated by the ministry of energy; and in Zimbabwe: prices are regulated by the energy ministry.

[17] See for instance listed price structure by Mauritius State Trading Corporation (https://www.stcmu.com/ppm/price-structure); Zimbabwe's Petroleum Products Pricing Regulations 2019 (https://www.zera.co.zw/wp-content/uploads/2021/04/S1-10-OF-2019-Petroleum_Products_Pricing.pdfhttps://www.zera.co.zw/fuel-prices-reviewed-downward/); Zambia's Energy Regulation Act of 2019 (https://www.erb.org.zm/press/statements/2020-09-16_PressStatement.pdf).

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Muanda, where it is offloaded into storage facilities owned by parastatal Société Congo-Italienne de Raffinage ("**SOCIR**"), or further up the Congo River to the Port of Matadi, where it is offloaded into storage facilities owned by industry participants such as SEP Congo, SPSA Cobil and Lerexcom. In the case of product that arrives in Muanda, it is transported by barges owned by SOCIR to SEP Congo's facility in Matadi. From Matadi, product is either transported via SEP-Congo-owned pipeline or trucks to Kinshasa, where various retail and commercial suppliers of refined fuels (such as Engen and Puma) have storage facilities. Product can then be further transported, either via barges or trucks, to smaller storage facilities across the west of the DRC.

46. In both the east and the south, any local firm can import and manage the transport of refined fuel products. As such traders supply imported product either on a delivered-at-place Lubumbashi basis or an ex-tank basis from a neighbouring country. All gasoline, diesel and jet fuel supplied in the east and the south of the DRC is imported from neighbouring countries such as Mozambique, Uganda and Tanzania. These products are transported into the DRC via truck. Once products arrive in the DRC, they are stored in facilities owned by local retail and commercial suppliers of refined fuel, such as United Petroleum and Congo Petrole.

47. The acquiring group only supplies certain commercial customers in the east of the DRC, which could suggest that differences in conditions of competition across the different regions.

48. In view of the foregoing, the CID considered that the relevant geographic markets for non-retail supply of automotive fuels can be segmented into the west, east and south parts of the DRC.

49. In the case of retail supply of fuels, transport costs are often an important factor in the identification of narrower markets[18]. From a geographic standpoint, retail supply of fuel is characterised by a local element in so far as the demand is constituted by motorists who are normally supplied by the filing stations near to their centre of activity. There is normally a certain overlap between filing stations' catchment areas, which will not only determine the competitive interactions between filing stations located close to each other, but will also, to some extent, have an effect on more distant filing stations. Further, though retail prices are set at national level, retail players may have varying market presence in different localities. While retail fuel is perceived as a fundamentally homogeneous product, the marketing strategy of market operators, however, often focuses on non-price characteristics, such as quality (e.g., sulphur content, additives, compliance with standards). Differentiation between service stations may also result from additional services provided, such as convenience stores

[18] See European Commission decision in Repsol YPF/Shell Portugal, 13 September 2004 (para 12), COMP/M.3516.

and loyalty cards. In this regard, the CID considered that the relevant geographic markets for retail supply of automotive fuels is narrower than national and can be grouped by localised areas depending on competition dynamics such as distances between filing stations, number of filing stations within the area, non-price competition factors etc.

50. The parties' activities in the retail supply of automotive fuels overlap only in Mauritius. While the acquiring group does not have presence in the retail segment in DRC, it is involved in the upstream supply of refined fuels, which may have an impact post-merger on the downstream retail market. For this reason, the CID considered that the retail supply of automotive fuels in the DRC remains a relevant market for purposes of the assessment, which geographic scope can be segmented can be segmented into the west, east and south regions of the DRC.

Jet fuel market

51. In line with its past decisional practice for jet fuel[19], the CID considered that the geographic market is likely to be airport specific as it depends on the supply contracts and the fuelling infrastructure at the airport. It is noted that the overlap only occurs in Mauritius and DRC. The assessment will focus on the affected airports within DRC.

Bunker fuel market

52. In previous cases, the CID held that the market for the sale of bunker fuel was national in scope. Customers may choose between several ports for bunkering, and as a result bunker prices in ports may constrain each other beyond national borders. Further, bunker traders located anywhere in the world may trade in the supply of bunker fuel to any country. It is noted that the overlap only occurs in Mauritius. As a result, the assessment has not further considered the market for supply of bunker fuel.

Lubricants markets

53. The relevant geographic market for automotive, international marine, and industrial lubricants is likely broader than national. For instance, all lubricants in Mauritius and DRC (where the parties' operations overlap) are imported. To the best of the acquiring firm's knowledge, lubricant imports into Mauritius and the DRC take place mainly from the United Arab Emirates (the "**UAE**"), China, France, Italy, Malaysia, Egypt, South Africa, Germany, India, Japan, Korea and Thailand. The acquiring group imports most of its lubricants for Mauritius from [redacted] and for the DRC from [redacted]. Engen imports its

[19] Decision of the 80th meeting of the CID regarding the proposed acquisition by Trafigura over Puma Energy, dated 15 December 2021.

COMESA COMPETITION COMMISSION 28 AUG 2023 lubricants for both Mauritius and the DRC [redacted]. There are no major imports barriers and hence there are many independent lubricant suppliers.

54. Whilst within COMESA, there are lubricant blending plants in Egypt, Kenya, Libya, Tunisia and Sudan, it is noted that there are significant trade flows between the affected Member States and other countries for the import of lubricants. Lubricants are specified according to international standards and can be largely traded across Member States[20]. The relevant market is thus likely to be at least COMESA-wide, and plausibly wider.

Storage of petroleum products

55. The approach to the geographic scope of the market for the storage of petroleum products has varied from being national, regional or local (i.e. limited to a radius of 150km around the relevant storage depot) depending on the size of the relevant country. In the Common Market, the parties' storage facilities which are made available to third parties are located in Mauritius and Kenya (Nairobi and Mombasa). Engen does not sell storage space to third parties in Mauritius, while the acquiring group provides approximately [redacted] of its total storage space to third parties[21]. The parties confirmed that in the DRC, neither of the merging parties sell storage space to third parties in the DRC. Given that the target does not operate in Kenya, and in the absence of operations by either party in the DRC, the CID has not further considered the storage market in its assessment.

Conclusion on Relevant Markets

56. On the basis of the foregoing assessment, and without prejudice to the CID' approach in similar future cases, the relevant markets have been identified as the national provision of:

a) **Upstream trading and supply of refined fuels segmented by type of fuel (gasoil, gasoline, and jet fuel) at global level**

b) **Retail supply of automotive fuels in the east, west, and south of DRC**

c) **Non-retail supply of each of gasoline and gasoil in the east, west, and south of DRC**

d) **Supply of jet fuel to commercial customers at airports in DRC**

e) **Supply of lubricants segmented by type of lubricant (automotive, marine and industrial lubricants) in the Common Market.**

[20] The EC adopted a similar approach in defining the geographic market for lubricants in ***Galp Energia/ExxonMobil*** *Iberia*.
[21] Information claimed as confidential by the merging parties.

Consideration of Substantial Lessening of Competition or "Effect" Test

A. *Upstream Trading and Supply of Refined Fuels Segmented by Type of Fuels at Global Level*

57. The acquiring group submitted that it is not in possession of objective third party data of global market shares for suppliers of refined petroleum products. It has calculated its own global market shares to be [0-10]% for gasoline, [0-10]% for gasoil and [0-10]% for jet fuel, based on its own volumes in 2022 divided by International Energy Agency data in respect of global demand for those products in 2019 (which it believes is a good proxy for 2022).

58. It is recalled that only the acquiring group is present in the upstream markets for trading and supply of refined fuels. As such, the proposed transaction will not affect the existing market structure in the aforementioned markets.

59. Key to also note that the global market is very fragmented and competitive. There exist other global players operating within the Common Market which will continue to impose competitive pressures on the merging parties, including Sinopec, Shell, ExxonMobil, Equinor, and Trafigura.

B. *Retail Supply of Automotive Fuels in DRC*

60. In the DRC, Engen has a subsidiary, Engen DRC S.A., which is partially owned by Engen and by the DRC government. Engen DRC's operations centre around a network of Engen-branded retail fuel service stations, which supply retail customers with gasoline, diesel and lubricants.

61. As noted earlier, the acquiring group does not have presence in the retail segment in DRC, the transaction will therefore not result in direct market share accretion. In view of potential vertical relationship between the activities of the merging parties, the CID assessed whether the transaction can result in foreclosure concerns.

<u>*Consideration of Vertical Effects*</u>

62. There is a risk that the transaction could increase the parties' incentive and ability to engage in foreclosure at either one or both levels of the supply chain.

63. Foreclosure occurs when actual or potential rivals' access to markets is hampered, thereby reducing those companies' ability and/or incentive to compete. Input foreclosure occurs when the access of downstream rivals (in this case Engen's competitors) to an essential upstream provider is restricted. Vertical mergers may also result in customer foreclosure when they block competitors of the merged entity in the upstream market (in this case Vitol's competitors) from gaining access to market opportunities (customer base).

64. For foreclosure to be a concern, three conditions need to be met post-transaction: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the downstream competitors in the case of input foreclosure and on the upstream competitors in the case of customer foreclosure. The CID will consider these factors together since they are closely intertwined.

<u>*Input Foreclosure*</u>

65. It was submitted that volumes provided by Vitol Group at the upstream level of the market account for [redacted]% of the gasoline and [redacted]% of the diesel volumes supplied into the DRC, as of 2022.

66. In relation to the gasoline market, having regard to the limited volumes supplied by the Vitol Group, it is apparent that the downstream players have access to other competitive sources of supply. Other suppliers on the DRC market include Trafigura, Total, Sahara and Glencore. As such, the CID was satisfied that the Vitol Group would not be able to engage in input foreclosure for the supply of gasoline.

67. In relation to the gasoil market, whilst at global level, Vitol is a relatively small player in the upstream market, the CID observed that the Vitol Group constitutes a significant supplier in DRC. The price of sales of gasoline and diesel to retail customers is regulated, which would prevent the merged entity from raising their prices to competitors of Engen; nonetheless, the CID considered whether the merged entity could engage in other restrictive behaviour such as refusing to supply Engen's competitors, or prioritising supply to Engen over its competitors during periods of shortage or bottlenecks in supply which may distort competition in the downstream markets. From information submitted by the Commission Nationale de la Concurrence de la République démocratique du Congo ("**CONAC**"), and as shown in the graph below, it appears that in 2022, Engen accounted for [0-10]% of Vitol's sale of fuels into DRC, which is relatively insignificant. Vitol's [redacted] was [][22] (accounting for [90-100]% of sales by Vitol in DRC in 2022). Should the merged entity decide to divert its supplies to Engen, Vitol's customers would be affected if Vitol does not have sufficient capacity to continue supplying them in addition to Engen.

Figure 1 - Share of Purchases by Vitol's Customers out of Vitol's Total Sales of Fuels in DRC (2022)

[][23]

[22] Confidential information.
[23] Confidential information.

68. The CID nonetheless noted that the volumes supplied by the Vitol Group in DRC amount to approximately [30-40]% of the total market volumes, which therefore suggests that the remaining [60-70]% of the national retail market is supplied by competitors of Vitol. In the west of the DRC, the centralised import committee deals with a number of oil traders such as Trafigura and Sahara on a frequent basis. Any volumes currently supplied by Vitol Group could thus be replaced by these suppliers, or the almost 20 other suppliers that hold a Contrat de Fourniture but are not currently importing product into the west of the DRC. Similarly, in the east and the south of the DRC, any downstream rivals that are supplied by Vitol Group could potentially replace these volumes with volumes from other upstream suppliers such as Trafigura, Sahara, Glencore and others. It is also relevant to note that the volumes that are supplied into the east and the south of the DRC come from neighbouring countries, and hence any supplier of gasoline and diesel in those countries could potentially supply to the DRC.

69. It, therefore, does not appear that the merged entity would have the ability to engage in an anti-competitive foreclosure strategy as the acquiring group does not have market power in the upstream market and thus, competitors of Engen in the retail market would still have access to other strong suppliers which include Trafigura and Sahara. In the same vein, the merged entity would not have a financial incentive to engage in input foreclosure; it is recalled that pre-merger, Engen was an insignificant source of sales for Vitol. Any strategy of total or partial input foreclosure would entail Vitol Group no longer supplying, or reducing supplies to, its existing customers. From Table 1 below, it can be seen that Engen was already a significant player in the retail market. [][24], Vitol's main customer pre-merger, have a relatively small presence in the DRC retail market, with only [][25]. For the foreclosure strategy to be financially viable, the gains from excluding these customers from the retail market (and thus sales being diverted to the merged entity) would need to exceed the lost sales from the foreclosure strategy. Having regard to the relatively small market position of Vitol's existing customers, and the presence of alternative suppliers on the upstream market to whom these customers can turn to, it is highly unlikely that Engen's market position could be enhanced to such an extent in the retail market that would offset the lost sales by Vitol to the downstream competitors.

[24] Confidential information.
[25] Confidential information.

Table 2 - Estimated market shares of Engen and its main competitors for the retail supply of automotive fuels in the DRC[26]

Competitors	Estimated market shares	
	2021	2022
Engen DRC SA	[20-30]%	[30-40]%
Total Energies	[20-30]%	[20-30]%
Cobil	[10-20]%	[10-20]%
Sonahydroc	[0-10]%	[0-10]%
Independents	[30-40]%	[20-30]%

70. The parties further confirmed that "*in a scenario where Engen were to request the Vitol Group to supply 100% of its DRC requirements, the Vitol Group would have sufficient capacity to supply the full requirements of Engen in the DRC whilst also maintaining the full supply of the Vitol Group's existing customers in that country*". It was further submitted that it would be straight forward for the Vitol Group's existing customers to switch to other fuel suppliers as there are limited barriers to switching given the commoditised nature of the product the Vitol Group sells and the number of sophisticated players competing with the Vitol Group in the market. It is further noted that Vitol Group has been appointed as [][27] sole supplier since 2019, and the supply agreement also sets out the considerations for the pricing structures and terms of delivery, which would reduce the risks and ability of the Vitol Group to engage in anti-competitive discriminatory practices between [redacted] and Engen post-merger.

71. In view of the foregoing, the CID is therefore satisfied that there are no risks of input foreclosure materialising in the DRC markets as a result of this transaction.

<u>Customer Foreclosure</u>

72. It is noted that pre-merger, [][28] was Engen's main supplier of gasoline, and gasoil, and was appointed through a tender process. [redacted] accounted for [90-100]% of Engen's total purchases in 2021 and [90-100]% in 2022. Engen's remaining purchases were sourced from [][29].

73. As seen above, in 2022, Engen was the market leader in the retail supply of automotive fuels in the DRC, with an estimated market share of [30-40]%. If as a result

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[26] The Commission's research from public sources also confirmed that the top three retail distributors in the DRC market are Engen, Total, and Cobil sa. (Source: '20 years of Cobil in DRC', Accessed at: https://actualite.cd/2023/05/30/rdc-20-ans-de-cobil-sa-le-gouvernement-salue-les-progres-et-promet-de-la-rendre).

[27] Confidential information.

[28] Confidential information.

[29] Confidential information.

COMESA COMPETITION COMMISSION * 29 AUG 2023 of the merger, Engen decided to procure its supplies exclusively from the merged entity, this would result in the loss of a significant customer for [][30]. However, [][31] is generally recognised as a key player in the region and at global level as an upstream trader of refined fuels, and further that there are a number of competing retail players that [][32] would still be able to supply in DRC, with independents accounting for [20-30]% of the market, absent any exclusive agreements between these customers and the Vitol Group.

74. The parties have submitted that "*Engen procures its supplies of gasoil, gasoline and jet fuel in the DRC on rolling short-term* [redacted] *supply contracts. These contracts are awarded based on economic merit, taking into consideration the reliability and experience of the proposed supplier. Supply contracts are generally awarded after a tender process with suppliers. Post-acquisition, Engen will continue to procure its fuel supply for the DRC from the suppliers who offer the best value from time to time.*"

75. In order to ensure that the above is feasible, it is necessary to ensure the target would not source exclusively from the Vitol Group as a result of the transaction, which may result in a distortion of competition in the upstream market.

C. *Non-retail supply of automotive fuels segmented by type of fuel in DRC*

76. Engen is active in the supply of gasoline and diesel to commercial customers (such as mines, large industrial manufacturers, such as breweries, and construction firms) in the west, east and south of the DRC. It was submitted that [][33]. The parties clarified that customers of Vivo Energy import its products from Rwanda, Uganda, Tanzania and Mozambique, including [][34].

77. Table 3 below presents the merging parties' estimated share of supply to commercial customers (including both gasoline and diesel) at national level. The table indicates that the parties' combined share of commercial supply nationally is approximately [40-50]%, with the transaction resulting in an increment of around [0-10]%. In the east of DRC, Engen has a market share of circa [0-10]%.

Table 3 - National estimates of share of commercial supply of gasoline and diesel (2022)[35]

Party	Market share (estimate)
Engen	*[30-40]%*
Vivo Energy	*[0-10]%*
Combined	***[40-50]%***

[30] Confidential information.
[31] Confidential information.
[32] Confidential information.
[33] Confidential information.
[34] Confidential information.
[35] Information claimed as confidential by the merging parties. Source: Engen estimates, Vivo Energy internal data.

Total	[20-30]%
Cobil	[0-10]%
Others	[20-30]%
Total	**100%**

Consideration of Unilateral Effects

78. The transaction will result in the merged entity remaining the market leader, however, with a market share which is twice that of its closest competitor, Total. The third largest player on the market is Cobil, with a relatively lower market share at [0-10]%. The top three players pre-merger accounted for [60-70]% of the market, with the post-merger market concentration at the three-firm level increasing to [70-80]%. Nonetheless, it is noted that there are other independent suppliers accounting for a significant part of the market at [20-30]% who will remain on the market and may offer some degree of competitive pressures on the merged entity.

79. Commercial sales of gasoline and diesel are subject to a price cap set by the DRC government, against which suppliers can offer discounts. Therefore, the parties would be constrained in any attempt to charge higher prices to their customers. Given the relatively homogenous nature of the products at hand, it would be difficult for the merging parties to engage in aggressive discount strategies that could significantly distort the competitive process and harm consumers. On a balance of probabilities, the CID considered that the transaction will not result in such a significant market share accretion that would lead to the merged entity enjoying a dominant position on the market.

Consideration of Coordinated Effects

80. It is noted that the transaction would result in the reduction of the number of players on the market. However, there is significant asymmetry in the market share of the main competitors on the market, which would make alignment of incentives to coordinate their commercial strategies difficult. There would be no incentives for the merging parties to engage in collusive conduct with rivals in the downstream market in view of their higher market position. It is also noted that retail prices are fixed by the DRC Government, and there would be significant heterogeneity in relation to other terms of competitions (for example loyalty cards, additional services provided at filing stations which are further run by independent dealers for the target entity) which would render incentives for information sharing on cost structures unlikely. Further, it is recalled that there will remain a number of smaller players on the market which account for [20-30]% of the market, which would limit the success of coordinated actions on the market.

D. Supply of jet fuel at in DRC

81. The DRC does not have any fuel refineries and all refined fuel requirements (including jet fuel) are imported. Jet fuel is sold at a number of airports across the DRC, to both international and local airlines. The Vitol Group is not active downstream in the retailing of jet fuel, whilst Engen supplies jet fuel to commercial customers. The transaction will, therefore, not result in direct market share accretion. In view of potential vertical relationship in the activities of the merging parties, the CID assessed whether the transaction could result in foreclosure concerns.

<u>*Consideration of Vertical Effects*</u>

82. Engen is the market leader in the supply of jet fuel in the DRC, with an estimated market share of [40-50]% in 2021 and [50-60]% in 2022 according to figures provided by the merging parties, and a market of share around [40-50]% according to CONAC. The remaining players account for significant lesser market shares, with Total at [10-20]% in 2022, Cobil at [10-20]% and other independents at [0-10]%.

83. In terms of an input foreclosure strategy, it is noted that at the upstream level, the Vitol Group only accounted for [0-10]% of the jet fuel supplied into the DRC, as of 2022. This suggests that downstream rivals are already sourcing the vast majority of their jet fuel requirements from alternative suppliers and are not reliant on Vitol Group. This indicates, in and of itself, that Vitol Group has no ability to foreclose. Any downstream rivals that are supplied by Vitol Group could easily replace these volumes with volumes from other upstream suppliers such as Trafigura, Sahara and Glencore as well any other large regional suppliers that are currently not supplying product into the DRC.

84. Accordingly, the CID was satisfied that the merged entity would not have the ability to engage in input foreclosure.

85. As regards customer foreclosure, it is recalled that Engen procures its supplies of gasoil, gasoline, and jet fuel predominantly from [][36]. Further, Engen is the market leader in the downstream market, commanding a market share of over [50-60]% in 2022. If post-merger, Engen shifts its purchases solely to the Vitol Group, [][37] would lose access to the market leader in the downstream market, which may in turn affect its market position in the upstream market to the advantage of the merged entity. From the market position of Engen, it would appear that the merged entity may have the ability to engage in customer foreclosure. Further, assuming that the Vitol Group is able to satisfy all of Engen's demand, the merged entity have a financial incentive to

[36] Confidential information.
[37] Confidential information.

foreclose [][38], as this would lead to a significant increase in the Vitol Group's market position at upstream level.

E. Supply of lubricants segmented by type of lubricant (automotive, marine and industrial lubricants) in the Common Market

86. The parties submitted that the market for lubricants can be segmented according to the retail and commercial segments. The parties further provided information in relation to the national markets where their operations overlap, namely DRC and Mauritius. In DRC, it was submitted that the acquiring group supplied [redacted] to customers in the east and south of the DRC. In addition, as shown in **Table** below, the target is a relatively small player at national level.

Table 4 – Engen's market shares by type of lubricant sold (i.e., automotive, marine, and industrial) for the last two years in the DRC[39]

Lubes Type	Estimated (Indicative) Market share	
	2021	2022
Automotive	[0-10]%	[0-10]%
Industrial	[0-10]%	[0-10]%
Greases	[0-10]%	[0-10]%
Marine	[0-10]%	[0-10]%

87. The transaction would thus not result in any significant market share accretion in the supply of lubricants (within any product segmentation) in the DRC. However, it is recalled that the CID identified a broader geographic market, being at least COMESA-wide. In some countries, it is worth noting that the merging parties are significant players, e.g., in Mauritius, the merging parties combined would control more than[50-60]% of the market shares for the supply of lubricants. Nonetheless, in several Member States, including Kenya, Malawi, Rwanda, Zambia and Zimbabwe, there would be no change in market structure given that Vivo had already acquired the Engen entities in these markets in 2018. Further, at a regional level, it is noted that there are other players such as Total, Centlube, ExxonMobil Corporation, Chevron Corporation, Fuchs Petrolub AG, Sinopec Limited, and Petrochina Company Limited.

88. As a result, the CID considered that the transaction would not result in significant market share accretion in the supply of automotive, marine and industrial lubricants in the Common Market that could result in the merging parties having, or strengthening, a position of dominance in these markets.

[38] Confidential information.
[39] Information claimed as confidential by the merging parties.

Commitments

89. Whilst maintaining their position that the merger does not lead to any competition concerns, the acquiring firm gave the following undertakings on without prejudice basis, with a view to facilitating a timely conclusion to the Commission's investigation:

    i. For a period of twenty-four months after implementation of the proposed transaction, in the DRC, the acquiring firm shall -

        a) procure that Engen issues tenders at least twice per year for its requirements of gasoil, gasoline, and jet fuel;

        b) put in place information barriers to ensure that Vitol does not have access to the bids of other suppliers to Engen in response to such tenders; and

        c) submit a compliance report regarding such tenders on or before the first anniversary of the Commission's merger decision.

90. The CID observed that the proposed remedy offered for the conduct of tender at least twice a year for a period of two years would address the concerns of customer foreclosure identified during its assessment. Further, the tender process, combined with the commitment of information barriers to ensure Vitol does not gain access to competitive information of other bidders, would ensure that competition in the upstream market would not be distorted.

91. In addition to the above, the CID further considered that within three months from the date of the merger approval, the parties should be required to submit a report setting out the information barriers which it intends to establish, for the Commission' review; and that the Commission may request for the appointment of a monitoring trustee if it deems it necessary for the proper monitoring of the parties' compliance with the undertakings.

Consideration of Third Party Views

92. Submissions were received from the national competition authorities of Malawi, Kenya, and Zimbabwe, which did not raise any concerns from the transaction. These are aligned to the CID's findings, as set out above. In relation to the DRC market, the CID was concerned that the transaction could give rise in customer foreclosure in relation to the supply of gasoil, gasoline, and jet fuel.

93. The national competition authority of Mauritius identified significant concerns in respect of the Mauritian markets, and the part of the transaction relating to Mauritian markets was accordingly referred to the CC pursuant to Article 24(9)(b) of the Regulations.

Determination

94. In view of the foregoing reasons, the CID determined that the merger could result in customer foreclosure in the supply of gasoil, gasoline and jet fuel in the DRC.

95. The CID, therefore, approved the merger subject to the merging parties' compliance with the following undertakings:

   i. For a period of twenty-four months after implementation of the proposed transaction, in the DRC, the acquiring firm shall -

      a) procure that Engen issues tenders at least twice per year for its requirements of gasoil, gasoline, and jet fuel;

      b) put in place information barriers to ensure that Vitol does not have access to the bids of other suppliers to Engen in response to such tenders. Within three months from the date of the merger approval, the parties shall submit a report setting out the information barriers which it intends to establish, for the Commission' review; and

      c) submit a compliance report regarding such tenders on or before the first anniversary of the Commission's merger decision.

96. The Commission may request for the appointment of a monitoring trustee if it deems it necessary for the proper monitoring of the parties' compliance with the undertakings.

97. The above approval does not apply to the Mauritian market. In accordance with the referral granted by the Commission, the Competition Commission of Mauritius shall issue its decision in relation to aspects of the merger relating to the Mauritian market.

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

Dated this 28th day of August 2023

Commissioner Dr Mahmoud Momtaz (Chairperson)

Commissioner Lloyds Vincent Nkhoma **Commissioner Islam Tagelsir Ahmed Alhasan**

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