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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/04/17/2024

Decision[1] of the 109th Meeting of the Committee Responsible for Initial Determinations regarding the Proposed Acquisition of Sole Control by BASF SE of Harbour Energy Plc and Wintershall NewCo

ECONOMIC SECTOR: Energy

22 August 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 11 June 2024, the COMESA Competition Commission (the "**Commission**") received a notification regarding the proposed merger involving BASF SE ("BASF"), Harbour Energy Plc ("**Harbour**"), and Wintershall NewCo ("**Wintershall NewCo**"), 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

BASF

1. The parties submitted that BASF is a publicly traded European stock corporation headquartered in Ludwigshafen am Rhein, Germany, listed on the German Stock Exchange in Frankfurt. BASF, together with its controlled affiliates (the "**BASF group**") creates chemistry for a sustainable future.

2. The BASF group has activities worldwide in more than ninety (90) countries, including Europe, North America, Asia-Pacific, South America, Africa, and the Middle East. Its business is divided into six (6) segments, namely chemicals, materials, industrial solutions, surface technologies, nutrition & care, and agricultural solutions.

3. Within the Common Market, the BASF group generated turnover from all Member States except Comoros, Eritrea, Seychelles and Somalia through the activities presented in Table 1.

Table 1: BASF Group's activities in the Common Market

Member State	Activity
Burundi	Nutrition, health, and agricultural solutions.
The DRC	Performance chemicals, care chemicals, monomers, and agricultural solutions.
Djibouti	Nutrition & health, agricultural solutions, care chemicals, performance materials, and dispersions and resins.
Egypt	Petrochemicals, intermediates, performance materials, monomers, dispersions and resins, performance chemicals, catalysts, coatings, care chemicals, nutrition & health, and agricultural solutions.
Eswatini	Coatings, nutrition and health.
Ethiopia	Mainly agricultural solutions but also engages in activities in relation to nutrition and health, performance materials, care chemicals, dispersions, resins, coatings, and monomers.
Kenya	Petrochemicals, intermediates, performance materials, monomers, dispersions and resins, performance chemicals, coatings, care chemicals, nutrition and health and agricultural solutions.
Libya	Monomers, dispersions and resins, coatings, performance chemicals, care chemicals, and agricultural solutions.
Madagascar	Petrochemicals, monomers, performance chemicals, and agricultural solutions.
Malawi	Nutrition and health, dispersions and resins, and agricultural solutions.
Mauritius	Dispersions and resins, performance chemicals, care chemicals, and agricultural solutions.
Rwanda	Dispersions, resins, and performance chemicals.
Sudan	Nutrition and health, agricultural solutions, and coatings.
Tunisia	Petrochemicals, intermediates, performance materials, monomers, dispersions and resins, performance chemicals, catalysts, care chemicals, nutrition and health, agricultural solutions, and coatings.

Member State	Activity
Uganda	Monomers, dispersions and resins, performance chemicals, care chemicals, nutrition and health, monomers, agricultural solutions, and coatings.
Zambia	Performance chemicals, nutrition and health, dispersions and resins, care chemicals, agricultural solutions, and coatings.
Zimbabwe	Performance chemicals, dispersions, resins, nutrition, health, agricultural solutions, and coatings.

Harbour

4. The parties submitted that Harbour is a UK-listed public company incorporated in accordance with the laws of Scotland, with its business address at 23 Lower Belgrave Street, London SW1W ONR, the United Kingdom.

5. The parties further submitted that Harbour is an independent oil and gas company with a primary focus on the United Kingdom, as well as interests in Indonesia, Vietnam, Mexico, and Norway. Harbour does not have any activity or physical presence in the Common Market.

Wintershall NewCo

6. The parties submitted that Wintershall NewCo is a company incorporated for the purposes of the proposed transaction, which will comprise the Exploration and Production (E&P) business of Wintershall DEA AG ("**Wintershall DEA**"), excluding Russia-related assets and operations of Wintershall DEA AG.

7. Wintershall DEA is a full-function joint venture, with its business address at Friedrich-Ebert-Straße 160, 34119 Kassel, Germany. It is active in the exploration and production of oil and gas in Europe, North America, South America, North Africa, and the Middle East. It is also active, to a limited extent, in gas transportation.

8. Within the Common Market, the Wintershall DEA assets that are attributable to Wintershall NewCo were active in the exploration and production of oil and gas in Egypt and Libya through the entities presented in Table 2 below.

Table 2: List of entities of Wintershall DEA whose assets will be attributed to Wintershall NewCo

Member State	Entity name
Egypt	Wintershall DEA Suez GmbH (incorporated in Germany with branch office in Egypt)
	Wintershall DEA Nile GmbH (incorporated in Germany with branch office in Egypt)
	Wintershall DEA WND GmbH (incorporated in Germany with no branch in Egypt)

	Disouq Petroleum Company (a joint venture between Wintershall DEA Nile GmbH and The Egyptian Natural Gas Holding Company)
Libya	Wintershall Petroleum (E&P) B.V. (incorporated in the Netherlands with branch office in Libya)
	DEA E&P GmbH (incorporated in Germany with no branch in Libya)
	DEA Cyrenaica GmbH (incorporated in Germany with branch office in Libya)
	DEA North Africa/Middle East GmbH (incorporated in Germany with branch office in Libya)

Jurisdiction of the Commission

9. 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.

10. The undertakings concerned have operations in two or more Member States. The undertakings concerned derived turnover of more than the threshold of USD 50 million in the Common Market and they each derived turnover 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 turnover or asset within one and the same Member State. The Commission was thus satisfied that the transaction constitutes a notifiable transaction within the meaning of Article 23(5)(a) of the Regulations.

Details of the Merger

11. The parties submitted that the proposed transaction entails the acquisition:

    i. by Harbour of 100% of the shares in Wintershall NewCo (holding Wintershall DEA's non-Russian E&P business); and

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ii. by BASF of de facto sole control of Harbour and Wintershall NewCo (collectively, the "**proposed transaction**").

12. BASF will acquire de facto sole control over Harbour and, indirectly, over the non-Russia related assets of Wintershall DEA which are to be held by newly incorporated Wintershall NewCo.

13. The parties submitted that the proposed transaction will enable BASF to take a major step towards achieving its announced strategic goal to exit the oil and gas business. Further, the proposed transaction is in line with Harbour's mergers & acquisitions objectives and offers a transformational value-creating opportunity for Harbour's shareholders.

Competition Assessment

Consideration of the Relevant Markets

Relevant Product Market

14. Paragraph 7 of the Commission's Guidelines on Market Definition states 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".

15. The CID noted that within the Common Market, BASF is active in various business segments, namely chemicals, materials, industrial solutions, surface technologies, nutrition & care, and agricultural solutions.

16. On the other hand, while Harbour is active in the oil and gas businesses, it has no activities within the Common Market. Wintershall NewCo is active in the exploration and production of oil and gas in Egypt and Libya including to a limited extent, gas transportation.

17. Since the proposed transaction was not likely to result in overlaps, the focus of the relevant product market was on the target undertakings' activities as this is where any effects are likely to manifest. Thus, the assessment focused on the oil and gas businesses in which Wintershall and Harbour are active.

Oil and gas industry

18. The oil and gas industry comprises three main sectors: upstream, midstream, and downstream.[2] Upstream activities involve exploration and production ("**E&P**"), including the search for hydrocarbon reservoirs, drilling exploratory wells, and establishing extraction facilities for crude oil and natural gas as well as upstream wholesale crude oil and natural gas. The midstream sector focuses on transporting and storing raw materials, utilizing pipelines, railroads, highways, and maritime

[2] https://www.intertekinform.com/en-au/resources/blog/oil-and-gas-value-chain, accessed on 20 July 2024.

vessels as needed. In the downstream sector, refineries play a critical role in converting raw materials into refined products suitable for industrial, commercial, and residential use.

19. The E&P phase is said to form a single industry due to the functional nature of the market for crude oil which entails a difference between E&P and refining.[3] Refining and selling of fuels are separate industries with their own value chains, facilitated by markets for refined products. Additionally, the transportation of crude oil and refined products can be treated as separate value chains, often managed by distinct businesses.

20. In ***Trafigura/Puma Energy***[4], the CID considered the upstream activities are distinguished from the downstream activities as they require distinct equipment for drilling and extraction, licenses for exploration, development of infrastructure for production such as oil platforms, pipelines and terminals. Given the target undertakings operate within the exploration and production of oil and gas, the relevant market for purposes of conducting a competitive assessment is the upstream market for the exploration and production of oil and gas as discussed below.

Exploration of crude oil and natural gas

21. In ***ADNOC/OMV***[5], the CID considered that the exploration of crude oil and gas entails the researching and the discovery of potential sites for oil and gas drilling extraction and reserves for crude oil. The exploration of crude oil and natural gas was considered as a single relevant product market since at the exploration stage, the contents of the underground reservoirs cannot be known and both are formed through a similar process, namely the decomposition of the remains of animal and plants buried under the ocean flows. The location of underground oil and natural gas occurs at the same place as such the exploration of oil or natural gas is often conducted at the same time.

22. Similarly, the European Commission ("**EC**")[6] has considered that no distinction is to be made, in terms of the relevant product market, between the exploration for crude oil on the one hand and exploration for natural gas on the other, as the contents of underground reservoirs cannot be known at the stage of exploration. The CID noted that there are no reasonable grounds to deviate from previous case

[3] African Natural Resources Centre (ANRC). 2021. Value chain analysis for the oil sector - Potential contributions to African economies. African Development Bank. Abidjan, Côte d'Ivoire. Available at: https://www.afdb.org/sites/default/files/documents/publications/value_chain_analysis_for_the_oil_sector_3.pdf, accessed on 20 July 2024.
[4] See Case File No. CCC/MER/05/15/2021, para 14, decision dated 6th December 2021.
[5] See Case File No. CCC/MER/07/21/2023, para 14, decision dated on 5th November 2023.
[6] See case M.9175 – TOTAL/CHEVERON DENMARK, para 19, decision dated 7/3/2019.

precedents and thus considers the exploration of crude oil and natural gas as a distinct market.

The production and sale of crude oil and natural gas

23. It is recalled from the preceding section that the location of crude oil and natural gas tend to occur at the same place thus it is expected that as companies contemplate crude oil production, they should also plan to extract natural gas. The discussion on crude oil and natural gas is therefore presented under the same section below.

24. The production and sale of oil and gas comprises two aspects, infrastructure development and the sale of crude oil or natural gas. The production process starts with developing new infrastructure to support the production, notably oil platforms, pipelines and terminals. The development involves setting-up adequate infrastructure (i.e., oil platforms, pipelines, terminals, etc) for future production.[7] The parties have submitted that the production and sale of crude oil and unprocessed natural gas involves the exploitation of the developed hydrocarbon reserves, and the sale of such hydrocarbons on the marketplace. The development, production and sale of crude oil and natural gas can be construed to comprise separate markets given the ultimate purpose for each is unique and the required infrastructure under oil and natural gas is bound to differ.

25. In ***Total/Cheveron Denmark,*** the EC considered the development, production and sales of crude oil and the development, production and sales of natural gas as separate relevant product markets since gas and crude oil have differing applications and are subject to varying pricing behaviour as well as cost constraints.[8] Similarly, in ***ElF Aquitaine/MOLL***[9] the CID concluded that the production and sale of crude oil and natural gas were separate markets.

26. The CID noted that there were no reasonable grounds to deviate from previous case precedents and thus considers the development, production and sale of crude oil; and the development, production and sale of natural gas as distinct markets.

Transportation of natural gas

27. When natural gas emerges from the well-head of a production facility, the stream contains gaseous hydrocarbons and hydrocarbon liquids.[10] This unprocessed gas often requires transportation by pipeline to a facility at which it is processed by separating the gaseous and liquid constituents. The transport of unprocessed gas

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[7] See Case No IV/M.1383 ñ Exxon/Mobil, para 10.
[8] See Case IV/M.1532 BP Amoco/Arco, para 14, decision dated, 29 September 1999.
[9] Case File No. CCC/MER/2/11/2018, para 9, decision dated 5th October 2018.

[10] See Case No COMP/M.5585 - CENTRICA / VENTURE PRODUCTION, para 12, decision dated 21/08/2009.

through pipelines linking the gas fields with the necessary processing facilities and the processing facilities itself are essential requirements to be able to sell pipeline quality gas.

28. The EC has defined a separate market for gas transport, which was distinct from the markets for the sale or supply of gas, since the market conditions for both services (e.g., product characteristics, suppliers, prices) were different.[11] Similarly, the provision of natural gas transportation service was considered a separate market.

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

i. **the exploration of crude oil and natural gas;**

ii. **the development, production and sales of crude oil;**

iii. **the development, production and sales of natural gas; and**

iv. **the provision of natural gas transportation services.**

Relevant Geographic Market

30. The Commission's Guidelines on Market Definition define the relevant geographic market as comprising ***"...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"***[12].

31. The CID observed from the parties' submission that Harbour operates in the oil and gas sectors with primarily focus on the United Kingdom, with additional interests in Indonesia, Vietnam, Mexico, and Norway while Wintershall is involved in the exploration and production of oil and gas across Europe, North America, South America, North Africa, and the Middle East (specifically in Egypt and Libya within the Common Market). This indicated that the exploration and production of crude oil and natural gas was likely to have global scope since the parties' activities covers worldwide in scope.

32. Similarly, the EC has considered the exploration and production of crude oil and natural gas market to be worldwide in scope, given that the companies engaged in exploration do not tend to limit their activities to a particular geographic area.[13] Similarly, in ***EIF Aquitaine/MOLL***[14] the geographic scope of the exploration and production of crude oil and natural gas was defined as global. The current

[11] Latin American and Caribbean Competition Forum - Session II: Market Definition in the Gas Sector, para 16. Available at https://one.oecd.org/document/DAF/COMP/LACF(2022)4/en/pdf, accessed on 23 July 2024.
[12] Paragraph 8
[13] See case M.9175 – TOTAL/CHEVERON DENMARK, para 19, decision dated 7/3/2019
[14] Case File No. CCC/MER/2/11/2018, para 9, decision dated 5th October 2018.

assessment also adopted the global market for the exploration of crude oil and natural gas, and the development, production, and sales of crude oil markets.

33. With respect to the development, production, and sales of natural gas, and the provision of natural gas transportation service, the CID considered that the markets could be defined as national from a supply-side perspective, due to limited interconnection infrastructure or lack of available cross-border capacity transporting gas from one area to a neighbouring one. It also included the need for an inter-governmental agreement between the countries to be crossed by the pipeline. Though left open, the EC considered the geographic market for the upstream production and sale of natural gas national in scope since there were logistical constraints on pipeline transport and infrastructure.[15]

34. In view of the above assessment, the geographic scope for the development, production and sales of natural gas, and the provision of natural gas transportation service was likely to be national, i.e., Egypt and Libya being the Member States where the Wintershall operates.

Conclusion of Relevant Market Definition

35. For the purposes of assessing the proposed transaction, and without prejudice to its approach in future similar cases, the CID has identified the relevant markets as:

   i. ***the global market for the exploration of crude oil and natural gas;***
   ii. ***the global market for the development, production, and sale of crude oil;***
   iii. ***the development, production, and sale of natural gas in Egypt and Libya; and***
   iv. ***the transportation of natural gas in Egypt and Libya.***

Market Shares and Concentration

36. The parties have submitted Wintershall NewCo and its top 5 (five) competitors' market share in each COMESA Member State in which the assets attributable to Wintershall NewCo were active in the 2022 financial year as presented in Table 3 below.

Table 3: Estimated market share in the exploration and production of oil and gas in the Common Market[16]

Member State	Competitor Name	Estimated market shares (%)
Egypt	Eni	[15 – 25]
	BP	[10 – 20]

[15] Case No Comp/M.5585 - Centrica / Venture Production, Para 11, Decision Date 21/08/2009.
[16] Information confidentiality claimed by the parties.

	Apache (APA Corp)	[0 – 10]
	Rosneft	[0 – 10]
	Sinopec	[0 – 10]
	Wintershall (the target)	**[0 – 10]**
	Others	[40 – 45]
	Total	**100**
Libya	Eni	[10 – 20]
	TotalEnergies	[0 – 10]
	OMV	[0 – 10]
	Suncor Energy	[0 – 10]
	Equinor	[0 – 10]
	Wintershall (the target)	[0 – 10]
	Others	[70 – 80]
	Total	**100**

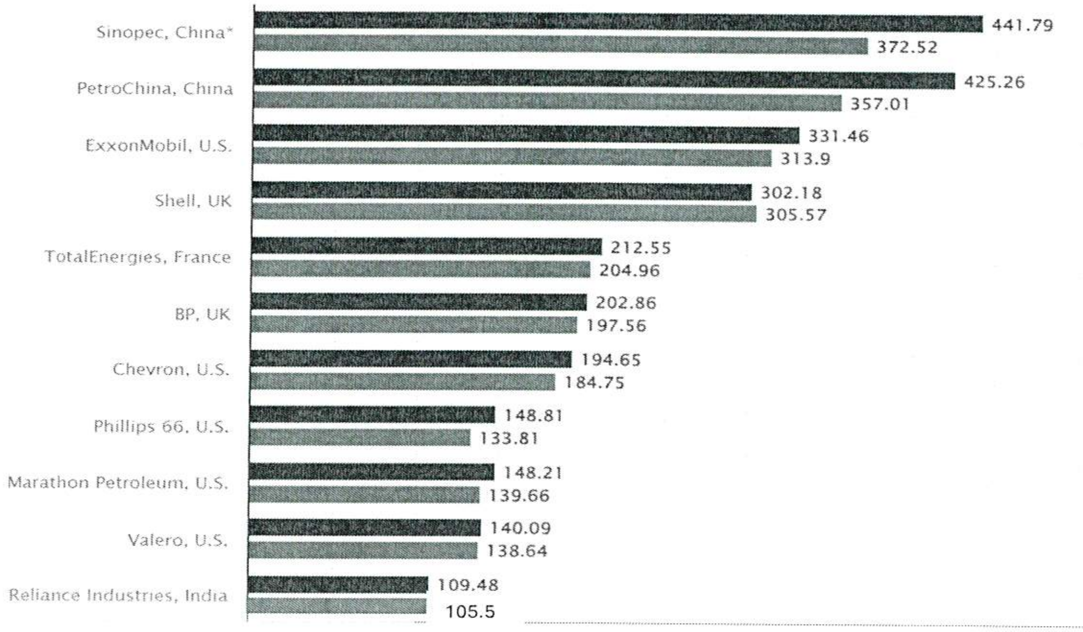
37. From Table 3 above, the CID noted that the target's approximate market share in the broader market for the exploration and production of oil and gas in Egypt was [0 – 10]%, and Libya [0 – 10]%. It was noted that the target had insignificant market share both in Egypt and Libya. It was further noted that the market was characterised by presence of many players with fragmented market shares where the acquirer does not have activities in the Egypt and Libya. Thus, the existing market structure would not change following the proposed transaction. Similarly, the parties submitted that the merged entity would continue to face significant competition from their competitors post-transaction. Further, with there being no overlaps between the merging parties' activities, the proposed transaction would not result in market share accretion.

38. The CID observed that in the global market for the exploration and production of oil and gas Saudi Arabian Oil Co, Gazprom, Rosneft Oil Co, BP Plc, and Lukoil Oil Co were the top 5 integrated oil & gas companies in the world in 2021 by reserves.[17] It was reported that in the aggregate, the top 10 integrated oil & gas companies had reserves of 584,008 million barrels of oil equivalent (MMboe), where Saudi Arabian Oil Co had the highest reserves (337,333 MMboe) and Shell plc had the lowest (8,972 MMboe). In aggregate, they had revenue of $2,058 billion with average revenue growth of 57.2%. None of the top 10 companies had a revenue decline in 2021. In terms of the geographic split, 3 out of 10 of the world's top integrated oil & gas companies are based in Russia, another 3 are based in Europe, while 2 are based in the US, and the remaining companies are based in Saudi Arabia and China.[18]

[17] https://www.globaldata.com/companies/top-companies-by-sector/oil-gas/global-integrated-companies-by-reserves/, accessed on 25 July 2024.
[18] Ibid.

39. The CID further observed that Sinopec (China), PetroChina (China), ExxonMobil (US), Shell (UK), TotalEnergies (France), BP(UK), Chevron (US), Philips 66(US), Marathon Petroleum (US), Valero (US), and Reliance Industries (India) are among the leading oil and gas companies worldwide based on revenue, as presented in figure 1 below.

Figure 1: Leading oil and gas companies worldwide based on revenue as of July 2024 (in billion U.S. dollars)[19]



40. The CID noted from the above figure that Sinopec (China Petroleum & Chemical Corporation) is the leading global oil and gas company by revenues generated. The Chinese state-owned enterprise generated 372.52 and 441.79 billion U.S. dollars in revenues in 2023 and 2024 respectively. PetroChina with 357.01 billion U.S. dollars in 2023, 425.26 billion U.S. dollars in 2024, and the US-based ExxonMobil followed with 313.9 and 331.46 billion U.S. dollars in 2023 and 2024 respectively. It was further observed that the merging parties are not among the leading oil and gas companies in the global petroleum industry.

41. The CID noted there would be no change in the existing market structure post-merger in view of the absence of overlap pre-merger and further that the merged entity would continue to face competition from the existing competitors which include major global and regional players listed above.

Consideration of Third-Party Views

42. In arriving at its determination, the CID also considered submissions from the National Competition Agencies of DRC, Egypt, Ethiopia, Malawi, Zambia and

[19] https://www.statista.com/statistics/272710/top-10-oil-and-gas-companies-worldwide-based-on-revenue/, accessed on 25 July 2024.

Zimbabwe which confirmed the absence of competition and public interest concerns.

Determination

43. 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.

44. The CID, therefore, approved the transaction.

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

Dated this 22nd day of August 2024

Commissioner Dr Mahmoud Momtaz (Chairperson)

Commissioner Lloyds Vincent Nkhoma

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