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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/09/25/2021

Decision[1] of the Eightieth (80th) Committee Responsible for Initial Determination Regarding the Formation of a Joint Venture involving VodaFamily Ethiopia Holding Company Limited, Sumitomo Corporation, and CDC Group Plc

ECONOMIC SECTOR: Telecommunications

6th December 2021

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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

Introduction and Relevant Background

1. On 27th September 2021, the COMESA Competition Commission (the **"Commission"**) received a notification for approval of a proposed transaction involving Sumitomo Corporation (**"Sumitomo"**), VodaFamily Ethiopia Holding Company Limited (**"Voda Family"**) and CDC Group Plc[2] (**"CDC"**, together with Sumitomo and Voda Family, the **"Consortium"**), pursuant to Article 24(1) of the COMESA Competition Regulations of 2004 (the **"Regulations"**). The notified transaction relates to the formation of a joint venture (the **"JV"**) for the purposes of bidding for a full-service telecommunications licence (the **"Licence"**) under the Ethiopian telecommunications regulatory framework (the **"Proposed Transaction"**).

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 CID is responsible for making initial determinations on cases before the Commission. The decision of the CID is set out below.

The Parties

Sumitomo

4. The parties submitted that Sumitomo is a global trading and investment company incorporated and registered in Japan with registration number 0100-01-008692 whose registered office is at Otemachi Place East Tower, 3-2 Otemachi 2-Chome, Chiyoda-ku, Tokyo 100-8601, Japan. Sumitomo conducts business activities across a wide range of industries (including media/digital; metal products; transportation and construction systems; real estate; and mineral resources, energy, chemical and electronics) in 66 countries and regions.

5. Sumitomo has stakes in a large number of undertakings globally. In the Common Market, Sumitomo has a controlling interest in business activities across a wide range of industries (including energy, commodities and transportation) in 4 Member States:

    a. Sumitomo imports metal products (tubular products (OCTG and Line Pipe), automobile and related products (motor vehicles and tyres) and other products (including pesticides and household insecticides, animal health science, plastic materials and graphite electrodes) into Egypt;

    b. Sumitomo procures and sells completed vehicles and forklifts (including parts) to distributors in Kenya;

[2]CDC is a non-controlling shareholder in the notified joint venture. CDC is the UK's development finance institution. CDC is incorporated in England and Wales with registered number 3877777, whose registered office is at 123 Victoria Street, London SW1E 6DE.

c. Sumitomo is involved in the import and wholesale of Toyota vehicles and parts in Libya; and

d. Sumitomo holds an engineering, procurement and construction contract with Société Tunisienne de l'Electricité et du Gaz (STEG) for a gas-fired combined cycle power plant in Tunisia.

Voda Family

6. The parties submitted that Voda Family is a newly incorporated entity for the purposes of the Joint Venture and has no other activities. Voda Family is a company incorporated and registered in England with registration number 13190091 whose registered office is at 3 More London Riverside, United Kingdom, SE1 2AQ.

7. The following are shareholders of Voda Family:

   a. Safaricom Plc ("**Safaricom**"), a company incorporated and registered in Kenya whose principal place of business is at Safaricom House, Waiyaki Way, Nairobi P.O. Box 66827 Westlands – 00800, Nairobi, Kenya;

   b. Vodacom International Holdings (Proprietary) Limited ("**Vodacom**"), a company incorporated and registered in the Republic of South Africa with registration number 2001/007051/07 whose registered office is at Vodacom Corporate Park, 082 Vodacom Boulevard, Midrand, 1685, Johannesburg, South Africa; and

   c. Vodafone International Operations Limited ("**Vodafone**"), a company incorporated and registered in England with registration number 02797438 whose registered office is at Vodafone House, the Connection, Newbury, Berkshire RG14 2FN, United Kingdom.

8. The activities of the (indirect and direct) shareholders of Voda Family in the Common Market are as follows:

   a. Safaricom is a telecommunications operator in Kenya;

   b. Vodacom Group Limited has a 51% shareholding in Vodacom Congo (RDC) SA, a telecommunications operator in the DRC; and

   c. Vodafone Group Plc has a 55% shareholding in Vodafone Egypt Telecommunications S.A.E., a telecommunications operator in Egypt.

9. Neither Voda Family nor any of its controlling shareholders have any activities in the Ethiopian telecommunications sector, which is the area of activity of the newly created JV.

The JV

10. As part of the award of the licence, Voda Family incorporated GPE as a special purpose vehicle for the purposes of the JV. GPE is a newly-incorporated entity and has no other activities. GPE is a private company with limited liability (besloten vennootschap met beperkte aansprakelijkheid), having its corporate seat (statutaire zetel) in Amsterdam, the Netherlands, with address 3 More London Riverside, London, United Kingdom, SE1 2AQ, England, United

Kingdom, registered with the Trade Register of the Chamber of Commerce (Kamer van Koophandel) under number 82721394.

11. The Request for Proposals specified that a licensee must be an Ethiopian company registered in Ethiopia pursuant to the applicable legal and regulatory frameworks and this company must be incorporated within a period of 45 days. Accordingly, Safaricom Telecommunications Ethiopia Private Limited Company (**"Safaricom Ethiopia"**) was incorporated as a wholly-owned subsidiary (save for one share) of GPE by the Consortium on 7 July 2021 to hold the licence.

12. For the purposes of this decision, the term 'JV' refers to both GPE, as the holding company, and Safaricom Ethiopia, as the operational company.

13. Safaricom Ethiopia once operational will be market-facing and engage with customers for the provision of telecommunications services. It is envisaged that Safaricom Ethiopia will have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible) in order to discharge its responsibilities under the licence.

Jurisdiction of the Commission

14. 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.*

15. The merging parties have operations in more than two COMESA Member States, their combined asset in the Common Market exceeds the threshold of USD 50 million and they each hold asset of more than USD 10 million in the Common Market. In addition, the merging parties do not achieve more than two-thirds of their respective COMESA-wide asset within one and the same Member State. The notified transaction is therefore notifiable to the Commission within the meaning of Article 23(5)(a) of the Regulations.

Details of the Merger

16. The notified transaction relates to the formation of a full-function joint venture for the purposes of holding a full-service telecommunications licence awarded by the Ethiopian Communications

Authority under the Ethiopian telecommunications regulatory framework. The award of the licence is pursuant to the Communications Services Proclamation No. 1148/2019, which opened the Ethiopian telecommunications sector for private sector participation (including domestic and foreign investors) and established the Ethiopian Communications Authority as the institution tasked with the regulation and liberalisation of the telecommunications sector.

17. It was submitted that while Safaricom Ethiopia has been incorporated, there will be a period of several months prior to the operations commencing under the licence. A number of additional operating agreements will need to be entered into during this period, for example relating to the provision of services to the JV as well as complying with the operational requirements of the applicable regulations. It was submitted that Safaricom Ethiopia aims to start providing telecommunication services as from 2022.

Competition Assessment

Relevant Markets

Relevant Product Market

18. The CID noted that the parties to the Consortium, namely Safaricom and the Vodafone/Vodacom group are involved in the provision of telecommunication services, more specifically the provision of retail mobile and fixed-line telecommunications services (voice/SMS/data), and mobile financial services. Further, the licence awarded to the JV entitles the licensee to provide telecommunications services (voice, short text messages, or data) in Ethiopia, however delivered, whether over a fixed, mobile or satellite network, and provided by any technical means and using any approved technical standard. Telecommunications services may be provided to other licensees (wholesale services) or to end customers or subscribers (retail services). [redacted]

Fixed network vs mobile network

19. The CID observed that the telecommunication market is usually divided into distinct sub-markets for fixed network services (referring to all wired networks that are used for voice and data communications) and mobile services (a local-area wireless transmission technology which connects customers to the network, potentially on the move, using mobile devices)[3].

20. The CID noted that over the past decade, there has been increasing convergence between mobile and fixed-line internet services, particularly in terms of internet bandwidth and usage caps. Fixed-line and mobile broadband connections can be used for similar applications such as the download of music or films and are both able to provide secure connections for internet banking and other applications requiring a protected connection.

[3] Copenhagen Economics, 'Review of the SMP Guidelines', 2017, pages 10-11. Accessed at https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/1/471/1548342153/copenhagen-economics-review-of-the-smp-guidelines.pdf, on 11th October 2021.

21. However, the CID noted that, a key difference between the two types of services relates to the mobility afforded by mobile telecommunications services, which limits the substitutability of fixed-line services with mobile services. The CID considered that a one-way asymmetric substitution from fixed-line services to mobile services could be found, in that retail fixed access for voice and data services are likely to be sufficiently substitutable with mobile access services, but not the other way around. It is unlikely that in response to a small but significant increase in price of mobile services relative to fixed-line services, users would be willing to forego the mobility feature of mobile services to switch to fixed-line services. The asymmetric substitution points towards the identification of two separate markets. This is supported by the position of Finland's national regulatory authority that "*retail mobile access is a distinct adjacent product market which gives rise to competitive constraints being exercised on operators in the fixed access market*"[4].

22. Within the fixed-line telecommunications market, the CID previously[5] identified distinct markets for fixed voice services and fixed broadband services having regard to their separate offering and applications.

23. On the other hand, within the market for provision of retail mobile services, the CID has further considered whether additional segmentations should be made by type of service (voice, data, SMS) as these services are often offered as a bundle[6].

Segmentation within the mobile telecommunications services market

24. The CID did not identify separate markets for voice services, SMS services and data services such as access to e-mail services and general internet services. This is due to the fact that providers offer all these types of services to their customers, highlighting a high degree of supply substitutability. Most mobile subscriptions are sold with voice, text, and data services pre-enabled at no extra cost to the consumer. While the cost of using each service, and consumer preferences in terms of most-used services may vary, the parameters of competition are sufficiently similar across the operators for these services.

25. The CID however noted that the inclusion of data services and voice/text services in the same relevant product market does not necessarily imply that data-centric communication services[7] are also part of the product market. While both perform the same basic function, which is to enable communication between users, data-centric communication services require all the participants to have access to the same application (e.g. a Skype user cannot call/text a WhatsApp

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[4] Defining the Relevant Market in Telecommunications, OECD 2014, Page 24.

[5] Decision of the Sixty-First (61st) CID Regarding the Proposed Acquisition by Airtel Networks Kenya Limited of the Mobile Operations, Enterprise and Carrier Services Business of Telkom Kenya Limited, dated 16th August 2019.

[6] In Hutchison 3G Austria / Orange Austria, one of the key elements underpinning the identification of a single market was the European Commission's finding that there was a high degree of supply-side substitutability. [Case No. M.6497, recitals 31-52].

[7] Data-centric communication refers to infrastructure where communication between otherwise independent applications is done data-object value, i.e., the fundamental unit of communication is data. (Source: https://www.electronicdesign.com/technologies/embedded-revolution/article/21795976/whats-the-difference-between-message-centric-and-data-centric-middleware)

user) and requires reliable internet connection[8]. By contrast, voice/text services over a mobile network can be made irrespective of the mobile network used (though they tend to be more expensive). The degree of substitutability between these two types of communication services is also likely to differ across the different age and income groups. While they exert some degree of competition on traditional mobile network operators, it is observed that providers of data-centric communication services would not be able to switch to offering the communication services offered by mobile network operators in response to an increase in cost of access to data.

26. The CID also considered whether the market should be segmented by type of customer, having regard to differences in price, usage limitation, and connectivity (upload/download) speed. For instance, business customers are typically viewed as heavy users compared to private customers. The CID considered that there might be limited substitutability from a demand perspective, as a residential or individual customer does not require the same range of services, and in any case, would not be eligible to the same services as a corporate customer (e.g. a corporate subscription would require production of a certificate of incorporation or registration and conclusion of contracts).

27. The CID observed that Safaricom and Vodacom/Vodafone are both active in both customer segments, and there is likely to be supply-side substitutability to the extent that the mobile network operators offering services to private customers could relatively easily start serving at least some business customers (namely SMEs) as they would appear to have the necessary infrastructure in place to offer the additional services requested by business customers[9]. In line with the approach adopted by the European Union in ***Hutchison 3G Austria / Orange Austria***[10], the CID concluded that mobile services to business and private customers do not constitute separate product markets, but rather constitute market segments within an overall retail market for the provision of mobile telecommunications services.

Market for Mobile Money Services

28. The CID noted that Safaricom is involved in the provision of mobile money services. The observed that Mobile money services typically offer a subset of the following services – Peer to Peer money transfers (P2P), remittances (domestic and / or international), bill payment / receipt, salary disbursement / receipt, retail payments, and money storage / savings. Of these, P2P tends to be the most common offering. In addition, services offer methods for turning physical cash

[8] Similarly, the European Commission excluded over-the-top services from the retail mobile market for voice, SMS and data, arguing that the former always requires data connectivity (CASE M.7612 - HUTCHISON 3G UK / TELEFONICA UK, recitals 264 to 265).

[9] In the merger involving ***Hutchison 3G Austria and Orange Austria (Case No COMP/M.6497)***, the EC found that there might be distinct demand from private and business customers but nonetheless concluded that, due to supply-side considerations, there was an overall product market that included both private and business customers. Accessed at https://ec.europa.eu/competition/mergers/cases/decisions/m6497_20121212_20600_3210969_EN.pdf

[10] *Ibid*, paragraph 58.

into electronic funds in a customer's mobile account and methods for turning electronic funds into physical cash.

29. The CID considered that while the market for mobile money is dependent on mobile communications and mobile platforms, the services offered are distinct from the mobile telephony services identified above, both from a demand and supply perspective. The CID further considered that mobile money is different from other types of payments/ transfers (cash, card, electronic transfers). Typically, the amount of money that can be transferred is lower compared to other forms of payments, as are the regulatory requirements for customers. Further, from a supply perspective, while banking and other financial institutions may have the regulatory ability to offer such financial services, they would need to partner with a mobile network operator to access consumers' phones and would need to develop different business models compared to traditional financial products. In view of the above discussion, the provision of mobile money services is determined as a separate relevant product market.

30. Based on the foregoing, the CID identified the following distinct product markets:
    a. fixed-line voice services;
    b. fixed-line broadband services;
    c. mobile telecommunications services; and
    d. mobile money services.

Relevant Geographical Market

31. For the purposes of defining the geographic market, the CID took into account a number of factors, such as the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, the existence of appreciable differences in the market share of undertakings in the area concerned as compared with neighbouring areas, or price differences[11].

32. The CID noted that regulatory requirements, such as the award of license and spectrum allocation, for the provision of telecommunication services is limited to national borders such that the competition conditions are likely to vary across Member States. Indeed, the CID observed that in the Member State where the JV is expected to operate, being Ethiopia, the conditions of competition are significantly different as it is only through the notified transaction that competition is being introduced into the telecommunications sector, compared to other Member States such as Kenya or Mauritius where several operators have been present for a few years.

33. In view of the foregoing, the CID identified the relevant geographic market for all four relevant product markets to be Ethiopia.

Market Shares and Concentration

[11] Case T-151/05, JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber) of 7 May 2009, Nederlandse Vakbond Varkenshouders (NVV), v European Commission, paragraph 52.

34. The CID noted that prior to the award of a second license by the telecoms regulator, Ethio telcom operated as a monopoly in the relevant markets. For the 2019/2020 financial year, Ethio Telecom reported the following subscriber numbers:

- Total subscribers: 46.2 million;
- Mobile voice subscribers: 44.5 million;
- Data and Internet users: 23.8 million;
- Fixed Services users: 980,000; and
- Fixed Broadband subscribers: 212,200.

35. The CID noted that the JV is expected to reduce the market share of Ethio telcom. However, the CID observed that at the stage of this assessment, it is not possible to estimate the reduction in market share. In any event, CID noted that the transaction is expected to lead to a reduction in the market concentration level, as the market adjusts to the introduction of a second operator.

36. The CID noted that the Pre-merger, entry into the telecommunications markets in Ethiopia was prevented due to applicable regulation. Further, they noted other additional barriers to entry which include the capital outlay for regulatory fees, network investments and roll outs, sales and agency network. Brand loyalty to Ethio Telecom may also present another barrier to entry. In view of the foregoing, the CID considered that the barriers to entry in the relevant markets are prohibitive.

37. Telecommunications markets are oligopolistic markets, normally characterized by extensive vertical relations and mutual dependencies and high transparency in terms of prices. While the characteristics of the telecommunications markets may favour implicit (or explicit) coordination, the CID considered that coordinated effects were not likely on the Ethiopian market, having regard to the high asymmetry in the market shares of Ethio telcom and the new JV. It seems highly unlikely that the merger would create any incentive for Ethios telcom to act in a coordinated fashion (whether actively or passively) with the merged entity at least in the foreseeable future.

38. The CID also observed that the high license fee could be prohibitive and may act as a barrier to entry into the Ethiopian telecommunications markets, thereby potentially stifling competition. Despite the perceived high license fee, in this case, the CID welcomed the transaction as it involved an investment that would lead to an increase in competition in the relevant markets. Subsequently, the CID concluded that such investments should be encouraged.

Third Party Views

39. Submissions were received from the national competition authorities of Kenya and Egypt which confirmed the CID's assessment that the transaction was unlikely to lead to any competition concerns as there is no market share accretion nor vertical integration arising from the transaction.

Determination

40. Based on the foregoing reasons, 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 be contrary to public interest.

41. The CID therefore approved this transaction. This decision is adopted in accordance with Article 26 of the Regulations.

Dated this 6th day of December 2021

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Commissioner Deshmuk Kowlessur (Chairperson)

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Commissioner Mahmoud Momtaz

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Commissioner Islam Tagelsir Ahmed Alhasan