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Common Market for Eastern and Southern Africa

**Case File No. CCC/MER/06/18/2023**

# Decision[1] of the Ninety-Eighth (98th) Meeting of the Committee Responsible for Initial Determinations Regarding the Proposed Merger involving G.D.F. International S.A., Meridiam Infrastructure Africa Fund II SLP and Meridiam Infrastructure Africa Parallel Fund II SLP and Okavango Kenya Mauritius Limited

**ECONOMIC SECTOR**: Energy

COMESA COMPETITION COMMISSION
12 OCT 2023

**12 October 2023**

[1] In the published version of this decision, some information has been omitted pursuant to Rule 73 of the COMESA Competition Rules concerning non-disclosure of business secrets and other confidential information. Where possible, the information omitted has been replaced by ranges of figures or a general description.

## The Committee Responsible for Initial Determinations,

Cognisant of Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the "**COMESA Treaty**");

Having regard to the COMESA Competition Regulations of 2004 (the "**Regulations**"), and in particular Part 4 thereof;

Mindful of the COMESA Competition Rules of 2004, as amended by the COMESA Competition [Amendment] Rules, 2014 (the "**Rules**");

Conscious of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation of 2015;

Recalling the overriding need to establish a Common Market;

Recognising that anti-competitive mergers may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA Member States;

Considering that the continued growth in regionalization of business activities correspondingly increases the likelihood that anti-competitive mergers in one Member State may adversely affect competition in another Member State,

Desirability of the overriding COMESA Treaty objective of strengthening and achieving convergence of COMESA Member States' economies through the attainment of full market integration,

Having regard to the COMESA Merger Assessment Guidelines of 2014,

Determines as follows:

### Introduction and Relevant Background

1. On 2 May 2023, the COMESA Competition Commission (the "**Commission**") received a notification for approval of a merger involving G.D.F. International S.A. ("**GDFI**"), Meridiam Infrastructure Africa Fund II SLP and Meridiam Infrastructure Africa Parallel Fund II SLP (collectively, "**Meridiam Infrastructure**") and Okavango Kenya Mauritius Limited ("**OKML**" or the "**target**), pursuant to Article 24(1) of the Regulations.

2. Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the transaction between the parties would or is likely to have the effect of substantially preventing or lessening competition or would be contrary to public interest in the Common Market.

3. Pursuant to Article 13(4) of the Regulations, there is established a Committee Responsible for Initial Determinations, referred to as the CID. The decision of the CID is set out below.

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## The Parties

***GDFI***

4. GDFI is a company incorporated in France. GDFI is a wholly owned subsidiary of Engie S.A. ("**Engie**"), who is also based in France and with global operations in low carbon electricity production, centralized and decentralized energy networks, and associated services. Engie has operations in the following Member States: Kenya, Uganda, DRC, Djibouti, Egypt, Ethiopia, Madagascar, Mauritius, Rwanda, Seychelles, Sudan, Tunisia and Zambia.

***Meridiam Infrastructure***

5. Meridiam Infrastructure Africa Fund II SLP ("**MIAF II**"), is a French professional specialised investment fund existing under the laws of France. It is managed by Meridiam SAS ("**Meridiam**").

6. Meridiam Infrastructure Africa Parallel Fund II SLP ("**MIAP II**"), is a French professional specialised investment fund existing under the laws of France, registered with the Paris trade and companies register and is also managed by Meridiam.

7. Meridiam is a global infrastructure investor and operator specialising in Private-Public Partnerships and concession opportunities. Meridiam specialises in developing, financing, and managing long-term public infrastructure projects. Meridiam has infrastructure assets under construction and operations in transport and social infrastructure sectors. Meridiam invests in public infrastructure in Europe, North America, and Africa. Meridiam mainly focuses on 3 sectors:

   a) Energy Transition and Environment (i.e., renewables – solar, wind, hydro, biomass, waste to energy, transmission)

   b) Mobility (airports, seaports, ICDs, BRTs, light rail, roads)

   c) Social Infrastructure (schools, student housing, civic buildings, waste and water treatment).

8. Meridiam has also built an energy portfolio of geothermal, solar, hydro, waste-to-energy, biogas, and biomass assets, making it a leading investor in energy transition.

9. Meridiam controls the following entities in the following Member States:

   a) In Ethiopia: TM Geothermal Operations PLC (also known as Tulu Moye) which is a geothermal power plant project. The parties have submitted that the project, is however still in the development phase and is yet to generate any revenue.

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b) In Kenya: Rift Valley Highway Limited which is a Kenyan registered special purpose vehicle for the development of the Nairobi-Nakuru-Mau Summit highway PPP project. The parties have submitted that the project, however, is still in the development phase and is yet to generate any revenue.

c) In Uganda: Raxio Group BV which is a data centre platform set up to develop sites within close proximity of key cities in Africa under the 'Raxio' brand name. The parties have submitted that Raxio Group BV is in the process of commissioning its first data centre in Uganda.

10. Meridiam Infrastructure was incorporated to develop, finance and manage long-term sustainable public infrastructure projects in three core sectors: sustainable mobility, critical public services and innovative low carbon solutions.

***OKML (the target)***

11. OKML is a company incorporated under the laws of Mauritius. OKML is an energy investment business that has a presence in Mauritius and Kenya. OKML does not undertake any business or sell any products in Mauritius and directly owns 88% of Kipeto Energy PLC ("**Kipeto**"), a public company incorporated in Kenya which operates a 100MW wind energy plant in Kajiado County, Kenya.

12. OKML's only operation in the Common Market is Kipeto.

## 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 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.*

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14. The undertakings concerned have operations in two or more Member States. The merging parties hold a combined asset value in excess of the threshold of USD 50 million in the Common Market. In addition, the parties do not hold more than two-thirds of their respective aggregate COMESA-wide asset 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. This transaction is structured as follow: in terms of back-to-back transactions,

**a)** GDFI will acquire the entire shareholding of Actis Okavango from Actis Holdings (the "**Initial Transaction**"); and

**b)** Immediately on completion of the Initial Transaction (on the same day), GDFI will procure the on-sale by Actis Okavango of the following assets to Meridiam Infrastructure:

i. the entire shareholding of OKML, (including all of the shares held by OKML in Kipeto);

ii. various renewable energy projects or battery storage projects being developed, constructed or acquired, or proposed to be developed, constructed or acquired by affiliates of Actis Okavango (pipeline projects) which are not located in South Africa and Egypt, (if any)[2]; and

iii. any and all other assets and liabilities relating to the development, financing, construction, ownership and/or operation of renewable energy projects in Kenya, including, without limitation, Actis Energy Okavango Services Kenya Limited[3].

## COMPETITION ASSESSMENT

### Consideration of the Relevant Markets

#### *Relevant Product Market*

16. Meridiam invests in public infrastructure in Africa focussing on *inter alia*, energy transition and environment (i.e. renewables – solar, wind, hydro, biomass, waste to energy, transmission). The parties have submitted that specifically in the

[2] The parties submitted that the most advanced pipeline project is a 50MW expansion project to Kipeto (wind and battery storage), based in Kenya which is being developed by the same shareholders as the Kipeto Project Company and is currently in the early stages of development. The other pipeline opportunities are proposed acquisitions from third parties of wind and solar projects at various stages of development or operations in Kenya, Mozambique and Namibia. These proposed acquisitions are still at very early stages of commercial negotiations and Kipeto does not own any rights in relation to these projects.

[3] The parties submitted that Actis Energy Okavango Services Kenya Limited has been dissolved in Kenya and the tax deregistration process is being completed.



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Common Market, Meridiam controls TM Geothermal Operations PLC ("**TMGO**") which is a geothermal power plant project in Ethiopia which, upon completion, will have a geothermal capacity of [][4].

17. The target through Kipeto operates a [][5] wind energy plant in Kajiado County, Kenya.

18. The CID has previously distinguished the market for the construction and operation of power plants from that of electricity generation[6], having regard to the different activities comprised in the former, which include choice of the location conditions, (ii) administrative procedures and environmental authorisations, (iii) acquisition of the necessary rights on the land and procurement of power plants, (iv) license to connect the power plants to the transmission network, (v) construction and (vi) start-up.

19. The market for generation and wholesale supply of electricity, on the other hand, comprises electricity generated in power stations, traded on the wholesale market (through bilateral agreements, regulated marketplaces, and power exchanges) as well as electricity physically imported via interconnectors for the purpose of resale to retailers, traders and to a lesser extent to large industrial end-users. On the supply side, market players are electricity producers, importers, and traders.

20. The generation and wholesale supply of electricity are considered one single relevant product market because the generation of electricity does not constitute a market activity as long as the electricity is not sold. Generation and wholesale supply of electricity can be distinguished from other markets in the electricity sector, such as retail supply (which involves sale of electricity to the final customer), having regard to the difference in types of contracts, and customers served.

21. The parties submitted that the electricity that will be produced by the TM Geothermal Operations PLC once it is operational, will be sold to the state-owned offtaker of Ethiopia, namely Ethiopia Electric Power ("**EEP**") pursuant to a power purchase agreement. EEP would then transmit and distribute the energy to its own wholesale and retail customers in Ethiopia. Further, Kenya has a 'single buyer model' where all the power from all the grid-connected independent power producers in the country sell power to Kenya Power and Lighting Company

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[4] Information claimed as confidential by merging parties.
[5] Information claimed as confidential by merging parties.
[6] CCC/MER/4/11/2023, Decision of the 95th meeting of the Committee Responsible for Initial Determinations Regarding the Proposed Merger involving TotalEnergies SE and Total Eren Holding S.A. This is consistent with the approach adopted by the European Commission (the EC), see for instance EC decision Dong Energy Borkum Riffgrund I Holdco / Boston Holding / Birkum Riffgrund I Offshore Windpark (para. 19-20); Iberdola Renovables / Gamesa (para. 13).



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("**KPLC**"). Kipeto's only customer is therefore KPLC. The parties' activities are therefore limited to the wholesale segment.

22. Electricity can be generated from many sources, classified as renewable and non-renewable[7]. Renewable sources of energy relate to natural sources which consumption does not decrease the availability of that resource[8]. Renewable sources of energy are water, wind, geothermal, sunlight, waves or biomass. A geothermal power plant is one in which electricity is produced using heat from within the earth. Power produced in a geothermal plant is a renewable source of energy whereby the mechanics of the plant allows it to draw fluids from underground reservoirs to the surface to produce steam, which steam then drives turbines to generate electricity[9]. Electricity is produced from wind turbines on a wind farm. Wind is used as energy to turn wind blades of wind turbines. The spinning motion activates a shaft in the nacelle and a generator built into the nacelle then converts the kinetic energy of the turning shaft into electrical energy[10].

23. Non-renewable sources of energy are fossil fuels, that is oil, gas and coal are burnt to produce energy. Such fossil fuels by their nature take hundred of millions of years to be produced[11]. Once consumed, such fossil fuels, are technically depleted.

24. The fact that electricity can be generated from different sources may be grounds for possible further segmentation of the market according to mode of generation. For purposes of the present case, the CID considered that it is not necessary to delve into further possible segmentation of the markets according to the type of energy (i.e., nuclear energy, wind energy, gas etc.) given that the transaction would not raise concern under any alternative market definition.

25. Based on the foregoing assessment and without prejudice to its approach in similar future cases, the CID considered that the relevant product markets are:

    **a)** development and operation of geothermal power plants

    **b)** development and operation of wind farms, and

    **c)** generation and wholesale supply of electricity.

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[7] Decision of the Ninety-Fifth Committee Responsible for Initial Determinations Regarding the Proposed Merger involving Energy Pulse Ltd and Equator Energy Limited
[8] www.un.org/en/climatechange/what-is-renewable-energy accessed 31 August 2023
[9] www.energy.gov/eere/geothermal/electricity-generation accessed 15 August 2023
[10] ww.nrel.gov/research/re-wind.html accessed 18 September 2023
[11] www.un.org/en/climatechange/what-is-renewable-energy accessed 31 August 2023



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***Relevant Geographic Market***

26. Having regard to the relatively immovable nature of the power plants and national legislation, the CID considers that the markets of the construction and operation of geothermal power plants and wind farms are national in scope. Despite the presence of global players, it is unlikely that in response to favourable conditions in a particular Member State, suppliers in other countries would be able to shift their production plants within a short timeframe and in a risk-free manner to satisfy the substitutability test. Of interest are the national markets for Ethiopia and Kenya given that the target plants are located in Kenya, whereas the acquiring group is at a phase of development in Ethiopia.

27. The market for electricity generation has previously been defined as national, in particular because of the differences in legislation and regulation of the sector which exist in the Member States and limited interconnections between most neighbouring Member States. However, there are Member States are active in the exportation and importation of electricity. Zambia for instance is a major electricity exporter to its neighbouring countries, including DRC and Zimbabwe[12]. Eswatini imports electricity from South Africa, Mozambique and Zimbabwe[13]. Kenya regional interconnection projects include:

    i. 5km 400kV Lessos – Tororo line (Kenya – Uganda interconnector)

    ii. 686km 500kV Eastern Electricity Highway Project (Ethiopia – Kenya interconnector

    iii. 96km 400kV Kenya – Tanzania interconnector

    iv. Lake Victoria Ring (include 235km 400kV Rongai – Kilgoris line).

28. Whilst there are indications that the relevant geographic market for the wholesale supply of electricity could be broader than national for countries with sufficient export capacity as considered by the CID in its previous decision[14], for purposes of this transaction, noting that any alternative market definition would not affect the outcome of the competitive assessment, the assessment has focussed on the national markets of Ethiopia and Kenya.

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[12] Lusaka Times, 'Government Justifies Export of Power to Neighboring Countries' 14 January 2023, www.lusakatimes.com/2023/01/14/government-justifies-export-of-power-to-neighboring-countries/ accessed 14 September 2023

[13] OEC, 'Electricity in Eswatini' https://oec.world/en/profile/bilateral-product/electricity/reporter/swz accessed 14 September 2023

[14] Decision of the 94th Committee Responsible for Initial Determinations Regarding the Proposed Merger involving Serengeti Energy Limited and Rwaza Hydropower Limited.



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***Conclusion of Relevant Market Definition***

29. Based on the foregoing assessment, and without prejudice to the CID's approach in similar future cases, the relevant markets have been identified as the:

a) **development and operation of geothermal power plants in Ethiopia;**

b) **development and operation of wind farms in Kenya; and**

c) **the national markets for the generation and wholesale supply of electricity in Ethiopia and Kenya.**

**Market Shares and Concentration**

30. Ethiopia has a total installed electricity capacity of 4,965.5 MW, which is managed by EEP. EEP is the only entity that is operating in the generation and wholesale supply of electricity in Ethiopia. The parties submitted that if (a) no other generation capacity was installed on the national grid and (b) the TMGO project were to achieve financial close, be successfully constructed and enter into operations, it would then constitute approximately [between 1% and 3%] of the installed generation capacity in Ethiopia. Given that the target is not present in the Ethiopian market, whether at development or generation stage, the transaction will not result in any market share accretion in Ethiopia.

31. According to the Energy and Petroleum Regulatory Authority of Kenya, the country has a total installed electricity capacity of 3,601.76 MW, with a total installed wind energy capacity of 436.1 MW. Electricity generated by wind represents 17.22%. Kipeto's installed capacity accounts for [between 2% and 4%][15] of the total installed electricity capacity in Kenya. The CID further notes that there is a pipeline project in its early stages of development which will expand the capacity of Kipeto by [][16]. Post the expansion project, the market shares of Kipeto will increase [by less than1%]. The CID observes that project expanding the capacity of Kipeto will not result in a significant increase in the market shares of Kipeto.

32. Given that the acquiring undertaking does not operate in Kenya, the transaction will not result in any market share accretion in the relevant market for development of wind farms, nor in electricity generation.

33. Hence, this transaction will not result in a change in the market structures, by way of market share accretion, in any of the relevant markets identified.

34. Given that the transaction will not alter the market structure in the relevant markets, the CID observes that the merging parties will be constrained by the other players in the relevant markets post-merger. Further, KPLC is the dominant player

[15] Confidential information claimed by merging parties.
[16] Information claimed as confidential by merging parties.

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in Kenya and is likely to remain so in the foreseeable future. With the target having a market share of [between 2% and 4%] pre- transaction, it is unlikely that the increased investment from Meridiam will increase its market share significantly to an extent of resulting in a lessening of competition in the relevant markets in Kenya.

## Consideration of Third-Party Views

35. The CID considered submissions from the national competition authorities of Kenya and Mauritius which did not raise any concerns in relation to the transaction, which submissions are consistent with the CID's findings, as discussed above.

## Determination

36. Based on the circumstances of the case and having regard to the foregoing assessment, the CID determined that the merger is not likely to substantially prevent or lessen competition in the Common Market or a substantial part of it, nor be contrary to public interest. The CID further determined that the transaction is unlikely to negatively affect trade between Member States. The CID, therefore, approved this transaction.

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

Dated this 12th day of October 2023

**Commissioner Dr Mahmoud Momtaz (Chairperson)**

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