COMESA Competition Commission

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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/7/32/2022

Decision[1] of the Ninetieth (90th) Meeting of the Committee Responsible for Initial Determinations Regarding the Proposed Merger involving SAS Shipping Agencies Services Sàrl and Bolloré Africa Logistics SAS

ECONOMIC SECTOR: Shipping

COMESA COMPETITION COMMISSION 19 DEC 2022

19 December 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 8 August 2022, the Commission received a notification from ENSafrica on behalf of their clients, Bolloré Africa Logistics SAS ("**BAL**") and SAS Shipping Agencies Services Sàrl ("**SAS Lux**"), pursuant to Article 24(1) of the Regulations[2].

[2] Article 25(1) of the Regulations provides that the Commission shall examine a merger within 120 days after receiving the notification. Further, Article 25(2) of the Regulations provides that if prior to the expiry of the 120-day period, the Commission has decided that a longer time period is necessary, it shall so inform the parties and seek an extension from the Board. In the instant case, the 120-days period would have expired on 7 December 2022. The Commission's preliminary assessment had identified potential concerns likely to arise from the transaction and has proposed potential remedies. The Commission noted that it required additional time to conclude its assessment, including discussions with the merging parties and the affected Member States on the concerns identified and proposed remedies. On 17 November 2022, the Commission informed the parties of its intention to seek an extension of 30 days to the timeline for concluding the review of this transaction from the Committee responsible for Initial Determination (the "CID"). At its 89th meeting held on 27-28 November 2022, the CID granted approval for an extension of 30 days starting from 8 December 2022.

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

SAS Lux (the acquiring firm)

4. SAS Lux is a private limited liability company incorporated under the laws of the Grand Duchy of Luxembourg. It is a wholly owned subsidiary of MSC Mediterranean Shipping Company SA ("**MSC**", together with its subsidiaries, the "**MSC Group**").

5. MSC is a privately held company founded in 1970 which provides, at a worldwide level, maritime transport and containerised liner shipping services. MSC operates a fleet of more than 610 ships covering more than 500 ports of call globally. MSC has been active in Africa since 1971.

6. In addition, the MSC Group is active in logistics (warehousing and distribution, off-dock storage, logistics, projects, specialised reefer services, etc.) as well as rail, inland waterway and road transport (notably through its logistics arm Medlog). Medlog is a global operator of logistics supply chain services. It is active in over 70 countries and specialises in the transport of containerised goods by truck, train and inland barge, as well as logistics services.

7. The MSC Group's activities also include, notably via Terminal Investment Limited, container port handling services and terminal operations. MSC is also active worldwide in the cruise industry.

8. In the Common Market, the MSC Group's services include the following:

- *Deep-sea container liner shipping services*

7.1 MSC's main maritime cargo activities consist of deep-sea container liner shipping services, including dry[3] and reefer cargo to/from ports in Djibouti, Egypt, Kenya, Libya, Madagascar, Mauritius, Somalia, Sudan and Tunisia (extending to the hinterland of several COMESA countries).

[3] Dry cargo services are the simplest and most common services offered by MSC. Dry cargo can include some of the world's most commonly traded commodities such as paper, white-goods and scrap metals, but can also include hazardous cargo, food-grade cargo, and rare and precious cargo.

7.2 MSC has interests in Ignazio Messina & C. S.p.A. and RORO Italia S.r.l. (collectively referred to as "**IM**"), which are active in container liner shipping services and Roll On/ Roll Off ("Ro-Ro")[4] shipping services from/to several COMESA Member States. IM operates as a standalone brand; and

7.3 MSC's subsidiary Grandi Veloci Navi provides, on a very limited basis, unitised short-sea freight transportation services (Ro-Ro cargo only) between Italy and Tunisia on its Ro-Ro passenger (Ro-Pax) vessels.

- *Container terminal services*

7.4 In May 2022, MSC received approval from the Commission[5] to enter into a joint venture with the Kenya Ports Authority in terms of which it will jointly control Kenya National Shipping Line Limited ("**KNSL**") which may act as the operator of the upgraded Kipevu Container Terminal in Mombasa Port in Kenya (the "**Mombasa Container Terminal 2**") [redacted].

7.5 The Mombasa Container Terminal 2 offers services that include the discharging and loading of vessels, stacking and unstacking of containers in the yard, and the delivery and receipt of import and export containers. [redacted]

- *Inland transport services by road*

7.6 The MSC Group is also active (via its subsidiary Medlog) in the inland transport of containers by road in Madagascar. Precisely, Medlog operates a limited fleet of trucks/trailers[6].

- *Freight forwarding services*

7.7 The MSC Group (via its subsidiary Kenfreight) offers sea freight forwarding services in Burundi, Kenya, Mauritius, Rwanda and Uganda.

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[4] Ro-Ro vessels are vessels equipped with a mobile access ramp allowing the loading/unloading of goods by towing between the ship and the quay, as opposed to Lift On/ Lift Off (Lo-Lo) vessels.

[5] Decision of the Committee responsible for Initial Determination (CID) dated 10 May 2022 in the merger regarding the proposed joint venture involving SAS Shipping Agencies Services Sarl, Kenya Ports Authority, and Kenya National Shipping Lines Limited (the "**KNSL Decision**"). Accessed at: https://www.comesacompetition.org/wp-content/uploads/2022/06/SAS-KPA-KNSL-CID-Decision-compressed.pdf

[6] It was submitted that Medlog operates a limited fleet of trucks/trailers in Madagascar. Further, MSC also has limited container shunting activities in Egypt, which consist in moving empty or laden containers by truck within a short distance, exclusively between the port and the inland container depot. This activity is carried out by MSC exclusively for MSC's containers and is not proposed on the market. In addition, Kenfreight, a subsidiary of MSC, recently sold its limited fleet of trucks in Kenya and Uganda and is therefore not active in the provision of inland transport services anymore.

7.8 The parties submitted that Kenfreight also has very marginal activities in air freight forwarding services in Kenya, Rwanda, Tanzania and Uganda.

BAL (the target firm)

9. BAL is a French société par actions simplifiée, whose registered office is located at 31/32 quai de Dion Bouton, 92800 Puteaux Cedex, France. It is a French-owned group active in transport and logistics services as well as terminal activities mainly in the African continent. It is a wholly owned subsidiary of Bolloré SE (the "**Seller**") and is currently integrated within its Transport & Logistics division. The Seller is a worldwide group with 79,000 employees active in 130 countries. It is mainly active in three lines of business, namely transportation and logistics, communications and electricity storage and systems.

10. BAL offers an integrated solution to its local and international customers through port / rail concessions and maritime agencies. In Africa, BAL is present in 42 ports and has a network of 250 subsidiaries with almost 21,000 employees. The parties submitted that over time, BAL has built up a diverse portfolio of efficient assets by capitalizing on its know-how and on the reliability of its logistics operations. BAL's services allow it to facilitate intra-regional trade to its customers.

11. BAL's activities at global level and in COMESA Member States consist of the following:

- *Terminal services*

14.1 BAL currently operates 17 port concessions mainly in Africa[7] as well as one timber terminal and two river terminals, providing terminal services for containers, Ro-Ro cargo and conventional cargo (bulk, bags etc).

14.2 In the Common Market, BAL operates one maritime terminal in the Moroni Port (Comoros) (the "**Moroni Terminal**").

14.3 In Egypt, BAL, in a consortium with Toyota Tsusho Corporation and Nippon Yusen Kabushiki Kaisha, has undertaken the establishment of a dedicated automotive Ro-Ro terminal in Port Said[8]. This terminal is due to commence operation in the second trimester of 2023. It will be located in the Special Economic Zone of Suez Canal and will be dedicated to the local market for imported new vehicles. It will exclusively service the automotive industry, particularly in terms of importing, exporting and

[7] BAL's port concessions are located in Benin, Cameroon, Comoros, Congo, Gabon, Ghana, Guinea-Conakry, India, Ivory Coast, Liberia, Nigeria, Sierra Leone, Senegal and Togo. In addition, BAL has terminal projects under development in Egypt, Haiti, Ivory Coast and East Timor.

[8] The creation of the consortium was approved by the CID on 12 November 2020. Accessed at: https://www.comesacompetition.org/wp-content/uploads/2020/11/CID-Decision-Joint-Venture-TTC-NYK-and-BAL.pdf

reshipping vehicles to markets and ports in neighbouring countries, with an intended capacity of approximately 800,000 vehicles annually.

- *Freight forwarding services*

14.4 BAL offers end-to-end solutions for export / import, combining sea and air freight forwarding services, as well as maritime consignment and customs clearance services. These freight forwarding activities are supported by 860,000 sqm of forwarding and commodities consolidation warehouses and yards owned/rented and operated by BAL, as well as 71,000 sqm managed in situ.

14.5 In the Common Market, BAL is active in the provision of air and sea freight forwarding services in Burundi, Comoros, Democratic Republic of Congo, Djibouti, Ethiopia, Kenya, Madagascar, Malawi, Rwanda, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

- *Contract logistics services*

14.6 BAL is active in contract logistics services and offers value-added warehousing and logistics solutions with a range of services to facilitate the importation, storage, inventory management and distribution of finished goods as well as raw materials/components within countries and across borders.

14.7 Contract logistics services provided by BAL include tailored services for various industries in numerous cities across the continent, including warehousing services (511,000 sqm and yards owned/rented directly by BAL and 157,000 sqm operated by BAL at customers' premises).

14.8 In the Common Market, BAL operates approx. 50 contract logistics sites in Burundi, Democratic Republic of Congo, Ethiopia, Kenya, Madagascar, Malawi, Rwanda, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

- *Inland transport services by road*

14.9 BAL is active across the African continent in the carriage of goods and containers from maritime ports to inland destinations, covering different types of transportation modes (trucks, trains and barges).

14.10 BAL's service offering includes a full range of specialised services for the inland transport of cargo (dry and refrigerated container cargo, dry and liquid bulk, etc.) giving access to the sea to landlocked hinterland countries in Africa.

14.11 In the Common Market, BAL provides very limited inland transport services of containerized cargo in Kenya, the Democratic Republic of

Congo and Madagascar, as well as inland transport services of general cargo in the Democratic Republic of Congo and Zambia.

12. In addition to the activities detailed above, BAL also offers a range of maritime services to customers active in the shipping industry, notably shipping agency services, empty container depots, container repairs and maintenance, renovation of vessels, etc. BAL is not active globally or in the Common Market in maritime transport and does not provide any container liner shipping services.

Jurisdiction of the Commission

13. Article 24(1) of the Regulations requires 'notifiable mergers' to be notified to the Commission. Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the "**Merger Notification Thresholds Rules**") provides that:

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

a) *the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM$ 50 million; and*

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

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

Details of the Merger

15. On 20 December 2021, Bolloré SE received an offer from MSC for the acquisition of all the shares of BAL. The Seller granted MSC exclusivity until 31 March 2022 in order to pursue negotiations, conduct additional due diligences and enter into a fully binding agreement. On 31 March 2022, the Seller and SAS Lux entered into a Share Purchase Agreement relating to the sale and purchase of 100% of the shares in BAL (the "**SPA**"). It is noted that the parties engaged the Commission via email on 21 April 2022, in accordance with Article 24(1) of the

Regulations, to inform the Commission of the proposed transaction and an extension was granted to the parties to complete the notification procedures.

16. Upon completion of the Proposed Transaction, SAS Lux will exercise sole control over BAL, which operates, directly or indirectly through its affiliates, mainly in the African continent (i) port terminals (terminals, operations, marine line agent and goods handling); (ii) railway concessions; (iii) transit and logistics (freight forwarding, logistics operations and/or associated businesses) for import and export activities; (iv) holding services; and (v) other ancillary services.

Competition Assessment

Relevant Product Markets

17. The transaction gives rise to horizontally affected markets in sea freight forwarding and inland road transportation. The transaction also gives rise to vertically affected markets between sea freight forwarding and (i) deep-sea container liner shipping on one hand and (ii) container terminal services on the other hand.

18. The CID also noted that the transaction could potentially give rise to vertical links in respect of the acquiring group's Ro-Ro shipping services and BAL's future Ro-Ro terminal services.

<u>Container Liner Shipping Services and Ro-Ro Shipping Services</u>

19. Container liner shipping involves the provision of regular, scheduled services for the carriage of cargo by sea. In ***MSC/Messina***[9], the CID identified a market for container liner shipping services distinct from (i) non-liner shipping services; and (ii) non-containerised transport, such as bulk cargo and roll-on/ roll-off (Ro-Ro) services. These are discussed further below.

20. The non-liner/ tramp shipping sector relates generally to the transport of a single commodity which fills a single ship. Unlike in the liner sector, tramp shipping markets are unscheduled, in the sense that vessels do not sail on advertised, pre-determined routes on particular days. When they are not laden, idle/empty tramp vessels bid for business in their area or move to a load port in order to pick up cargo or move to a more promising area[10]. Container-liner shipping can be thus distinguished from non-liner shipping because of the regularity and frequency of the service[11]. Customers demand scheduled transport in order to

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[9] Decision of the Sixty-Seventh (67th) CID regarding the Merger involving Marinvest S.r.l., Ignazio Messina & C. S.p.A. and RORO Italia S.r.l., dated 22 December 2019.
[10] EC decision in Case No COMP/M.5346 - APMM / BROSTRÖM, paragraph 9.
[11] EC decision in Case No COMP/M.5450 - KÜHNE / HGV / TUI / HAPAG-LLOYD, paragraph 13. See also cases M.831 – PO/Royal Nedlloyd; M.1651 – Maersk/Sealand; M.3512 – ECT/PONL/Euromax; M.3829 – Maersk/PONL; M.3863 TUI/CP Ships.

meet production runs and delivery deadlines, which makes demand substitution less effective between liner and non-liner services. As the merging parties do not offer non-liner services, the CID has not further considered the non-liner shipping segment in the competitive assessment.

21. Bulk cargo services (sometimes 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 because the type of transported cargo and of vessels used are generally different[12]. For examples goods such as vehicles, and forest products such as paper and board - can be carried on bulk vessels especially designed for such cargoes. The Court of Justice in the ***Tetra Pak*** judgement[13] 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 break-bulk and container transport, the CID noted the findings of the European Commission (the "**EC**") that there is no evidence that there is in fact any lasting substitution from container towards bulk for the vast majority of cases. In ***CMA CGM/ OPDR***[14], the majorities among all groups of respondents were of the opinion that container shipping should be distinguished from a market for the transport of for bulk cargo. None of the MSC entities or IM provide bulk / breakbulk shipping services in the Common Market, as such this segment is not pertinent for this transaction.

22. Ro-Ro cargo services are provided using Ro-Ro vessels, which are designed to carry exclusively wheeled cargo such as cars, trucks and trailers. On containerised vessels, on the other hand, the cargo is loaded and unloaded by crane. From a demand side, the CID noted the findings by the EC 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 RoRo as they cannot be containerised.*"[15]. From a supply perspective, container transport vessels present different characteristics than the Ro-Ro vessels which are provided with facilities for trailers to drive on the vessels. Moreover, terminal facilities are different; containers transport vessels

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[12] See for example the EC decisions in case No COMP/M.5066 - EUROGATE/APMM; and Case No IV/M.831 - P&O/Royal Nedlloyd.

[13] Judgement of the Court (Fifth Chamber) in Case C-333/94 P, TETRA PAK v EC, dated 14 November 1996, paragraphs 13-15.

[14] EC decision in Case No COMP/M.7523 - CMA CGM/ OPDR, para 42.

[15] EC decision in Case No COMP/M.5756 - DFDS/ NORFOLK, paragraph 13. Further, it is reported that Ro-Ro services are cheaper than single container shipping (reference: https://tgal.us/roro-vs-container-shipping/).

need a terminal with container cranes hence a large investment, whereby Ro-Ro can be worked on a quayside without this investment due to the built-in ramp of a Ro-Ro vessel[16].

23. On the basis of the facts at hand and in line with its previous decisional practice in similar cases presenting similar characteristics, **the CID considered that the relevant markets are the provision of container liner shipping services and Ro-Ro shipping services.**

24. The CID has in the past considered further possible segmentation in the market for the provision of container liner shipping services in terms of (i) short-sea transport and deep-sea transport; and (ii) reefer (i.e., refrigerated) and non-reefer (i.e., not refrigerated) service.

25. Deep sea shipping refers to the maritime transport of goods on intercontinental routes crossing oceans as opposed to short sea shipping over relatively short distances. As a result, deep sea shipping typically involves the use of much larger vessels, although vessels can be used for both shorter coastal trade and longer routes. Short sea services also generally involve pre-established contracts between the providers and customers on account of the frequency of service. As the MSC Group's activities in maritime transport of cargo into/from COMESA almost exclusively consist of deep-sea container liner shipping services, the relevant product market in the present case is the supply of deep-sea container liner shipping services.

26. The CID observed 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). From a demand side perspective, certain goods such as fruit, meat and dairy products must be shipped under refrigerated conditions. For this reason, non-reefer containers are not a substitute for reefer containers. As to the supply side, a container ship can carry non-reefer containers as well as reefer containers. Reefer containers have their own cooling unit which depends on electric energy to be provided by the ship. Container ships therefore need reefer plugs and sufficient power generation capacity to be able to transport refrigerated goods in reefer containers. According to a third-party report, much of the world's container shipping fleet is equipped with plugs for reefer containers, but they are not necessarily in use for this purpose[17]. The report indicates that it would be relatively inexpensive to equip a vessel for reefer containers and the slot could be used for non-reefer containers as well. According to another third-party report, the "*reefer share of overall containership capacity has grown from*

[16] *Ibid*, paragraph 14.

[17] Ocean Shipping Consultants, Refrigerated trades and Outlook to 2015, May 2005, page 177.

16% to 20% in 5-year period to July 2016[18]. As of 2022, it is reported that the reefer capacity of three largest container carriers (namely Maersk, MSC, and CMA CGM) as a percentage of their fleet ranges between 21% to 23%[19]. The reefer container market is growing on account of the increasing demand for pharmaceutical products, rising number of trade routes, expanding e-commerce industry, and surging penetration of the real-time tracking technology.

27. The CID noted the decisional practice by the EC that on routes where the share of reefer containers in relation to all containerised cargo is below 10% in both directions, a single market is considered for containerised liner shipping services, as the ships have in general more reefer facilities than is actually used. Carriers will therefore be able to shift volume from transport of non-reefer containers to reefer containers in the short term and without significant additional costs. On the other hand, on routes where there is a high share of transport in reefer containers in relation to all containerised cargo in one direction and relatively low shares in the other direction, the situation on the supply side can be different. On the leg of the route with a high reefer share, the reefer capacity on the ships can be exhausted. Installation of additional plugs and power generation capacities on ships which are already operating on the trade entails time delays and additional investments. An increase of reefer capacity can require substantial technical adjustments on a ship designed for and equipped with 10% reefer plugs, in particular if additional cooling mechanisms become necessary. The redeployment of ships with higher reefer capacity also comes with time delays and additional costs. On these routes, supply side substitution is therefore more difficult, and may therefore justify the identification of reefer vessels as a distinct market.[20]

28. The CID considered that the costs and time considerations for installing additional plugs would similarly prevail on the sea routes in the Common Market. The CID observed that on the routes affecting the COMESA Member States, namely East Africa (EAF)/ South Africa (SAF), the share of reefer containers transported by MSC and IM in 2021 was largely under 10% segmented for transport of refrigerated goods. The parties further submitted BAL does not handle any reefer volumes between East Africa and South Africa (in either direction).

29. The CID further noted that there is no horizontal overlap between the parties' activities in respect of container liner shipping services, and accordingly, reefer

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[18] Drewry Reefer Shipping Market Outlook report 2017, accessed at https://www.mundomaritimo.net/noticias/containerized-refrigerated-cargo-on-the-rise-2021-outlook
[19] https://fullavantenews.com/global-reefer-container-fleet-report-2022/
[20] EC decision in Case No COMP/M.3829 - MAERSK / PONL, paragraphs 7 to 13.

cargo services do not constitute an overlapping segment for the purpose of the proposed transaction.

30. In view of the foregoing, the CID noted that the adoption of a broader market definition would not affect the competitive assessment, given that the merging parties already enjoy significant market shares on certain routes in the market for **deep sea container liner shipping services.**

<u>*Container Terminal Services*</u>

31. The provision of container terminal services by terminal operators involves the loading, unloading, storage, and land-side handling for inland transportation of containerised cargo[21]. Container terminal services are input services to container liner shipping. 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 are moved from one ocean-going vessel to another ocean-going vessel to onward movement to another more distant market[22].

32. Unlike handling hinterland traffic, handling transhipment traffic does not require road/rail infrastructure and a hinterland linkage. Furthermore, there might be differences in pricing and cut-off times as barges might be available to a lesser extent than feeders. The CID thus considered that **distinct markets exist for container terminal services for hinterland traffic and for transhipment traffic.**

33. Further, given the distinct market identified for vessels designed for RO-RO cargo, the CID considers that a distinct market can be identified for the provision of RO-RO terminal services as the Ro-Ro vessels require different terminal infrastructure from other types of vessels such as Lift-on/Lift-off. Further, given that the joint venture to be operated by BAL in Egypt is expected to be a dedicated automotive terminal, the CID considered that only terminals capable of providing stevedoring and storage services for vehicles would be part of the relevant market.

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

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

Freight Forwarding and Inland Transport Services

34. As noted above, both the acquiring group and the target are active is in the provision of sea freight forwarding services. The CID has previously identified a distinct market for freight forwarding services[23]. 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*"[24]. Freight forwarding facilitates 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.

35. It is noted that within the freight forwarding market, narrower markets could potentially exist according to the mode of transport (air, land, and sea)[25]. Although it could be argued that the different modes of transport ultimately compete with each other in the provision of a door-to-door multimodal transport service, the CID observes that such services can be provided as complements to secure an ultimate door-to-door service. Further, it does not appear the transport operators within the Common Market compete on an intra-COMESA door-to-door multimodal transport market. It is noted that the acquirer does not offer air freight forwarding services. It is likely that there are certain routes for which sea freight forwarding and air freight forwarding would not constitute effective substitutes in terms of connectivity, access to and through national borders (particularly in areas facing political instability), costs, and travel time.

36. In sea freight forwarding, transportation capacity is provided by container liner shipping companies like MSC and its competitors. Freight forwarders are thus customers of container liner shipping companies, i.e., freight forwarding is a downstream market to container liner shipping.

37. Having regard to the horizontal and vertical overlap in relation to sea freight forwarding, for the purposes of this transaction, the assessment focussed on the narrower market for **provision of sea freight forwarding services**.

38. The CID further identified the **provision of inland road transport services** as a relevant market distinct from freight forwarding services. Inland transportation

[23] Decision of the Seventy-Second (72nd) Committee Responsible for Initial Determination Regarding the Merger between CEVA Logistics AG and AMI Worldwide Limited, dated 4th September 2020.
[24] Case COMP/M.4045 DB / BAX Global, Case COMP/M.3971 Deutsche Post / Exel, Case COMP/M.3603 UPS / Menlo, 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
[25] EC 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.

covers the physical movement of goods by using own (i.e., owned or leased) equipment. Providers of freight forwarding, and transport services do not primarily compete with each other, and freight forwarders are generally considered to offer a distinct service to customers. Instead, freight forwards typically sub-contract the actual transportation to specialist transport providers. If a container liner shipping company provides door-to-door services, it also arranges inland haulage for its customers to and/or from the harbour. Thus, these services are vertically related to container liner shipping.

Relevant Geographic Markets

Ro-Ro shipping services and Deep-sea container liner shipping services

39. The CID considered that the geographical dimension of the shipping services should be defined by the ports which are served at both ends of the service. Each trading route has 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[26]. From a demand perspective, a trading route is unlikely to be viewed as interchangeable with a different route. Further, market conditions on the two legs of a trade route can be different, in particular in case of trade imbalances or different characteristics of the products shipped; a distinction between the two directions (legs) of a trade is therefore warranted[27].

40. It is noted that there are no horizontal overlaps between the parties in the provision of deep-sea container liner shipping services. The relevant geographic markets have therefore focused on MSC's main legs of trade in the Common Market:

- Europe - COMESA;
- COMESA - Europe;
- Far East - COMESA; and
- COMESA - Far East.

41. In relation to Ro-Ro services, the CID noted that the transaction only affects services offered by the merging parties in Egypt where the Ro-Ro terminal is expected to operate. The CID considered that Port Said is likely to face effective competition from other ports of Egypt, and that ports of neighbouring countries are unlikely to offer similar type of competitive constraints for shipping of vehicles into or from Egypt which is the focus of the joint venture company. For this

[26] EC decision in Case No COMP/M.7268 - CSAV/ HGV/ KÜHNE MARITIME/ HAPAG-LLOYD AG, paragraph 23.
[27] EC decision in Case M.7908 - CMA CGM / NOL, paragraph 13.

reason, the geographic market for the provision of Ro-Ro services is limited to routes involving Egypt.

Container terminal services market

42. With respect to the container terminal services market, the CID considered that the geographic scope would be defined by the catchment area of ports which the container terminal generally serves. The terminal operated by the acquiring group in Comoros serves hinterland traffic only; whereas the terminal operations anticipated in Kenya cover both hinterland and transhipment traffic.

43. Having regard to the parties' hinterland operations in the Common Market, the CID considered that the catchment area for the Moroni terminal is limited to the Union of Comoros in view of its geographical isolation. Given the absence of operations of the acquiring group in Comoros, the CID considered that the container terminal services market in Comoros is unlikely to be affected by the transaction and has thus not further considered this market in its assessment.

44. With regard to the Container Terminal 2 at the Mombasa port, it is noted that the port is described as the main gateway to East and Central Africa serving a vast hinterland of more than 120 million people in Kenya, Uganda, Rwanda, Burundi, Eastern DRC, South Sudan, Ethiopia, Somalia and Northern Tanzania. The CID considered that the competitive constraints from surrounding ports are likely to be limited having regard to the berthing capacity (lack of available capacity would further increase switching costs), handling costs and time, and that they are likely to serve a different hinterland. Further, the suitability of a port from the point of view of a cargo owner may depend on the distance and connection to the cargo owner's production site or the ultimate final destination. This is mainly due to costs which are caused by the inland haulage (especially pre-carriage to a port) incurred. For the above reasons, the geographic scope of the market for handling of hinterland traffic could be possibly narrowed down to comprising the Mombasa port only.

45. By contrast, for transhipment traffic, the relevant market is likely to extend beyond the port of operation as neighbouring ports can also provide competitive pressures. In ***KNSL/SAS***[28], the CID held that the geographic scope should extend to all ports in Eastern and Southern Africa. For purposes of this transaction, a similar approach can be adopted.

[28] KNSL Decision.

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Sea freight forwarding services

46. In line with previous decisional practice[29], the CID considered that the markets for sea freight forwarding services are likely to be at least national in scope, and possibly COMESA-wide. Whilst it is noted that customers may 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, to create transnational network. 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.

47. In view of the vertical links raised by the transaction, on a conservative approach, the CID also considered the markets for sea freight forwarding on an intra-COMESA country pair basis, and focussed on the country pairs involving Burundi, Kenya, Rwanda and Uganda.

Inland road transport services

48. The CID considered that the geographic scope is at most national given that the targeted customers are domestic customers, who are likely to procure such services from suppliers operating within the territory. Whilst there may be some competition from cross-border transport providers, they may not constitute a timely and cost-effective substitute to whom customers may turn to in the event of a 5-10% increase in price charged by domestic providers. The geographic markets concerned by this transaction include Kenya, Madagascar, and Zambia being the main territories where the parties are active in the provision of inland road transportation services.

Conclusion on Relevant Markets

49. For purposes of this competitive assessment and without prejudice to the CID's approach in future cases, the relevant markets are defined as follows:

   i. **provision of RO-RO terminal services for vehicles in Egypt**
   ii. **provision of RO-RO shipping services for vehicles to and from Egypt**
   iii. **Deep sea container liner shipping services on the following routes: (a) Europe - COMESA; (b) COMESA - Europe; (c) Far East - COMESA; and (d) COMESA - Far East**
   iv. **Container terminal services for hinterland traffic served by the Mombasa port**
   v. **Container terminal services for transhipment traffic at ports in Eastern and Southern Africa**

[29] Decision of the Seventy-Sixth (76th) CID regarding the merger involving IVY 2 Investments VCC and PIL Holdings Pte. Ltd.

vi. **Sea freight forwarding services on intra-COMESA country pair involving Burundi, Kenya, Rwanda and Uganda; and**

vii. **Provision of inland road transportation services in Kenya, Madagascar, and Zambia.**

Market shares and Concentration

i. <u>Provision of RO-RO shipping services for vehicles to and from Egypt and Provision of RO-RO terminal services for vehicles in Egypt</u>

50. IM provides limited Ro-Ro shipping services with its vessels calling at the port of Alexandria. Further, the CID received confirmation from the Egyptian Competition Authority that MSC was not active in the provision of Ro-Ro services in Egypt. The transaction will therefore not result in any market share accretion, and the parties are expected to remain relatively small players.

51. Egypt has 48 maritime ports[30], including 15 commercial ports and specialised ports for fishing vessels (6), oil tankers (14), mining materials carriers (6), tourists (7)[31]. The Egyptian seaports have a combined number of 188 berths (including container berths) and cover a combined area of 6,527,324 m^2. Alexandria port and Port of Dekheila (which is an extension to Alexandria Port) are together the biggest port in Egypt accounting for 33% of the land area and 42% of number of berths. According to a press release by NYK[32], the Alexandria port currently handles almost all of Egypt's vehicle imports and "is a multi-purpose port that sees a variety of cargo and lacks storage space. Therefore, the new dedicated automotive terminal to be developed and operated by the consortium will be favorably received". The two ports of Alexandria have an estimated maximum capacity of 36.8 million ton per year[33].

52. It is anticipated that the market share of the joint venture company involving BAL, once the Terminal begins commercial operations, would be 35% of the Egyptian market. The creation of the joint venture company will thus result in a significant change in market structure once it commences operations; however, the transaction at hand would not cause any alteration to the market structure.

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[30] http://www.mts.gov.eg/en/sections/9-Maritime-Ports

[31] http://www.mts.gov.eg/en/sections/11/1-11-Specialized-Ports

[32] 'NYK Establishes First Exclusive RORO Terminal in Egypt' (28 January 2020). Accessed at: https://www.nyk.com/english/news/2020/20200128_01.html

[33] http://www.mts.gov.eg/en/content/142-Port-Specifications

ii. <u>Deep sea container liner shipping services</u>

53. The following are estimated market shares[34] of MSC and its largest competitors in deep-sea container liner shipping services on the main COMESA trade routes in Tables 1 to 4 below (Source: Container Trade Statistics – CTS).

Table 1 - Europe to COMESA route (2021)

Competitors	Estimated market shares
Maersk Line	[20-30]%
CMA CGM	[20-30]%
MSC	***[20-30]%***
Hapag-Lloyd	[5-10]%
COSCO Shipping	[0-5]%
Others	[10-20]%

Table 2 - COMESA to Europe route (2021)

Competitors	Estimated market shares
Maersk Line	[20-30]%
MSC	***[20-30]%***
CMA CGM	[10-20]%
Hapag-Lloyd	[5-10]%
Hamburg Sud	[5-10]%
Others	[20-30]%

Table 3 - Far East to COMESA route (2021)

Competitors	Estimated market shares
CMA CGM	[20-30]%
Maersk Line	[20-30]%
MSC	***[10-20]%***
Evergreen	[0-5]%
Hapag-Lloyd	[0-5]%
Others	[30-40]%

Table 4 - COMESA to Far East route (2021)

Competitors	Estimated market shares
CMA CGM	[20-30]%
Maersk Line	[10-20]%
MSC	***[5-10]%***
Hapag-Lloyd	[5-10]%
ONE Line	[0-5]%
Others	[30-40]%

54. It is recalled that the target is not active in the container liner shipping services market. As such the transaction will not result in any market share accretion in this market. Nonetheless, the CID considered the market position of the acquirer given the interrelations between the shipping services market and the

[34] Market share information claimed as confidential by the merging parties.

downstream market for freight forwarding services and inland road transportation.

55. On both legs of the COMESA/Europe route, the acquirer is among the top 3 players in the market, with a market share of [20-30]%. On the Far East routes on the other hand, the acquirer's market shares are more modest, ranging from [5-10]% to [10-20]%.

iii. *Container Terminal Services*

56. In ***KNSL/SAS***, it was established that the market shares of the Mombasa port (where the acquirer is expected to operate Container Terminal 2), compared to other terminal operators for hinterland traffic in the region around Kenya and Tanzania was significantly high. Given that the ports are mostly Government owned and operated, it is expected that the market shares will be high as such terminals operate as quasi-monopolies. The Mombasa port also enjoys a high market share in the provision of transhipment traffic container terminal services in Southern and Eastern Africa.

iv. *Sea freight forwarding services*

57. The parties submitted their estimated market shares and those of their largest competitors in sea freight forwarding services (narrow segment for containerized cargo only) in the Common Market, as per Table 5 below. According to the parties' estimates, they are relatively insignificant players on the regional market.

Table 5 - Sea freight forwarding services for containerized cargo within COMESA (2021)

Competitors	**Estimated market shares**
MSC Group	**<[0-5]%**
BAL	**[0-5]%**
Damco (A.P. Moller Maersk)	[0-5]%
DHL	[0-5]%
Kuehne & Nagel	[0-5]%
CEVA Logistics (CMA-CGM)	[0-5]%
Others	[80-90]%

58. The CID observed that at a regional level, the transaction would not result in significant market share accretion in the provision of sea freight forwarding services. In view of the horizontal and vertical links between the merging parties, the CID also sought to assess the market structure in relation to intra-COMESA country-pairs involving Member States where the acquirer provides shipping services and container terminal services. The parties submitted that BAL provides only very limited sea freight forwarding services on an intra-COMESA level (i.e., with the point of origin and the point of destination both located in the Common Market), and that it is not able to provide estimated market shares on

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an intra-COMESA country pair basis in view of its marginal activities in this regard and the absence of external studies and/or precise data publicly available.

59. The parties nonetheless provided the below estimated market share data for 2021 on the market for sea freight forwarding services (containerized cargo) on a national basis in each of Burundi, Kenya, Rwanda and Uganda:

- Burundi: BAL – [10-20]% and Kenfreight (MSC Group) – [0-5]%. To the parties' best knowledge, the main sea freight forwarders active in Burundi notably include Sodetra, Spedag Interfreight[35] and Kuhne & Nagel.
- Kenya: BAL – [0-5]% and Kenfreight – [0-5]%. To the parties' best knowledge, the main sea freight forwarders active in Kenya notably include Muranga, Acceller, Speedex, Damco (Maersk), Agility, Kuhne & Nagel, DHL, Mitchell Cotts, FFK and Signion Freight.
- Rwanda: BAL – [5-10]% and Kenfreight – [0-5]%. To the parties' best knowledge, the main sea freight forwarders active in Rwanda notably include Spedag Interfreight, CEVA Logistics (CMA CGM) and DPW.
- Uganda: BAL – [5-10]% and Kenfreight – [0-5]%. To the parties' best knowledge, the main sea freight forwarders active in Uganda notably include Spedag Interfreight, Multiple Hauliers, Damco (Maersk), Unifrreight, Fratch/Transfreight, CEVA Logistics (CMA CGM) and Western Logistics.

60. According to the submissions made by Competition Authority of Kenya, the target's market share in the provision of sea freight forwarding services was approximately [10-20]%. Notwithstanding the differences in the estimates provided by CAK and the merging parties, the CID observed that the transaction will not lead to a material increase in the merged entity's combined market position post-merger, as the acquirer was a relatively smaller player. The CID thus noted that even in the narrower national markets, the transaction would not result in significant market share accretion in the provision of sea freight forwarding services.

v. <u>Provision of inland road transportation services</u>

61. The following are the estimates of the market shares of the merging parties and those of their largest competitors in inland transportation services (narrow segment for containerized cargo only) in Madagascar:

[35] For completeness, it is noted that Spedag Interfreight (i.e., the East African network of M+R Spedag Group) has been recently acquired by CEVA Logistics, a subsidiary of CMA CGM.

Table 6 – Road-based inland transportation services for containerized cargo in Madagascar (2021)

Competitors	Estimated market shares
McExpress	[10-15]%
Transport LEONG	[5-10]%
Salone	[5-10]%
STMB	[5-10]%
Transport Tsiou Therese	[5-10]%
MSC Group	***[0-5]%***
BAL	***[0-5]%***
Others	> 50%

62. The CID noted that the parties' combined market shares in Madagascar were relatively insignificant.

63. BAL estimated its market share on the market for the provision of inland transport services in Kenya to be approximately [0-5]%, suggesting that any market share accretion would be relatively insignificant.

64. Whilst the parties did not submit the target's market shares for inland road transportation services in Zambia, the CID noted the submissions from the Competition and Consumer Protection Commission of Zambia that MSC Zambia's market share in the provision of in-land transportation services was estimated at [0-5]%, and there were numerous other players on the market including J and J Transport Limited, Galco Transport and Logistics, One World Freight and Logistics, Impala Terminals Zambia Limited.

65. The CID noted that the transaction would therefore not result in any significant market share accretion in the market for the provision of inland road transportation services in Kenya, Madagascar, and Zambia.

Consideration of Dominance/ Unilateral Effects

66. Unilateral effects may arise where, as a result of a merger, the merged entity finds it profitable to raise prices (or reduce output or quality) because of the loss of competition between the merged entities. Pre-merger, any increase in the price of one of the merging parties' products could have led to a diversion of its sales to the other party (depending on the extent of competition between them). However, post-merger the competitive constraints that each firm imposed on the other is eliminated which may provide incentives for the merged entity to increase prices.

RO-RO Shipping Services and Deep-Sea Container Liner Shipping Services

67. It is recalled that the target is not active in the provision of Ro-Ro shipping services nor that of deep-sea container liner shipping services. Therefore, the

CID has not identified any concerns of unilateral effects likely to arise from the proposed transaction in these markets.

Container Terminal Services

68. In the market for container terminal services, it is noted that the acquirer and the target do not have overlapping activities within the same relevant geographic areas; the acquirer operate container terminals in Comoros and Kenya, whilst the target is expected to operate a terminal in Egypt. The CID has accordingly not identified any concerns of unilateral effects likely to arise from the proposed transaction in the provision of terminal services.

Sea Freight Forwarding Services and Inland Transportation Services

69. In the markets for sea freight forwarding services and inland transportation services, while the transaction will result in market share accretion, the CID noted that the parties are not each other's strongest competitors, such that even in markets where one of the parties has a relatively strong market position, the resulting market share accretion will not be material. The CID is therefore satisfied that the transaction will not enable the parties to engage in unilateral conduct in any of the identified relevant markets, absent any tying strategy, as there exist numerous other alternatives for customers of the various services.

Consideration of Vertical Effects

70. The CID assessed whether the transaction could increase the parties' incentive and ability to engage in foreclosure at either one or both levels of the supply chain. The transaction results in vertically affected markets between sea freight forwarding and (i) deep-sea container liner shipping on one hand and (ii) container terminal services on the other hand.

Sea freight forwarding services and Deep sea container shipping services

71. Freight forwarders require access to shipping services as part of their market offering. Input foreclosure would arise where, post-merger, the merged entity would be able, and incentivised, to restrict the access of BAL's downstream rivals (in the market for sea freight forwarding services) to deep sea container liner shipping services.

72. The CID considered that MSC was a significant player in the market for deep sea container liner shipping services in COMESA, in particular on the COMESA-Europe routes where it commands a market share of [20-30]%. The market shares provided by the merging parties for BAL's operations at national level suggest that BAL may not be a strong player in the sea freight forwarding market. The CID nonetheless noted that BAL describes itself as having the leading integrated logistics network in Africa and one of the world leaders in logistics and

freight forwarding[36]. Further, that the target group has become one of the world's 10 biggest logistics operators and Africa's largest transportation group through a combination of organic and external growth operations[37]. The CID thus considered that the transaction may present incentives for the merged entity to strengthen their position as a freight forwarder by leveraging on MSC's position in the upstream market for shipping services.

73. This could manifest itself in the parties only providing their shipping services to customers of BAL or providing materially better rates to BAL than its competitors; or requiring MSC's customers to only use BAL's freight forwarding services.

74. The CID observed that it may not be commercially viable for the merged entity to restrict their shipping services to customers of BAL, as they would forego revenues from the business of other freight forwarders. The CID however noted that the MSC group also enters into direct agreements with the end customers seeking shipping services, and these include large customers. The CID considered that MSC would have the ability and incentive to restrict the choice of the freight forwarding provider to BAL, given that it is a significant player in the maritime transport market and customers are likely to have particular preferences for a shipping line having regard e.g., to its reputation for timely services.

75. For the reasons set out below, the merging parties submitted that the concern of input foreclosure is unwarranted:

   a. The parties submitted that direct customers typically enter into service contract agreements with shipping companies such as MSC at either a worldwide or specific trade route level. Importantly, these customers have actively chosen to engage directly with the shipping liners as opposed to doing so via a freight forwarder. Their reasons for doing so could be multiple but would generally include that they do not require the services of a freight forwarder (as their logistic requirements are simple or they have their own in-house expertise capable of performing the role of the freight forwarder), and thus seek to avoid possible additional costs by engaging the services of a freight forwarder. Importantly, these direct customers (typically large manufacturers or distributors of products) have large volume of shipment and thus significant bargaining power.

   b. The concern articulated by the CID is not a concern typically raised in vertical mergers. In this regard, the typical concern in a vertical merger is that it may result in the foreclosure of current or potential rivals. That is, the concern

[36] Bollore SE – 2021 Annual report, page 16. Accessed at: https://www.bollore.com/bollo-content/uploads/2022/05/0504_2202206_boll_ra_2021_gb_mel.pdf
[37] *Ibid*, page 14.

would be that the merged entity will be able to use its position in one market (e.g., the upstream market for container liner shipping services) to harm the competitiveness of its rivals in the other (e.g., the downstream market for sea freight forwarding services). This would weaken the constraints that the merged entity faces and as a result harm competition and therefore customers.

c. The concern articulated by the CID does not fit within this theory. In this regard, even if such conduct did occur (which for the reasons explained below, is unlikely), no foreclosure of competitors, either from an input or customer foreclosure perspective, would occur and therefore no harm to competition can arise. This is so for the following reasons:

- First, if MSC tried to force such customers to use the services of BAL, they could switch to one of MSC's many large rivals (including Maersk, CMA CGM, etc.). MSC's market share for deep-sea container liner sipping services on the main trade routes from/to the Common Market falls well below any threshold at which dominance or market power could be asserted.

- Second, were MSC to engage in the conduct envisioned, no rival shipping line would be deprived of a potential customer as a result of such conduct.

- Third, and similar to the above, no freight forwarder rival to BAL would be deprived of any input (i.e., deep-sea container liner shipping services). If MSC refused to service rivals of BAL, such rivals would simply approach any of MSC's upstream rivals to fulfil their deep-sea container liner shipping service needs. Moreover, given that BAL's share of sea-freight forwarding services in the Common Market is no greater than [0-5]%, such refusal by MSC would be a profoundly unprofitable strategy with no prospect of MSC being able to recoup its loses in the upstream market via the downstream market. By way of further illustration, less than [0-5%] of the turnover generated by MSC in the Common Market during the course of 2021 related to deep-sea container liner shipping and related services rendered to BAL.

d. The absence of this concern is also supported by the clearance decisions of all the other African competition authorities to which the transaction has been notified and which all have approved the transaction. Notably, the South African Competition Tribunal which, having considered both potential customer and input foreclosure concerns, did not raise the concern articulated by the CID and ultimately found that "*it is unlikely that the merged entity can recoup lost revenues from a [input foreclosure] self-dealing strategy*" and that "*the proposed transaction is unlikely to lead to a strategy* *of customer foreclosure as BAL's share of the downstream freight forwarding services is less than 1%"*.

e. [redacted]

f. Finally, it is worth noting that in the recent transaction between CMA CGM and CEVA Logistics, which structurally has a similar impact on the market, neither the Commission nor the EC raised this as a concern. In the EC's decision, which included a detailed vertical assessment, the CID's concern as articulated was not identified as a concern. It also excluded the risk that the merger entity would engage in a strategy of tying or bundling its contract logistics services with its container liner shipping services notably on the basis that (i) "*the merged entity [would] lack the market power on any of the markets concerned to engage in such a strategy*" and "*CEVA [had] only a very limited share in contract logistics ([0-5]% at EEA level)*", (ii) "*competing container liner shipping services and contract logistics services [would] remain available on a stand-alone basis from other sea carriers and logistics providers*" and (iii) "*CMA CGM would have no incentive post-Transaction to favour any tied or bundled offers to the detriment of its core container liner shipping activities. Indeed, CEVA's share in contract logistics services [was] small*". More generally, the EC excluded foreclosure concerns resulting from a vertical link between CMA CGM's upstream activities on the deep-sea container liner shipping market and CEVA's downstream activities on the sea freight forwarding market, noting that "*no freight forwarder can afford, in order to address its clients' need, to procure all of its needs in container liner shipping services from a single sea carrier such as CMA CGM.*"

75. The CID noted that while it is at liberty to make reference to decisions pronounced in other jurisdictions, it is not bound by such decisions. It is common cause that the different authorities would consider different relevant geographic markets, and accordingly, the competitive conditions are likely to differ. It is the CID's considered view that in the Common Market, MSC is a significant player at upstream level on the COMESA routes, with even larger market shares on the SAF-EAF routes. In this regard, the CID considered that the direct consumers may have a specific preference from MSC in view of the routes or services provided. The CID remains of the position that the transaction may provide incentives to the merging parties to restrict the choice of the freight forwarder to BAL for its direct customers. This strategy is further supported by the rationale of the transaction where it is clear that the parties intend to rely on the

complementary nature of the activities and location of operations of BAL and the MSC Group to improve their offering in terms of port handling and logistics within Africa.

76. **In this regard, the CID concluded that the transaction was likely to raise input foreclosure concerns in the sea freight forwarding market.**

77. The CID also considered whether the transaction could result in customer foreclosure concerns. Customer foreclosure arises where, post-merger, BAL would shift its purchase of shipping services from MSC's competitors to the vertically integrated entity, such that MSC's competitors could be foreclosed from access to an important customer. Foreclosure may raise competition concems only if the merger concerns a customer which has a substantial market power in the downstream market. Further, competition is not significantly impeded when competitors have a sufficiently large customer base.

78. The CID observed that even if BAL opted to exclusively utilise the services of MSC for container liner shipping in the delivery of its sea freight forwarding services, no anti-competitive foreclosure of MSC's competitors could arise in view of the limited combined market share of the merging parties on the market for sea freight forwarding services in the Common Market. Further, BAL will not have any ability or incentive to procure services exclusively from MSC post-transaction, since this would not be economically viable and would result in a loss of revenues and customers for BAL[38]. In this regard, the parties submitted that all freight forwarders use several deep-sea container liner shipping operators, notably for the following reasons:

(i) the choice of a container liner shipping company depends on many criteria for a specific shipment (freight rates, transit time, availability of containers, vessels capacity, etc.).

(ii) freight forwarders must negotiate the best freight rates with all shipping lines in order to propose the most competitive services to their customers; and

(iii) finally, customers (i.e., the exporters/importers) generally make the final decision regarding the selection of the shipping line which will take responsibility for the maritime transport, depending on their own set of criteria (sensitivity to price, speed to market, size of orders, etc.).

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[38] The parties refer to the EC decision concerning the acquisition by CMA CGM of CEVA Logistics (Case M.9221, paras. 91-92) which indicated that "*no freight forwarder can afford, in order to address its clients' need, to procure all of its needs in container liner shipping services from a single sea carrier such as CMA CGM*" and "*therefore, should CEVA decide to stop procuring container liner shipping services from CMA CGM's competitors post-transaction, it is likely that the merged entity would incur losses in the downstream market for freight forwarding, with no prospect of increasing volumes and revenues in the upstream markets for container liner shipping services*".

79. **The CID was thus satisfied that the transaction was unlikely to raise concerns of customer foreclosure.**

Sea freight forwarding services and Container terminal services

80. Freight forwarding services include a range of operations at ports of transshipment, departure and destination, such as transit, import and export formalities, control of cargo handling operations and documentation flow as well as pre- and on-carriage by road or rail; which require access to the container terminal. Freight forwarders are thus dependent upon the terminal operators to ensure the successful clearing and handling of cargo, including access to the relevant areas within the port.

81. The CID was concerned that the merged entity may have an incentive to restrict access of BAL's competitors from the container terminal services expected to be provided by the acquiring group at Container Terminal 2 at the Mombasa port, or providing such services at unfair terms and conditions, thereby raising its downstream rivals' costs.

82. The CID was mindful that the presence of another, separate, joint controller in KNSL, namely KPA, could limit MSC's ability to engage in foreclosure as it does not appear that KPA has any structural links with BAL which may incentive the former to sanction a strategy of foreclosing BAL's competitors. However, the CID considered that on a balance of probabilities test, the transaction would create sufficient incentives for the merged entity to attempt to use its influence in KNSL, by virtue of its joint control, to discriminate against competing freight forwarders' access to Container Terminal 2 at the Mombasa port, in order to increase their market position in the freight forwarding market.

Ro-Ro shipping services and Ro-Ro container terminal services

83. The transaction could potentially give rise to vertical links in respect of the acquiring group's Ro-Ro shipping services and BAL's expected Ro-Ro terminal services. As noted above, IM provides limited Ro-Ro shipping services with its vessels calling at the port of Alexandria while MSC was not active in the provision of Ro-Ro services in Egypt. As such the transaction would not create any incentives for the merged entity to engage in foreclosure strategies to deny or restrict access by MSC's competitors to the terminal.

84. The CID further noted that the Concession Agreement entered into between the General Authority for Suez Canal Economic Zone and the joint venture partners provides that the joint venture company should "*except for the priority and preferential berthing that may be authorised in terms of guidelines issued by the Concessioning Authority from time to time, manage and operate the Project Facilities and Services on a first come-first serve basis, common-user basis,*

open to any and all shipping lines, importers, exporters, shippers, consignees and receivers, and refrain from indulging in any unfair or discriminatory practice against any user or potential user thereof provided that this restriction shall not prevent the Concessionaire from engaging in selective Tariffs discounting or rebating in order to optimize the Concessionaire's sustainable profitability in accordance with Good Industry Practice"[39]. Thus, any attempt by the joint venture company to engage in discriminatory practices towards rival shipping lines would amount to a violation of the Concession Agreement itself.

Consideration of Coordinated Effects

85. The removal of a firm through a merger may facilitate coordination, express or tacit, among the remaining firms in the industry, leading to reduced output, increased prices or diminished innovation. Stable or successful coordination requires an ability to detect and punish deviations that would undermine the coordinated interaction.

86. The CID observed that pursuant to Article 26(2) of the Regulations, when determining whether the merger would have the effect, or be likely to have the effect, of substantially lessening competition in the market, the level, trends of concentration and history of collusion in the market must be taken into account. The CID was concerned that the international shipping industry has been characterized by a remarkable degree of collusion. In 2018, the EC fined four car carriers (CSAV, Kawasaki Kisen Kaisha Limited (K-Line), Mitsui O.S.K Lines Ltd ("MOL"), Nippon Yusen Kabushiki Kaisha Ltd ("NYK"), Wallenius Wilhelmsen Logistics AS ("WWL")) a total of **€395 million** for participating in a cartel "*in the market for deep sea transport of new cars, trucks and other large vehicles such as combine harvesters and tractors, on various routes between Europe and other continents*"[40]. Similar investigations were carried out in other jurisdictions. In August 2018, the Competition Commission of South Africa found that K-Line, MOL, NYK, and WWL had fixed prices, divided markets and tendered collusively in respect of shipment of Toyota vehicles from South Africa to Europe, North Africa, (Mediterranean Coast) and the Caribbean Islands via Europe, West Africa, East Africa and Red Sea (Latin America)[41]. In February 2021, three shipping companies were fined a total of **AUD 83.5 million** (approximately **USD 53,266,320**) by the Australian Competition and Consumer Commission for their participation in an international cartel involving several international shipping

[39] 6.1(a) of the Concession Agreement.
[40] '[European] Commission fines maritime car carriers and car parts suppliers a total of €546 million in three separate cartel settlements'. Published on 21 February 2018, accessed at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_962 on 30 October 2022.
[41] 'KLINE ADMITS TO CARTEL CONDUCT, AGREES TO PAY R99M'. Published on 21 August 2018, accessed at: http://www.compcom.co.za/wp-content/uploads/2019/03/KLINE-ADMITS-TO-CARTEL-CONDUCT-AGREES-TO-PAY-ALMOST-R99M-1.pdf on 31 October 2022.

companies in relation to the shipping of vehicles to Australia from Asia, Europe and the US on behalf of major car manufacturers[42]. In 2022, the Competition Commission of India imposed fines totaling more than **₹63 crore** (approximately **USD 7,604,906.40**) on K-Line, MOL, Nissan Motor Car Carrier Company and NYK for cartelisation with respect to maritime motor vehicle transport services provided to automobile Original Equipment Manufacturers for various trade routes[43].

87. The CID recalled that in April 2022, the South Korean Fair Trade Commission fined 28 shipping lines a total of **80 billion won** (approximately **USD 55,988,720**) for fixing freight rates on South Korea-Japan routes and South Korea- China routes. This followed fines imposed in January 2022 for collusion on the South Korean-Southeast Asia route. The shipping lines colluded on container freight rates over the past 17 years in various ways, such as setting minimum freight rates, introducing surcharges and rigging bids solicited by shipper[44].

88. The CID was concerned with the possibility of information exchange likely to result from the transaction. It observed that information exchange can take directly between competitors; but it can also occur indirectly through a common agency (for example, a trade association) or a third party, for instance, an upstream supplier or downstream customer. Such indirect information exchanges entail hub-and-spoke arrangements; these are horizontal restrictions on the supplier or retailer level (the "spokes"), which are implemented through vertically related players that serve as a common "hub". The "hub" facilitates the co-ordination of competition between the "spokes" without direct contacts between the spokes. The CID considered that as a customer, BAL would have access to detailed information in relation to the pricing, discounts and other competitive terms offered by MSC's competitors. The CID considered that there were serious risks that as a result of the transaction, through BAL, MSC may obtain commercially sensitive information about its competitors that it may not have in the ordinary course of business, and further that BAL could be used as a hub to facilitate the sharing of information between MSC and its competitors.

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[42] 'Shipping cartel fines now total $83.5 million after WWO conviction'. Published on 5 February 2021, accessed at: https://www.accc.gov.au/media-release/shipping-cartel-fines-now-total-835-million-after-wwo-conviction on 30 October 2022.

[43] 'CCI IMPOSES PENALTY ON MARITIME TRANSPORT COMPANIES FOR INDULGING IN CARTELISATION'. Published on 25 January 2022, accessed at: https://www.bricscompetition.org/news/cci-imposes-penalty-on-maritime-transport-companies-for-indulging-in-cartelisation on 30 October 2022.

[44] 'Global Shiping Lines Sanctioned for Price Fixing in Container TransportServices on South Korea-Japan and South Korea-China Routes'. Published on 30 June 2022, accessed at: https://www.ftc.go.kr/solution/skin/doc.html?fn=d9846325831f93bc690c3a1374b3c4d5067e09709e4a70b3a231dbe7023cb8fa&rs=/fileupload/data/result/BBSMSTR_000000002402/ on 31 October 2022.

89. The parties were not in agreement that the transaction would or is likely to raise such concerns and therefore made the following submissions:

a. Upon closing of the proposed transaction, BAL's activities will continue to be carried on by BAL with its own management and without the operational involvement of MSC.

b. BAL's business model is premised on its ability to procure the best shipping rates for its customers. In this regard BAL already works currently with several shipping line and will remain a multiuser freight forwarder post-transaction, as offering services from any shipping line to its clients is a key element of BAL's service offering and added value on the market. Therefore, sharing market information with MSC would be detrimental to BAL's activities. This will remain a critical component of the business model going forward. As such, there exists a material commercial incentive for the parties to ensure this is maintained post-merger.

c. The information included in the bill of lading / quote proposed by shipping lines to BAL would not have any added value for MSC or its competitors if, hypothetically, it were to obtain it, notably as (i) the conditions proposed by shipping lines depend on the commercial relationship established with each customer as well as on the negotiation that may have taken place between the parties, and (ii) the conditions proposed by shipping lines to freight forwarders are usually only valid for a limited period. In particular, freight rates are very volatile meaning that any data collected has a very short life span. In addition, for large volume contracts such as those involving commodities, these are subject to global contracts entered into directly between traders and shipping lines, and therefore BAL does not have any visibility in respect of any competitively sensitive information that may be contained in these agreements. Finally, the Merging Parties note that the choice of container line depends on a number of factors such as freight rates, container availability, space on board, sailing frequency and transit time.

[redacted]

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e. It is particularly noteworthy that the EC did not foresee any information sharing concerns arising as a result of CMA CGM's acquisition of CEVA. Similarly, the merging parties are not aware of the Commission imposing any such conditions in any of CMA CGM/CEVA's recent similar transactions.

f. In any event, MSC will ensure that its already stringent global competition law compliance policy, which caters for concerns of such a nature, is strictly enforced as regards to interactions with BAL.

90. With regard to the parties' submissions on approvals obtained in other jurisdictions, the CID reiterates its position that it is not bound by the decisions adopted in other jurisdictions. Its assessment is guided by the conditions of competition within the relevant markets identified, which may differ from the situation prevailing in other jurisdictions. Likewise, the CID contends that the absence of a similar concern being raised in a different merger assessed by the CID in the same sector does not imply that the CID cannot raise such concerns in the current case, if the circumstances so warrant. The CID considers that as part of its negotiations with the shipping lines, BAL may be tempted to inform a potential provider of the rates offered by the competitor, in an effort to obtain more competitive rates. From a customer perspective, this would be a commercially rational strategy. **Therefore, the CID maintains that the merging parties could exploit this platform by obtaining information about MSC's competitors, or using BAL, to transmit information to its competitors and align their competitive strategies.**

Consideration of Third-Party Views

91. Submissions were received from the national competition authorities of Egypt, Eswatini, Kenya, Malawi, Mauritius, and Zambia which mostly confirm the absence of competition concerns likely to arise from the proposed transaction in relation to the horizontal overlaps existing between the activities of the merging parties. It is worth noting that some third parties raised competition concerns with regard to the transaction and these concerns were consistent with those identified by the CID. For example, concerns were raised by certain stakeholders in Kenya in relation to the risk of the parties' worsening or abandoning their contractual obligations towards their existing customers.

Undertakings Provided by Merging Parties

92. Notwithstanding their position as regard the concerns identified by the CID, the parties submitted the following undertakings:

a. For a period of three years from the date of merger clearance, MSC shall not require or oblige directly or indirectly customers of its deep-sea container liner shipping services to or from the Common Market to also purchase sea freight forwarding services from BAL. For the avoidance of doubt, this undertaking does not prevent MSC from offering direct customers a combined package of both deep-sea container liner shipping services from MSC and sea freight forwarding services from BAL, provided that such customers are in any event able to purchase each of these services separately.

b. [redacted] and for so long as SAS Lux holds a controlling interest in KNSL, SAS Lux shall not use its joint control over KNSL to discriminate against competitors of BAL in the sea freight forwarding market by denying or otherwise restricting open and fair access to the Kipevu Container Terminal at the Port of Mombasa and its associated services, in accordance with its obligations contained in the Terminal Operation Agreement in terms of which notably –

- [redacted]
- [redacted]

c. For as long as SAS Lux holds a controlling interest in BAL, BAL shall not harm competition through the facilitation of the exchange of competitively sensitive non-public information between competitors in the provision of deep-sea container liner shipping services. To this end, the merged entity will establish, post-closing, information barriers designed to prevent the disclosure of competitively sensitive non-public information by BAL to any deep-sea container liner shipping company, including MSC. Within a period of three months from the date of approval, the merged entity shall submit to the Commission a report setting out the necessary practical steps taken by it to establish the abovementioned information barriers designed to prevent the disclosure of competitively sensitive non-public information by BAL to any deep-sea container liner shipping company, including MSC.

a) Competitively sensitive non-public information shall include all information pertaining to price, discount, and other conditions of competition which is not publicly available and whose disclosure may harm the legitimate business interests of the disclosed entity.

b) The merged entity, acting reasonably in its discretion, shall establish other practical and/or operational measures necessary to maintain the segregation of their respective operations. These measures, however, shall not impede the acquiring party (or its affiliated companies):

- to comply with its reporting and/or disclosure obligations under any applicable law; and/or
- to obtain legal or other professional advice; and/or
- to legitimately protect its rights as a shareholder in BAL.

d. The parties shall honour all contractual obligations validly entered into by the Merging Parties with customers in Kenya prior to the implementation of the proposed transaction. For the avoidance of doubt, any potential commitment should not require that the merging parties renew any contract at the end of its term or limit the Merging Parties to enforce any price escalation mechanism and/or dispute process currently catered for in a particular agreement.

93. Further, SAS Lux and BAL shall produce a joint annual report which details their compliance with the conditions contemplated above. Such report will be submitted to the Commission within one month of each anniversary of the Approval Date, for the first 3 years, and will be accompanied by affidavits or declarations attesting to the accuracy thereof by directors of SAS Lux and BAL, respectively.

94. The relevance of the conditions that persist for longer than 3 years, and any monitoring and reporting thereof, shall be reviewed after 3 years based on the prevailing market conditions.

95. The merging parties may, at any time, on good cause shown and on notice to the Commission, apply for any of the undertakings to be waived, relaxed, modified or substituted.

Determination

96. Given the foregoing analysis and conclusions, the CID determined that the merger is likely to substantially prevent or lessen competition in the Common Market.

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

a. For a period of three years from the date of merger clearance, MSC shall not require or oblige directly or indirectly customers of its deep-sea container liner shipping services to or from the Common Market to also purchase sea freight forwarding services from BAL. For the avoidance of doubt, this undertaking does not prevent MSC from offering direct customers a combined package of both deep-sea container liner shipping services from MSC and sea freight forwarding services from BAL, provided that such customers are in any event able to purchase each of these services separately.

b. [redacted] and for so long as SAS Lux holds a controlling interest in KNSL, SAS Lux shall not use its joint control over KNSL to discriminate against competitors of BAL in the sea freight forwarding market by denying or otherwise restricting open and fair access to the Kipevu Container Terminal at the Port of Mombasa and its associated services, in accordance with its obligations contained in the Terminal Operation Agreement in terms of which notably –

- [redacted]
- [redacted]

c. For as long as SAS Lux holds a controlling interest in BAL, BAL shall not harm competition through the facilitation of the exchange of competitively sensitive non-public information between competitors in the provision of deep-sea container liner shipping services. To this end, the merged entity will establish, post-closing, information barriers designed to prevent the disclosure of competitively sensitive non-public information by BAL to any deep-sea container liner shipping company, including MSC. Within a period of three months from the date of approval, the merged entity shall submit to the Commission a report setting out the necessary practical steps taken by it to establish the abovementioned information barriers designed to prevent the disclosure of competitively sensitive non-public information by BAL to any deep-sea container liner shipping company, including MSC.

(a) Competitively sensitive non-public information shall include all information pertaining to price, discount, and other conditions of competition which is not publicly available and whose disclosure may harm the legitimate business interests of the disclosed entity.

(b) The merged entity, acting reasonably in its discretion, shall establish other practical and/or operational measures necessary to maintain the segregation of their respective operations. These measures, however, shall not impede the acquiring party (or its affiliated companies):

- to comply with its reporting and/or disclosure obligations under any applicable law; and/or

- to obtain legal or other professional advice; and/or
- to legitimately protect its rights as a shareholder in BAL.

d. The merging parties shall honour all contractual obligations validly entered into by the merging parties with customers in Kenya prior to the implementation of the proposed transaction. For the avoidance of doubt, any potential commitment should not require that the merging parties renew any contract at the end of its term or limit the merging parties to enforce any price escalation mechanism and/or dispute process currently catered for in a particular agreement.

e. SAS Lux and BAL shall produce a joint annual report which details their compliance with the conditions contemplated above. Such report will be submitted to the Commission within one month of each anniversary of the Approval Date, for the first 3 years, and will be accompanied by affidavits or declarations attesting to the accuracy thereof by directors of SAS Lux and BAL, respectively.

98. The Commission shall review the relevance of the conditions that persist for longer than 3 years, and any monitoring and reporting thereof, after 3 years based on the prevailing market conditions.

99. The merging parties may, at any time, on good cause shown and on notice to the Commission, apply for any of the undertakings to be waived, relaxed, modified or substituted. The Commission reserves the right to independently monitor the market at any reasonable time to assess the merging parties' compliance with the above conditions.

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

Commissioner Dr Mahmoud Momtaz (Chairperson)

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

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