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Common Market for Eastern and Southern Africa

**Case File No. CCC/MER/09/30/2023**

# Decision[1] of the 105th Meeting of the Committee Responsible for Initial Determinations Regarding the Proposed Merger involving Maziwa and Highland Creamers & Food Limited

**ECONOMIC SECTOR**: Dairy

**11 March 2024**

COMESA COMPETITION COMMISSION
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[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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 21 November 2023, the COMESA Competition Commission (the "**Commission**") received a notification involving Maziwa ("**Maziwa**" or the "**Acquiring Undertaking**") and Highland Creamers & Food Limited ("**Highland Creamers**" or the "**Target Undertaking**"), pursuant to Article 24(1) of the Regulations. The transaction concerns the proposed acquisition of 100% of the total issued share capital of Target Undertaking by Maziwa.

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

***Maziwa (the "Acquiring Undertaking")***

4. Maziwa is a non-operating holding company incorporated in Mauritius. It was incorporated on 5 June 2017. Maziwa holds investments in various subsidiaries incorporated in Kenya and Uganda together, the "**Acquiring Group**".

5. The principal business activities of the Acquiring Group include the collection, processing and selling of milk and milk products in Uganda and Kenya. The Acquiring Group processes milk under the Lato brand. The Acquiring Group also exports milk and milk products to the following countries in the Common Market: Malawi, Ethiopia, Democratic Republic of Congo ("**DRC**"), Egypt, Rwanda, Somalia, Madagascar and Burundi. Specifically, the Acquiring Group produces and supplies Ultra-High Temperature (UHT) milk (plain), UHT milk (flavoured), milk powder, butter, and yoghurt. However, the parties submitted that currently, the Acquiring Undertaking is not active in the production and sale of yoghurt in Kenya.

6. Maziwa operates in the following COMESA countries: Kenya, Mauritius and Uganda.

7. The Acquiring Undertaking's vision of working with farmers to improve their livelihoods is a top priority along with addressing nutritional gaps in the countries of operation with the products that are existing and being planned for launch.

***Highland Creamers (the "Target Undertaking")***

8. The Target Undertaking is a company incorporated in Kenya on 30 June 2015. The Target Undertaking's principal activity is the collection, processing, packaging and selling of milk and milk products, specifically UHT long-life milk (90 days and 180 days) and yoghurt in Kenya only. Target Undertaking does not own any dairy cattle and sources its milk from smallholder farmers, through cooperatives, from Bomet, Kericho, Murang'a, Nakuru, Nandi, Nyamira and Transmara counties in Kenya[2]. Although the Target Undertaking produced yoghurt in Kenya in 2018 and 2019, this production was paused in 2019 to focus on UHT milk production. As such, the Target Undertaking does not currently process yoghurt nor does it produce butter.

9. The Target Undertaking does not have any subsidiaries and only operates in one (1) COMESA Member State, namely Kenya.

[2] Parties' email submission dated 12 February 2024.

## Jurisdiction of the Commission

10. 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.*

11. The undertakings concerned have operations in two or more Member States. The undertakings concerned hold assets of more than the threshold of USD 50 million in the Common Market and they each hold assets of more than USD 10 million in the Common Market. In addition, the parties do not hold more than two-thirds of their respective aggregate assets in 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

12. The parties submitted that the proposed transaction entails the acquisition of 100% of the total issued share capital of the Target Undertaking by Maziwa.

13. The parties submitted that the proposed transaction is not expected to cause a substantial prevention or lessening of competition or give rise to any public interest concerns. To the contrary, as the Kenyan milk market is currently dominated by a single entity, it is anticipated that the proposed transaction will enhance competition in Kenya.

14. The parties submitted that the proposed transaction would allow the Acquiring Undertaking to operate a two-country manufacturing set up that will allow it to reduce the turnaround time for getting its products to customers and increase the value addition in both countries. The access to the two separate milk pools will also allow for growth in the local Kenyan market.

15. The parties submitted that the proposed transaction is pro-competitive and poised to benefit Kenya's local farming community by enabling local farmers to supply their products to communities with more limited access to milk. As part of the acquirer's expansion plan, the increased output will not only enhance availability of locally produced milk but also foster competition within the Kenyan market and in the medium to long term, allowing the acquiring undertaking to look to increase exports from Kenya to the region.

## COMPETITION ASSESSMENT

### Consideration of the Relevant Markets

#### *Relevant Product Market*

16. Paragraph 7 of the COMESA Guidelines on Market Definition (the "Market Definition Guidelines") provides that a *"relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer/customer, by reason of the products' characteristics, their prices and their intended use".*

17. The Acquiring Undertaking is active in the collection, processing and supply of UHT milk products particularly, UHT milk (plain), UHT milk (flavoured) and milk powder. The Target Undertaking is also active in the collection, processing, packaging and selling of milk and milk products, specifically UHT long-life milk (90 days and 180 days). The parties' activities overlap in respect of the collection, processing and supply of milk, particularly UHT milk.

18. In view of the activities of the parties, the assessment of the relevant product market was limited to the milk and milk products, given the horizontal overlap.

*Collection, processing and supply of milk*

19. Dairy producers undertake several efforts to supply milk and milk products. This includes collection, processing and supply of the milk and milk products. Collection of milk is the first activity that involves procuring raw milk from farms to a central location. Once collected, raw milk can be processed or transported to processing centres or markets. The collection of milk is often done within four (4) hours of milking[3], given the perishability of raw milk, which has not undergone any processing apart from cooling.

20. Dairy producers can either collect milk from their own dairy cattle or they can procure the milk from other collectors. In the current transaction, the parties do not

[3] Jurjen Draaijer, 2001, 'Milk Producer Group Resource Book: A practical guide to assist milk producer groups'. Accessed on 26 January 2024 at https://www.fao.org/3/y3548e/y3548e06.htm.

own their own dairy cattle but procure raw milk from cooperatives. Procurement of raw milk can be construed as a separate market from the processing and supply of processed milk. In ***Friesland/Campina***[4], the European Commission ("**EC**") considered that the procurement of raw milk can be segmented into two separate markets, being the procurement of conventional milk and the procurement of organic milk. However, in the ***Humana/Nordmilch*** and concerning the German market, the Bundeskartellamt left the market open on account of unlikely competition concerns arising from the transaction. In the current transaction and from a supply perspective, it is considered that the procurement of all forms of milk is likely to be substitutable given the common requirement that once the milking is done, raw milk should be stored or transported in a refrigerated environment to prevent the milk spoiling. In view of the above, it is considered that the procurement of raw milk is a separate relevant market.

21. The processing of milk entails converting raw milk into various dairy products such as pasteurized liquid milk, yoghurt, butter, cheese, ghee or fermented milk. Milk is processed to attract higher prices from the various dairy products and processing increases the shelf life for the products, ensuring that the supply to distant markets is possible. The various dairy products can be construed as separate markets due to their different characteristics, intended use and prices including the method of processing. Thus, products such as milk, yoghurt, cheese and ghee should be construed as separate products markets.

22. It is recalled that both parties are active in the production and supply of UHT milk. A distinction can also be made between fresh milk and long-life milk whereby the former requires storage in a refrigerated place while the latter may be kept for months at room temperature unless the packaging has been opened for use, after which the product must be refrigerated. In ***ARLA/HANSA***[5], the EU confirmed that fresh and long-life milk are distinguishable on account of differences in the distribution channels and whether the products were branded or private labelled.

23. One key difference between fresh and long-life milk is how the respective products are processed. Fresh (pasteurised) milk and long-life milk are distinguishable considering the former as a result of pasteurisation while the latter undergoes UHT process with main difference being the temperature up to which the raw milk is treated and this has implications on their storage and distribution. Under pasteurisation, raw milk is exposed to a high temperature for a short time (at least 71.7°C for 15 seconds)[6]. The raw milk is heated just enough to kill harmful micro-

[4] See Case M.5046 Friesland/Campina, para 52
[5] See Case M.6119 – ARLA/HANSA
[6] European Communities (Hygienic Production and Placing on the Market of Raw Milk, Heat-Treated Milk and Milk-Based Products) Regulations, 1996, https://faolex.fao.org/docs/pdf/ire27199.pdf, accessed on 1 February 2024

organisms but without destroying flavour and nutritional qualities. Pasteurised milk has a shelf life of 2-3 days, and up to 12 days if kept at 4°C. To the contrary, long-life (UHT) milk undergoes a continuous flow of heat for a short time (not less than + 135°C for not less than a second) – the aim being to destroy all residual spoilage micro-organisms and their spores[7]. Thereafter, the milk is packaged using aseptic opaque containers. Although pasteurisation and UHT milk undergo different processes including storage requirements, pasteurised and UHT milk comprise the same main ingredients (i.e., protein, calcium and vitamin D) and are consumed in a similar manner. Other dairy products may also be distinguished on the grounds of whether they are pasteurised or long-life (UHT) and these include cream, yoghurt, flavoured dairy drinks and butter.

24. Considering the differences in the production process between pasteurised and UHT milk and given the different storage requirements, the CID considered that UHT milk belongs to a separate relevant market from pasteurised milk. Therefore, given that the parties' activities overlap in the production and supply of UHT milk, the relevant product market is determined as the production and supply of UHT milk.

25. Considering the above assessment, the relevant product markets were identified as follows:
   *i.* ***the procurement of raw milk; and***
   *ii.* ***the production and supply of UHT milk.***

***Relevant Geographical Market***

26. The Commission's Guidelines on Market Definition define the relevant geographic market as follows:

> *"...the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas..."*[8].

27. The CID observed that the parties' activities overlap in Kenya where both were active in the production and supply of UHT milk. With regards to the procurement of milk, it was considered that the geographic scope of this market was likely to be national given the perishability of raw milk, which must be transported for further processing within four (4) hours of milking. It was unlikely that milk processors

[7] Ibid 9
[8] Paragraph 8.

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would opt to switch procurement of raw milk locally with Kenya to procuring outside of Kenya as it may compromise the quality of the milk. Therefore, the geographic market for the procurement of milk was considered as Kenya.

28. With regards to the production and supply of UHT milk, it was considered that the geographic market was likely to be broader than national since UHT milk has a longer shelf life, can be stored at room temperature and therefore may be supplied across borders. This was evident from the parties' submission that the Acquiring Undertaking exports its milk and milk products across the Common Market including to DRC, Egypt, Burundi, Ethiopia, Madagascar, Malawi, Rwanda and Somalia. Conversely, UHT milk and milk products in Kenya were also likely to face competition from similar imported products from the Common Market. Therefore, the market for the production and supply of milk and milk products was considered as at least COMESA-wide.

***Conclusion on Relevant Markets***

29. Based on the foregoing assessment, and without prejudice to its approach in similar future cases, the CID construed the relevant markets as the:

*i.* ***Procurement of raw milk in Kenya; and***

*ii.* ***Production and supply of UHT milk in COMESA.***

**Market Shares and Concentration**

30. It was observed from the parties' submission that the Kenyan milk market is highly fragmented with over twenty-five (25) main players, including other small players. The CID noted the following market share information for the parties' competitors in Kenya:

**Table 1: Estimated market share of the parties and competitors in Kenya[9]**

| Name of Entity | Market share (%) |
|---|---|
| Brookside Dairy Limited | [5 – 10] |
| Meru Highlands Dairy | [3 –8] |
| New Kenya Cooperative Creameries | [2 – 5] |
| Fresha – Githunguri Dairy Farmers Co-operative Society Ltd | [1 – 4] |
| Sameer Agriculture & Livestock Limited (trading in Daima milk products) | [0.4 - 1.8] |
| **Maziwa (Musty Distribution Limited) – the Acquirer** | **[0.5 - 1.4]** |
| Ziara Dairy Ltd | [0.1 - 0.2] |
| Narumoro Dairy Farm Ltd | [0.1 - 0.2] |
| Sanagare Gardens | [0.1 - 0.3] |

[9] Information claimed as confidential by the merging parties.

| | |
|---|---|
| Italian Gelati & Food Products Ltd | [0.1 - 0.3] |
| Enkanasa Cow | [0.1 - 0.3] |
| Ndumberi Dairy Farmers Cooperative Society Ltd | [0.1 - 0.3] |
| Wimssy Fresh Dairy Ltd | [0.1 - 0.3] |
| Moiben Dairy Farm Ltd | [0.1 - 0.3] |
| Kibos Dairy Ltd | [0.1 - 0.3] |
| Kiambaa Dairy Farmers Co-Operative Society Ltd | [0.1 - 0.3] |
| Milele Dairy Ltd | [0.1 - 0.3] |
| Marima Dairy Ltd | [0.1 - 0.3] |
| Kifaru Dairy Ltd | [0.1 - 0.3] |
| Rima Dairy Ltd | [0.1 - 0.3] |
| ***Highland Creamers & Food Limited (Target Undertaking)*** | ***[0.5 - 0.8]*** |
| Mount Kenya Dairies | [0.8 - 1.3] |
| Pascha – Uplands Premium Dairies and Foods Ltd | [0.8 - 1.3] |
| Canaan Factories Ltd | [0.5 - 1] |
| Aspendos Dairy Ltd | [0.4 - 0.9] |
| Others (producers of unprocessed/ raw milk) | [45 – 65] |

31. The transaction was not likely to raise any competition concerns in the Common Market given that the market share accretion would not be significant. Further, it was evident from the parties' submission and from the submissions by the Competition Authority of Kenya that the market was fragmented with numerous competitors who would continue to exert competitive pressure on the merged entity.

32. The CID noted that the parties have a limited vertical relationship in Kenya in that the Target Undertaking has entered into contracts with the Acquiring Undertaking's subsidiary in Kenya, Musty Distribution Limited, to contract manufacture the Acquiring Undertaking's subsidiary's products in Kenya, where the Target Undertaking has the capacity to do so. The products are manufactured for the Acquiring Undertakings subsidiary under the Acquiring Undertakings brand and sold to its customers in Kenya.

33. The CID considered that the transaction was not likely to raise any input foreclosure given the vertical relationship since the Target Undertaking was a small player and the market was characterised by the presence of other milk suppliers who will be available post-merger to supply the market. It was further noted that input foreclosure was unlikely given the milk the Target supplies was not likely to be unique and could easily be substitutable with milk by other suppliers.

34. The proposed transaction was also unlikely to result in customer foreclosure given that the Acquiring Undertaking was not a significant buyer and that there were other players in the market that purchase milk from the market. Therefore, assuming the Acquiring Undertaking purchased all its milk from the Target Undertaking, such

purchase would not be significant given the Target's market size and the market would still have other customers.

35. In the current transaction, the market share accretion resulting from the horizontal overlap in the activities of the parties would not give the merged entity a dominant position. Consequently, the merged entity would not be able to unilaterally affect the market, given that there exist other effective competitors in the relevant markets.

## Consideration of Third-Party Views

36. In arriving at its determination, the CID also considered submissions from the national competition authorities of Egypt, Kenya and Malawi which did not raise any concerns in relation to the transaction.

## Determination

37. 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 will it be contrary to public interest. The CID further determined that the transaction is unlikely to negatively affect trade between Member States.

38. The CID, therefore, approved the transaction.

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

Dated this 11th day of March 2024

**Commissioner Dr Mahmoud Momtaz (Chairperson)**

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