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Common Market for Eastern and Southern Africa

Staff Paper No. 2018/12/RR/07

Decision[1] of the Forty-Ninth (49th) Committee Responsible for Initial Determination Regarding the Application for Authorisation of the Distribution Agreement between Wirtgen Group and Sodirex SA, Madagascar

ECONOMIC SECTOR: Road Construction Machinery

6th December, 2018

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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 replaces by ranges of figures or a general description.

Information and Relevant Background

1. On 18th January, 2018, the COMESA Competition Commission ("the Commission") received an application for authorisation of a distribution agreement between the Wirtgen Group ("Wirtgen") and Sodirex SA ("Sodirex").

2. The application for authorisation was submitted to the Commission under Article 20 of the COMESA Competition Regulations ("the Regulations"). The Commission's concern is to determine, under Article 16 (1), whether or not the Agreement may affect trade between Member States and has 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 has a regional dimension and may likely affect trade between Member States. This therefore means that the Commission has jurisdiction to assess the Agreement

The Parties

Wirtgen

4. Wirtgen is a Germany company with its principal business address at Reinhard Wirtgen Strasse 2, 53578 Windhagen, Germany. Wirtgen is an internationally operating group of companies in the construction machinery sector incorporating the product brands such as Wirtgem, Vogele, Hamm, Kleemann, Benninghoven and Ciber. With these brands, Wirtgen's activities encompass the entire process chain in the 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.

5. Wirtgen supplies the following products in the Common Market: compactors; recyclers; rollers; slipform pavers; road pavers; cold milling machines; crushers; screens; used equipment; and spare parts into Egypt, Ethiopia, Kenya, Libya, Madagascar, Mauritius, Rwanda, Sudan, Swaziland, Uganda, Zambia and Zimbabwe

Sodirex

6. Sodirex is a Madagascan company with its business address at Antananarivo 101, Madagascar. Sodirex is active in industrial supplies; home and garden; and vehicle sales business. Sodirex distributes road construction equipment of the Wirtgen brands in Madagascar.

The Agreement

7. Wirtgen has appointed Sodirex to exclusively market the Wirtgen Group products (which includes: machines, parts and accessories) as an independent distributor in the territory of Madagascar.

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Competition Analysis

8. The CID defined the relevant markets are follows:

    a) The global upstream market for the manufacture and supply of road construction equipment;

    b) The market for the distribution of earthmoving Machines in Madagascar;

    c) The market for the distribution of road making Machines in Madagascar; and

    d) The market for the distribution of material handling machines in Madagascar.

9. The CID noted that the parties are in a vertical relationship at different levels of the value chain. It was noted that the agreements contain vertical restraints which constrain the distributor's conduct in the relevant markets. The CID identified competition concerns as follows:

    a) The territorial restrictions have the effect of restricting passive sales to Madagascar; and

    b) The non-compete obligations duration of 5 years was unreasonable and may restrict competition.

10. The CID observed that Sodirex is the exclusive distributor for the Wirtgen Group in the Territory. furthermore. Sodirex is prevented from exporting outside its allocated territory. The CID noted that the agreement prohibits the distributors from engaging in passive sales.

Determination

11. The CID is generally concerned with the prevalence of anti-competitive agreements in the Common Market and from the prevailing evidence, the current Agreement is likely to negatively affect trade between Member States and in not compatible with the Treaty establishing the Common Market for Eastern and Southern Africa.

12. The CID therefore resolved to authorise the agreement on the basis that parties undertake to amend the anti-competitive concerns in the Agreement relating to restrictions on passive sales and the duration of the non-compete obligations. The parties undertook not to restrict passive sales to Madagascar and reduce the non-compete duration to 3 years.

13. The CID reviewed the parties' undertakings and was satisfied that they were sufficient to address the identified competition concerns.

14. This decision is adopted in accordance with Article 20 of the Regulations.

Dated this 6th of December, 2018

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Commissioner Patrick Okilangole (Chairperson)

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Commissioner Brian Lingela
(Member)

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Commissioner Thembelihle Dube
(Member)