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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/06/24/2019

Decision[1] of the Eightieth (80th) Committee Responsible for Initial Determination Regarding the Non-Compliance with the CID-Decision in the Merger Concerning the Acquisition of 100% Shareholding in Eaton Towers Holdings Limited by ATC Heston B.V.

ECONOMIC SECTOR: Telecommunication

6th December 2021

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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

Introduction and Relevant Background

1. On 22nd December 2019, the Committee Responsible for Initial Determination (the "**CID**") at its Sixty-Seventh Meeting granted conditional approval of a merger regarding the acquisition of 100% shareholding in Eaton Towers Holdings Limited ("**ETHL**") by ATC Heston B.V. (**ATC**) (the "**CID Decision**"), pursuant to Article 26 of the COMESA Competition Regulations (the "**Regulations**").

2. The CID, during the said meeting, observed that the transaction would raise competition concerns in Uganda, and resolved to approve the transaction on the basis of undertakings submitted by the parties. Among the undertakings, the parties undertook that "*ATC shall procure that the Uganda Operating Entities shall not discriminate among mobile network operators (MNOs) in Uganda in the provision of leasing space on its telecommunication towers and roof tops or related services. The Uganda Operating Entities should develop an objective criterion to use when determining the MNOs, it leases space to. The Criterion should be submitted to the Commission for consideration within one (1) month from the date of approval of the Transaction" (emphasis added).*

Secretariat's Submissions on Non-compliance with the CID Decision

3. Secretariat submitted a report to the CID on ATC's failure to comply with part of the above-mentioned undertaking. Secretariat submitted that, in order to be in compliant with the undertaking, ATC was required to submit the Objective Criterion within one (**1**) month from the date of approval of the transaction, i.e., by 22nd January 2020. However, ATC submitted the Objective Criterion to the Commission on 29th October 2020, approximately ten (**10**) months from the date of the approval of the transaction.

4. Secretariat further submitted that upon submission of the Objective Criterion on 29th October 2020, ATC apologized for not sending the Objective Criterion earlier and indicated that this was an oversight on their part. Secretariat also submitted that ATC did not engage the Commission to request for an extension to submit the Objective Criterion later than the prescribed timeline in the CID Decision, neither did they provide a reasonable justification for submitting the Objective Criterion beyond the stipulated date.

5. Secretariat finally submitted that ATC's failure to complied with the specific time frames given by the CID was a blatant disregard of the CID decision which constituted a breach of the Regulations, specifically Article 8(5), and which deserved to be penalized as a deterrent to future infringers of the Regulations. Secretariat thus recommended that ATC be penalised for such breach by being ordered to pay a fine of [redacted] **USD 96,614.252**.

Summary of Submissions by the Parties

6. ATC made submissions to the CID in response to the Commission's Report wherein they explained the circumstances surrounding the late submission of the Objective Criterion to the Commission, including:

a. integrating the assets, employees, systems, and processes of Eaton Uganda into ATC Uganda

b. ensuring that Eaton continue to meet its contractually agreed service level agreements with MNOs;

c. compliance with the other conditions in the decision including the appointment of a monitoring trustee which was the first time they were engaged in such; and

d. complying with the conditions prescribed by the Uganda Communications Commission.

7. ATC argued that given the circumstances of the breach, a fine should not be imposed since a fine need not be levied in all circumstances and if the Commission deems fit, ATC should be given a written warning in this instance with the possibility of a fine in future should there be another breach or if the CID considers that circumstances surrounding the breach are deserving of a fine, a reduced fine be imposed.

8. The CID considered Secretariat's and ATC's submissions in its determination.

CID's Assessment of Compliance with the CID Decision

9. The CID noted that the merger transaction was approved on the basis of undertakings provided by the parties since the assessment concluded that the transaction was likely to raise competition concerns in the relevant markets, specifically that the transaction led to the creation of a dominant player in Uganda in the market for the provision of antenna space on towers and ancillary services. Therefore, in order to prevent any likely competition concerns post-merger, the parties had undertaken to submit an Objective Criterion used for leasing telecommunication tower space to mobile network operators whose aim was to increase transparency in the market in order to prevent discrimination amongst customers.

10. The CID noted that the approval of the merger was based on the undertakings, including the submission of the Objective Criterion. Therefore, the CID considered that the non-submission of the Objective Criterion constitutes a breach of the CID decision.

11. The CID observed that Article 8 of the Regulations confers upon the Commission jurisdiction to impose penalties for breaches of the Regulations. In particular, Article 8(5) provides that "*Any person who contravenes or fails to comply with any Regulations or any Rules made hereunder or any directive or order lawfully given, or any requirements lawfully imposed under these Regulations or any Rules made hereunder, for which no penalty is provided shall be determined to have breached the Regulations and shall be liable pursuant to that determination to a fine (in an amount to be determined by Rules) and/or such other penalty as may be assessed*".

12. The CID considered that one of the objectives of administrative penalties is deterrence against future contravention of the Regulations as well as to act as a general deterrent to other firms that may be contemplating engaging in similar breaches.

13. The CID was not satisfied that the Secretariat had sufficiently taken into account mitigating factors, notably the cooperation of the parties after the breach was identified and the proportionality of the fine in relation to the nature of the infringement.

14. The CID resolved that a total reduction of 30% to the recommended fine should be applied. Therefore, the CID considered that a fine of **USD 67,629.98** be imposed on the parties for non-compliance with the CID Decision.

Determination

15. The CID concluded that the parties breached the Regulations by not complying with the CID Decision issued pursuant to Article 26 of the Regulations. Specifically, the parties failed to submit an Objective Criterion used to engage with customers within the stipulated time in the CID Decision. The CID considered mitigating factors and proportionality of the fine in relation to the nature of the infringement.

16. In view of the foregoing, and pursuant to Article 8(5) of the Regulations which empowers the Commission to impose fines for violation of the Regulations as assessed and taking into account best practices with regard to imposition of fines, *inter alia*, the gravity of the violation, duration of the violation and parties' willingness to cooperate, the CID determined to impose a fine of **USD 67,629.98** on the parties for non-compliance with the CID Decision.

Dated this 6th day of December 2021

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Commissioner Deshmuk Kowlessur (Chairperson)

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Commissioner Mahmoud Momtaz

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Commissioner Islam Tagelsir Ahmed Alhasan