Competition Commission
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Common Market for Eastern and Southern Africa

Staff Paper No. 2018/12/RR/06

Decision[1] of the Forty Ninth (49th) Committee Responsible for Initial Determination on the Application for Authorisation of the Distribution Agreement between the Wirtgen Group and UMCL Limited

ECONOMIC SECTOR: Agriculture and Construction Equipment

06 December 2018

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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

Information and Relevant Background

1. On 18th January 2018, the COMESA Competition Commission (the "**Commission**") received a notification for authorisation of a distribution agreement from Deere & Company ("**Deere**") pursuant to Article 20 of the COMESA Competition Regulations (the "**Regulations**").

2. In terms of the application, Deere sought authorisation for the distribution agreement entered into between Wirtgen GmbH, Josepf Vegele AG, HAMM AG, Kleemann GmbH, Benninghoven GmbH & Co. KG., Ciber Equipamentos Rodoviarios Ltda (together the "**Wirtgen Group**") and Mauritian distributor, UMCL Ltd ("**UMCL**").

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 and they meet the prescribed notification thresholds. This therefore means that the regional dimension is satisfied and confirms the jurisdiction of the Commission to assess the transaction.

The Parties

Wirtgen

4. Wirtgen Holding is an internationally operating group of companies in the road construction and mining machinery sector incorporating the product brands: *Wirtgem*, *Vögele*, *Hamm*, *Kleemann*, *Benninghoven* and *Ciber*, as well as sales and services companies. Within the Common Market, Wirtgen Holding's products are supplied by a Wirtgen Holding controlled firm or by an independent third-party distributor (or a combination of both).

UMCL Limited

5. UMCL is a company incorporated under Mauritian law, and is the official Hitachi Construction Machinery, Wirtgen Group, Cummins and MST distributor for Mauritius and the Indian Ocean Islands.

The Agreement

6. Wirtgen Group has appointed UMCL to be the exclusive distributor of road construction machinery in Comoros, Mauritius, and Seychelles (together referred to as the "**Territories**").

Competition Analysis

7. The CID defined the relevant market as the market for supply and distribution of road construction machines and mining equipment.

8. 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:

   i) The territorial restrictions have the effect of restricting passive sales outside the territories; and

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ii) The non-complete obligation period of 5 years was unreasonable and may restrict competition.

Determination

9. The CID expressed concern with the prevalence of anti-competitive agreements which partition the Common Market and negatively affect trade between Member States. Such conduct is not compatible with the Treaty establishing the Common Market for Eastern and Southern Africa.

10. The CID also considered that the non-compete period within which the distributors could not engage in similar business after the termination of the agreement needed to be reasonable so as not to restrict competition.

11. The CID resolved to authorise the agreements on the basis of the parties' undertakings to amend the anti-competitive concerns in the agreement. Specifically, the parties have undertaken as follows:

    i) to amend the clauses of the agreements to allow passive sales; and

    ii) to reduce the duration of the non-compete period to 3 years.

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

13. 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)