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Common Market for Eastern and Southern Africa

Case File No. CCC/MER/3/20/2022

Decision[1] of the Eighty-Third (83rd) Committee Responsible for Initial Determinations Regarding the Proposed Merger involving Diani Beach Hospitality Limited and Ascent DBH Ltd

ECONOMIC SECTOR: Health

31 May 2022

[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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 24th March 2022, the COMESA Competition Commission (the "**Commission**") received a notification involving Ascent DBH Ltd ("**Ascent DBH**") as the acquiring undertaking and Diani Beach Hospitality Limited ("**DBH**") as the target undertaking, pursuant to Article 24(1) of the COMESA Competition Regulations of 2004 (the "**Regulations**").

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 decision of the CID is set out below.

The Parties

Ascent DBH (the acquiring undertaking)

4. Ascent DBH is a special purpose vehicle incorporated under the laws of Mauritius as a wholly owned subsidiary of Ascent Capital Holdings Africa II Limited ("**Ascent Capital**"). Upon completion of the proposed transaction, Ascent DBH will be jointly controlled by Ascent Capital and Facilité d'Investissement et de Soutien aux Entreprises en Afrique ("**FISEA**").

5. Ascent Capital is a company incorporated under the laws of Mauritius. Ascent Capital is controlled by Ascent Rift Valley Fund II LP ("**ARVF II**"), which is in turn managed by Ascent Capital Management Africa II Ltd ("**Ascent II**"). Ascent Capital, ARVF II, Ascent II and entities controlled by Ascent Capital, ARVF II and Ascent II are collectively referred to as the "**Ascent Capital Group**".

6. Ascent DBH has no activities in the Common Market. However, Ascent Capital, through its deemed controlled portfolio companies, is active in the microfinancing business including the provision of loan services to individual and medium sized enterprises, and brokerage insurance services. Within the Common Market, Ascent Capital operates in Kenya, Mauritius and Uganda.

7. FISEA is a company incorporated under the laws of France. FISEA is wholly owned by Agence Française de Développement ("**AFD**") which also controls Société de Promotion et de Participation pour la Coopération économique ("**PROPARCO**"), a development finance institution that provides investment services to FISEA and as such, acts on behalf of FISEA. FISEA, AFD, PROPARCO and entities controlled by them are collectively referred to as the **FISEA Group**.

8. With the Common Market, the FISEA Group is active in Comoros, the Democratic Republic of Congo (the **"DRC"**), Djibouti, Kenya, Madagascar, Mauritius, and Uganda.

DBH (the Target)

9. DBH is a company incorporated on 14 October 1996 in accordance with the laws of Kenya.

10. DBH operates a hospital in Diani Beach, Ukunda, at the coastal region of Kenya, with three satellite clinics in Kwale Town, Likoni Town and Ukunda Town as follows:[2]

- **Diani Beach Hospital Ukunda Clinic** - the Ukunda clinic is situated in Ukunda town. The clinic has medical officers for consultations, a well-equipped laboratory and a well-stocked pharmacy. The clinic also has a dental unit;
- **Diani Beach Hospital Kwale Clinic** - the Kwale clinic is in Kwale town and has medical officers to attend to patients, a well-equipped laboratory and a well-stocked pharmacy. The clinic also has a dental unit; and
- **Diani Beach Hospital Likoni Clinic** - the Likoni clinic is located on the main road in Likoni town. It is the Hospital's flagship satellite clinic offering five doctor/consultation rooms, two 3-bed day wards, a state-of-the-art laboratory, a dental unit, a radiology suite offering x-ray and ultrasound services and a minor theatre. In addition, the Likoni Clinic has a 22-bed in-patient admitting facilities.

11. DBH offers a range of services such as routine consultations, in-patient management, dental services, physiotherapy, laboratory, diagnostic imaging (including digitalized X-rays, CT scans and 3D ultrasound), pharmacy, dialysis, and an intensive care unit[3]. Further, DBH is a general 100-bed hospital, with no specific specialties or super-specialties and it is not a teaching hospital.

12. The parties submitted that within the Common Market, DBH operates only in Kenya, more specifically only in Kwale County and Mombasa County (Likoni Constituency only) at the Kenyan Coast.

Jurisdiction of the Commission

13. 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

[2] https://dianibeachhospital.com/satellite-clinics/ accessed on 26th April 2022.
[3] https://dianibeachhospital.com/diani-beach-hospital-facilities/, accessed on 20th April 2022.

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.*

14. The merging parties have operations in more than two COMESA Member States. The parties' combined annual asset value in the Common Market exceeds the threshold of USD 50 million and they each hold asset value 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 value 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

15. The proposed transaction entails that Ascent DBH will acquire up to 80% of the entire issued share capital in DBH.

Competitive Assessment

Relevant Markets

Relevant Product Market

16. The CID noted that no categories of products and/or services supplied by the Acquiring group and Target can be considered as similar, reasonably interchangeable or substitutable. For this reason, the CID's assessment focussed on the healthcare services provided by the target in Kenya.

Provision of healthcare services

17. The CID noted that under the Kenyan Health Act of 2017[4], "*healthcare services mean the prevention, promotion, management or alleviation of disease,*

[4] http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2021%20of%202017.

illness, injury, and other physical and mental impairments in individuals, delivered by health care professionals through the healthcare system's routine health services, or its emergency health services". Healthcare services can be provided either by private hospitals or public hospitals. "*Private health services mean provision of health services by a health facility that is not owned by the national or county governments and includes health care services provided by individuals, faith-based organizations and private health institutions whereas the public health services mean health services owned and offered by the national and county governments*"[5].

18. The quality of the healthcare services provided by private hospitals differ from the healthcare services provided by public hospitals. The CID noted that the facilities of private hospitals are more luxurious and have shorter customer waiting times as compared to public hospitals. Private and public hospitals may also be distinguished based on whether a patient is required to pay for the healthcare services or not. Therefore, the CID noted that while private hospitals often require patients to pay for the services, public hospitals often provide healthcare services regardless of the ability to pay for individual patients. Further, public hospitals receive an annual subsidy to support the healthcare services they provide.

19. The CID noted that in other jurisdictions such the European Commission ("**EC**") a distinction has also been made between the provision of private and public healthcare. For instance, In ***APW/APSA/Nordic Capital/Capio***[6], the EC distinguished private and public healthcare by noting that "*private healthcare is paid for by the patient, usually through insurance with a private medical insurer operating on a national basis, public healthcare is generally partly or entirely funded through taxation and requires either a limited contribution of the patient or is offered for free, at the point of service delivery. Private acute hospitals also differentiate themselves from public acute hospitals in terms of the overall patient experience, waiting lists, clinical outcomes, and physical comfort*".

20. The CID considered that private and public hospitals can also be distinguished based on the nature of equipment used. For instance, private hospitals tend to have proper facilities and qualified staff to perform their services, as well as skilled personnel with more advanced skills and knowledge, compared to the public hospitals. [7] This suggests that the former is likely to be more expensive than the later as there are high costs involved in providing the service such as personnel with specialised technical knowledge and advanced hospital equipment and facilities.

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[5] *Ibid.*
[6] See para 11, Case No COMP/M.4367 - APW/APSA/Nordic Capital/Capio.
[7] See para 6 & 8, Case No: 53/LM/Sep01; and para 6, Case No: 11/LM/Mar10.

21. The CID therefore considered that public hospitals are low-cost, and their niche markets are mainly the low-income segments of a community and members of the National Hospital Insurance schemes while the healthcare services provided by private hospitals tend to be expensive, and their niche markets are mainly the middle and upper-income segments of the community. In this respect, the CID identified distinct markets for healthcare services by private hospitals and healthcare services by public hospitals.

22. The CID noted that in ***Afrox/AmaHosp and LGH/Ambubesi,***[8] the Competition Tribunal of South Africa ("**CTSA**") similarly distinguished private healthcare services from public healthcare services by, among other things, noting that *"there is a huge difference between the prices charged by state and private hospitals making it unlikely that they compete for same clients".* Further, *"...the rates of private hospitals are much higher than those of state hospitals...* and *"...the scale benefits prescribed by the Board of Healthcare Funders for private hospitals, which is the rate that healthcare funders pay for services provided by private hospitals, is above that for state hospitals. There is also a vast difference in the quality of the facilities and standard of service. Typically, private hospitals attract patients who have some form of medical aid or medical insurance whilst state hospitals attract patients without"".*

23. In view of the foregoing, the CID considered that the relevant market for purpose of conducting a competitive assessment in this transaction was the market for the provision of healthcare services by private hospitals which is the service that the target undertaking provides.

24. The CID observed that healthcare services provided by private hospitals can be further segmented as primary services, secondary services, or tertiary services. It was noted that the services of primary hospital entail clinical supportive supervision to lower level Facilities, referral level out-patient care, in-patient services, emergency obstetric care and oral health services, surgery on in-patient basis, client health education, provision of specialized laboratory tests, radiology service, and proper case management of referral cases.[9] On the other hand, the CID noted that secondary hospital tend to provide specialized services, training facilities for cadres of health workers who function at the primary care level and serve as an internship centre for all medical staff. Lastly, tertiary hospital provide highly specialized services, acts as research centres and provide training and research services on issues of national importance.

25. The CID noted, from the supply side, that the capital required to invest in primary hospital, secondary and tertiary hospital are likely to be different as the level of

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[8] see para 8, Case No: 53/LM/Sep01; and para 6, Case No: 11/LM/Mar10.

[9] the Kenyan Health Act, 2017, see at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2021%20of%202017.

technology or quality of the facilities required and level of specialisation and standard of service varies. The CID also noted that the licences granted to each hospital category are likely to be different.

26. In view of the foregoing, the CID considered that it is unlikely for there to be a swift shift from a provider of primary healthcare to providing secondary or tertiary healthcare in response to a small but significant non-transitory increase in the price of providing primary healthcare services. Such a shift is unlikely to occur immediately due to the high-cost implication for providing secondary or tertiary healthcare and the requirement for relevant licenses to provide such services. Thus, the CID distinguished primary, secondary and tertiary healthcare services by private hospitals as distinct.

27. The CID observed that the target undertaking does not have specific specialties or super-specialties and is not a teaching hospital. Accordingly, the CID considered that the services of the target undertaking can be categorised under primary healthcare.

28. Based on the foregoing, and without prejudice to the CID's approach in similar future cases, the relevant product market was construed as ***the provision of primary healthcare services by private hospitals.***

Relevant Geographic Market

29. The CID observed that the geographic scope of the relevant product market can be beyond national market as patients can travel abroad for medical treatment. However, the CID noted that even though this is likely, it may be limited by the high-cost implications of accessing medical treatment abroad. It was noted that the high cost of travelling may limit timely substitution from accessing medical services in a patient's country of residence to accessing services abroad hence distinguishing the national market as unique.

30. The CID further noted that the national geographic market can be segmented by localities. It was noted that patients are likely to seek such healthcare services from hospitals in their vicinity due to lower transportation costs and shorter turnaround time period. In addition, most patients do not travel far for their treatment and normally seek admission at private hospitals that are not too far from their residential areas. Further, from a supply side perspective, primary healthcare services providing private hospitals need local presence to build their brands and are subject to licensing by the relevant regulatory bodies.

31. However, the CID considered that a further segmentation was not necessary in this transaction since any narrower market definition was not likely to alter the outcome of the assessment given the absence of horizontal overlaps.

32. The CID therefore considered that the geographic market for the provision of primary healthcare services by private hospitals is likely to be national in scope as such services are generally offered to local communities that require services over a shorter timeframe.

33. In view of the above, the CID considered that the relevant geographic market was Kenya.

Conclusion of relevant market

34. On the basis of the foregoing, and without prejudice to the CID's approach in similar future cases, the relevant market was construed as ***the provision of primary healthcare services by private hospitals in Kenya.***

Market Shares and Concentration

35. The CID noted the estimated market share range of target undertaking and its top competitors for the provision of healthcare services by healthcare providers who operate in (or target patients in) the same region as the target undertaking Kenya (that is Kwale County, and Mombasa County (Likoni Constituency only) of the Kenyan Coast) as per Table 3 below.

Table 3: Estimated market share of the target undertaking and its top competitors in the provision of healthcare services

No.	Company Name	Pre-merger	Post-merger
1	DBH	[15 – 25]%	[15 – 25]%
2	Kinondo Kwetu Hospital	[10 – 20]%	[10 – 20]%
3	Msambweni County Referral Hospital	[15 – 25]%	[15 – 25]%
4	Palm Beach Hospital	[5 – 10]%	[5 – 10]%
5	Mombasa Hospital	[5 – 10]%	[5 – 10]%
6	Aga Khan Hospital, Ukunda Branch	[5 – 10]%	[5 – 10]%
7	Kwale District Hospital	[5 – 10]%	[5 – 10]%
8	Others	[15 – 35]%	[15 – 35]%
	Total	**100%**	**100%**

36. The CID noted that the target undertaking is market leader in the provision of healthcare services by private hospitals. However, the CID considered that the proposed merger is not likely to change the existing market structure as the merging parties do not provide overlapping services in Kenya.

37. Thus, the CID further noted the presence of alternative providers of primary private healthcare services which will continue to compete with the merged entity, post-merger.

Consideration of Third-Party Views

38. The CID noted submissions from Egypt, Kenya, Madagascar and Mauritius which concluded that the transaction is not likely to raise any concerns given that the parties do not operate as competitors, pre-merger.

Determination

39. 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. The CID further determined that the transaction is unlikely to negatively affect trade between Member States.

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

Dated this 31st day of May 2022

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Commissioner Mahmoud Momtaz (Chairperson)

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Commissioner Vincent Nkhoma

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Commissioner Islam Tagelsir Ahmed Alhasan