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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/02/10/2022

Decision[1] of the Eighty-Fifth (85th) Committee Responsible for Initial Determinations Regarding the Proposed Acquisition of Joint Control of Klinchenberg B.V. by CDC Group Plc, together with Norfund

ECONOMIC SECTOR: Energy

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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 24 March 2022, the COMESA Competition Commission (the "**Commission**") received a notification involving the proposed acquisition of joint control by CDC Group Plc[2] ("**CDC**" or the "**acquiring undertaking**") of Klinchenberg B.V. ("**Klinchenberg**" or the "**target undertaking**") together with Norfund, 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.

[2] CDC Group plc's name has been changed to British International Investment plc, with effect from 4 April 2022

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

CDC (the acquiring undertaking)

4. CDC is a public limited company incorporated under the company laws of England and Wales, with its business address at 123 Victoria Street, SW1E 6DE, London, United Kingdom. It is wholly owned by the Foreign Commonwealth and Development Office of the Government of the United Kingdom.

5. The parties submitted that CDC's mandate is to support sustainable, long-term growth amongst businesses in Africa and South Asia via impact investment, in alignment with the United Nations' Sustainable Development Goals. CDC invests in businesses across the economic spectrum, including manufacturing, agribusiness, infrastructure, financial institutions, construction, health, and education.

6. Within the Common Market, CDC generates revenue from the Democratic Republic of Congo (the "**DRC**"), Egypt, Kenya, Malawi, Mauritius, Rwanda, Uganda, Zambia and Zimbabwe.

7. CDC has an existing minority, non-controlling interest in Bujagali hydropower infrastructure project and will also have an indirect, minority interest in Ruzizi hydropower infrastructure project as follows:

   - In Uganda, CDC holds an indirect equity stake of 1[redacted]n Bujagali (a 255MW hydropower plant in Uganda that has one customer namely, Uganda Electricity Transmission Company Limited, CDC's stake is held through a company called Bujagali Holding Power Company Limited); and
   - In Rwanda, CDC will hold an effective indirect equity stake [redacted] in Ruzizi III Energy Ltd, a 206MW hydropower plant, which is currently under development, and does not have any market-facing activities.

Klinchenberg (the target undertaking)

8. Klinchenberg is a newly formed Dutch entity incorporated under the company laws of the Netherlands. Klinchenberg has been established by, and is currently wholly owned by, Norfund, the Norwegian Investment Fund for Developing Countries.

9. As part of a presale re-organisation being undertaken in connection with the proposed transaction, Norfund's [redacted] interest in certain hydropower infrastructure projects in sub-Saharan Africa held directly and indirectly by SN

Power AS[3] (for ease of reference referred to as the **SSA Portfolio**[4]), with the remaining [redacted] held by Scatec ASA ("**Scatec**")[5], will be contributed to Klinchenberg, including indirect ownership interests in the share capital of each of SN Development BV (under formation), SN Madagascar BV (under formation) and SN Power Invest Netherlands BV. SN Development BV, SN Madagascar BV, and SN Power Invest Netherlands BV are currently (or will prior to the completion of the presale re-organisation be) controlled by Scatec and Norfund.

10. The parties submitted that Klinchenberg, as a newly established special purpose vehicle, does not control any firms. However, prior to or immediately post-completion of the Proposed merger, Klinchenberg will control the following firms in the Common Market:

Table 1: Klinchenberg's controlled firms in the Common Market, post completion of the proposed transaction

Member State	Name of Subsidiary	Nature of Activities
Kenya	SN Power Africa Ltd	None – SN Power Africa is not associated with any project or a market-facing entity
Rwanda	Ruzizi III Energy Limited	None – The Ruzizi III project is currently not operational. This project is still in development stage
Uganda	Bujagali Energy Limited	Operation of a hydropower plant. It generates and sales hydropower electricity in Uganda
	SN Power Uganda Limited	None – SN Power Uganda is not associated with any project or a market-facing entity.
Madagascar	Compagnie Generale d'Hydroelectricite de Volobe	None – The Volobe project is currently not operational. This project is still in development stage.
Malawi	Mpatamanga or Malawi SPV Ltd	Under feasibility study. Hydroelectric power plant under development

11. The parties submitted that within the Common Market, Klinchenberg only generates turnover and sales hydroelectric power in Uganda.

Jurisdiction of the Commission

12. Article 24(1) of the Regulations requires 'notifiable mergers' to be notified to the Commission within 30 days of parties arriving at a decision to merge. Only

[3] SN Power AS is a Norwegian company that owns, operates and develops renewable energy assets in developing countries in Asia, Africa and South America.
[4] The SSA Portfolio currently operates as an unincorporated joint venture between Scatec and Norfund.
[5] Scatec is a renewable energy power producer, headquartered in Norway, which develops, owns and operates solar, wind and hydro power plants and storage solutions.

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.

13. 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

14. The transaction involves the proposed acquisition of joint control by CDC together with Norfund of Klinchenberg. As part of a presale re-organisation being undertaken in connection with the proposed transaction, Norfund's [redacted] interest in certain hydropower infrastructure projects in sub-Saharan Africa, including indirect ownership interests in the share capital of each of SN Development BV (under formation), SN Madagascar BV (under formation) and SN Power Invest Netherlands BV, will be contributed to Klinchenberg.

15. The parties further submitted that SN Development BV, SN Madagascar BV, and SN Power Invest Netherlands BV are currently (or will prior to the completion of the presale re-organisation be) controlled by Scatec and Norfund.

16. Pursuant to the proposed transaction, CDC will acquire control (indirectly, through its acquisition of joint control of Klinchenberg) of SN Development BV, SN Madagascar BV and SN Power Invest Netherlands BV. Scatec will maintain a controlling interest in these entities and, accordingly, they will continue to be,

jointly (indirectly) controlled by Norfund, Scatec, and CDC after the proposed transaction. Following the proposed transaction, Norfund and CDC will fund the development and construction of hydropower projects across sub-Saharan Africa through Klinchenberg.

Competition Assessment

Relevant Product Market

17. The CID noted that CDC is a development finance institution with investments in various portfolios such as manufacturing, agri-business, infrastructure, financial institutions, construction, health and education. Klinchenberg is a special purpose vehicle established to invest in, own, generate and supply electricity in Uganda through Bujagali Energy Limited to Uganda Electricity Transmission Company Limited under a long-term fixed contract. The CID further noted that CDC has a minority non-controlling interest in Bujagali Energy Limited. The CID focused its assessment on the electricity generation and supply sector.

Generation and supply of electricity

18. Electricity production value chain comprises three key stages namely, generation, transmission, and distribution. Each of the three stages constitute a different and unique activity due to the way each is implemented and the intended purpose that each activity has. For instance, the generation of electricity involves the production of electricity at power stations where mechanical energy is harnessed and used to rotate turbines[6]. The mechanical energy to spin the turbine can come from a variety of sources such as falling water, wind, or steam from heat generated by a nuclear reaction or by burning fossil fuels.

19. The CID noted that the transmission of electricity comprises a distinct process of delivering electricity once generated to the distribution grids. It involves the bulk movement of electrical energy from a generating site such as a power station to an electrical sub-station where voltage is transformed and distributed to consumers or other sub-stations[7]. Transmission networks (or power grids) consist of towers and the wires that run between them, underground cables, transformers, switching equipment, reactive power devices, and monitoring and telecommunications equipment.

20. The CID also noted that the last activity in the electricity production value chain is distribution which entails the conveyance of electricity from the national grid to consumers through a local network. Each distribution licensee receives electricity from the national grid at various supply points. Electricity is then distributed to

[6] https://www.eia.gov/energyexplained/electricity/how-electricity-is-generated.php, accessed on 29th April 2022
[7] https://www.power-and-beyond.com/basics-of-an-electrical-power-transmission-system-a-919739/, accessed on 29th April 2022

customers by means of overhead lines, underground cables, transformers, and circuit breakers, through a series of networks.

21. The CID observed that these different stages in the electricity production value chain exhibits unique processes which can be construed as separate markets by virtue of uniqueness in the processes and by intended use. The CID recalled its decision in ***AIF Holding/TPL/TPSL***[8], wherein it identified generation, transmission, and distribution of electricity as separate markets. The CID considered that from a supply perspective, equipment for generating electricity is bound to be different from the equipment used for the transmission of electricity. For instance, under the former, a company would require generators operated via falling water, wind, fossil fuels or nuclear to generate electricity while under the latter a company would require setting up a power grid through which to transmit electricity once generated. Similarly, the distribution of electricity would require different equipment and investment. The CID observed that the differentiation can also be appreciated from a demand perspective. For instance, at generation, the intention is to produce electricity which is intended for a distribution company before supply to the ultimate end-users which falls under the distribution stage of electricity.

22. In view of the foregoing, the CID concluded that the generation, transmission, and distribution of electricity are separate markets and not substitutable. Thus, given that Klinchenberg is only active at the level of generation of electricity for supplying to its only customer, Uganda Electricity Transmission Company Limited, the CID focussed its assessment on the generation and supply of electricity.

23. The CID noted that the generation of electricity is often tied to the supply of electricity given that competition takes place at the level of supply of electricity such that in considering the relevant market, the approach is to focus on the generation and supply of electricity as the two go hand in hand. The CID noted that a similar approach was adopted by the European Commission (EC) which considered that generation and wholesale supply should be taken as a single relevant product market given that generation of electricity cannot be considered as a market activity as long as the electricity is not sold[9].

24. The CID further noted that generation and supply of electricity can be further delineated based on the source of generation. For instance, varying sources of generation may include hydropower, wind, or nuclear. However, despite the different available means of generating electricity, a segmentation by source was

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[8] See Case File No. CCC/MER/04/11/2021

[9] Case COMP/M.6984 EPH / Stredoslovenska Energetika.

considered not necessary, as the competitive assessment would not be altered in the current transaction.

25. The CID observed that a further segmentation of the market may be possible based on whether the supply of electricity is intended for wholesale or retail. Under wholesale market, electricity demand comes mainly from electricity suppliers, large industrial and commercial customers who buy electricity in bulk directly from the electricity generation company. The wholesale electricity market allows the buying and selling of electricity by various counterparties using a range of various products and time horizons. It allows counterparties to balance their supply and demand, to hedge their risks or to take a position on future prices.

26. On the other hand, the retail market concerns selling electricity to individual consumers who are end users and the amount of electricity supplied per individual customer is low and not in bulk. On this basis, the CID considered that the wholesale and retail supply of electricity comprise separate markets. Similarly, in ***AIF Holding/TPL/TPSL**, and **Iberafrica/AIF,*** the CID observed that the wholesale and retail markets comprise different markets considering the different customers served under each market[10]. Likewise, the EC differentiated the market for retail supply of electricity from wholesale supply of electricity on the understanding that the former encompasses the sale of electricity to final customers while the latter entails electricity sales on a wholesale market either to traders, distribution companies, electricity exchanges or large industrial end-users (either through bilateral agreements, regulated marketplaces, or power exchanges)[11].

27. The CID recalled that the target is active in the generation and wholesale supply of electricity to its only customer, Uganda Electricity Transmission Company Limited, which buys bulk electricity and sells to individual customers in the Ugandan market.

28. In view of the foregoing, the CID considered **the generation and wholesale supply of electricity as a distinct relevant market**.

Relevant Geographic Market

29. The CID noted that electricity, once generated, cannot be stored on any scale, but it can be converted to other forms of energy which can be stored and later reconverted to electricity on demand[12]. Combined with a limited possibility of substitutability between different time periods, different geographic electricity

[10] See Case File No. CCC/MER/04/11/2021; Case CCC/MER/04/11/2019.

[11] Para 26, Case M.8758 - BAYWA / CLEAN ENERGY TRADING, para 228. Case No COMP/M.3868-DONG/Elsam/Energi E2.

[12] https://world-nuclear.org/information-library/current-and-future-generation/electricity-and-energy-storage.aspx, accessed on 20th July 2022.

markets can be distinguished by the time at which the electricity is delivered. It is transmitted from power stations to buyers through capital intensive network of power lines such as national grids, regional networks and local networks. Congestion on the transmission network can cause a national electricity market to split into separate price areas. These differences in price across countries is highly likely to limit electricity suppliers to operating in a given area thus limiting the geographic scope of the market.

30. The CID observed that there exists a possibility of trading electricity across national borders whereby countries can import and export power. For instance, countries in the Common Market such as Zambia is known to export electricity to DRC and at the same time it also imports electricity from Mozambique and South Africa. However, for such trade to take place, the concerned companies and countries often conclude bilateral and multi-lateral trade agreements. These agreements take long to negotiate and conclude and may also imply heavy financial investments. Further, for suppliers to tap into such export markets, they may need electricity transmission infrastructure to facilitate such trading of electricity. Therefore, in an event of a small but significant non-transitory increase in the price (SSNIP) of electricity, it is highly unlikely that companies would shift to generate and supply electricity across countries in a timely manner and without incurring substantial costs. Further, such possibility for trade in electricity is not sufficient enough and not significant to alter the competition dynamics given a SSNIP. Thus, the market for the generation and wholesale supply of electricity is likely to be national.

31. The CID recalled that the target generates and supplies electricity only in Uganda[13] while it is under development stages in Kenya, Malawi, Madagascar, and Rwanda. The CID considered that given the limitations for the timely entry into the export market for electricity supply, it is unlikely that the target would timely shift its focus to supplying electricity beyond Uganda given a small but significant non-transitory increase in the wholesale price of electricity in countries outside Uganda. The CID considered that supply substitution is likely to be limited in the short term given the high-cost implications. Similarly, from the demand side, the CID noted that customers at the wholesale level cannot easily switch to purchasing electricity from suppliers outside of their territory in response to a significant increase in the wholesale price of electricity in their home country.

32. On the basis of the foregoing, and without prejudice to the CID's approach in similar future cases, the relevant market in the current transaction has been determined as ***the generation and wholesale supply of electricity in Uganda***.

[13] The hydro-electric power generation is under development stages in Kenya, Malawi, Madagascar, and Rwanda.

Market Shares and Concentration

33. The CID observed that the transaction was not likely to result in a change in the structure of the market for generation and supply of electricity in Uganda given that only the target is the only party active in this market. The CID concluded that competition concerns are unlikely to arise since the market is characterised by actual and potential future competitors who will continue to offer alternative sources of general and supply of electricity.

Third-Party Views

34. The CID noted submissions from the national competition authorities of Egypt, Kenya, and Malawi which did not raise any competition and public interest concerns resulting from the proposed transaction, given that there is no product overlap in the parties' activities. This is consistent with the CID's assessment, as presented above.

Determination

35. 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.

36. 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