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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/02/18/2022

Decision[1] of the Eighty-Fifth (85th) Committee Responsible for Initial Determinations Regarding the Proposed Acquisition of Control by Viterra USA Investment, LLC of Gavilon Agriculture Investment, Inc

ECONOMIC SECTOR: Agriculture

2 August 2022

[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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 25 March 2022, the COMESA Competition Commission (the "**Commission**") received a notification involving Viterra Limited ("**Viterra**") as the acquiring undertaking and Gavilon Agriculture Investment Inc. ("**Gavilon**") as the target undertaking, 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

Viterra (the Acquiring undertaking)

4. The acquiring undertaking, Viterra, is a company incorporated in accordance with the laws of Jersey, with its business address at Blaak 31, 3011 GA Rotterdam, The Netherlands. The direct acquiring firm is Viterra USA Investment LLC ("**Viterra USA**"), a company incorporated in accordance with the laws of Delaware, with its business address at 3110 California Street NE, Minneapolis, 55418-1808, United States of America. Viterra USA is a wholly owned subsidiary of Viterra.

5. Viterra is a global producer and marketer of agricultural commodities active in the origination, marketing, refining, storage and transport of agriproducts. Viterra's cross-border network enables it to source agricultural commodities direct from producers, store and handle the commodities in its facilities near the growing regions, and efficiently transport the commodities (whether or not refined or processed in its facilities) from the growing regions to its port terminals which supply a wide range of international markets.

6. Globally, Viterra's operations can be structured in five main segments: (i) origination and marketing, (ii) storage and handling, (iii) processing and refining, (iv) logistics, and (v) port terminals.

7. Viterra is jointly controlled by Glencore plc ("**Glencore**") and Canadian Pension Plan Investment Board ("**CPP Investments**").

8. Glencore, a company headquartered in Baar, Switzerland, is the top holding company of the Glencore group of companies. Glencore supplies a wide range of commodities and raw materials to industrial customers throughout the world, including metals, minerals, oil and oil products, and coal. Those customers are typically active in the automotive, steel, power generation, battery manufacturing and oil sectors. Outside of Viterra, Glencore is not active in the agricultural commodities sector.

9. CPP Investments, a company headquartered in Toronto, Canada, is an investment management organisation that invests the funds of the Canadian Pension Plan ("**CPP**"). CPP Investments acquired a controlling stake in Viterra (then operating as Glencore Agriculture Products)[2] in 2016. CPP Investments principally invests in public equities, private equities, real estate, infrastructure and fixed income instruments. Outside of its investment in Viterra, CPP Investments does not currently control other portfolio companies with activities that overlap with those of the target.

[2] In November 2020, Viterra rebranded from Glencore Agriculture to Viterra.

10. Viterra, Glencore and CPP Investments and their subsidiaries are collectively referred to as the "**Acquiring Group**".

Gavilon (the Target undertaking)

11. Gavilon is incorporated in accordance with the laws of Delaware, with its business address at 1331 Capitol Avenue, Omaha, NE 68102-1106, United States of America.

12. Gavilon is a commodity management company, offering international origination, storage and handling, transportation and logistics, marketing and distribution, and risk management services in two main operating segments: (i) Grain & Ingredients, and (ii) Crop Nutrients (fertilisers).

13. Globally, the primary business activities of Gavilon are the origination, marketing, storage, and handling and transport of agricultural commodities. Agricultural commodities are essentially staple crops produced on farms and plantations. Most agriproducts, such as grains, provide a source of food for people and animals across the globe. Some agricultural commodities have purely industrial applications or serve as both a source of food and as an industrial ingredient (such as corn, for example). In the Common Market, the target is active in Egypt.

Jurisdiction of the Commission

14. Article 24(1) of the Regulations requires 'notifiable mergers' to be notified to the Commission within 30 days of the concerned parties' decision to merge. Only mergers that satisfy the prescribed thresholds pursuant to Articles 23(4) and 23(5) of the Regulations are regarded as notifiable mergers. The merger notification thresholds are prescribed under Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the "**Merger Notification Thresholds Rules**") which 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 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.*

15. The merging parties have operations in more than two COMESA Member States. The parties' combined annual asset value in the Common Market exceeds the threshold of USD 50 million and they each hold asset value of more than USD 10 million in the Common Market. In addition, the merging parties do not achieve more than two-thirds of their respective COMESA-wide asset value 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.

Details of the Merger

16. The notified transaction involves Viterra acquiring the Grain and Ingredients business lines of Gavilon. Post- transaction, Gavilon will fall under the sole control of Viterra.

Competition Assessment

Relevant Product Market

17. Both the acquiring group and the target operate in the agricultural commodities segment. Agricultural commodities include grains, livestock and meat, cotton, oil seeds, dairy and soft commodities comprising of, *inter alia,* sugar, cocoa and coffee and other miscellaneous agricultural commodities including wool and rubber.

Origination and Marketing of agriproducts

18. The agricultural commodities supply chain comprises of various stages. The value chain starts with origination. Origination refers to the market for purchasing crops such as harvested grains and oilseeds directly from farmers. Purchasers include agricultural traders, distributors, millers or crushers.

19. Once the agriproducts have been originated from the farmers, they are stored and handled in silos, elevators and/or port terminals. The agriproducts are then either transported to processing or refining facilities (e.g., crushing or milling facilities to turn soybeans into soybean oil; wheat into wheat flour; sugar into refined sugar; etc.) or transported directly in their unprocessed form for trade and distribution.

20. The agriproducts are then sold to a large variety of export markets, including to food manufacturing companies, animal feed manufacturing companies, and non-food manufacturing companies (e.g., biofuels or industrial products). These manufacturers then sell the final product to food/feed retailers and other outlets for consumption. Direct sales can also occur between non-adjacent parts of the chain (e.g., direct sales by farmers/cooperatives to processors or direct sales by processors to end users).

21. The CID considered that the origination stage constitutes a distinct market separate from the downstream wholesale markets as they involve different players and therefore different supply and purchase conditions. The farmers sell to intermediaries who may further process the grains or seeds before marketing the crops. The intermediaries typically have larger financial, storage and transportation facilities than their customers at the downstream marketing chain and are typically more sophisticated as they also engage in paper trade of such crops. The CID noted that the European Commission has similarly traditionally identified distinct markets for origination and for marketing whereby marketing comprises of the sale by wholesalers to third parties[3]. The CID noted a further segmentation by the European Commission by type of agriproduct[4]. The CID considered such segmentation in its discussions below.

Grains and Oil Seeds

22. The parties are both involved in the marketing of grains and oilseeds. Grains are different from other crops such as oil seeds, cocoa and coffee on account of their physical characteristics and this can influence the different manner in which the crops are stored, transported and marketed. For instance, green coffee beans tend to be sensitive to foreign odours and moisture hence they are usually shipped in woven bags made from natural fibre which allows free circulation of air. This is likely to have cost implications to distributors of coffee beans since they have to ensure the coffee beans are stored in a controlled environment which does not compromise the quality of the coffee beans[5]. On the other hand, grain marketing generally does not require complicated transportation and storage systems. The key requirement for grain is to ensure that it is dried to the right moisture content.

23. The CID therefore considered that the origination and distribution of grains is a distinct market from that of other agricultural commodities. The CID considered that it was not necessary to further segment the market according to the various types of grain which may exist, given that from a supply perspective, grain marketers can easily switch to the distribution of different grains since there are no special skills or know-how required to deal with particular grain products.

24. The merging parties themselves originate and distribute a wide variety of grains. The CID observed that global players similarly offer various grain options rather than specialising in one type of grain which would point to supply side substitutability. The grains supply of ADM Germany GMBH, for instance, extend to beans and pulses (including dark red kidney, light red kidney, chickpea, navy bean, black bean, pinto bean, red lentil, green lentil, fava bean, yellow pea and

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[3] European Commission Case No COMP/M.6740 - Baywa/Cefetra, dated 19 December 2012, paragraph 9.
[4] *Ibid.*
[5] Decision of the Seventy-Fifth Committee Responsible for Initial Determination Regarding the Proposed Merger Involving Apuleaf II Limited and Louis Dreyfus Company B.V. Case File No. CCC/MER/01/02/2021

small red bean), edible seeds (chia, flax, hemp, pumpkin and sunflower) and peanuts. Another competitor and global player, Cargill, distributes grains which include wheat, corn, barley and sorghum. Therefore, within the marketing market, the CID is of the view that marketers would easily switch to start supplying other types of grains without significant costs or risks in response to a small but significant price increase.

25. Oil seeds are derived from the following crops: canola, palm oil, soybeans, rapeseed and sunflower. Oil seeds are grown for their high oil content. Oilseeds are crushed to produce oil and when the oil has been extracted, the seeds are used for animal feed.

26. While each oil seed produces oil with a distinct colour and flavour, ultimately all types of oil are processed and refined to reach the same functionality for downstream use and further processing. To this end, the CID is of the view that there exists one broad product market for oilseeds, encompassing all oils produced from the various seeds[6].

27. On the basis of the foregoing assessment, the CID considered that the relevant product markets are:

- **the origination of grains;**
- **the origination of oilseeds;**
- **the marketing of grains; and**
- **the marketing of oilseeds.**

Relevant Geographic Market

28. The CID considered that the relevant geographic markets were likely to be wider than national. While the importation of grain and oilseeds in most Member States may be subject to Government regulations such as licensing and compliance with sanitary and phytosanitary standards, these requirements are likely to be attainable and not prohibitive to prevent trade from taking place.

29. Given that the COMESA region is implementing a Free Trade Area where trade in wholly originating products such as grains and oilseeds would not be subjected to trade taxes, the Common Market can be seen as presenting a homogenous environment whose conditions affecting competition are unique.

30. Premised on the foregoing discussions, and for purposes of this transaction, the CID was of the view that the relevant geographic market is at least COMESA-wide. The CID further noted that the major players in the relevant markets operate at global level, and there are imports coming from players outside the Common

[6] Case No IV/M.1376 - Cargill / Continental Grain dated 3rd February 1999, paragraph 14

Market. It is common knowledge for example that Ukraine, Russia and India, among other countries, are major suppliers of grain and oilseed and a number of countries in the Common Market like Egypt, Somalia and Sudan. Therefore, it is not impracticable for global companies involved in origination and marketing of grain and oil seed to access such products from outside the Common Market. For the foregoing reasons, the relevant geographic markets are construed as **global**.

Market Shares and Concentration

31. Table 1 below presents the non-confidential market shares ranges for the global origination of grains and oilseeds markets respectively.

Table 1 – Market Share Ranges for the Global Origination of Grains and Oilseeds

Relevant Market	**Entity**	**Approximate Market Shares (%)**
Origination of Grains	Cargill	5-15
	ADM	0-10
	Bunge	0-10
	Louis Dreyfus	0-10
	Viterra	***0-10***
	Gavilon	***0-10***
Origination of Oilseeds	Bunge	10-20
	Cargill	0-10
	ADM	0-10
	COFCO	0-10
	Viterra	***0-10***
	Gavilon	***0-10***

32. The CID noted that the global market is characterised by the presence of strong players such as Agricor, Bunge, Cargill and ADM Germany GMBH who will continue to impose competitive pressures on the parties post-merger. This is supported by submissions from the Egyptian Competition Authority which confirmed that there are many other suppliers of grains and seeds in Egypt, where both parties operate, with significant supply capacity.

33. The CID observed that the barriers to entry in the relevant markets are minimal. The presence of a large number of players in the relevant markets suggest that entry into the relevant markets is not prohibitive; this may be explained by the fact that the relevant markets require no complex technical know-how or licensing requirements, which suggests entry could occur in a timely manner to constrain

any potential anti-competitive effects of the merger. Further, the CID is of the view that the merger itself will not contribute to creating or heightening the barriers to entry in the relevant markets.

34. Given the insignificant market share accretion that will occur as a result of the transaction at global level, the CID considered that the transaction is not capable of leading to unilateral effects. The combined market share of the merged entity is unlikely to afford it the ability to raise prices above competitive levels or to disregard service quality and consumers for a sustained period of time.

35. The relevant markets being global in scope and considering the high number of market players with low market shares, the CID considered that the possibility for the merged entity to facilitate or be incentivised to engage in coordinated conduct was highly unlikely.

Third-Party Views

36. The Commission received third-party views from the national competition authorities of Kenya, Mauritius, Ethiopia, and Egypt, which did not raise any concerns in relation to the transaction. This is consistent with the CID's assessment, as presented above.

Determination

37. 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 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.

38. The CID, therefore, approved this transaction. This decision is adopted in accordance with Article 26 of the Regulations.

Dated this 2nd day of August 2022

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Commissioner Brian Muletambo Lingela (Chairperson)

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Commissioner Lloyds Vincent Nkhoma

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Commissioner Islam Tagelsir Ahmed Alhasan