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**Common Market for Eastern
and Southern Africa**

Case File No. CCC/MER/03/07/2023

**Decision¹ of the Ninety-Fifth (95th) Committee Responsible
for Initial Determinations Regarding the Proposed Merger
involving Elgon Healthcare Limited and Westlands Heights
Limited**

ECONOMIC SECTOR: Medical



26 June 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 20 April 2023, the COMESA Competition Commission (the “**Commission**”) received a notification of a merger involving Elgon Healthcare Limited (“**Elgon**”) and Westlands Heights Limited (“**Westlands**”), 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.



The Parties

Elgon (the acquiring undertaking)

4. The acquiring undertaking, Elgon, is a company incorporated under the laws of the Republic of Mauritius. The acquiring undertaking is a special purpose vehicle which does not have any operations in the Common Market. It will be jointly controlled by IBL Ltd (“**IBL**”) and Société de Promotion et de Participation pour la Coopération Economique (“**Proparco**”).
5. IBL is a public company incorporated in Mauritius. IBL, together with its subsidiaries and controlled undertakings are referred to as the “**IBL Group**”. The IBL Group operates in a number of different sectors that include agro and energy, building and engineering, commercial and distribution, financial services, hospitality and leisure, life and technologies, logistics, seafood, and property. The IBL Group is active in the following Member States: Comoros, Kenya, Madagascar, Mauritius, Seychelles, and Uganda.
6. Proparco is a development finance institution incorporated under the laws of France. Proparco is controlled by Agence Française de Développement (**AFD**) which is in turn controlled by the Government of the Republic of France. Proparco, AFD and entities under common control or controlled by them are together referred to as the “**Proparco Group**”. The Proparco Group has assets or controlled investments in the following COMESA Member States: Comoros, Democratic Republic of Congo (“**DRC**”), Djibouti, Egypt, Kenya, Madagascar, Mauritius, Tunisia, and Uganda.
7. The Acquiring Undertaking, the IBL Group and the Proparco Group are together referred to as the “**Acquiring Group**”.

Westlands (the target)

8. The target, Westlands, is a private company limited by shares, incorporated in accordance with the laws of the Republic of Mauritius. It is an investment holding company which wholly owns Harley’s Limited and Harley’s Uganda Limited.
9. The target, through its subsidiaries, distributes and sells pharmaceutical products and medical equipment in Kenya and Uganda.

Jurisdiction of the Commission

10. Article 24(1) of the Regulations requires ‘notifiable mergers’ to be notified to the Commission. Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the “**Merger Notification Thresholds Rules**”) provides that:



Any merger, where both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, shall be notifiable if:

- a) the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM\$ 50 million; and*
- b) the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM\$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State.*

11. The undertakings concerned have operations in two or more Member States. The undertakings concerned derive turnover of more than the threshold of USD 50 million in the Common Market and they each derive turnover of more than USD 10 million in the Common Market. In addition, the parties do not derive more than two-thirds of their respective aggregate COMESA-wide turnover from one and the same Member State. The notified transaction is, therefore, notifiable to the Commission within the meaning of Article 23(5)(a) of the Regulations.

Details of the Merger

12. This transaction entails the acquisition of 65% of the issued share capital of the target by the acquiring undertaking.

Competition Assessment

Consideration of the Relevant Markets

Relevant Product Market

13. In relation to the acquiring group, IBL Group operates in the healthcare sector in four COMESA Member States namely, Comoros, Madagascar, Mauritius, and Seychelles. It sells pharmaceutical products and medical equipment in the latter Member States which products are similar to those provided by the Target Group. Proparco controls Ciel Healthcare Limited (**Ciel**) in Mauritius and International Medical Group (**IMG**) in Uganda and both provide healthcare services through hospitals in their respective jurisdictions.
14. The target is involved in the wholesale and retail distribution of pharmaceutical and medical equipment in Kenya and Uganda. The merging parties therefore operate in the healthcare sector.



The provision of healthcare services

15. Healthcare services can be provided as a public good, funded by public taxation or as a private good, supplied by private clinics and hospitals. Both the public and private healthcare providers require the services of manufacturers and suppliers of pharmaceutical products (medication) and medical equipment as an input to be able to provide healthcare services to patients. To this end, these suppliers operate at two different levels of the supply chain.
16. The market for the provision of healthcare services can be segmented into the speciality of treatment, in-patient and outpatient treatment services, public and private, curative, or preventive or rehabilitative, as discussed below:
 - a) Given that a medical treatment is required for one specific healthcare problem, this limits demand side substitutability among the different types of treatment available. Similarly, on the supply side, if the treatment for a specific healthcare problem is being provided by a medical practitioner, then supply-side substitution to provide treatment to an unrelated area of specialisation is limited. This is because the provision of such services requires skilled education and training which might not be obtained in a timely manner. Resources (medical practitioners and medical equipment) required to treat patients in each specialty is therefore distinct from those required to treat patients in another specialty. Therefore, to the extent that a private hospital or clinic has the required capacity, then supply side substitution is more likely because the provider can employ medical practitioners and buy required equipment to provide the service.
 - b) In-patient treatment refers to the treatment only upon admission of the patient over-night to the healthcare facility whereas out-patient treatment refers to services which can be provided without over-night stay.
 - c) Public healthcare services are usually provided free of charge or at a nominal fee whereas private healthcare services are obtained only upon payment of the full amount for the service.
 - d) Curative and rehabilitative healthcare services are consumed to cure a certain illness and to restore the health of the patient whereas preventive treatment is taken to prevent or reduce the occurrence of an illness.
17. While the CID has previously identified distinct markets for different types of healthcare services, for the purposes of this transaction, a broad market for the provision of healthcare services was considered in view of the absence of the operations of the acquiring group in this market.



The wholesale distribution of pharmaceutical products

18. The supply of pharmaceutical products at the wholesale level refers to the distribution of such products to pharmacies, hospitals, clinics, and some dispensing doctors who in turn deliver such products to patients, who are the end customers. The customers of the wholesalers of pharmaceutical products are therefore not the patients themselves.
19. Wholesale distributors of pharmaceutical products are usually appointed by the manufacturer and are therefore the official distributors of such products. The distribution thus takes place within a specified legal framework and under distribution agreements which are required given the sensitive nature of the products. The distribution of pharmaceuticals products must be done under controlled conditions such as correct temperature and packed in appropriate boxes such that when the product reaches the end customer, it is safe for consumption.
20. The CID considered that at this level of supply chain, further segmentation by type of pharmaceutical products may not apply as the conditions for wholesale distribution were likely to be similar across the various types of pharmaceutical products.

The retail distribution of pharmaceutical products

21. The retail distribution of pharmaceutical products refers to the supply of the later products to end customers, the patient, via specific retail channels, including pharmacies.
22. The retail distribution of pharmaceutical products can be segmented into over the counter or on prescription. Further, as pharmaceutical products are made up of active ingredients which are used to treat particular conditions, their intended therapeutic use limit substitutability from a demand perspective². The CID³ has also previously separated pharmaceutical products for human consumption from those for animal consumption as each category of the pharmaceutical product cannot be administered to the other category of users, i.e., medication intended for human consumption cannot be administered on animals and vice-versa.
23. The above notwithstanding, the CID observed that the transaction would not raise competition concerns and thus focussed its assessment on the broad market for the retail distribution of pharmaceutical products.

² Case M.8889 - Teva / PGT OTC Assets (29/06/2018), paragraph 26

³ Decision of the Seventy-Fourth (74th) Committee Responsible for Initial Determinations Regarding the Proposed Acquisition of 98.7277931% of the issued share capital of Adwia Company S.A.E. by Zanzibar Pharma Limited. Case File No. CCC/MER/08/18/2020; and Decision of the Seventy-Eight (78th) Committee Responsible for Initial Determinations Regarding the Proposed Merger Involving Ultra Welfare Ltd and Amoun Pharmaceutical Company S.A.E. Case File No. CCC/MER/03/11/2021.



Distribution of medical equipment

24. Medical equipment provided by the IBL Group fall in the following categories: radiology, cardiology, ophthalmology, dialysis and electromedical. The target provides the following categories of medical equipment: for operation theatre, ICU, medical furniture, invalid equipment, and in vitro diagnostic medical devices.
25. The distribution of medical equipment can be categorised into wholesale and retail distribution. The wholesale distribution of medical equipment refers to the supply of such goods to intermediaries such as pharmacies and hospitals who procure them to either sell them at the retail level to patients or to use them to be able to supply their medical services to patients. The retail distribution of medical equipment refers to the supply of the latter products to end customers, the patient, via specific retail channels, including pharmacies.
26. While the CID observed that medical equipment differ in their intended use, given the absence of competition concerns, it was not necessary to conclude on the possibility of narrower markets within the wholesale and retail distribution of medical equipment.
27. Based on the foregoing assessment and without prejudice to the CID's approach in similar future cases, the relevant product markets are considered as the:
 - a) **Provision of healthcare services**
 - b) **Wholesale distribution of pharmaceutical products**
 - c) **Retail distribution of pharmaceutical products**
 - d) **Wholesale distribution of medical equipment, and**
 - e) **Retail distribution of medical equipment.**

Relevant Geographic Market

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

"...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"⁴.
29. Healthcare services are provided to patients depending on the level of sophistication and advancement of the medical health care sector of a particular country. On the demand side, subject to the availability of the required medical treatment, the patient will generally seek to procure of the service from the closest

⁴ Paragraph 8



provider within his country of residency, such that local markets may be identified. The CID observed that for specialised treatment, certain categories of patients may opt to travel to other countries to obtain the required treatment. For instance, it is not uncommon for patients residing within the Common Market to travel to India or South Africa for medical treatment. For this reason, the CID considered that the relevant geographic market for the provision of general healthcare services is likely to be national and potentially wider for specialised services.

30. In previous decisional practice⁵, the CID considered that the geographic market for upstream supply of pharmaceutical products was likely to be wider than national. While licensing and importation restrictions differ per Member State, wholesale or retail distributors are not generally constrained in their ability to source products from several overseas jurisdictions, including outside the Common Market. Further, the major distributors of pharmaceutical products are global players. Nonetheless, the CID noted that these global players would need to satisfy local requirements to supply national markets. Given that the transaction is not likely raise competition concerns, the CID resolved that the relevant market could be left open.
31. In relation to the retail distribution of pharmaceutical products, the CID observed that patients tend to procure their required products from distributors/supplies which are geographically closer, and within the national borders. This is the case in view of security of supply and transportation costs. For this reason, the CID considered that the geographic market for retail distribution of pharmaceutical products is likely to be national.
32. For the same reasons as above, the CID considered that the market for the wholesale and retail distribution of medical equipment can be left open.

Market Shares and Concentration

33. The parties submitted that the Acquiring Group holds a respective market share of [40-45]% in Mauritius⁶ and [10-15]% in Uganda⁷ in the market for the provision of healthcare services. It is recalled that the target is not active in this market, therefore no market share accretion is expected as a result of the merger.
34. The parties provided the approximate market share of the target and its competitors for the market for the wholesale distribution of pharmaceutical

⁵ Decision of the Seventy-Eight (78th) Committee Responsible for Initial Determinations Regarding the Proposed Merger Involving Ultra Welfare Ltd and Amoun Pharmaceutical Company S.A.E. Case File No. CCC/MER/03/11/2021 and Decision of the Eighty-First (82nd) Committee Responsible for Initial Determination Regarding the Proposed Merger involving DAWAA'A Restricted Ltd and Pharma Strategy Partners GmbH Case File No. CCC/MER/12/31/2021.

⁶ Confidential information claimed by merging parties.

⁷ Confidential information claimed by merging parties.



products at national level as per Table 1 below. It is noted that the transaction would not result in any significant market share accretion at national level.

Table 1: Estimated Market Shares of the parties for the wholesale distribution of pharmaceutical products⁸

Supplier	Estimated Market Share in Mauritius (%)	Estimated Market Share in Kenya (%)	Estimated Market Share in Uganda (%)
The IBL Group	20- 25	Not Applicable	Not Applicable
The Proparco Group	Not Applicable	Not Applicable	<1
Target	Not Applicable	5 -10	<2

35. In relation to the retail distribution of pharmaceutical products, in Mauritius, the acquiring group is reported to have a market share of [20-25]%, whereas the target is not present. In Kenya and Uganda, the parties further the approximate market share of the target and its competitors for the broad market for the supply of pharmaceutical products in Kenya and Uganda as per Table 2 below.

Table 2: Estimated Broad Market Shares for the supply of pharmaceutical products in Kenya and Uganda⁹

Supplier	Estimated Market Share in Kenya (%)	Estimated Market Share in Uganda (%)
Target	4 - 8	<2
Abacus Pharma (Kenya) Limited	Negligible	10 - 15
Surgipharm Limited	10 - 15	<2
Crown Healthcare (K) Limited	9 - 12	2- 5
Philips Therapeutics Limited	2 - 5	4 - 8
Laborex Kenya Limited	2 - 4.5	5 - 10

36. The CID observed that the target is a relatively smaller player in the supply of pharmaceutical products in Kenya and Uganda. At global level, the CID considered that there are likely to be larger players with the capacity to extend their product offerings to these Member States in response to any anti-competitive behaviour by the merged entity.

⁸ Confidential information claimed by merging parties.

⁹ Confidential information claimed by merging parties.



37. The parties have provided the approximate market share of the target in the market for the wholesale distribution of medical equipment in Kenya and Uganda as per Table 3 below.

Table 3: Estimated Broad Market Shares for the wholesale distribution of medical equipment¹⁰

Supplier	Estimated Market Share in Mauritius (%)	Estimated Market Share in Kenya (%)	Estimated Market Share in Uganda (%)
The IBL Group	20 - 25	Not Applicable	Not Applicable
The Proparco Group	Not Applicable	Not Applicable	Negligible
Target	Not Applicable	1 - 3	Negligible

38. The CID noted that in Kenya and Uganda, the target had limited market shares in the wholesale distribution of medical equipment and was of the view that at a global level, it was likely to face stronger rivals.
39. With respect to the retail segment, it was submitted that the acquiring group is not involved in the retail distribution of medical equipment and the target had zero market shares in Kenya and negligible market shares in Uganda. The transaction would therefore not result in any market share accretion.
40. The CID considered that the pharmaceutical and medical equipment market is typically characterised by significant barriers to entry in terms of the research and testing which is required to introduce new products, intellectual property rights on the products, licensing, and registration requirements for pharmaceutical products.
41. The foregoing notwithstanding, it was observed that the merging parties are not dominant players in the relevant markets, and that post-merger, they would remain constrained by the other competitors operating in the relevant markets.

Consideration of Third-Party Views

42. Submissions were received from the national competition authorities of DRC, Mauritius, Kenya, and Egypt which confirmed that the transaction is not likely to substantially prevent or lessen competition in the Common Market or be contrary to the public interest, in line with the CID's findings as set out above.

Determination

43. Based on the foregoing reasons, the CID determined that the merger is not likely to substantially prevent or lessen competition in the Common Market or a

¹⁰ Confidential information claimed by merging parties .



substantial part of it, nor be contrary to public interest. The CID further determined that the transaction is unlikely to negatively affect trade between Member States. The CID, therefore, approved this transaction.

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

Dated this 26th day of June 2023

Commissioner Dr Mahmoud Momtaz (Chairperson)

Commissioner Lloyds Vincent Nkhoma

Commissioner Islam Tagelsir Ahmed Alhasan

