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Common Market for Eastern and Southern Africa

Staff Paper No. 2016/11/LV/02

Decision[1] of the Twenty Seventh Committee Responsible for Initial Determination on the Application for Authorisation of the Acquisition of the Entire Issued Share Capital of Gulf Africa Petroleum Corporation by Total Outre Mer S.A

ECONOMIC SECTOR: **Petroleum**

22nd November 2016 – Livingstone, Zambia

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Information and Relevant Background

1. On 5th July 2016, the COMESA Competition Commission (hereinafter referred to as "the Commission") received a notification for approval of a merger between Total Outre Mer S.A (hereinafter referred to as "Total Outre Mer") the acquiring undertaking and Gulf Africa Petroleum Corporation (hereinafter referred to as "Gapco") the target undertaking.

2. The transaction was notified with the Commission under Article 24(1) of the COMESA Competition Regulations (hereinafter referred to as "the Regulations"). Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the proposed 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. The Committee Responsible for Initial Determination (hereinafter referred to as "the CID") established that the parties operate in more than one COMESA Member State. This therefore means that the regional dimension requirement under Article 23(3) of the Regulations is satisfied and asserts jurisdiction on the Commission to assess the transaction.

The Parties

Total Outre Mer

4. Total Outre Mer is a wholly owned subsidiary of Total Marketing Services S.A., which is listed on the Paris, London, Brussels and New York stock exchanges. Total Outre Mer operates in the following Member States: Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Swaziland, Uganda, Zambia and Zimbabwe.

GAPCO

5. The target undertaking, GAPCO, is a company incorporated in the Republic of Mauritius. The principal activity of GAPCO is that of an investment holding company. GAPCO has interests in three countries and four subsidiaries throughout Eastern Africa. The Subsidiary companies are GAPCO Tanzania Limited, GAPCO Kenya Limited, GAPCO Uganda Limited and Gapoil (Zanzibar) Limited. The principal activities are storage, handling and distribution of petroleum products through its retail network and industrial customers in Tanzania, Zanzibar, Uganda and Kenya.

Nature of the Transaction

6. Total Outre Mer will acquire 100% of the ordinary share capital in GAPCO held by Reliance Exploration and Production DMCC and Fortune Oil Corporation.

Competition Analysis

7. The CID defined the relevant market as the:

    - Retail supply of automotive fuels in the Common Market;
    - Non-retail supply of petroleum products in the Common Market;
    - The supply of lubricants in the Common Market; and
    - Import of petroleum products through the Open Tender System in the Common Market.

8. The CID observed that the transaction did not raise any competition concerns in the rest of the Common Market except Kenya. The competition concerns in the Kenyan market pertained to the provision of storage facilities to third parties post-merger. Furthermore, issues around the current employees of GAPCO were raised in Kenya.

9. The CID expressed concerns that the post-merger entity may not provide storage facilities to third parties. The CID noted that GAPCO is currently the single largest private player in the provision of storage facilities and that such facilities must remain available to third parties post-merger. Pursuant to the CID's concerns, the parties submitted undertakings.

Determination

10. To remedy the concerns identified in the Kenyan market, the parties submitted undertakings.

11. As regards the storage of petroleum - :

    a) The merging parties shall respect all 'hospitality agreements' that Gapco has entered into with third parties on or before 21 July 2016 in relation to the Mombasa Terminal;

    b) For three years after the date of completion of the Transaction, the merging parties shall maintain the present policy of making hospitality at Mombasa Terminal 2 available to third parties and entering into relevant hospitality agreements with third parties, provided that:

        i. Contractual terms are agreed between merging parties and its customers; and

        ii. Third parties fully comply with all applicable Kenyan laws and regulations on health, safety and environmental ("HSE") requirements, as well as all HSE standards and terminal policies in force at any given time in relation to Mombasa Terminal 2.

12. As regards employment in Kenya - :

   a) The merging parties shall not terminate any of the current short-term employment contracts of GAPCO employees (i.e. those with a term of less than two years) for a period 12 months from the date of completion of the transaction;

   b) The merging parties shall, where a short-term contract is due to expire before the end of the period in (a) above, extend the contract until the end of the 12 months period from the date of completion of the transaction.

   c) The merging parties shall not terminate any permanent and pensionable long-term employment contracts of GAPCO employees before the end of the 24 months period from the date of completion of the transaction.

   d) For the duration of the hospitality and employment conditions (as set out in para 11(b) and paras 12 (a)-(c) above respectively), the merging parties shall on an annual basis submit a report to the Competition Authority of Kenya in order to determine whether the conditions are being complied with.

   e) The employment conditions are subject to the continuation in force of all other provisions concerning employees in the Share Purchase Agreement dated 30 May 2016 which remain unchanged.

13. The CID noted that the above undertakings seek to restore or maintain competition at the level existing pre-merger, while permitting the realisation of relevant merger benefits. The CID was thus satisfied that the undertakings proposed adequately addresses competition concerns and therefore approved the merger.

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

Dated this 22nd day of November, 2016.

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Commissioner Matthews Chikankheni (Chairman)

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Commissioner Thabisile Langa (Member)

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Commissioner Chilufya Sampa (Member)