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**Common Market for Eastern
and Southern Africa**

Case No. CCC/RFA/8/6/2017

Decision¹ of the Forty-Seventh Committee Responsible for Initial Determination in the Application for Authorisation of the Distribution Agreement between the Wirtgen Group and The Motor Engineering Company of Ethiopia

ECONOMIC SECTOR: Agriculture and Construction Equipment

6th October 2018 – Johannesburg, South Africa

¹ In the published version of this decision, some information may have 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

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Information and Relevant Background

1. On 18th January 2018, the COMESA Competition Commission (hereinafter referred to as the “Commission”) received an application for authorisation of the distribution agreement concluded between the Wirtgen Group (Wirtgen) and the Motor Engineering Company of Ethiopia (“MOENCO”).
2. The application was submitted to the Commission in accordance with Article 20 of the COMESA Competition Regulations, 2004 (hereinafter referred to as the “Regulations”). The Commission’s concern was to determine whether or not the agreement affects trade between Member States and had as its object or effect the prevention, restriction, or distortion of competition within the Common Market.
3. The Committee Responsible for Initial Determination (hereinafter referred to as the “CID”) established that the agreement affected more than one COMESA Member State and therefore had a regional dimension.

The Parties

Wirtgen

4. The parties submitted that Wirtgen was a Germany incorporated company dealing in construction equipment. Wirtgen’s activities encompass the entire process chain in road construction, from process, mixing, paving and compacting, to rehabilitation as well as mining and quarrying equipment. Wirtgen also manufactures and supplies milling machines, recyclers as well as slipform pavers for road construction. The parties submitted that Wirtgen supplied road construction products to the following Member States: Egypt, Ethiopia, Kenya, Libya, Madagascar, Mauritius, Rwanda, Sudan, Eswatini, Uganda, Zambia and Zimbabwe.

MOENCO

5. The parties submitted that MOENCO was an Ethiopian distribution company located in Addis Ababa. MOENCO’s operations included the distribution of agricultural equipment, construction and mining equipment and material handling equipment. MOENCO also provided product support and genuine parts supply.

The Agreement

6. The Secretariat informed the CID that MOENCO was appointed as the exclusive distributor for Wirtgen products in the identified territories in Ethiopia. The terms of the distribution agreement provided that MOENCO should not supply the products to customers located outside the territories. The offending clauses in the Agreement provided that-:
 - Wirtgen Group undertakes not to appoint any other person or undertaking to distribute the products in the territories, whether as a distributor, consignee, or commercial agent. Furthermore, the Wirtgen Group undertakes not to supply products to dealers or customers for which it is

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known, by the Wirtgen Group, that they would actively distribute in the territories;

- MOENCO undertakes not to supply the products to customers outside the territories; or to customers within the territories of whom it knows or must assume will sell the products in a region outside the territories. If MOENCO breaches this obligation, it must pay a commission of 10% of the sale price to the Wirtgen Group, which will pass it on to the dealer for the territory concerned. In addition, MOENCO is required to pay the commission if it must have known that the customer it supplied would supply the products to a region outside the territory;
- MOENCO is required to purchase the products exclusively from the Wirtgen Group, with the exception of used machines, which can be exchanged in partial payment for the sale of new products i.e. trade-ins. MOENCO is prohibited from holding an interest in or participating in, whether directly or indirectly, any undertakings that manufactures or markets competing goods. This prohibition also applies to used goods, with the exception of used goods that were taken back by MOENCO as trade-ins; and
- MOENCO is prohibited from marketing or manufacturing, whether by itself or through others, goods that compete with the Wirtgen Products. MOENCO is further prohibited, inside and outside the Territories, from trading directly or indirectly, as distributor, sales representative, commercial agent, or in any other form, in competing goods. This prohibition remains in force for 5 years following the termination of the agreement.

Competition Analysis

7. The CID considered that the relevant market was the national market for the supply and distribution of road construction machines and mining equipment in Ethiopia. The CID observed that there was low import competition in the relevant market with a low presence of global brands. The CID noted that the market was highly concentrated with the distributor accounting for 67% of the market share.
8. The CID observed that the Agreement conferred absolute territorial restriction to the distributor. The CID noted that absolute territorial restriction was inimical to the fundamental COMESA Treaty objective of full market integration. The CID also considered the non-compete period of five years within which the distributor could not engage in similar business after the termination of the agreement. The CID considered that while non-compete clauses were a feature of business, they needed to be reasonable not to restrict competition. In view of this, the CID considered that five years was unreasonable.

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Determination

9. The CID registered its concern that the distribution agreement prohibited MOENCO from engaging in passive sales to customers outside the territories, a situation that amounted to absolute territorial restriction. The CID determined that absolute territorial protection was inimical to the objective of full market integration.
10. Furthermore, in terms of the distribution agreement, MOENCO undertook not to market or manufacture, whether itself or through others, competing goods for 5 years following the effective termination of the distribution agreement. The CID observed that such non-compete clauses while not prohibited *per se* in competition law but raised competition concerns if they were of long duration. The CID considered that the period of 5 years had the effect of foreclosing the market for upcoming competitors.
11. The CID therefore directed the parties to undertake to amend the offending clauses in the Agreement that restrict passive sales and reduce the non-compete obligation to a reasonable period of two years.
12. This decision is adopted in accordance with Article 20 of the Regulations.

Dated this 6th of October 2018



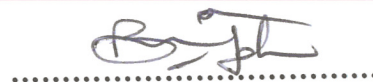
Commissioner Patrick O. Okilangole.

(Chairperson)



Commissioner Thembelihle P. Dube

(Member)



Commissioner Brian M. Lingela

(Member)