COMESA Competition Commission
COMESA Competition Commission
Kang'ombe House, 5th Floor-West Wing
P.O. Box 30742
Lilongwe 3, Malawi
Tel: +265 1 772 466
Email- compcom@comesa.int

Common Market for Eastern and Southern Africa

Case File No. CCC/MER/04/11/2021

Decision[1] of the Seventy-Sixth (76th) Committee Responsible for Initial Determination Regarding the Proposed acquisition by AIF Thika Power Holding LLP of 100% shares in Thika Power Limited and Thika Power Services Limited

ECONOMIC SECTOR: Energy

27th June 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

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Introduction and Relevant Background

1. On 26th April 2021, the COMESA Competition Commission (the "**Commission**") received a notification for approval of the proposed acquisition by AIF Thika Power Holdings LLP ("**AIF Holdings**") of 100% of the issued share capital of each of Thika Power Limited ("**TPL**") and Thika Power Services Limited ("**TPSL**"), 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

AIF Holdings (the acquirer)

4. AIF Holdings is a limited liability partnership organized and existing under the laws of England and Wales, having the registration number OC435256. AIF Holding is a special purpose vehicle established by Africa Infrastructure Fund I K/S ("AIF I") investment fund through its intermediary holding companies to hold its investment in the target undertakings. It was submitted that AIF Holdings is controlled by AIF East Africa Power & Energy LLP, a wholly owned subsidiary of AIF I. AIF Holdings was established to invest in, own and operate power and energy infrastructure assets in Kenya and has a target to invest up to USD 200 million in equity capital in greenfield and brownfield power and energy infrastructure assets in Kenya.

5. It was submitted that AIF I is a Danish limited partnership, established as an investment fund to create and enable opportunities through investments in African infrastructure. Its purpose is to support sustainable economic growth and prosperity on the continent AIF I is controlled by A.P Møller Capital P/S ("AP Møller Group") through a management agreement to manage stand-alone funds to invest in infrastructure in emerging markets. Further, AP Møller Group, acting as manager of AIF I, is a partnership established as an affiliate of A.P Møller Holding A/S ("APMH"), to manage stand-alone funds to invest in infrastructure in emerging markets. The AP Møller Group is directly controlled by APMH Invest A/S, a wholly owned subsidiary of APMH. It was submitted that AP Møller Group offers container liner shipping, container terminal services, inland transportation, inland services, supply chain management services, harbour towage, reefer container manufacturing, and electricity generation through AIF I.

6. It was submitted that in 2020, AIF I, through its intermediary holding companies, acquired a 100% interest in Iberafrica Power (East Africa) Limited in Kenya

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("Iberafrica") from Naturgy[2]. Iberafrica owns a 52.5MW heavy fuel oil fueled operational thermal power plant in Nairobi, Kenya. Its core business is electricity generation which it supplies to its only customer, Kenya Power and Lighting Company ("KPLC").

7. The parties submitted that the AP Møller Group (or the "acquiring group") operates under the following trading entities within the Common Market:

Member State	Acquiring Group	Primary Activities
The Democratic Republic of Congo	**<u>A.P. Møller-Mærsk</u>** Maersk Congo DRC SA	Shipping Agency
Djibouti	**<u>A.P. Møller-Mærsk</u>** • Maersk Djibouti SARL • Maersk Djibouti Container Freight Station SA • Damco Djibouti S.A.	• Shipping Agency • Container Freight Station • Logistics
Egypt	**<u>A.P. Møller-Mærsk</u>** • Maersk Egypt for Maritime Transport SAE	• Agency
	• Maersk Egypt Shipping Agency SAE • Hamburg Sud Egypt Maritime Agencies SAE • Safmarine Egypt SAE (in liquidation) • Damco for Logistics Services Free Zone -- (Damco Free Zone) Limited • Suez Canal Container Terminal SAE (joint • venture) • Maersk Logistics & Services Egypt Ltd. • Ports & Inland Services Egypt LLC • Svitzer Egypt LLC • Svitzer Idku SAE	• Maritime Agency Activities • Shipping Agency • Terminal operation • Logistics • Towage operation
	<u>Maersk Drilling</u> • Maersk Drilling Deepwater Egypt LLC, • Maersk Drilling Holdings Singapore PTE LTD -Egypt Branch	Drilling

[2] The transaction was approved by the Commission on 9th March 2020, see Case No. CCC/MER/09/37/2019 available at https://www.comesacompetition.org/wp-content/uploads/2020/03/Iberafrica-3-of-2020.pdf

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Ethiopia	**A.P. Møller-Mærsk** • Maersk Ethiopia PLC • Maersk Ethiopia Logistics and Services PLC	• Agency • Shipping Agency
Kenya	**Africa Infrastructure Fund I K/S** Iberafrica Power (EA) Limited	Electricity Generation
	A.P. Møller-Mærsk • Maersk Kenya Limited • Damco Logistics Kenya Ltd • Inland Services Kenya Investment Ltd • APM Terminals Kenya Limited • Great Lakes Ports Ltd. (joint venture)	• Agency • Logistics • Holding • Inland Container Depot • Container Depot
Madagascar	**A.P. Møller-Mærsk** Damco Logistics Madagascar SA (in liquidation)	Forwarding & Logistics
	Malagasy Shipping SA	Agency
Malawi	**A.P. Møller-Mærsk** Maersk Line Nyenyezi Limited	Shipping agency
	Maersk (Malawi) Ltd (inactive)	Agency
Mauritius	**A.P. Møller-Mærsk** • Maersk (Mauritius) Ltd • Maersk Logistics & Services (Mauritius) • Maersk Africa Holdings Ltd • APM Terminals Mauritius Ltd • APM Terminals Mauritius Holding Ltd • PTS Holdings Limited (joint venture)	• Agency • Logistics and Warehousing • Holding
Sudan	**A.P. Møller-Mærsk** Maersk Shipping Company Ltd	Agency
Swaziland	AP Møller-Mærsk Maersk Swaziland (Pty) Ltd	Agency
Tunisia	**A.P. Møller-Mærsk** Maersk Logistics & Services Tunisia	Inland Services
	Maersk Services	Business Support Services
	Maersk Tunisie SA	Agency
	Star Container Trade Tunisie	Inland Services
Uganda	**A.P. Møller-Mærsk** • Maersk Agency Uganda Limited • Damco Logistics Uganda Ltd • APM Terminals Uganda Ltd	• Agent for carriage of freight • Logistics • Container Depot

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Zambia	**<u>A.P. Møller-Mærsk</u>** • Maersk Line Zambia Limited • Damco Zambia Ltd	• Agency • Logistics, Agency SCL & ML
Zimbabwe	**<u>A.P. Møller-Mærsk</u>** Zimbabwe Shipping Holdings Ltd	Agency

TPL & TPSL (the "Target Undertakings")

8. TPL is a company incorporated in Kenya on 29 September 2010 with company registration number CPR/2010/32559 and its registered business address is at Plot L.R No.209/66/44 Chiromo Road, Westlands, Nairobi, Kenya. TPSL is a company incorporated in Kenya on 25 April 2013 with company registration number CPR/2013/100251 and whose registered business address is at Plot L.R No.209/66/44 Chiromo Road, Westlands, Nairobi, Kenya.

9. It was submitted that the target undertakings are directly controlled by Thika Holding Limited ("**THL**"), a company incorporated in the British Virgin Islands, and having its registered address at Vanterpool Plaza, 2nd Floor, Wickhams Cay I, Road Town, Tortola, British Virgin Islands.

10. TPL owns the Thika Power Plant, an 87MW combined cycle heavy fuel oil power plant located 5 km from the town Thika and 38 km north-east of Nairobi. TPSL provides manpower services to one customer only, TPL. The manpower services provided include: manpower management, technical human resource services and recruitment and placement of the outsourced positions.

11. It was submitted that the core businesses of the target undertakings are electricity generation in Kenya. The entire power generation output is contracted to KPLC on a 20-year Power Purchase Agreement dating 2014 – 2034. The plant was commissioned in 2014 and consists of five heavy fuel oil generators and a 7MW steam turbine.

Jurisdiction of the Commission

12. 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 COM$ 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 COM$ 10 million, unless each of the parties to a merger achieves at least two-

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thirds of its aggregate turnover or assets in the Common Market within one and the same Member State.

13. The merging parties have operations in more than two COMESA Member States. The parties' combined turnover in the Common Market exceeds the threshold of USD 50 million and they each derive turnover 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 turnover 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

14. It was submitted that the proposed transaction involves the acquisition of 100% of the shares in TPL and TPSL by AIF Holdings from Thika Holdings Limited. It was submitted that the strategic rationale for the transaction is that Kenya is one of the key focus countries for AIF I due to its stable, diversified and growing economy as well as its strategic location in East Africa; and its sizeable, attractive and transforming power market with over 2.5GW of installed capacity and its further need for additional investments in the sector.

Relevant Markets

Relevant Product Market

15. The activities of the merger parties overlap in relation to the generation and supply of electricity. The acquiring group generates electricity through its intermediary holding company, Iberafrica, which it supplies to Kenya Power Limited Company, in Kenya. The target undertakings also generate electricity through TPL in Kenya which is also supplies to Kenya Power Limited Company. Accordingly, the assessment focused on the generation and supply of electricity in Kenya.

16. The value chain for electricity production comprises three key stages, namely generation, transmission, and distribution. The three are considered separate given the different processes that each entail and different intended purposes. Generation of electricity, as the initial stage in the value chain, entails the generation of electricity when mechanical energy is harnessed and used to rotate a turbine[3]. The mechanical energy to spin the turbine can come from a variety of sources such as falling water, wind, or steam from heat generated by a nuclear reaction or by burning fossil fuels.

17. Transmission involves the bulk movement of electrical energy from a generating site such as a power station to an electrical substation where voltage is transformed and distributed to consumers or other substations through a transmission network or a power grid[4]. Transmission networks consist of towers and wires that run between them, underground

[3] https://electricity.ca/learn/electricity-today/generating-electricity/ , accessed on 3rd June 2021
[4] https://www.power-and-beyond.com/basics-of-an-electrical-power-transmission-system-a-919739/, accessed on 3rd June 2021 at 10:52hrs

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cables, transformers, switching equipment, reactive power devices, and monitoring and telecommunications equipment. Following transmission, the distribution phase entails the supply of electricity to end-users. At distribution stage, high voltage electricity transmitted from a generator is converted into lower voltage by sub-station transformers and carried in wires over poles or in wires buried underground to end-user such businesses and homes.

18. The CID observed that generation of electricity requires generators and the presence of falling water, wind, fossil fuels or nuclear in order to generate electricity. On the other, transmission requires infrastructure such as power grid through which electricity once generated is transmitted.

19. The CID concluded that generation, transmission and distribution of electricity are separate markets. CID further noted that the target undertakings were only active in generation and supply of electricity hence this was the relevant focus of the assessment.

20. The CID observed that electricity can be generated from different sources such as water/hydro, wind or nuclear. It was also observed that the usage of electricity is not differentiated according to the mode of generation. Electricity generated from water, wind or nuclear can similarly be used for lighting, heating, cooling, and refrigeration, operating appliances, computers, electronics, machinery, or any other use. The CID also observed that the generation and supply of electricity may be segmented according to wholesale or retail market. The wholesale market is targeted at distribution companies which buy electricity in bulk for onward sale to end-users. The wholesale market is also targeted at large industrial users and the amount of electricity supplied is in bulk. The retail market concerns selling electricity to individual consumers who are end users and the amounts of electricity supplied is low. The CID concluded that the relevant product market involved the generation and wholesale supply of electricity.

21. In the case involving ***Iberafrica/AIF I***, the CID considered that generation and supply of electricity may be segmented into wholesale and retail markets which comprise difference markets given the different end customers under each segment[5]. In this transaction, the relevant market was identified as the generation and wholesale supply of electricity. Similarly, in ***EPH/Stredoslovenska Energetika***, the European Commission observed that a separate product market exists encompassing both generation and upstream wholesale supply of electricity[6]. It was considered that this market comprises electricity generated in power stations, traded on the wholesale market (through bilateral agreements, regulated market places or power exchanges) as well as electricity physically imported via inter-connectors. It was further observed that generation and wholesale supply should be considered as one single relevant product market given that generation of electricity cannot be considered as a market activity as long as the electricity is not sold.

[5] Case CCC/MER/04/11/2019
[6] Case COMP/M.6984 EPH / Stredoslovenska Energetika

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22. In view of the foregoing, the CID construed the relevant product market as the market for the generation and wholesale supply of electricity.

Relevant Geographic Market

23. Electricity is transmitted from power stations to buyers through capital intensive network of power lines such as national grids, regional networks and local networks. Electricity may be traded across national borders. However, cross border trade of electricity is facilitated by bilateral and multi-lateral trade agreements that take long time periods to negotiate and conclude and entail heavy financial investments. Further, cross border trade of electricity would require the presence of transmission infrastructures to facilitate export of electricity across countries. It is, therefore, highly unlikely that companies involved in the generation and wholesale supply of electricity would easily shift to generate and supply electricity across countries in the short term and at reasonable costs.

24. Therefore, the CID considered the geographic scope for the identified product market as national. The parties' activity of generation and supply of electricity only overlap in one geographic market, being Kenya. The CID observed that cross border trade in electricity, though likely, its occurrence is limited in the short term. It was considered that companies involved in the generation and wholesale supply of electricity are unlikely to shift wholesale supply of electricity beyond Kenya given a small but significant non-transitory increase in the wholesale price of electricity in neighbouring countries with Kenya. Further, demand substitution beyond Kenya is unlikely given that customers at the wholesale level would not easily switch to purchase electricity from suppliers located outside of their Kenya in response to a SSNIP in their home country.

25. **In view of the foregoing and without prejudice to the CID's approach in similar future cases, the relevant market was construed the generation and wholesale supply of electricity in Kenya.**

Competitive Assessment

26. The CID noted that the respective estimated market shares for the acquirer and target in Kenya for the generation and wholesale supply of electricity are 0.5% and 0.4%. Post-merger, the market share for the merged entity will be less than 1%. It was observed that the market for the generation and wholesale supply of electricity will remain competitive post-merger due to the presence of other competitors of the merged entity as presented in table 2 below:

Table 2 - Estimated market shares of players in the market for generation and wholesale supply of electricity

Company	Share of Total Country Production
Kenya Electricity Generating Company PLC	72.5%
Lake Turkana Wind Power Limited	11%
OrPower 4 Inc.	8.4%

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Rabai Power Limited	2.2%
Tsavo Power Company Limited	1.4%
Thika Power Limited (target)	**0.4%**
Iberafrica (Acquirer)	**0.5%**

27. The CID noted that the transaction will neither result in the creation nor strengthening of a dominant position in the market for the generation and wholesale supply of electricity in Kenya given the presence of competitors that hold larger market shares than the merged entity. The transaction is also unlikely to lead to a material change in the structure of the market given the minimal market shares of the merging parties.

28. The barriers to entry in the generation and wholesale supply of electricity include high capital requirement and regulatory requirements. New entrants in the market would require to spend a significant amount of resources and obtain the necessary regulatory approvals in order to establish a market presence. In the past three years new entrants in the relevant market include the acquirer and the following other entrants:

    a. Kipeto Wind Power Project, a 100MW wind farm project;

    b. Alten Energias Reovables which is constructing a 55MW solar power plant; and

    c. Olsuswa Energy which is constructing a 140MW geothermal power plant.

29. The CID observed that despite the presence barriers to entry, the relevant market is likely to remain competitive post-merger given the presence of other competitors. It was also observed that the transaction is unlikely to lead to foreclosure in the relevant market.

30. In view of the absence of foreclosure concerns, it was concluded that the transaction will not stifle trade between Member States.

Third-Party Views

31. Submissions were received from Egyptian Competition Authority, the Competition Authority of Kenya, the Conseil de la Concurrence de Madagascar, Competition and Fair Trading Commission of Malawi, the Fair Trading Commission of Seychelles and the Competition and Consumer Protection Commission of Zambia. The third party submissions were consistent with the CID's findings that the transaction was unlikely to raise competition concerns as a result of the relatively low market shares of the merging parties in the relevant markets within the Common Market.

Determination

32. 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.

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33. The CID therefore **approved** this transaction. This decision was adopted in accordance with Article 26 of the Regulations.

Dated this 27th day of June 2021

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Commissioner Justice Charlotte Wezi Malonda (Chairperson)

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Commissioner Brian M. Lingela

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Commissioner Ellen Ruparanganda