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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/02/12/2022

Decision[1] of the Eighty-Second (82nd) Committee Responsible for Initial Determinations Regarding the Proposed Joint Venture involving SAS Shipping Agencies Services Sàrl, Kenya Ports Authority and Kenya National Shipping Lines Limited

ECONOMIC SECTOR: Shipping, freight forwarding and inland transportation

COMESA COMPETITION COMMISSION * 10 MAY 2022

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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

Introduction and Relevant Background

1. On 14th March 2022, the COMESA Competition Commission (the "**Commission**") received a notification regarding the proposed joint venture involving SAS Shipping Agencies Services Sàrl ("**SAS**"), Kenya Ports Authority ("**KPA**") and Kenya National Shipping Lines Limited ("**KNSL**"), pursuant to Article 24(1) of the COMESA Competition Regulations of 2004 (the "**Regulations**").

2. Pursuant to Article 26 of 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 CID is responsible for making initial determinations on matters before the Commission including mergers and acquisitions. Decisions of the CID are final where there is no appeal against its decision to the Board of Commissioners of the Commission. The decision of the CID is set out below.

The Parties

SAS

4. SAS is a wholly owned subsidiary of MSC Mediterranean Shipping Company SA ("**MSC**"). According to the parties' submissions, MSC is a privately-owned company incorporated under the laws of Switzerland. MSC has a fleet of around 600 (owned and chartered) vessels and operates approximately on 230 lines and calls at 500 ports around the world. MSC ships around 23 million Twenty-Foot Equivalent units ("**TEU**"s) per year.

5. The MSC group provides worldwide container transport and ancillary services that combine maritime shipping with rail, river and road freight, as well as terminal services. MSC also provides a limited range of freight forwarding services and marine support services. MSC is also involved in the cruise industry, and in other maritime activities. Through its subsidiary, Terminal Investment Limited ("**TIL**"), MSC operates various container terminals around the world. MSC also provides in-land container transportation services through its wholly owned subsidiary Medlog. Neither MSC nor TIL own or operate any container terminals in the Common Market.

6. In the Common Market, MSC provides deep-sea container liner shipping services, sea freight forwarding services and in-land transportation services and is active in Djibouti, Egypt, Eswatini, Kenya, Libya, Madagascar, Malawi, Mauritius, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

7. SAS, MSC and its subsidiaries are hereinafter collectively referred to as the "**Acquiring Group**".

8. The activities of the Acquiring Group in the Common Market are further explained below:

   a. ***Container liner shipping services***: entails the provision of regular, scheduled services for the carriage of containerised cargo by sea.

   b. ***Sea freight forwarding***: entails in-sea freight forwarding, transportation capacity provided by container liner shipping companies meaning freight forwarders are customers of container liner shipping companies.

   c. ***In-land transportation***: entails a container liner shipping company providing door-to-door services, arranging in-land haulage for its customers to and/or from the harbour, by truck, rail or barge (also called "carrier carriage"), as opposed to "merchant haulage" when the customer only purchases port-to-port services.

KPA

9. The mandate of KPA is to maintain, operate, improve and regulate all sea and inland waterway ports in Kenya[2]. The parties have submitted that KPA is responsible for the operation and management of all the port terminals in Kenya.

10. KPA manages and operates the Mombasa port and all scheduled seaports along Kenya's coastline that include Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimoni, Funzi and Vanga.

11. The port of Mombasa connects East and Central Africa. The port provides direct connectivity to over 80 Ports worldwide and is linked to a vast hinterland comprising Uganda, Rwanda, Burundi, Eastern Democratic Republic of Congo, Northern Tanzania, Southern Sudan, Somalia and Ethiopia by road[3]. A railway line also runs from the Port to Uganda and Tanzania[4].

12. The port of Mombasa has two container terminals namely; the Mombasa Container Terminal ("**Container Terminal 1**"), and the newly built Kipevu Container Terminal ("**Container Terminal 2**") with an annual total capacity of 1.65 million TEUs currently[5]. Container operations at the Port of Mombasa entail discharging and loading of vessels, stacking and unstacking of containers in the yard and delivery/receipt of import and export containers[6].

13. Container Terminal 1 has berths 16, 17, 18 and 19 per Table 1 below[7]

[2] https://www.kpa.co.ke/AboutUs/Pages/Our-Mandate.aspx
[3] https://kpa.co.ke/AboutUs/Pages/default.aspx
[4] https://kpa.co.ke/AboutUs/Pages/default.aspx
[5] https://kpa.co.ke/AboutUs/Pages/default.aspx
[6] https://kpa.co.ke/AboutUs/Pages/default.aspx
[7] https://kpa.co.ke/OurBusiness/pages/mombasa-container-terminal.aspx

Table 1: Berths of Container Terminal 1

Berth Number	Draft (m)	Length (m)	Cargo Type
16	12.5	177.7	Container
17	12.5	182.9	Container
18	12.5	239.0	Container
19	13.5	240.0	Container

14. Container Terminal 2 was completed in March 2016 and is comprised of two berths, namely berths 20 and 21. A new berth, namely berth 22, has been recently constructed and will be operational around May or June 2022. Container Terminal 2 has yard capacity of 4,135 ground slots for the storage of containers comprised of 1,090 and 3,045 for yard 20 and 21 respectively. The two berths can handle Panamax and Post-Panamax[8] container vessels of 20,000 tons and 60,000 tons respectively.

15. The berths of Container Terminal 2 are described in Table 2 below[9].

Table 2: Berths of Container Terminal 2

Berth Number	Draft (m)	Length (m)	Cargo Type
20	9.9	210	Container
21	14	350	Container
22	12	230	Container

16. KPA provides container terminal services which can be segmented by traffic flows, namely hinterland traffic (i.e., containers transported directly onto/from a container vessel from/to the hinterland via barge, truck or train) and trans-shipment traffic (i.e., containers destined for onward transportation to other ports or other vessels).

17. In the Common Market, KPA is active in Kenya, Rwanda and Uganda. The parties have submitted that KPA [redacted][10]. The liaison office acts as a link between KPA and its transit customers, undertakes documentation services and marketing and business development activities for KPA and handles customer support/relation issues as and when they arise. [redacted][11]. The liaison office supports the hinterland cargo terminal services (including hinterland container terminal services) that KPA provides to the [redacted] markets at the Port of Mombasa.

[8] Panamax and Post Panamax are terms for the size limits for ships travelling through the Panama Canal. The limits and requirements are published by the Panama Canal Authority.
[9] https://kpa.co.ke/OurBusiness/pages/kipevu-container-terminal.aspx
[10] Confidential information claimed by merging parties
[11] Confidential information claimed by merging parties

KNSL

18. KNSL is a limited liability company incorporated in Kenya which was established in late 1988 by the Government of Kenya and operates from its head office in Mombasa. KNSL is a subsidiary of KPA. KNSL is a sea freight forwarding company headquartered in Mombasa that currently offers in-land transportation services and freight forwarding services. KNSL was founded to provide end-to-end customer driven solutions for cargo transportation[12]. The CID noted that the activities of KNSL are minimal and KNSL is essentially inactive.

19. The CID noted that[13] KSNL was set up by the Government of Kenya to operate as the Kenyan National Shipping Line to take part in international trade to benefit from the UNCTAD 40–40–20 Code for liner conferences. KNSL was set up by the Government of Kenya with two private investors, namely Unimas and DG Germany.

20. The CID took note of the parties' submissions that KNSL however, did not perform as expected and lacked the necessary capacity, including skills and assets to conduct its business. MSC, through Heywood Shipping Company Ltd acquired 33% shareholding in KNSL in 1997.

Jurisdiction of the Commission

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

22. The undertakings concerned have operations in two or more Member States. The parties' combined annual asset value in the Common Market exceeds the threshold

[12] https://knsl.go.ke/background-2/
[13] Information gathered by the Commission during its meeting with Kenya Maritime Authority and KNSL

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.

Assessment Tests

23. In the inquiry and assessment of mergers, the Commission takes a multiple assessment approach, i.e., carries out a number of tests to ascertain whether the proposed transaction has or is likely to substantially prevent or lessen competition or is likely to be contrary to public interest.

(i) *Substantial Lessening of Competition or "Effect" Test – Article 26*

24. This test considers whether the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest. In order to determine whether the merger would have the effect, or be likely to have the effect, of substantially lessening competition in the market, the following matters must be taken into account in accordance with Article 26(2):

   a) the actual and potential level of import competition in the market;
   b) the ease of entry into the market, including tariff and regulatory barriers;
   c) the level, trends of concentration and history of collusion in the market;
   d) the degree of countervailing power in the market;
   e) the likelihood that the acquisition would result in the merged parties having market power;
   f) the dynamic characteristics of the market including growth, innovation and product differentiation;
   g) the nature and extent of vertical integration;
   h) whether the business or part of the business of a party to the merger or proposed merger has failed or likely to fail; and
   i) whether the merger will result in the removal of efficient competition.

(ii) *Public Interest Test Article 26(4)*

25. In order for the Commission to determine whether a merger is or will be contrary to public interest, the Commission shall take into account all matters that it considers relevant in the circumstances and shall have regard to the desirability of:

   a) maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;

   b) promoting the interests of consumers, purchasers, and other users in the region, in regard to the prices, quality and variety of such commodities and services;

c) promoting through competition, the reduction of costs and the development of new commodities and facilitating the entry of new competitors into existing markets.

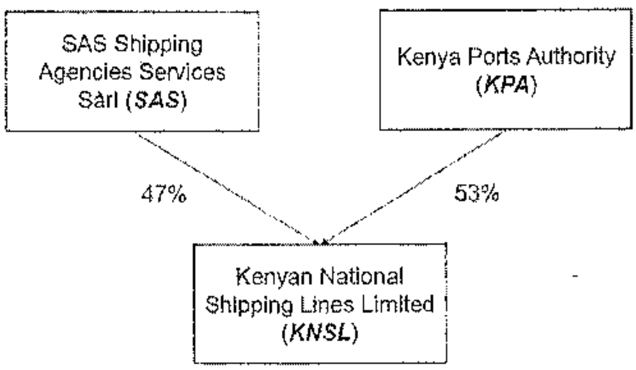
Inquiries conducted by the Commission

26. This Decision of the CID has considered information that was submitted by the merging parties in the Form 12 Notice of Merger, primary data obtained from stakeholders during the Commission's inquiry and research from the internet and other literature readings. The CID notes that the Commission also wrote to the affected Member States and gave a public notice on its website in accordance with Article 26(6) requesting for comments regarding the transaction and received written submissions received from some stakeholders. The CID further noted that the Commission conducted on-site information gathering from the parties, Kenya Maritime Authority, competitors to the parties and the Dock Workers' Union in Kenya.

Details of the Merger

27. The notified transaction involves SAS acquiring 47% shareholding of KNSL. KNSL is currently held by KPA and post the transaction, KNSL will fall under the joint control KPA and SAS, with 53% and 47% of shareholding respectively. As explained, SAS is a wholly owned subsidiary of MSC. MSC through Heywood Shipping Company Ltd holds 33.3% shareholding in KSNL since 1997. MSC has now acquired an additional 14% shareholding in KSNL and these shares represent the shares of exiting shareholders, namely Unimas and DG Germany through the pre-emptive rights under KNSL's Articles of Association[14].

28. The figure below provides the shareholding structure of KNSL post the transaction.



29. The parties submitted that with the 33% shareholding of MSC in KNSL, its rights were limited to board representation. The minority representation on the Board of KNSL and MSC was not part of any shareholder's agreement with KNSL.

[14] Information gathered by the Commission during meetings with KPA and KNSL

30. When considering the meaning of control, the CID is guided by paragraph 2.5 of the COMESA Merger Assessment Guidelines (the "Merger Assessment Guidelines") which provides that "control" is constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the undertaking or asset concerned.

31. Further, paragraph 2.6 of the Merger Assessment Guidelines provides that when determining whether a person has the possibility of exercising decisive influence over an undertaking, the Commission will take into account, among other factors, whether the person directly or indirectly:

   a) has the ability to determine a majority of the votes that may be cast at a general meeting of the undertaking;

   b) is able to appoint or to veto the appointment of a majority of the directors of the undertaking;

   c) has the ability to determine the appointment of senior management, strategic commercial policy, the budget or the business plan of the undertaking; or

   d) has a controlling interest in an intermediary undertaking that in turn has a controlling interest in the undertaking.

32. As a result of the transaction, SAS/MSC will have the following controlling rights in KNSL:

   a. Appointment and removal of [redacted] directors out of the total of [redacted] directors on the board of directors.

      - The board of directors is responsible for [redacted][15].
      - The Board also has the power to [redacted][16].
      - The [redacted][17].

   b. Power to [redacted][19].

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[15] [redacted] Confidential information claimed by merging parties
[16] [redacted] - Confidential information claimed by merging parties
[17] [redacted] - Confidential information claimed by merging parties
[18] [redacted] - Confidential Information claimed by merging parties
[19] [redacted] - Confidential information claimed by merging parties

c. The quorum at the Shareholder's meeting of KNSL [redacted] [20].

33. While the transaction will not confer the sole control of KNSL to SAS/MSC, it does confer upon the latter certain controlling rights as listed above, hence conferring decisive influence to SAS/MSC. Post the transaction, KNSL will fall under the joint control of SAS and KPA where pre-merger KPA had controlling interest in KNSL and MSC, through Heywood Company Ltd had a minority interest with 33.3% shareholding. The notified transaction entails a change from sole control to joint control, and this change in control, which is on a lasting basis, amounts to a merger.

34. While the parties have described the transaction as a joint venture, the Commission observed that the transaction is a merger given that it entails a change from sole control in KNSL to joint control conferred upon SAS and KPA where this change in control amounts to a merger as defined under Article 23 of the Regulations.

Competitive Assessment

Relevant Markets

Relevant Product Market

35. In its assessment of the relevant product market, the CID makes reference to its definition under the COMESA Guidelines on Market Definition (the "**Market Definition Guidelines**") which provides that:

"The 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"

36. In the Common Market, the Acquiring Group provides deep-sea container liner shipping services, sea freight forwarding services and in-land transportation services. MSC, through its subsidiary, TIL, operates various container terminals around the world. The Acquiring Group does not however own or operate any container terminals in the Common Market.

37. KPA operates and manages all the port terminals in Kenya while KNSL offers in-land transportation services and freight forwarding services, albeit to a minimal level.

38. The CID noted that parties' submission that the purpose of the notified transaction is to allow the Acquiring Group to continue carrying out the current activities of KNSL and for KNSL to operate the Container Terminal 2 and start offering container liner shipping services.

39. The CID's assessment of the relevant product market therefore focussed on the container liner shipping services, container terminal operation services, freight

[20] [redacted] - Confidential information claimed by merging parties

forwarding and in-land transportation. The CID noted these markets are vertically linked to each other.

Container liner shipping services

40. The Acquiring Group offers container liner services and post-merger, KNSL will start offering container liner shipping services. The CID noted that MSC offers container liner shipping services in Kenya from anywhere in the world and from Kenya to any part of the world. The container liner shipping services of MSC, through the port of Mombasa extends to the hinterland of DRC, Uganda, Burundi and Rwanda. Container liner shipping services is also referred to as deep-sea container liner shipping services.

41. The container shipping industry comprises of "shipping companies transporting containerized goods overseas via regular liner services as their core activity"[21]. A liner service is a fleet of ships, with common ownership or management, which provide a fixed service, at regular intervals, between designated ports, and offer transport to any goods in the hinterland served by those ports and ready for transit by their sailing dates[22].

42. Container liner shipping services hence involve the carriage of goods in modular containers by specially equipped ships. It involves the provision of the equipment (both the container and the shipping vessel) to facilitate a structured and organised method of carrying goods on vessels via the sea. The services comprise of the business "of offering regular scheduled ocean shipping services in international trade"[23]. Containers carried by container liners vary in size, however, common across them is that they constitute industrial sized "boxes" of a certain standard size. Container liner shipping services operate with a fixed port rotation with published dates of operations at the advertised ports.

43. The CID has in past cases found a relevant product market for container liner shipping consisting of the provision of regular, scheduled services for the carriage of cargo by container[24]. The CID considered that container liner shipping was distinct from the markets of (i) non-liner shipping such as tramp or specialised transport; (ii) non-containerised transport such as bulk cargo; and (iii) roll-on/roll-off shipping.

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[21] Dr. Theo Notteboom, "Ports and Container Shipping" https://porteconomicsmanagement.org/pemp/contents/part1/ports-and-container-shipping/

[22] Martin Stopford, "Maritime Economics" (1997) Psychology Press

[23] United Nations Conference on Trade and Development, "Liner Shipping: Is there a way for more Competition" Discussion Papers No 224 (March 2016)

[24] Decision of the Twenty Seventh Committee for Initial Determination on the Application for Authorisation of the Proposed Merger between Hapag-Lloyd Aktiengesellschaft and United Arab Shipping Company; and Decision of the Sixty-Seventh CID Regarding the Proposed Merger involving Marinvest S.r.l., Ignazio Messina & C. S.p.A. and RORO Italia S.r.l.. This approach is consistent with the findings of the European Commission who has similarly found distinct product market for container liner shipping in past cases, including Case No COMP/M.7268 ***CSAV/ HGV/ Kühne Maritime/ Hapag-Lloyd AG***, available at https://ec.europa.eu/competition/mergers/cases/decisions/m7268_1503_2.pdf

44. Container liner services can be distinguished from non-liner shipping services (i.e. charter, tramp, specialised transport) based on the regularity and frequency of the service. A tramp service is a ship that has no fixed routing or itinerary or schedule and is available at short notice to load any cargo from port to port[25]. Customers demand scheduled transport in order to meet production runs and delivery deadlines, which makes demand substitution less effective between liner and non-liner services.

45. Furthermore, the use of containerised transportation can be considered separate from other non-containerised transport such as transport by bulk vessel. The non-container/bulk cargo services (also referred to as general cargo or break-bulk cargo) includes all types of break-bulk goods (i.e., goods that must be loaded individually and not in containers). Container-liner shipping are said to have a low degree of substitutability with non-containerised cargo/bulk cargo because the type of transported cargo and of vessels used are generally different[26]. For example, goods such as vehicles, and forest products such as paper and board - can be carried on bulk vessels specially designed for such cargoes.

46. The European Court of Justice in ***Tetra Pak***[27] stated that the stability of demand for a certain product is the appropriate basis for defining a relevant market and that when different products are, to a marginal extent, interchangeable, this does not preclude the conclusion that these products belong to separate product markets. On this basis, while it is possible that in exceptional circumstances some substitution may occur between bulk cargo and container transport, it is noted from the findings of the European Court of Justice that there is no evidence that there is in fact any lasting substitution from containerised cargo towards bulk cargo for the vast majority of cases. The European Court of Justice's position on this matter buttresses the CID's analysis and conclusion that the container liner shipping services is a distinct market.

47. Container liner services can also be differentiated from roll-on/roll-off cargo services. The latter services are provided using roll-on/roll-off ("Ro-Ro") vessels, which are designed to carry exclusively wheeled cargo such as cars, trucks and trailers. Cargo on containerised vessels to the contrary is loaded and unloaded by crane. From a demand side, it is noted from the findings of the European Commission in ***DFDS/ Norfolk*** that Ro-Ro vessels "aim at different cargo flows as some goods such as steel, pipes, cars, timber, food-stuff (if in bulk) or paper products can only be transported by Ro-Ro as they cannot be containerised. In addition, customers indicated that transport on Ro-Ro is faster, as Ro-Ro is in general a direct service between two ports with more (often daily) frequencies, which constitutes a key element for transport of time sensitive products such as flowers or meat"[28]. From a supply perspective, container transport vessels present different characteristics than

[25] http://shippingandfreightresource.com/liner-and-tramp-service/
[26] See for example the European Commission decisions in case No COMP/M.5066 - EUROGATE/APMM; and Case No IV/M.831 - P&O/Royal Nedlloyd
[27] See the European Commission decision in Case C-333/94 P, of 14/11/1996, par 13-15
[28] European Commission decision in Case No COMP/M.5756 - DFDS/ Norfolk, paragraph 13

the Ro-Ro vessels which are provided with facilities for trailers to drive on the vessels. Moreover, the terminal facilities required for Ro-Ro vessels and container liners are different. Specifically, container transport vessels need a terminal with container cranes hence a large investment, while Ro-Ro can be worked on a quayside without this investment due to the built-in ramp of a Ro-Ro vessel[29]. Therefore, it does appear with significant confidence that supply side substitution is not likely to take place in a timely and sufficient manner in reaction to significant changes in price or other conditions of competition.

48. It is considered that the exact segmentation of the container liner shipping markets in terms of non-liner shipping services, non-container/bulk cargo services and roll-on/roll-off is not required as the parties do not have any overlapping container liner shipping activity pre-merger. The exact segmentation of the market will therefore not affect the competitive assessment of the transaction.

49. In line with its previous decisional practice, the CID considered that the relevant market is the "market for the provision of container liner shipping services". It is noted that a possible narrower product market could be identified in terms of transport of refrigerated goods, which could be limited to refrigerated (reefer) containers only or could include transport in conventional reefer (refrigerated vessels). The CID however considered that the adoption of a narrower market definition would not materially affect the competitive assessment, given that the parties do not have any overlapping activity in this market pre-merger.

Container Terminal Operation Services

50. The provision of container terminal services by terminal operators such as KPA involves the loading, unloading, storage, and land-side handling for inland transportation of containerised cargo[30]. Container terminal services are input services to container liner shipping. While MSC operates container terminals around the world, it does not operate any container terminal in the Common Market.

51. Container terminal services have traditionally been segmented according to traffic flows as follows:

    a) hinterland traffic, that is containers transported directly onto/from a container vessel from/to the hinterland (via barge, truck or train), and

    b) transhipment traffic, that is, containers destined for onward transportation to other ports or other vessels. Transhipment traffic involves both feeder movements, where containers are moved from a deep-sea vessel to a short-sea vessel serving adjacent markets; and relay movements, where containers

[29] Ibid, paragraph 14

[30] Cases M.7523 – CMA CGM/OPDR, paragraph 63 https://ec.europa.eu/competition/mergers/cases/decisions/m7523_985_2.pdf

are moved from one ocean-going vessel to another ocean-going vessel for onward movement to another more distant market[31].

52. The CID has noted from the merger filing that KPA provides both hinterland traffic and transhipment traffic container terminal services. The majority of container terminal services provided by KPA at the port of Mombasa are however hinterland traffic container terminal services. Given that KNSL will take over the operations of Container Terminal 2 from KPA, KNSL will also be providing both hinterland and transhipment traffic container terminal services.

53. The assessment has considered that the traditional segmentation of container terminal services is appropriate for the transaction at hand. Container terminal services should be segmented by virtue of traffic flows since on the demand-side, such services are viewed as distinct. A customer requires transhipment traffic as his/her container has not reached the final port of destination, the main reason being that the liner shipping company does not connect the port of origin and the required port of destination. Transhipment traffic is therefore required only for containers in transit where one container is moved from one shipping vessel and loaded to another with a view to sending it to another transhipment hub or its final destination. Hinterland traffic services are sought by a customer only once the container has reached its final destination. In view of the intended usage and requirement of the service, it is observed that such services are not substitutable and in the event of a hypothetical small (in the range 5 % to 10 %) but permanent increase in the price of hinterland traffic services, customers are not likely to switch to transhipment traffic, and vice-versa.

54. Therefore, for the purposes of this transaction, the CID considered that the broad market for container terminal operation services should be segmented into the following service markets:

   a. the provision of hinterland traffic container terminal services; and

   b. the provision of transhipment traffic container terminal services.

Freight Forwarding Services

55. Both the Acquiring Group and KNSL are involved in the provision of freight forwarding services. The Acquiring Group specifically provides sea freight forwarding services.

56. Freight forwarding entails "the organisation of transportation of items (including activities such as customs clearance, warehousing, ground services etc.) on behalf of customers according to their needs"[32]. Freight forwarding facilitates International

[31] Cases M.8330 – Maersk Line/HSDG, paragraph 29
https://ec.europa.eu/competition/mergers/cases/decisions/m8330_1036_3.pdf

[32] Case COMP/M.4045 DB / BAX Global, Case COMP/M.3971 Deutsche Post / Exel, Case COMP/M.3603 UPS / Mello, M.3496 TNT Forwarding Holding / Wilson Logistics, Case COMP/M.3155 Deutsche Post / Securicor, Case COMP/M.2908 Deutsche Post / DHL and Case COMP/M.1794 Deutsche Post / Air Express International

trade by ensuring that internationally traded goods move from point of origin to point of destination and arrive at the right place and time; in good condition; and at the most economical costs. Freight forwarders do not own any part of the network they use, but they normally hire transportation capacity from third parties for the transportation of shipments.

57. The CID noted that within the freight forwarding market, narrower markets could potentially exist. For instance, freight forwarding can be grouped into domestic and international freight forwarding or according to the mode of transport (air, land and sea)[33]. It is noted that the Acquiring Group is involved in the provision of sea freight forwarding services. However, for the purposes of this transaction, given that the activities of the Acquiring Group and of KNSL in the freight forwarding market are negligible, narrower markets need not be defined as any alternative market definition is not likely to alter the competitive assessment with respect to freight forwarding.

Inland transportation services

58. Inland transportation service refers to the inland haulage services offered by a container liner shipping company to convey the shipment at the door of the customer to and from the port. Inland transportation therefore covers the physical movement of goods from the port to the customer by the service provider by using own (i.e. owned or leased) equipment[34].

59. Inland transport can happen by various modes, which may include road or rail or inland waterways. The cost of inland transport is likely to vary according to the mode of transport being used. The nature of the good being transported is also material in deciding the mode of inland transport, perishable goods are likely to require faster mode of transport to reach the customer. If a vehicle is being transported, then it is likely to be delivered via road to the customer. For the latter reasons, there may therefore exist different sub product markets depending on the mode of inland transport. The mode of inland transport used by KPA is rail and road while that of MSC is mostly road. However, given that the target's activities are minimal in relation to inland transport, no conclusion is required on the precise boundaries of the market for inland transportation as this will not affect the competitive assessment.

60. In light of the above and given the activities of KNSL post-merger, the CID considered that the relevant product markets are:

    a. the provision of container liner shipping services;

    b. the provision of hinterland traffic container terminal services;

    c. the provision of transhipment traffic container terminal services;

[33] European Commission Case COMP/M.4746 Deutsche Bahn / EWS, Case COMP/M.4045 DB / BAX Global, Case COMP/M.3971 Deutsche Post / Exel and Case COMP/M.1794 Deutsche Post / Air Express International.

[34] European Commission Case M.8120 - Hapag-Lloyd / United Arab Shipping company

d. the provision of freight forwarding services; and

e. the provision of inland transportation services.

Relevant Geographic Market

61. In its assessment of the relevant geographic market, the CID makes reference to its definition under the Market Definition Guidelines which provides that:

"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."

Container terminal services

62. The CID has previously considered that the geographic scope for transhipment services could be broader than national and would be defined by the catchment area of ports which the container terminal generally serves; whereas for hinterland traffic, the geographic market is likely to be narrower having regard to the required hinterland connectivity to effectively facilitate container cargo flows from the foreland to hinterland[35].

Hinterland Traffic

63. Having regard to KPA's port operations, which will be transferred to KNSL post the transaction, the CID considered that the geographic market for the provision of hinterland traffic container terminal services is limited firstly to the ports of operations of KPA and KNSL, that is, Mombasa, Kenya operated by KPA which serves the hinterland of Kenya and the surrounding landlocked countries namely Uganda, northern Tanzania, Burundi, Rwanda, South Sudan, and the eastern regions of the DRC and secondly the competitor of KPA, which is the Port of Dar es Salaam (located in Tanzania which serves a larger hinterland of landlocked countries including Burundi, Rwanda, Malawi, Zambia, and the DRC).

64. In hinterland traffic container terminal services, the container has to reach the customer where he is located. The Commission has considered whether the port of Dar es Salam could be a substitute to container liner shipping companies calling at the port of Mombasa. The Commission has gathered that the Port of Dar es Salam is not an as effective substitute as it is a congested port and the waiting time to be berthed can go up to 20 days as compared to the port of Mombasa which was described as a more organised port and the maximum average time for a vessel to be berthed varies from one week to 10 days. The Commission further observes that it may not be feasible for hinterland to be wider the hinterland which is served by the port of Mombasa as it may be costly for cargo to be offloaded in Dar es Salam, given

[35] Decision of the Eighty-First (81st) Committee Responsible for Initial Determinations Regarding the Proposed Merger involving DP World Logistics FZE and Imperial Logistics Limited

the distance and the fact that the transportation of containers is done by rail or road. In the same vein, the Commission considers that the port of Maputo, Durban or ports in Egypt and transported to Kenya, DRC, Uganda or Rwanda are not effective substitutes to the port of Mombasa.

65. Therefore, the CID considered the relevant market as the markets for hinterland traffic container terminal services in Burundi, Democratic Republic of Congo, Kenya, Uganda and Rwanda which are the countries that the port of Mombasa serves in respect of hinterland services.

Transhipment Services

66. With respect to the provision of transhipment traffic container terminal services, the CID considered that the geographic market is likely to be broader than the port of operation. It is noted from the parties' submission that KPA competes at least with the container terminals in Dar Es Salaam (Tanzania), Port of Djibouti (Djibouti), Durban (South Africa), Port Louis (Mauritius), Maputo (Mozambique) and Pointe-des-Galets (Reunion Island) for transhipment traffic. Even though the market can extend to the north of the Continent, the CID believes that the likelihood of ports in Member States such as Egypt to compete with the port of Mombasa and other neighbouring ports is not likely because of the distance which will hinder effective transhipment. Therefore, the assessment considered that the geographic scope with respect to transhipment traffic should include all ports in the Eastern and Southern Africa.

Container Liner Shipping Services

67. The CID has traditionally defined the geographic scope of container liner shipping services on the basis of the legs of trade[36], defined by the range of ports that are served at each end of the service. Each trading route can have specific characteristics depending on the volumes shipped, the types of cargo transported, the ports served and the length of the journey from the point of origin to the point of destination[37]. From a demand perspective, a trading route is unlikely to be viewed as interchangeable with a different route. Moreover, market conditions on the two directions (legs) of a trade can be different, in particular in case of trade imbalances or different characteristics of the products shipped, a distinction can thus be made between the two directions (legs) of a trade.

68. In line with its past decisional practice, the CID considered that the relevant geographic markets are therefore the legs on which container liner shipping services are provided. The Acquiring Group offers container liner shipping services into and from Kenya on all the global trade routes.

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[36] Decision of the Seventy-Third (73rd) Committee Responsible for Initial Determination dated 12th November 2020 Regarding the Joint Venture involving Bollore Africa Logistics, Nippon Yusen Kabushiki Kaisha, Toyota Tsusho Corporation, CCC/MER/06/17/2020

[37] See the European Commission decision in Case No COMP/M.7268 - CSAV/ HGV/ KÜHNE MARITIME/ HAPAG-LLOYD AG, paragraph 23.

Freight Forwarding

69. In line with previous decisional practice[38], the CID considered that the market for the freight forwarding market is likely to be COMESA-wide. Whilst it is noted that customers may tend to prefer providers from their home country, the majority of freight forwarders are global players with local offices or registered agents in a number of countries, including in the Member States. The presence of such a selection of providers gives customers varying options of providers that can facilitate movement of their goods within the Common Market and beyond.

Inland Transportation Services

70. The CID assessment has considered that the geographic scope for the provision of inland transportation services is likely to be national in scope. This is because the services are now being required to deliver the goods at the doorstep of a customer. The customer is therefore likely to procure such services from the suppliers within his geographic territory as sourcing a supplier from outside his geographic boundaries may not be a timely and cost-effective option for the customer.

Conclusion of Relevant Market Definition

71. For the purposes of assessing the proposed transaction only, and without prejudice to future cases, the CID has identified the relevant markets as follows:
    a. the markets for hinterland traffic container terminal services in Burundi, DRC, Kenya, Uganda and Rwanda;
    b. the provision of transhipment traffic container terminal services in Southern and Eastern Africa;
    c. the global provision of container liner shipping services;
    d. the provision of freight forwarding services in the Common Market; and
    e. the national market for the provision of inland transportation services in Kenya.

Market Shares and Concentration

72. The parties have submitted that the core activity of KNSL after the transaction will be the provision of container terminal services.

73. The port of Mombasa is the gateway to the East Africa region together with the ports of Dar es Salam and Djibouti. The port of Mombasa has at present two container terminals. Firstly, Container terminal 1 which operates berths 1 to 19. However, the berths which are used by international container liner shipping companies are berths 16 to 19. The depth of the berths of Container Terminal 1 can berth vessels of 5000 TEU capacity. Secondly, Container Terminal 2 which was built in 2016 and operates berths 20 and 21. A new berth 22 has been built at Container Terminal 2 and this will

[38] Decision of the Seventy-Sixth (76th) Committee Responsible for Initial Determination Regarding the Proposed Merger Involving IVY 2 Investments VCC and PIL Holdings Pte. Ltd

be operational in or around May or June 2022. Berth 20 at Container Terminal 2 is used mainly by feeder vessels and for transhipment container traffic services. Berth 21 at Container Terminal 2 has a depth which can allow it to berth vessels which have a capacity of 8000 TEUs. The CID noted that Container Terminal 2 is therefore more efficient than Container Terminal 1 in terms of the depths of the berths, its cranes which are twin-lifts and newer, a vast container stacking space and capacity to berth larger vessels.

74. The parties estimate the market shares of the terminal operators for hinterland traffic in the region around Kenya and Tanzania as per Table 3 below:

Table 3 - Container Terminal Services for hinterland traffic for Kenya and Tanzania – 2021[39]

Ports	**Volume (TEUs)**	**Market shares (%)**
Mombasa	[redacted]	[redacted]%
Dar Es Salaam	[redacted][40]	[redacted]%
Lamu	[redacted][41]	0%
Total	[redacted]	[redacted]%

75. The CID noted that the market shares of the parties for hinterland traffic container terminal services in Kenya is significantly high. It is considered that given that the ports are Government owned and operated, it is expected that the market shares will be high for such operations. Such terminals are likely to be operating as quasi-monopolies.

76. The market shares of operators in the provision of transhipment traffic container terminal services in Southern and Eastern Africa has been provided by the parties per Table 4 below:

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39 [redacted]. Confidential information claimed by merging parties

40 [redacted]

41 [redacted]

Table 4 – Market Shares for container terminal services transshipment traffic for Eastern and Southern Africa – 2021[42]

Port	Volume (TEUs)	Market shares (%)[43]
Mombasa	[redacted]	[redacted]%
Dar Es Salaam	[redacted]	[redacted]%
Durban	[redacted]	[redacted]%
Total	[redacted]	[redacted]%

77. The CID noted that KPA's market shares are highest in this market. As explained, the CID believes that because ports are Government owned and operated, it is expected that the market shares will be high for such operations. Such terminals are likely to be operating as quasi-monopolies in the country.

78. The parties have submitted that the market shares for the Acquiring Group and KNSL in relation to in-land transportation services and sea freight forwarding services, in Kenya are below [redacted]%[44] on both markets. The CID noted that has limited operations and as such the market shares of the parties are likely to be lower in the provision of freight forwarding services in the Common Market.

Consideration of Dominance/ Unilateral Effects

79. The CID observed that the Container Terminal market is a market which is usually concentrated given the limited number of players offering the service. This service is currently provided exclusively by KPA. Post-merger, the Container Terminal 2 will be operated exclusively by KNSL. The CID further noted that as compared to Container Terminal 1, the Container Terminal 2 is more modern and efficient in terms of *inter alia*, its infrastructure and size of berths and this hinders the ability of Container Terminal 1 to be an effective competitor to Container Terminal 2. KNSL will therefore dominate the use of Container Terminal 2. The Container Terminal 2 will confer economic strength on KNSL which may prevent other container shipping liner companies from competing effectively on the relevant markets for the provision of both container terminal services and container liner shipping services. Further, given that MSC is a shareholder of KNSL, MSC will also enjoy from the economic strength of KNSL on the relevant markets for the provision of both container terminal services

42 [redacted]. Confidential information claimed by merging parties.

[redacted]

44 Confidential information claimed by merging parties.

and container liner shipping services, which may enable MSC to abuse the market power of KNSL to its advantage.

80. The CID noted that the transaction will result in vertical integration where SAS/MSC will have joint control over container terminal services at the port of Mombasa. No other competitor shipping liner company has control over the container terminals of Mombasa. The vertical integration may put SAS/MSC at a competitive advantage against the other competitors in relation to the use of container terminal services which allows it to operate without competitive constraints from other container liner shipping companies and are likely not to allow competitors' access to the Container Terminal 2.

Consideration of Vertical Effects and links

81. The CID noted that the parties are active on markets that are vertically related to each other, namely container terminal services, container liner shipping business, freight forwarding, and inland transportation services.

82. The Transaction would thus create vertical links between the parties' operations in the upstream markets for container terminal services and downstream market for container liner shipping services; and the downstream market for inland transportation services and freight forwarding services.

83. These markets would be vertically affected by the transaction if KNSL post the transaction has the ability and incentive to foreclose its rivals, and that the foreclosure strategy will result in a substantial lessening of competition in the upstream or downstream market.

84. The CID noted the submission by KPA that it is currently running the container terminal services on a fixed berthing window where container liner shipping companies are allocated berths according to a planning schedule of the KPA which caters for the fortnightly operations of the berths. The fixed berthing window provides a fixed berth to a container shipping liner company for a fixed period of time to load and offload a vessel. The fixed berthing window is efficient as it reduces the waiting time of vessels to be berthed and helps for better planning and operations of the Port.

85. The CID has however noted that fixed berthing windows are not always fully implemented in practice. To this end, the CID was concerned that post the transaction, Container Terminal 2 may be used exclusively by MSC and this can give an unfair competitive advantage to MSC over its competitors.

86. Given the nature of activities of parties and in view of the nature of the proposed transaction, the CID therefore considered the following potential theories of harm.

a. Input Foreclosure

87. The CID noted that tariffs for container terminal services are set by the KPA via a regulatory mechanism. The CID observed that KNSL will apply KPA tariffs as such it

may not have the ability to increase the prices for container terminal services at container terminal 2 for services provided to its competitors. Further, it is not likely that KNSL would use discriminatory pricing in favor of MSC.

b. Total Input Foreclosure

88. The CID observed that the container terminal 2 is more efficient when compared to container terminal 1 in terms of operations and can accommodate bigger vessels. Additionally, its efficiency will be enhanced with the operation of new Berth, 22 in May/June, 2022 which will increase the terminal's capacity.

89. The CID considered that the competitiveness of container shipping liner companies in terms of berthing at Container Terminal 1 cannot be compared to those container shipping liner companies being berthed at Container Terminal 2 for the following reasons:

    i. there is at present a congestion at Berths 16 and 17, given the number of container shipping liner companies using the Berths.

    ii. the ship to shore equipment at Berths 16 are single lift cranes which are old and often experience breakdowns.

90. The CID considered that the equipment at Berth 16 therefore puts the container shipping liner companies at a competitive disadvantage because the ship to shore equipment can make only 11 – 12 container lifts per hour while the ship to shore equipment, found on Berths 18 and 21 are twin-lifts making 20 moves an hour.

91. Due to the congestion, shipping lines, the CID observed that that their waiting time to be berthed is longer and when being berthed, they are subject to cut and runs which entail that the loading and off-loading activities of their vessels are stopped abruptly without reaching completion if another vessel is brought to the berth.

92. The cut and run policy results in additional costs to the shipping line which has to pay KPA for the container stacking services in addition to costs of full containers, which may contain perishable items, being held at the Port until the next vessel of the line is serviced.

93. Based on market enquiries, the CID noted that KNSL may not subject the vessels of MSC to cut and run policies, given the financial implications of same, while the vessels of other container liner shipping companies might be subject to cut and run policies. The CID noted that cut and run policies raise the costs of the container liner shipping companies where they have to incur additional costs for its containers on the yards of the port. Such additional costs are likely to be passed on by competing shipping liner companies to customers in terms of increased prices and this can hinder the ability of competitors to compete effectively in the relevant market.

94. The CID assessed the ability and incentive of KNSL to engage in total input foreclosure in view of the fees payable by KSNL to KPA. The CID observed that KSNL would have to rely on other container shipping liner companies apart from

MSC in order yield its revenue and this removes its ability and incentive to foreclose access of Container Terminal 2 to its competitors by virtue of applying discriminatory fees. However, the CID noted that the pursuant to the [redacted][45], [redacted][46] and KNSL [redacted][47]. Additionally, the CID noted that from the [redacted][48].

95. The CID therefore considered that the provisions of the Terminal Operations Agreement and Terminal Services Agreement may confer an exclusivity or at least a preference on MSC for the use of Container Terminal 2. Consequently, there is a likelihood that competitors to MSC might be foreclosed from the usage of Container Terminal 2. Further, considering that Container Terminal 1 is not comparable to Container Terminal 2 in terms of efficiency, this exclusivity is likely to substantially prevent or restrict competition in the market for the provision of container liner shipping services.

c. Commercially sensitive information

96. The CID considered that given KNSL has MSC as a shareholder and will at the same time be handling information and providing services to the competitors of MSC, there is a likelihood that MSC will have a competitive advantage over its competitors especially that the terminal services agreement gives KNSL information on access control and security measures.

97. Further, the shareholders agreement allows the parties to share information to their affiliates for authorised purposes. KNSL will also have access to information on the movement of cargo (import and export) of its competitors, and potentially on the clients of the competitors. This may put MSC at a competitive advantage over its competitors.

98. The CID considered that vertical concerns in terms of foreclosure and access to confidential information may result from the transaction which can have or is likely to have the effect of substantially lessening competition on the market.

99. In relation to the markets for freight forwarding and inland transportation, the CID considered that KNSL would not have the ability and incentive to foreclose the market for freight forwarding and inland transportation, post the transaction, as it is a very small player with less than [redacted]% market shares in the downstream market. In the event that freight forwarders are denied access to the shipping vessels of the acquiring

[45] Confidential information claimed by merging parties
[46] Confidential information claimed by merging parties
[47] Confidential information claimed by merging parties
[48] Confidential information claimed by merging parties

group, the CID considered that the players in this market have options of engaging other international competing shipping liner companies for their services.

100. The CID also considered whether the vertical integration of KNSL, where KNSL will obtain economic strength in the markets for the container terminal services and container liner shipping services, may give it the ability and incentive to prevent or restrict competition in the markets for freight forwarding and inland transportation. The CID concluded that no ability nor incentive may be conferred upon KNSL given that freight forwarding and inland transportation is not the main business of SAS/MSC.

Consideration of Public Interests

101. In considering public interest, the CID takes into account matters provided for under Article 26(4) of the Regulations. The consideration of Public Interest under Article 26(4) of the Regulations focuses on ensuring that competition is maintained and promoted between persons producing or distributing commodities and services in the Common Market; promote the interests of consumers, purchasers, and other users in the Common Market in regard to prices, quality and variety of such commodities and services; and promoting through competition, the reduction of costs and the development of new commodities and facilitating the entry of new competitors into existing markets. The CID observed that pro-competitive mergers should result in the creation of employment in the Common Market pursuant to Article 2 of the Regulations. Thus, any merger that has potential anti-competitive concerns and threatens the creation or maintenance of jobs may be contrary to public interest.

102. The CID noted that the notified transaction is likely to result into significant competition concerns and effect as described in the competition assessment section of this report and therefore by analogy and pursuant to Article 26(4) of the Regulations, the transaction is likely to be contrary to public interest.

103. The CID further observed from its market inquiry conducted in Kenya that public interest concerns relating to employment concerns resulting from the transaction where there is an uncertainty about the fate the employees of Container Terminal 2 and that of external service providers post the transaction. The CID noted that [redacted][49] [redacted][50]. The Commission further notes that [redacted] [redacted][51].

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[49] [redacted]. Confidential information claimed by merging parties.

[50] [redacted] Confidential information claimed by merging parties.

[51] [redacted] Confidential information claimed by merging parties.

104. The above notwithstanding, the CID was concerned the transaction may result in retrenchment of employees of Container Terminal 2. To this end, undertakings has been provided by the parties which address these concerns. The Commission is concerned with employment issues in merger transactions. This is because Article 2 of the Regulations provides that competition should result in job creation. Therefore, any transaction that results in employment loss without proper justifications may raise concerns.

Consideration of Effect on Trade between Member States

105. The CID noted that notion of effect on trade between Member States is not limited to traditional exchanges of goods and services across borders but it covers all cross-border economic activity such as the effect on the right of establishment or entry of undertakings in a market[52]. Further, the concept considers the appreciability of conduct on the market by considering the nature of the relevant product market and the market position of undertakings concerned. A consideration of whether a merger will affect trade between Member States implies that the assessment must consider how the transaction will impact cross-border economic activity involving at least two COMESA Member States.

106. According to the competitive assessment of this transaction, it has been noted that vertical concerns shall arise as a result of the merger since merged entity will be active in the container terminal services and container liner services which services are complementary. Further, the shareholders of KNSL being SAS/MSC and KPA are also active in the container liner shipping services. This interrelation shall increase the risk of discrimination in the access to container terminal services by KNSL in favour of itself and its shareholders which is likely to result in foreclosure concerns i.e., limiting the establishment or expansion of other container shipping liners. These foreclosure concerns are likely to affect competition which will appreciably affect trade between the affected Member States. Further, given that the Container Terminal 2 which will be operated by KNSL is an important facility providing access to the East African market, its likely to limit access to the port, hence appreciably affecting trade within the Common Market.

107. In view of the foregoing, it is concluded that the transaction is likely to result in an appreciable effect on trade between Member States.

Consideration of Third-Party Views

108. Third-party views were received from Egypt, Madagascar, Malawi, Mauritius, Eswatini and Kenya and other private stakeholders. The CID noted the submissions from stakeholders in Kenya which raised significant competition concerns in relation to the transaction, which buttressed the assessment of the CID.

[52] See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty – paragraph 19 - 22

Determination

109. Based on the foregoing reasons, the CID determined that the merger is likely to substantially prevent or lessen competition in the Common Market or a substantial part of it and be contrary to public interest. The CID further determined that the transaction is likely to negatively affect trade between Member States. The CID was also concerned that the transaction may have the potential of resulting in job losses.

110. The CID therefore approved this transaction subject to the following undertakings submitted by the parties:

    a. KNSL will not exclusively allocate the capacity of Container Terminal 2 to one container liner shipping company and shall operate it under a common user facility principle. This undertaking will apply on condition that:

        - the operation under a common user facility principle remains compatible with the stated public policy objectives of the joint venture namely, increasing gateway and transhipment traffic to and productivity of CT2.

        KNSL shall develop and/or establish objective, fair and transparent procedures for accessing the CT2. Post-merger, where the Commission upon review of the market situation comes to the conclusion that such procedures are not objective, fair and transparent, it reserves the right to use other provisions under the Regulations to resolve the matter.

    b. The tariffs to be applied by KNSL for container terminal services in Container Terminal 2 shall be the tariffs reflected in the KPA Tariff Book, to the extent required by the applicable Kenyan law or otherwise on non-discriminatory terms. Where KNSL is providing discounts and rebates to its customers on its tariffs or on any other charges for its services, this should be done on non-discriminatory terms. KNSL shall develop and/or establish objective, fair and transparent procedures for providing discounts and rebates.

    c. Employees of KNSL shall not have dual roles within KNSL and MSC simultaneously.

    d. The Senior Positions at KNSL such as General Managers, Sales Managers, General Counsel, Chief Financial Officer, and Chief Operations Officer shall not be held by someone who has held that position in MSC during a 1-year period preceding the Commission's approval of the merger.

    e. No director serving on the board of directors of MSC shall simultaneously serve as a director on the board of directors of KNSL. No existing director of MSC can serve the Board of KNSL prior to three years after the end of expiry of his directorship at MSC.

    f. Commercially sensitive information of KNSL's customers, other than MSC, such as competing container liner shipping companies, freight forwarders and providers of inland transportation (which shall include recent past, current and future price information, cost information, information about future product offerings, and non-public information of such customers of KNSL) will not be exchanged under any circumstances between KNSL and its shareholders. The exchange of non-commercially sensitive information by KNSL with its shareholders shall be solely for purposes of monitoring the performance and operational efficiency of KNSL.

g. The IT operating system to be used by KNSL post transaction should be distinct, separate and not connected to the IT systems of MSC or any of its subsidiaries, such that the computer systems of KNSL cannot have any shared information exchange interface, except in MSC's capacity as a customer of KNSL to enable data transfers of MSC cargo only.

h. There will be no merger-specific retrenchments at KNSL.

   For the sake of clarity, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Proposed Transaction; and (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance.

i. Contracts of service providers engaged by KPA at Container Terminal 2 will be maintained by KNSL, subject to compliance with the public procurement laws of Kenya.

j. The merging parties commit to submit, within thirty (30) days of each anniversary of the merger clearance decision of the Commission, for the next five years, a comprehensive report detailing compliance with the above Undertakings. This undertaking does not however stop the CCC from undertaking periodic reviews of the market to assess compliance.

k. After five (5) years, the Commission shall review the Undertakings to consider their continued relevance. If the Undertakings continue to be relevant, the Commission shall approve their continuation for a specified period of time depending on the prevailing market conditions at the port of Mombasa. The Commission shall inform KNSL of its decision in writing within one (1) month of expiry of the five (5) year period. The foregoing notwithstanding, the Commission may at any given time it deems necessary, review the market to determine the relevance and effectiveness of these undertakings.

l. The parties and the Commission may review some or all the undertakings before the expiration of the 5 years period from the date of the Commission's approval of the transaction in an event that an act of God (*force majeure*) renders the implementation of the undertakings impossible within the period of the manifestation of the act of God.

m. The undertakings shall enter into force on the date of approval of the transaction by the CID.

111. The CID's approval on the transaction does not absolve the parties from complying with other relevant laws, whether national, regional or international, which address matters outside the ambit of the Regulations.

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

Dated this 10th of May 2022

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Commissioner Mahmoud Momtaz (Chairperson)

COMESA COMPETITION COMMISSION * 10 MAY 2022

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Commissioner Vincent Nkhoma

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Commissioner Islam Tagelsir Ahmed Alhasan