IN THE UNITED REPUBLIC OF TANZANIA

FAIR COMPETITION COMMISSION

AT DODOMA

IN THE MATTER OF FAIR COMPETITION COMMISSION

FCC/COMP No. 9/2022

BETWEEN

FAIR COMPETITION COMMISSION.....COMPLAINANT

AND

SWALA (PAEM) LIMITED .....1ST RESPONDENT

ORCA EXPLORATION GROUP INC. ..... 2ND RESPONDENT

PAE PANAAFRICAN ENERGY CORPORATION ..... 3RD RESPONDENT

SWALA OIL GAS (TANZANIA) PLC. ..... 4TH RESPONDENT

PANAFRICAN ENERGY TANZANIA LIMITED ..... 5TH RESPONDENT

PROVISIONAL FINDINGS

(Made under Rule 19 (3) and (4) of the Competition Rules, 2018 G. N. 344 of 2018)

1.0 INTRODUCTION

1.1 Background to the Complaint

On 24th January, 2018, the Fair Competition Commission (FCC) received a letter from Swala Oil Gas (Tanzania) Plc (Swala Tanzania) (**FCC-1**), informing the FCC that, Swala (PAEM) Limited (Swala UK), a company registered in United Kingdom and Orca Exploration Group Inc., a company registered in United Kingdom, have entered into an Investment Agreement (**the Agreement**).

According to Swala Tanzania, the Agreement led to acquisition of 7.93% shares of Orca Exploration Group Inc. held in PAE PanAfrican Energy Corporation (PAEM) by Swala UK, a wholly owned subsidiary of Swala Tanzania. PAEM is a company registered in Mauritius and wholly owned by Orca. On the other hand, PAEM owns 100% shares in PanAfrican Energy Tanzania Limited (PAET), a company who owns and operates Songosongo gas field in Tanzania.

On 22nd February 2018, following the 2nd February 2018 meeting between FCC and Swala Tanzania officials, Swala Tanzania wrote a letter and reiterated that, the acquisition of 7.93% shares of Orca in PAEM by Swala Tanzania was not a controlling interest or an interest leading to a change of control (**FCC-2**). In adducing such position Swala Tanzania submitted the following reasons:

i. That, Swala has no board representation or any agreement under which it may affect board representation at this level of ownership;
ii. That, Swala has additional ownership rights beyond those of its equity interest;
iii. That, Swala has no shadow rights whether in respect of equity or directors;
iv. That, Swala provides no additional services or advantages to PAEM that would allow Swala to manage or direct the company;
v. That, Swala has no associate or derived rights that would allow it to do so.

Based on the above reasons, Swala sought for FCC's position on whether their position has a *locus standi*.

On 31st March, 2022 Swala wrote a reminder letter to FCC that, sometimes in 2018 they approached FCC for an opinion as to whether the 2017 transaction was notifiable merger but they have no record of a response on the same (**FCC-3**).

Swala Tanzania submitted that, the transaction was completed on the 29th of December 2017 and Swala paid a consideration, which included cash, Preferred Shares and the assumption of a proportionate share of the debt that PAET has with the International Financing Corporation, of $25,782,250. As a beneficial owner in the Songo Songo field, Swala has the right to a share of the net free cash flow distributed as dividends and is responsible for a share of the field's financial obligations. Under the terms of the investment agreement that governed the transaction, some or all of the Preferred Shares are to be redeemed in 2022.

Based on the above analogy, FCC initiated an investigation to establish whether the acquisition of 7.93% shares of Orca held in PAEM by Swala UK amounted to a merger under the ambit of the FCA and thus, the acquisition of the same amounted into infringement of the provisions under the Fair Competition Act, 2003 (the FCA).

1.2 The FCC's Jurisdiction to Initiate a Complaint

According to section 69 (1) of the FCA and Rule 10(1)(c) of the Competition Rules, 2018 (Competition Rules) FCC may initiate a complaint against an alleged infringement of the FCA. Section 69(1) of the FCA reads:

> *"the Commission may initiate a complaint against an alleged prohibited practices"*

Rule 10 (1) (c) of the Competition Rules stipulates as follows:

> *"Subject to the provisions of the Act, a complaint may be initiated by:-*
>
> *(c) the Commission on its own initiative;"*

1.3 Initiation of Investigation

Subject to Rule 10 (3) read together with Rule 10 (1) (d) of the Competition Rules, on 20th May, 2022, FCC initiated an investigation to ascertain whether the aforesaid

acquisition of shares was concluded in contravention with section 11 (2) and (5) of the FCA read together with paragraph 2 (2) of the Fair Competition (Threshold for Notification of a Merger) Order, 2007 as amended by G.N No. 222 of 2nd June, 2017 (Threshold Order).

1.4 Investigation Findings

FCC has learnt from the investigation that, on 29th December, 2017, Orca, a company incorporated under the laws of British Virgin Islands and Swala (PAEM) Limited, a private limited company incorporated under the laws of England and wales have entered into an Investment Agreement **(FCC-4).**

According to the content of the Agreement, Orca agreed to sell the Investment Shares to Swala UK and the later agreed to purchase the same from the former. The Investment Shares represent, in aggregate, 40% of the issued and outstanding Class A Common Shares of PanAfrican Energy Corporation. The transaction was supposed to be effected in three as indicated hereunder:

i. The First Tranche Shares involves acquisition of 7,933 shares at a price equals to USD 25,782,250.

ii. The Second Tranche Shares involves acquisition of 12,067 shares at a price equals to USD 39,217,750.

iii. The Third Tranche Shares involves acquisition of 20,000 shares at a price equals to USD 65,000,000.

The complainant has further leant that, on 1st April, 2019 Swala Tanzania issued a Press Release informing the public that, its wholly owned subsidiary (Swala Uk) has terminated the Agreement to the effect that it will not continue with the implementation of the Second and Third Tranche Shares. the Agreement was terminated after the acquisition of the 7.933 shares which is equivalent to 7.93% of the issued and outstanding Class A Common Shares of the PAEM.

Based on foregoing and subject to the provisions under section 2 of the FCA, the Complainant alleges that, the above-mentioned transaction amounted into a notifiable

merger and the consummation of the same without a prior clearance from the FCC is contrary to the provisions of section 11 (5) of the FCA read together with paragraph 2 (2) of the Threshold Order.

1.5 Parties to the Complaint

1.5.1 The Complainant

The Complainant is a statutory body established under section 62 of the FCA to promote and protect effective competition in trade and commerce and protect consumers from unfair and misleading market conduct. Its address of service for the purposes of this PFs is:

Fair Competition Commission,
PSSSF House, 6th Floor,
Makole Road,
P. O. Box 2351,
DODOMA.

1.5.2 The Respondents

1.5.2.1 The 1st Respondent: Swala (PAEM) Limited

Swala (PAEM) Limited (hereinafter referred to as the **1st Respondent)**, is a private limited company incorporated under the laws of England and Wales with registration number 11110427 whose registered office is located at Kemp House, 160 City Road, London, United Kingdom, ECIV 2NX. The 1st Respondent is a wholly owned subsidiary of Swala Oil Gas (Tanzania) Plc, a company registered in Tanzania.

The 1st Respondent's address of service for the purpose of this PFs unless prescribed otherwise by the 1st Respondent is:

Swala (PAEM) Limited,
c/o Swala Oil and Gas (Tanzania) Plc,
2nd Floor, Osterbay Plaza,
Plot No. 1196, Osterbay, Haile Selassie Road,
P.O. Box 105266,
DAR ES SALAAM.

1.5.2.2 The 2nd Respondent: Orca Exploration Group Inc.

Orca Exploration Group Inc. (hereinafter referred to as the **2nd Respondent**) is a company incorporated under the laws of British Virgin Islands. The 2nd Respondent is an established international public company, engaging in the development of natural gas resources in Africa.[1]

The 2nd Respondent's address of service for the purpose of this PFs unless prescribed otherwise by the 2nd Respondent is:

Orca Exploration Group Inc.,
C/o PanAfrican Energy Tanzania Limited
Oyster Plaza Building, 5th Floor,
Haile Selassie Road,
P.O. Box 80139,
DAR ES SALAAM.

1.5.2.3 The 3rd Respondent: PAE PanAfrican Energy Corporation

PAE PanAfrican Energy Corporation (hereinafter referred to as the **3rd Respondent**) is a company incorporated under the laws of Mauritius. The 3rd Respondent is actively engaging in exploration and production of oil and gas. The Company also acquires, develops, and manages oil properties in Sub-Saharan Africa.

The 2nd Respondent, is a wholly owner of Panafrican Energy Tanzania Limited, a company registered in Mainland Tanzania and is a major supplier of natural gas to the country's domestic energy market who operates the Songo Songo field in Tanzania. The 3rd Respondent's address of service for the purposes of this PFs unless prescribed otherwise by the 3rd Respondent is:

[1] Orca Energy Group Inc. visited on 2nd June, 2022 at 17:58 hours.

PAE PanAfrican Energy Corporation
C/o PanAfrican Energy Tanzania Limited
Oyster Plaza Building, 5th Floor,
Haile Selassie Road,
P.O. Box 80139,
DAR ES SALAAM.

1.5.2.4 The 4th Respondent: Swala Oil Gas (Tanzania) Plc

Swala Oil and Gas (Tanzania) Plc (hereinafter referred to as the **4th Respondent or PAEM**) is an oil and gas company listed on the Dar es Salaam stock exchange with assets in Tanzania and Burundi and an active growth programme in both Africa and elsewhere.[2] The 4th Respondent's current exploration licence is the Kilosa-Kilombero licence in Tanzania, which it operates with a 100% participating interest. The 4th Respondent's address of service for the purposes of this PFs unless prescribed otherwise by the 4th Respondent is:

Swala Oil and Gas (Tanzania) Plc,
2nd Floor, Osterbay Plaza,
Plot No. 1196, Osterbay, Haile Selassie Road,
P.O. Box 105266,
DAR ES SALAAM.

1.5.2.5 The 5th Respondent: PanAfrican Energy Tanzania Limited

PanAfrican Energy Tanzania Limited (hereinafter referred to as the **5th Respondent** or **PAET**) is a limited company registered under the laws of Tanzania and a wholly owned subsidiary of the 3rd Respondent. In 1991 the 5th Respondent acquired the Songo Songo lease and began development of the gas field in Southern Tanzania. The 5th Respondent is a major supplier of natural gas to the country's domestic energy market. The 5th Respondent's address of service for the purposes of this PFs unless prescribed otherwise by the 5th Respondent is:

[2] Swala Oil and Gas (Tanzania): The Company (visited on 20th June, 2022 at 14:35 HRS).

PanAfrican Energy Tanzania Limited
Oyster Plaza Building, 5th Floor,
Haile Selassie Road,
P.O. Box 80139,
DAR ES SALAAM.

1.6 The Provisions of the FCA Alleged to have been Infringed

As it shall be further discussed in this Provisional Findings (PFs), the allegations constituting this complaint fall under section 11(2) and (5) of the FCA *to wit*:

> *Acquisition of Class A Common Shares of the 2nd Respondent held in the 3rd Respondent by the 1st Respondent without prior notification to the Complainant as required by the FCA and Competition Rules; hence, this non-notification was an infringement of the provisions of the FCA.*

The details of the investigation carried out and the facts constituting the complaint are as set out in parts **2.0** to **6.0** of this PFs.

2.0 THE COMMISSION'S APPROACH

2.1 The Inquisitorial Approach

The Commission's handling of any competition complaint takes an *inquisitorial* rather than an *adversarial* approach. This approach is provided for under Rule 17 (1) and (2) of the Competition Rules, which reads as follows:

> *(1) "The Commission shall **adopt inquisitorial rather than adversarial procedure** in conducting the hearings.*
> *(2) Subject to sub-rule (1), the inquisitorial procedure shall be considered as part of the investigation process." **(Emphasis added)**.*

The Complainant therefore, plays the role of an inquisitor whereby it endeavours to discover facts while simultaneously examining or investigating the matter and,

finally, makes findings based on the inquiry. This means that the Complainant is not a passive recipient of information but is primarily responsible for gathering the evidence necessary to resolve the matter.

The meaning of taking an inquisitorial approach was aptly and succinctly explained by the Federal Court of Australia in the case of ***SZLPN v Minister for Immigration and Citizenship***[3] that:

> *"The relevant ordinary meaning of "inquisitorial" is having or exercising the function of an inquisitor, that is to say "one whose official duty it is to inquire, examine or investigate".*

Further to the persuasive authority cited above, the role which the Commission plays when it presides over a complaint was clarified by the Fair Competition Tribunal in its Ruling in the case of ***TBL vs FCC and Another***[4], where the Tribunal at page 36 and 37 states:

> *"unlike a Court, whenever the FCC carries out an investigation or a hearing of a complaint leading to a decision, it does so in its capacity as a regulator and in pursuance of its functions of administering the FCA and enforcing compliance with the FCA. The hearing at [the] FCC is part of the process of investigation and that is as provided in Rule 17 (1)".*

2.2 Issuance of Statement of the Case

Subject to Rule 12 (3) of the Competition Rules, on **29th July, 2022**, the FCC, being satisfied that the alleged non-notification of the said shares transaction in the 3rd Respondent constitutes a prima facie case, issued a Statement of the Case to the 1st, 2nd 3rd, 4th and 5th Respondents, setting out the facts constituting the complaint and the provisions of the law alleged to have been infringed, to wit, sections 11 (2) and (5) of the FCA read together with Rule 33 (1) of the Competition Rules and the Threshold Order.

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[3] *[2010] FCA 202, para 13 (citing Minister for Immigration and Citizenship v. SZIA [2009] HCA 39, 259 ALR 429.*

[4] *Consolidated Appeal No. 4 and 5, of 2010, (unreported)*

3.0 FACTS CONSTITUTING THE COMPLAINT

The Statement of the Case served upon the 1st, 2nd 3rd, 4th and 5th Respondents set out the following facts:

3.1 **THAT**, on 29th December, 2017 Orca Exploration Group Inc., a company incorporated under the laws of British Virgin Islands and Swala (PAEM) Limited, a private limited company incorporated under the laws of England and Wales, entered into an Investment Agreement (the Agreement);

3.2 THAT, the Investment Shares (the Shares) referred under Paragraph 1 hereinabove, means the Class A common shares of PAE Panafrican Energy Corporation (PAEM) of USD 1.00 each;

3.3 **THAT,** according to the Agreement, Orca Exploration Group Inc. sold the Shares to Swala (PAEM) Limited in three tranches i.e. the First Tranche Shares, Second Tranche Shares, the Third Tranche Shares or all of them;

3.4 **THAT**, the First Tranche Shares involves acquisition of 7,933, the Second Tranche Shares involves 12,067 and the Third Tranche Shares involves 20,000;

3.5 **THAT**, the total number of issued and outstanding Class A common shares in the 3rd Respondent is 100,000;

3.6 **THAT,** based on the facts under Paragraphs 3.4 and 3.4, the Shares in question represent, in the aggregate, 40% of the issued and outstanding Shares in the 3rd Respondent;

3.7 THAT, on 1st April, 2019 Swala Oil and Gas Tanzania Plc, a company registered in Tanzania and a parent company of Swala (PAEM) Limited, issued a Press Release informing the public that, the parties to the

Agreement have agreed to terminate the implementation of the Second and Third Tranche Shares;

3.8 THAT, based on the fact under Paragraph 3.7 hereinabove, the 1st Respondent effected the First Tranche Shares only which is equal to7.93%;

3.9 **THAT**, PAEM is a company registered in Mauritius and a wholly owned subsidiary of Orca Exploration Group Inc.;

3.10 **THAT**, PAEM wholly owns PanAfrican Energy Tanzania Limited, a limited company registered under the laws of the United Republic of Tanzania;

3.11 **THAT**, PanAfrican Energy Tanzania Limited owns and operates Songo Songo gas field in Kilwa District, Lindi Region;

3.12 **THAT,** Swala (PAEM) Limited is a wholly owned subsidiary of the Swala Oil and Gas Tanzania Plc, a company registered under the laws of the United Republic of Tanzania;

3.13 **THAT,** at the time of the Agreement the total assets of Orca Exploration Inc. was **$ 249,549,000**[5] equivalent to **TZS 559,299,200,760**[6]**;**

3.14 **THAT,** subject to Paragraph **3.1** hereinabove, the Agreement involved parties who are not physically present within the United Republic of Tanzania;

3.15 **THAT**, subject to paragraphs **3.9** and **3.10** hereinabove, Orca Exploration Group Inc. is the ultimately owner of PanAfrican Energy Tanzania Limited. In other words, the presence of Orca Exploration Group Inc. is through PanAfrican Energy Tanzania Limited;

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[5] Orca Exploration Group Inc. 2018 Financial Reports and Notes.

[6] https://www.bot.go.tz (exchange rate as at 31st December, 2017 USD=TZS 2,241.42).

3.16 **THAT,** the acquisition of the 7.93% of the issued and outstanding shares of Orca Exploration Group Inc. in PAE PanAfrican Energy Corporation by Swala (PAEM) Limited amounted to change of control of business of PanAfrican Energy Tanzania Limited in Tanzania, to wit, a merger, as defined under section 2 read together with section 7 (c) of the FCA, which ought to have been notified to the Complainant;

3.17 **THAT**, section 11 (2) of the FCA read together with the "Fair Competition (Threshold for Notification of a Merger) (Amendment) Order, 2017" (hereinafter to be referred to as **the Threshold Order**), specifies the current threshold amount for merger notification to be **Tanzanian Shillings Three Billion Five Hundred Million (TZS 3,500,000,000)** of which its calculation is based on the combined market value of either assets or turnover of the merging firms;

3.18 **THAT**, at the time the share transaction in the PAEM was effected, the market value of assets of the Orca Exploration Inc. alone amounted to **TZS 559,299,200,760**[7]**,** which exceeds the **TZS 3,500,000,000** being the threshold amount specified under the Threshold Order;

3.19 **THAT,** *"acquisition"* of the shares in the 3rd Respondent resulted into a ***"change of control"*** of the business of the 3rd Respondent's in Mainland Tanzania, *to wit*, a **merger**, as defined under section 2 read together with section 7(d) of the FCA, a conduct which ought to have been notified to the Complainant;

3.20 **THAT,** on the strengths of the facts stated under paragraphs **3.1** to **3.19** above, the Complainant hereby alleges that the 1st, 2nd, 3rd 4th and 5th Respondents contravened the provisions of the FCA, *to wit*;

> *"Failure to notify a notifiable merger to the Commission contrary to sections 11 (2) read together with section 11 (5)*

[7] Ibid.

and (6) of the FCA, Rule 33 (1) of the Competition Rules, 2018 and the Threshold Order";

3.21 THAT, pursuant to Rule 2 of the Competition Rules, the acquiring firms in this complaint is Swala (PAEM) Limited (the 2nd Respondent);

3.22 THAT, pursuant to Rule 2 of the Competition Rules, the target firm in this complaint is PAE PanAfrican Energy Corporation (the 3rd Respondent);

3.23 THAT, failure on the part of the 1st, 2nd, 3rd, 4th and 5th Respondents to notify a notifiable merger to the Commission prevented the Complainant from discharging its statutory obligation of assessing the lawfulness of such a merger as provided under Section 65 (2) (b) of the FCA.

4.0 THE COMPLAINANT'S LEGAL AND ECONOMIC ARGUMENTS

4.1 Overview of the Offence

The Complainant has assessed both legal and economic information and established that the 1st, 2nd 3rd, 4th and 5th Respondents have infringed the FCA on the following count:

On 29th December, 2022 the 1st, 2nd, 3rd, 4th and 5th Respondents consummated a notifiable merger without prior notification to the Commission contrary to section 11 (2) and (5) of the FCA read together with sections 11 (6) and 60 (1) of the FCA and the Threshold Order.

For ease of reference, the Complainant has reproduced below relevant sections constituting the allegation by the Complainant. Section 11 (2) of the FCA provides that:

"A merger is notifiable under this section if it involves turnover or assets above threshold amounts the Commission shall specify from time to time by Order, in the Gazette, calculated in the manner prescribed in the Order."

Section 11 (5) of the FCA provides that:

> *"Without limiting the operation of sub-section (1), a person shall not give effect to a notifiable merger unless it has, at least 14 days before doing so, filed with the Commission a notification of the proposed merger supplying such information as the Commission may by Order require to be included in such notification."*

Section 11 (6) of the FCA provides that:

> *"Any person, who intentionally or negligently, acts in contravention of the provision of this section, commits an offence under this Act."*

Section 60 (1) of the FCA provides that:

> *"Where a person commits an offence against this Act (other than under Part VI, Part VII or sections 58, 59 or 88) or is involved in such an offence, the Commission may impose on that person a fine of not less than five percent of his annual turnover and not exceeding ten percent of his annual turnover."*

4.2 Existence of a Notifiable Merger as defined under the FCA

Subject to section 11 (2) of the FCA, a merger is notifiable if the following elements exists:

(a) *Whether the share transaction in the 3rd Respondent constitute a merger as defined under section 2 of the FCA;*

(b) *Whether the shares transaction amounted to a notifiable merger under section 11 (2) of the FCA;*

In view of the above, to establish the 1st, 2nd 3rd, 4th and 5th Respondents' liability, the Complainant has examined the above issues as follows:

4.2.1 Whether the Share Transaction in the 3rd Respondent Constitute Merger as Defined under Section 2 of the FCA

Section 2 of the FCA defines a merger as follows:

*"merger" means an acquisition of **shares**, a business or other assets, whether inside or outside Tanzania, resulting in the **change of control** of a business, part of a business or an asset of a business in Tanzania. (**Emphasis added**).*

Based on the above provision of the FCA, it is clear that for the merger to occur two (2) conditions must be met namely there must be an acquisition of shares or assets of business and such acquisition should result into change of control. Therefore, it is a Complainant's onus to establish the following:

i. Whether the transaction involved an acquisition of shares, a business or other assets;
ii. Whether the transaction resulted into a change of control of a business, part of a business or an asset in Tanzania.

Therefore, in order to prove that a merger was created, the Complainant has ventured to establish whether the share transaction in the 3rd Respondent satisfies the above mentioned two (2) conditions.

4.2.1.1 Whether there was an acquisition of shares, a business or other assets

The word "acquisition" as it appears in the definition of the merger has a meaning defined under section 2 of the FCA as:

*" in relation to **shares** or assets means acquisition, either alone or jointly with another person, of any legal or equitable interest in such shares or assets but does not include acquisition by way of charge only."*

Further the word "acquire" has been defined under section 2 of the FCA to include:

*(a) acquire by **purchase**, exchange, lease, hire, hire-purchase or gift; and*
(b) ……..,
and "acquirer" has a corresponding meaning".

The Complainant has noted that, on 29th December, 2017 the 1st and 2nd Respondents entered into Investment Agreement whereby the 1st Respondent agreed to purchase 40% of investment shares in the 3rd Respondent held by the 2nd Respondent.

According to Article 1.1 of the **FCC-4**, the 1st Respondent agreed to acquire 40% of Investment Shares of the 2nd Respondent held in the 3rd Respondent in three tranches to wit the First Tranche Shares, the Second Tranche Shares and Third Tranche Shares. The First Tranche Shares involved acquisition of **7,933 shares** which were sold at **USD 25,782,250**. The Second Tranche Shares involved **12,067 Shares** which were pegged at **USD 39,217,750** and the Third Tranche Shares involve **20,000 shares** which were pegged at **USD 65,000,000.**

Article 2.1 of the FCC-4 stipulates that:

> *"On and subject to the terms and the conditions contained herein:*
>
> *(a) Orca hereby sells the First Tranche Shares to Swala and Swala purchases the First Tranche Shares from Orca; or*
>
> *(b) Orca agrees to sell the Second Tranche Shares and the Third Tranche Shares to Swala, and Swala agrees to purchase the Second Tranche Shares and the Third Tranche Shares from Orca."*

Further to that, Article 2.3 of the FCC-4 articulates how the 1st Respondent will make payment to the 2nd Respondent in relation to the acquisition 40% of the Shares. In particular Article 2.3 (a) (i) of the FCC-4 stipulates that:

> *"Subject to section 2.3 (e) and 2.3(f), Swala shall pay the First Purchase price to Orca as follows:*
>
> *Immediately upon execution of this Agreement, $ 17,055,950 by wire transfer in immediately available funds to the account and beneficiary as Orca shall direct"*

Article 2.3 (b) (i) of the FCC-4 stipulates that:

"Subject to section 2.3 (e) and 2.3(f), Swala shall pay the Second Purchase price to Orca as follows:

Immediately upon execution of this Agreement, $ 27,790,204 by wire transfer in immediately available funds to the account and beneficiary as Orca shall direct"

Article 2.3 (c) (i) of the FCC-4 stipulates that:

"Subject to section 2.3 (e) and 2.3(f), Swala shall pay the Third Purchase price to Orca as follows:

Immediately upon execution of this Agreement, $ 44,846,154 by wire transfer in immediately available funds to the account and beneficiary as Orca shall direct"

Accordingly, the 4th Respondent, in her 24th January, 2018 letter, voluntarily admitted that on 29th December, 2018 the 1st Respondent acquired 7.93% shares of the 2nd Respondent held in the 3rd Respondent. Following the acquisition, the 2nd Respondent remained with 92.07% shares in the 3rd Respondent.

Sequel, on 1st April, 2019, the 4th Respondent issued a Press Release informing the public that the 1st and 2nd Respondents have agreed to terminate the Agreement to the effect that the parties will not implement Articles 2.3 (b) and 2.3 (c) of the **FCC-4** (**FCC-5**). The Press Release reads:

> *"Swala Oil & Gas (Tanzania) PLC ("Swala" or the "Company") announces that, pursuant to the terms of its investment agreement dated December 29, 2017 (the "Agreement") with Orca Explorations Group Inc. ("Orca") in respect of PAE PanAfrican Energy Corporation ("PAEM"), the parties have* ***agreed to terminate the Agreement*** *as a result of Swala not acquiring additional shares in the capital of PAEM.* ***Swala continues to hold 7.93%*** *of the issued and outstanding shares of PAEM through the Company's subsidiary Swala (PAEM) Limited."*

The above Press release substantiates that the **FCC-4** was partly implemented as a result the 1st Respondent is a shareholder of the 3rd Respondent representing 7.93%

shareholding. The acquisition of 7.93% implies that, the 1st Respondent is a minority shareholder of the 3rd Respondent.

The 2018 Management's Discussion & Analysis of the 2nd Respondent indicates that on January 16, 2018 the 2nd Respondent sold 7.93 per cent (7,933 Class A common shares) of its subsidiary, PAEM, to Swala (PAEM) Limited, a wholly owned subsidiary of Swala Oil & Gas (Tanzania) plc. ("Swala"), for $15.7 million cash (net of closing adjustments) and $4.0 million of Swala convertible preference shares pursuant to a share purchase agreement.[8]

Therefore, the Complainant is of a strong view that the act of entering and effecting the **FCC-4** by the 1st and 2nd Respondents amounted to acquisition of 7.93 shares in the 3rd Respondent as provided under section 2 of the FCA for the reason that the same were purchased in exchange of sums of money.

It should be noted that, the 1st Respondent (acquiring firm) and 3rd Respondent (target firm) are not based in Mainland Tanzania. However, subject to section 7(d) of the FCA the transaction falls under the ambit of the FCA as it will be discussed in **Paragraph 4.2.1.2** hereunder.

In the light of the foregoing analysis, the Complainant has proved, on high preponderances of probability, that there was indeed, an acquisition of 7.93 shares in the 3rd Respondent by the 1st Respondent. This satisfies the first condition of the existence of a merger, that is, there must be an acquisition of shares.

4.2.1.2 Whether the acquisition of shares in the 3rd Respondent resulted into a Change of Control of a Business in Tanzania

The second condition for a merger to exist is that, such an acquisition of shares should result in a change of control of business, part of business or assets of a business in Mainland Tanzania. The key words here are *change of control*.

[8] Orca Exploration Group Inc. 2018 Financial Reports and Notes.

The FCA, however, does not define the word **change of control** but section 4 of the FCA defines "control" in relation to sections 8, 9 and 10, excluding section 11 of the FCA which is subject matter of this investigation.

In the case of ***Toyota Tshusho v Fair Competition Commission,*** *FCT Appeal No.6 of 2013* (Unreported), at page 32, the Fair Competition Tribunal defined change of control, for purposes of mergers and acquisitions, as:

> *"the potential ability of the Acquiring firm to* ***materially influence*** *the business policy and operations of the Target firm in the post-merger scenario irrespective of the size of ownership change."*

Equally, In the BskyB/ITV case, where BskyB acquired 19.7% shares in ITV, a public listed company, the then Competition Commission of UK, Office of Fair Trade (OFT) now Competition and Markets Authority – "CMA") found that:

> *"On the basis of evidence of attendance and voting at a recent ITV shareholders' meeting, BskyB's shareholding would be likely in practice to allow it to* ***block special resolutions*** *at ITV shareholdings' meeting."*

Based on the above cited cases, it is clear that control is attached to the ability of a person to change the strategic direction of the company. Minority shareholding may confer material influence or decisive influence (possession of direct or indirect control of the company). Material influence or decisive influence may arise from the ownership of all or part of the company's shares or rights.

Change of control is defined as a "situation where one party acquires the possibility of exercising ***decisive influence*** over another company. ***Decisive influence*** may arise by the ownership of all or part of the company's assets, or rights, which confer decisive influence on the decision-making process of the company (for example, by means of voting rights attached to shares or contractual rights).[9]

Similarly, the Complainant in establishing the existence of change of control in the case at hand has considered the effect of the share transaction in the holding structure of the

[9] Article 3 (2) EU Merger Regulation.

3rd Respondent. Following the acquisition of 7.93% shares the shareholding structure of the 3rd Respondent has changed from a sole to multiple owned subsidiary. This means that prior to the **FCC-4**, the 2nd Respondent had a full decisive and material power over the business strategy of the 3rd Respondent.

According to Article 9 (a) of the 3rd Respondent's Memorandum and Articles of Association, the 1st Respondent has a right to vote at the 3rd Respondent's shareholdings meeting. The Article stipulates that:

> *"The holders of each Class A common share shall be entitled: to one vote on a poll, and at a meeting of shareholders on any resolution."*

The Complainant construes that, the fact that the 1st Respondent is entitled to one vote at a meeting of shareholders, then the 1st Respondent confers decisive influence over the business strategy of the 3rd Respondent irrespective of the number of shares. The 1st Respondent has in practice a power to allow or block any agenda regarding the business of the 3rd Respondent during the shareholders meeting. In the case of *Ameritech/Tele Danmark*, a shareholding of 34% (which was to be increased to 42% by a capital reduction of the share capital) was held to confer a decisive influence[10].

Having established the material influence of the 1st Respondent over the business strategy of the 3rd Respondent, it is worth noting that all the parties involved in the transfer of 7.93% shares to wit the 1st Respondent as a buyer (acquiring firm) and the 2nd Respondent (seller) and the 3rd Respondent (target firm) are not registered in Tanzania. However, it is on records that, the 3rd Respondent wholly owns the 5th Respondent, a company registered and doing business in Mainland Tanzania.

Section 7 (c) of the FCA provides that:

> *"This Act shall apply to conduct outside mainland Tanzania:*
>
> *(a) ...;*
>
> *(b) ...;*

[10] *Case IV/M.1046 Ameritech/Tele Danmark.*

(c) ...;

(d) *by any person in relation to the acquisition of shares or other assets outside Tanzania resulting in the change of control of a business, part of a business or an asset of a business, in Tanzania."*

As already noted, the 1st Respondent acquired 7.93% of the shares held by the 2nd Respondent in the 3rd Respondent. By acquiring 7.93% of shares the 2nd Respondent, the 1st Respondent became a minority shareholder in the 3rd Respondent and, hence, the 1st Respondent acquired ability to control interest of the target firm (the 3rd Respondent).

Furthermore, by having a direct control interest in the 3rd Respondent, which wholly owns the 5th Respondent, the 1st Respondent became the owner of the 5th Respondent. It should be noted that, the 1st Respondent is wholly owned by the 4th Respondent. Thus, the 5th Respondent indirectly owned by the 4th Respondent.

It should be noted that, both the 4th and 5th Respondents are registered in Tanzania. The 4th Respondent is actively engaging in the exploration of gas and oil. On the other hand, the 5th Respondent is actively engaging in exploration, production and distribution of gas in Tanzania. Therefore, the transaction involves companies which are competing in the exploration of gas and oil market.

Based on the above analogy, the 4th Respondent, a company registered and doing business in Mainland Tanzania, indirectly acquired the control power over the business strategy of the 5th Respondent.

In the case of Cementbouw Handel & Industries B.V Vs Commission [2006] ECR II-319, the General Court held that "there is no difference whether the indirect or direct control is acquired in one, two, or more stages by means of more than one transaction". This position was upheld by European Court of Justice (ECJ) in December, 2007.

The Complainant understands that by acquiring 7.93% of shares in the 3rd Respondent, the 4th Respondent acquired control interest on the business strategies and direction of the 5th Respondent.

It is important to note here that the 4th Respondent has a sole control over the business conduct of its subsidiary (the 1st Respondent). Therefore, as a result of **FCC-4**, the 5th Respondent acquired indirect control over the business strategy of the 4th Respondent.

Therefore, the Complainant is of the considered position that, the share transaction in the 3rd Respondent resulted into a 'change of control' of the 3rd Respondent; a company duly incorporated in Tanzania, and, hence, the share transaction satisfies the requirement of section 2 of the FCA, and constitute a merger.

4.2.2 Whether the transaction was subject to notification

The FCA has a mandatory notification requirement of a merger involving a turnover or assets above a specified threshold amount. Failure to comply with this requirement is an offence under Section 11(6) of the FCA.

Section 11(2) of the FCA read together with Paragraph 2(1) of Threshold Order provides that a merger is notifiable if it involves turnover or assets above **TZS 3,500,000,000** of which its calculation is based on the combined market value of assets or turnover of the merging firms.

In calculating whether the transaction met the notification threshold, the Complainant has decided to base its calculations on the market value of assets of one of the merging firms alone, i.e. Orca Exploration Group Inc. (the 2nd Respondent) as reported in its Annual Report and Financial Statements for the year ended 31st December, 2017[11], being the year of committing infraction against the FCA (**FCC-6**).

The said Annual Report and Financial Statements report that the 2nd Respondent had assets totaling **USD 249,932,000** equivalent to **TZS 560,157,595,680**[12] which exceeds by far the **TZS 3,500,000,000** being the threshold amount specified under the Threshold Order; and by that fact, the acquisition of the said shares, pursuant to section 11 (2) of the FCA read together with Rule 33 (1) of the Competition Rules, ought to have been notified to the FCC by the 1st, 2nd, 3rd, 4th and 5th Respondents.

11

12 https://www.bot.go.tz/ExchangeRate/previous_rates visited on 7th June, 2017.

Based on the above facts, it is apparent that, the total combined market value of assets of the merging firms was far above the threshold amount. Therefore, the Complainant concludes that the transaction in question tantamount a notifiable merger under section 11(2) of the FCA read together with the Threshold Order.

Based on the above analogy, the Complainant hereby establishes on high preponderances of probability that the transaction HAVE TRIGGERED the numerical merger notification benchmark as per the Fair Competition Commission (Threshold for Notification of a Merger) Order, 2006 read together with Fair Competition Commission (Threshold for Notification of a Merger) (Amendment) Order, 2017 made under section 11(2) the FCA.

4.2.3 Whether the transaction amounted to a notifiable merger as per the provision of section 11(2) the FCA

In the wake of responses to the affirmative in issues 4.2.1 and 4.2.2, the Complainant hereby establishes on high preponderances of probability that the **transaction HAVE TRIGGERED:**

i. The merger definition benchmark as per the provision of section 2 the FCA

ii. The change of control definition benchmark as per the decision of the Fair Competition Tribunal in Appeal No. 6 of 2013.

iii. The numerical merger notification benchmark as per the Fair Competition Commission (Threshold for Notification of a Merger) Order, 2006 read together with Fair Competition Commission (Threshold for Notification of a Merger) (Amendment) Order, 2017 made under section 11(2) the Fair Competition Act No. 8 of 2003.

Based on the above analogy, the Complainant hereby establishes on high preponderances of probability that the transaction amounted to a notifiable

merger as per the provision of section 11(2) the Fair Competition Act No. 8 of 2003.

4.3 Proving the Alleged Offence

4.3.1 Whether the 1st, 2nd, 3rd, 4th and 5th Respondents notified the Commission before consummating a merger

Section 11 (5) of the FCA provides that:

> *"Without limiting the operation of sub-section (1), a person shall not give effect to a notifiable merger unless it has, at least 14 days before doing so, filed with the Commission a notification of the proposed merger supplying such information as the Commission may by Order require to be included in such notification."*

Further, Rule 33 (1) of the Competition Rules provides that:

> *"Any person who intends to acquire, control or to be acquired or controlled through a merger shall notify the Commission of that intended merger by filing a notification under section 11(2) of the Act."*

As it has been established herein, the 1st, 2nd and 3rd Respondents are corporate entities incorporated under the laws of British Virgin Islands, England and Mauritius respectively. In that regard, the presence of the 2nd and 3rd Respondents in Mainland Tanzania is viewed through the 5th Respondent.

As it has been discussed hereinabove, the 1st Respondent is a wholly owned subsidiary of the 4th Respondent, a company incorporated under the laws of Mainland Tanzania. The 4th Respondent ought to have known the requirement of notification under the FCA prior to allowing its wholly subsidiary (the 1st Respondent) to enter into **FCC-4**.

Indeed, it is a settled principle in competition law that, the separate legal personality of a subsidiary company is not itself a sufficient reason to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct in the market, but carries out, in all material respects, the instructions given to it by the parent company (See: *ICI v. Commission*

(1972) ECR 619). For instance, in the case of *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, it was stated that:

> *"...the circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously but in essentials follows directives of the parent company."* [13]

Certainly, the fact that the 1st Respondent is a foreign entity, its presence in Tanzania is viewed through its parent company (the 4th Respondent). As such, the 4th Respondent, being a parent company of the 1st Respondent, cannot exonerate itself from the failure to notify a notifiable merger to the Commission.

Furthermore, Article 5.8 of the FCC-4 stipulates:

> *"To the Knowledge of Orca (**the 2nd Respondent**), each of PAEM (**3rd Respondent**) and **PAEM's Subsidiaries (5th Respondent being one of them)** is in compliance, in all material respects, with all Applicable Law applicable to its business, or operations, and Orca (**the 2nd Respondent**) has not received written notice of, and each of PAEM (**3rd Respondent**) and its Subsidiaries (**5th Respondent being one of them**) has not been charged with, any violation of any Applicable Law."* ***Emphasis Added.***

Subject to the above Article as extracted from the **FCC-4,** the 2nd, 3rd and 5th Respondents ought to have notified the merger prior to its consummation of the same as provided under the provisions of the FCA. Sections 7 (d) and 11(5) of the FCA read together with Rule 33(1) of the Competition Rules requires any person who intends to acquire, control or to be acquired or controlled through a merger not to implement the merger until there is a notification or approval from the Commission.

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[13] Case 6-72, paragraph 15.

Therefore, it is apparent that the 1st, 2nd, 3rd, 4t and 5th Respondents were obliged to notify to the Commission on their intention to effect the share transaction in question. Through such notification, the Commission could have an opportunity to scrutinize the transaction and determine whether they have any unilateral or coordinated effects in the relevant market.

As it stands to date, supported by the **FCC-1** and **FCC-2**, there is no any record to adduce to the contrary, that the 1st, 2nd, 3rd, 4th and 5th Respondents had filed the application with the Commission for merger notification as per requirement of section 11 (2) and (5) of the FCA read together with Rule 33 (1) of the Competition Rules.

Therefore, the Complainant has proven, on high preponderances of probability that the 1st, 2nd, 3rd, 4th and 5th Respondents consummated the merger without notifying the Commission as provided under section 11 (5) of the FCA.

4.3.2 Whether the alleged infringements of the FCA were committed negligently or intentionally

Section 11 (6) of the FCA provides that:

> *"Any person, who intentionally or negligently acts in contravention of the provisions of this section, commits an offence under the FCA".*

We are of a considered opinion that given the calibre of the 1st, 2nd, 3rd, 4th and 5th Respondents and their corporate standing that transcends across the globe, one would have expected them, as good corporate citizens, to abide with all legal and regulatory requirements in Mainland Tanzania when carrying out their business.

It should be noted that, the FCA was enacted in 2003 and came into force on 12th May 2004 through Government Notice No. 150 which was published on 14th May, 2004. Also, the Threshold Order was promulgated in 2017. Therefore, at a time when the share transaction in the 3rd Respondent was concluded in the year 2017, the Threshold Order Amount was already in place.

Further, since, the acquisition of shares of the 3rd Respondent by the 1st Respondent was a notifiable merger; the consummation of the same was done in total disregard of

the requirements and procedures laid down by the provisions of the FCA and the Competition Rules. This signifies a very high degree of negligence given the calibre of the 1st, 2nd, 3rd, 4th and 5th Respondents as they ought to have respected the applicable laws that regulate mergers and acquisitions in Tanzania.

It is also evident that, the share transaction was drafted by a lawyer who proceeded to witness the share transfers. If it was not negligence on the part of the 1st, 2nd, 3rd, 4th and 5th Respondents, one would have expected that the 1st, 2nd, 3rd, 4th and 5th Respondents and their lawyers would have first and foremost conducted a regulatory compliance due diligence exercise and obtained the requisite approval or clearance of the FCC prior to consummating the said share transaction. Since the 1st, 2nd, 3rd, 4th and 5th Respondents failed to so act, this was tantamount to a high degree of negligence.

Therefore, the share transaction was executed without observing the regulatory requirements thus manifesting negligence on the part of the 1st, 2nd, 3rd, 4th and 5th Respondents.

4.3.3 Whether the merger investigation is not time barred under section 60(8) of the FCA, 2003

Section 60(8) of the FCA 2003 provides that:

> *"The Commission may act upon an offence at any time within six (6) years after the commission of the offence."*

Furthermore, Rule 10(1) (d) of the Competition Rules stipulates that:

> *"The Commission shall be deemed to have acted upon a complaint from the first time when it requested information in writing from the respondent(s)."*

As it has already been mentioned herein, the share transaction in the 3rd Respondent was consummated on 29th December, 2017 whereas the Complainant started its investigation on **31st May, 2022**, at a time when the Complainant initially requested relevant information by Summons on this matter to the 4th Respondent.

In that regard, investigation on this matter started five years after infraction against the FCA was committed by the 1st, 2nd, 3rd, 4th and 5th Respondents.

Therefore, the Complainant concludes that, investigation on this matter is within the prescribed time as provided for under section 60(8) of the FCA read together with Rule 10(1)(d) of the Competition Rules as it commenced before the expiry of the six-year prescribed time.

5.0 THE COMMISSION'S PROVISIONAL FINDINGS

Based on assessment of facts, the applicable legislation and the supporting evidence; the Commission, acting in accordance with Rule 19 (3) of the Competition Rules, 2018 hereby, provisionally, finds on high preponderances of probability, that:

i. The 1st, 2nd, 3rd, 4th and 5th Respondents occasioned an infringement by contravening section 11 (2), (5) and (6) of the FCA, as read together with Rule 33 (1), (2) and (7) of the Competition Rules, read together with the Fair Competition Commission (Threshold for Notification of a Merger) Order, 2006 read together with Fair Competition Commission (Threshold for Notification of a Merger) (Amendment) Order, 2017 made under section 11(2) the Fair Competition Act No. 8 of 2003.

ii. The 1st, 2nd, 3rd, 4th and 5th Respondents will thus be held liable for failure to notify a merger to the Commission contrary to section 11 (2), (6) of the FCA, as read together with Rule 33 (1), (2) and (7) of the Competition Rules, 2018 and the Fair Competition Commission (Threshold for Notification of a Merger) Order, 2006 read together with Fair Competition Commission (Threshold for Notification of a Merger) (Amendment) Order, 2017 made under section 11(2) the Fair Competition Act No. 8 of 2003.

iii. The failure of the 1st, 2nd, 3rd, 4th and 5th Respondents to notify the alleged notifiable merger to the Complainant; denied the latter a statutory opportunity to carry out an ex-ante assessment of the lawfulness of the said alleged merger as

statutorily required under section 65 (2) (b) the FCA read together with section 11 (1) of the FCA and Part V of the Competition Rules.

iv. On the basis of paragraph 5(iii) hereinabove and pursuant to section 62(4) of the FCA the Complainant shall invoke its inherent powers to apply the provisions of Part V of the Competition Rules and conduct an ex-post assessment of the alleged un-notified merger occasioned by the 1st, 2nd, 3rd, 4th and 5th Respondents.

6.0 EX-POST MERGER ASSESSMENT OF THE ALLEGED UN-NOTIFIED MERGER OCCASIONED BY THE 1ST, 2ND, 3RD, 4TH AND 5TH RESPONDENTS

It is alleged that the acquisition of the 3rd Respondent's shares by the 1st Respondent was not notified to the Complainant prior to the consummation of the same as required by the provisions under the FCA and Competition Rules, hence, this non-notification was an infringement of the provisions of the FCA.

In view of this allegation, competition assessment carried out herein is for the purpose of ascertaining whether apart from the offence of non-notification the 1st, 2nd, 3rd, 4th and 5th Respondents also executed a prohibited merger contrary to section 11 (1) of the FCA. In other words, whether the transaction in question created or strengthened a position of dominance of the 1st, 2nd, 3rd, 4th and 5th Respondents in the relevant market.

Section 11 (1) of the FCA prohibits all kinds of mergers which result into creating or strengthening dominance in markets in Mainland Tanzania. For ease of reference, the provision is provided hereunder:

> *"A merger is prohibited if it **creates** or **strengthens** a **position of dominance** in a market."* (**Emphasis added**)

Position of dominance in a market is defined under Section 5 (6) of the FCA as follows:

> *"A person has a dominant position in a market if both (a) and (b) apply:*
>
> *(a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and*

(b) the person's share of the relevant market exceeds 35 per cent."

Based on the above provisions, in order to establish whether a particular entity occupies a position of dominance, the Complainant is required to define the relevant market since dominance (market power) does not exist in the abstract but rather exists in relation to a market (relevant market).

In that context, the assessment is as discussed hereunder.

6.1 The Would-be Parties to the Merger

It is the Complainant's finding that had the 1st, 2nd, 3rd, 4th and 5th Respondents notified the said transaction to the Complainant; parties to the merger would have been as follows:

6.1.1 The Would Be Acquirer: Swala (PAEM) Limited (1st Respondent)

Swala (PAEM) Limited (**The Would be Acquirer)**, is a private limited company incorporated under the laws of England and Wales with registration number 11110427 whose registered office is located at Kemp House, 160 City Road, London, United Kingdom, ECIV 2NX. The Ownership Structure of the 1st Respondent is as provided **Table 1** below.

Table 1: Shareholding Structure of the 1st Respondent

S/N	Name and Description of Shareholder	Number of Shares Held	Shareholding in Percentage
1.	Swala Energy Tanzania Plc	150,000,000	100
	TOTAL	**150,000,000**	**100**

Source: Swala Oil and Gas (Tanzania) Plc submissions, 2022.

The Would be Acquirer is an energy resources company; it engages in the exploration of hydrocarbons. The Would be Acquirer was established in 2011 and in 2012 it entered into a production Sharing Agreement (PSA) with the Government of Tanzania and the Tanzania Petroleum Development Corporation (TPDC) to undertake exploration of oil and gas over the Kilosa-Kilombero onshore license area.

6.1.2 The Would-be Target Firm: PanAfrican Energy Tanzania Limited (5th Respondent)

PanAfrican Energy Tanzania Limited (**The Would-be Target Firm**) is a limited liability company incorporated under the laws of the United Republic of Tanzania. Its registered office is at Oyster Plaza Building, 5th Floor, Haile Selassie Road.

The Would be Target Firm is a wholly owned subsidiary of PAE PanAfrican Energy Corporation, a company incorporated under the laws of Mauritius as indicated in **Table 2** below:

Table 2: Shareholding Structure of the 3rd Respondent

S/N	Name and Description of Shareholder	Number of Shares Held	Shareholding in Percentage
1	PAE PanAfrican Energy Corporation	100,000	100
	TOTAL		**100**

Source: Swala Oil and Gas (Tanzania) Plc Submissions, 2022

6.2 The Would-be Proposed Transaction

Pursuant to the Investment Agreement entered between Orca Exploration Group Inc. and Swala (PAEM) Limited, the transaction related to acquisition of Class A common shares in PAE PanAfrican Energy Corporation. The transaction involved selling of 40% Class A common shares to the Would-be Acquirer. The Transaction was planned to be implemented in three tranches whereby the first tranche involved acquisition of 7,933 shares, second tranche involved 12,067 shares and the third tranche involved 20,000 shares at a consideration of USD 25,782,250, USD 39,217,750 and USD 65,000,000 respectively.

6.3 Description of the Industry and the Market

6.3.1 Product Market

In defining the product market, the Complainant has considered the main activity which the 5th Respondent, a Tanzanian subsidiary, carries out in Mainland Tanzania. The 5th Respondent has the operating rights to the Songo Songo gas field in Lindi region.

In 1991 the 5th Respondent acquired the Songo Songo lease and in June 2004 the first delivery of natural gas flowed from Songo Songo Island by marine and land pipeline and for the first-time power was being generated in Tanzania using a natural gas fired turbine generator. [14] The project is the first gas to power project in East Africa.

The 5th Respondent supplies gas that fuels more than 40% of Tanzania's total power generation and sustains 40 major industries in Dar es Salaam. The Company also supplies Compressed Natural Gas (CNG) to a growing number of domestic vehicles, public transport vehicles and to major hotels.[15]

The product market is therefore defined production and distribution of industrial natural gas and natural gas based electrical power.

6.3.2 Geographical Market

The area under consideration is the whole of Mainland Tanzania.

6.3.3 Relevant Market

The relevant market is therefore defined as production and distribution of industrial natural gas and natural gas based electrical power in Mainland Tanzania.

6.4 Market Structure and Concentration

The structure of the market of upstream petroleum sector in general is served with handful of Multinational companies. Various companies, in collaboration with TPDC are holders of exploration licenses in various blocks. 20 wildcat exploration and 8

[14] Pan African Energy Tanzania - Home (visited on 4th June, 2022 at 11:54 hrs).
[15] Ibid.

development wells have been drilled in a 222,000 square kilometre area, with participating companies such as Shell/BG Group, Equinor, Ophir Energy Plc (with its subsidiary Ophir East Africa Ventures Limited), Pavilion Energy Pte Limited and RAK Gas LLC. Others are the **4th Respondent**, Maurel Exploration Production Tanzania Limited, The Would-be Target Firm, Dodsal Resources & Mining Itingi (Tanzania) Pvt Limited and Heritage Oil Tanzania Limited.

In the past years, in exploration stage, several companies made discoveries of natural gas in the relevant market. These include

(i) Ophir and BG Group which announced the discoveries of approximately 16 to 17 trillion cubic feet of natural gas across Blocks 1, 3 and 4 offshore Tanzania.

(ii) Equinor which announced in March 2015 its eighth discovery in Block 2 offshore Tanzania of 1.0 to 1.8 trillion cubic feet, bringing the total of volumes up to approximately 22 trillion cubic feet in Block 2.

(iii) Dodsal, the Dubai based company which announced in March 2016 an estimated discovery of 2.7 trillion cubic feet of natural gas in the Ruvu Basin.

(iv) Helium One, Oxford and Durham Universities, which announced in late June, 2016 the discovery of a 54 billion cubic feet deposit of helium in one part of the Tanzanian East African Rift Valley.

Of those that have discovered natural gas, three companies are currently active in production and supply of natural gas through Songo Songo pipeline and Trans-National Pipeline that both run from the southern part to Dar es Salaam plant facilities. In June 2004 The Would be Target Firmwas the first company to deliver natural gas flowed from Songo Songo Island by marine and land pipeline and for the first-time power was being generated in Tanzania using a natural gas fired turbine generator. In fact, the project was the first gas to power project in East Africa. To date, the Would-be Target Firm supplies natural gas that fuels more than 40% of Tanzania's total power generation (in Ubungo power plants) and sustains 40 major industries in Dar es Salaam. The

Company also supplies Compressed Natural Gas (CNG) to a growing number of domestic vehicles, public transport vehicles and to major hotels.

Mnazi Bay, which is 756 squares Kilometre, owned by Wentworth Resource Plc and operated by Maurel and Prom in joint venture, is located at the adjacent of the Ruvuma PSA and produces currently 85.4 billion of standard cubic feet (Bscf) of gas that fed trans-national pipeline to Dar es Salaam[16].

The Maurel et Prom which has significant interest in Ruvuma PSA, is currently producing natural gas in its Kiliwani North well with its gross contingent gas estimated at 28 Bscf of gas. Ntorya Discovery which is under appraisal and is subject to the development in completion of the proposed transaction has potential estimates of 70 Bscf of gas[17].

Table 3: Market Structure and Concentration for the Year 2017

Sn	Name of Company	Industrial Gas Market	Natural Gas Electrical Power Market
1.	PanAfrican Energy Tanzania Limited	100%	40%
2.	Maurel et Prom	0%	29%
3.	Wentworth Resources	0%	19%
4.	Tanzania Petroleum Development Corporation	0%	12%
	TOTAL	**100%**	**100%**

Source: Swala Oil and Gas (Tanzania) Plc submissions, 2022.

Table 3 above shows that during the year 2017, being the time when the 1st, 2nd, 3rd, 4th and 5th Respondents executed a notifiable merger contrary to section 11 (2) of the FCA,

16 Extracted from the Mnazi Bay reserve assessment report as at 31st December, 2018

17 http://aminex-plc.com/tanzaniaOverview.aspx

The Would be Target Firmhad market share of 100% and 40% in the market for industrial gas and electrical power respectively. In other words, PanAfrican Energy Tanzania Limited had a dominance position in all two market segments as provided under section 5 (6) (b) of the FCA.

In establishing whether the transaction strengthened dominance position in the relevant market, FCC has applied HH Index in each market segment namely distribution of industrial natural gas, electrical power and power generation as indicated hereunder.

6.4.1 Industrial Natural Gas Market

Table 4: Pre and Post Merger Market Share of the Producer and Supplier of the Industrial Natural Gas in the Relevant Market as at 31st December, 2017

Sn	Name of the Company	Industrial Gas Market	Market Concentration (HHI)	
			Pre-Merger	Post-Merger
1.	PanAfrican Energy Tanzania Limited	100	10,000	10,000
		100%	**10,000**	**10,000**

Source: Swala Oil and Gas (Tanzania) Plc submissions, 2022.

Based on the information in **Table 4**, the market for the production and supply of raw gas is currently served by one company as indicated by the HHI calculation which is 10,000 in pre-merger scenario and HHI of 10,000 in post-merger scenario. Delta which is difference between HHI Post Merger and HHI pre-merger is 0 suggesting that, the concentration in the market segment for production and supply of industrial natural gas remained unchanged. Therefore, the transaction in question did not strengthen the dominance position of the target firm in Mainland Tanzania.

6.4.2 Natural Gas Based Electrical Power Market

Table 6: Pre and Post-Merger Market Share of the Producer and Supplier of the Natural Gas Electrical Power as at 31st December, 2017

Sn	Name of the Company	Market shares	Market Concentration (HHI)	
			Pre-Merger	Post-Merger
1.	PanAfrican Energy Tanzania Limited	40%	1,600	1,600
2.	Maurel et Prom	29%	841	841
3.	Wentworth Resources	19%	361	361
5.	Tanzania Petroleum development Corporation	12%	144	144
		100%	**2,946**	**2,946**

Source: Swala Oil and Gas (Tanzania) Plc submissions, 2022.

Based on the information in Table 6, the market for the production and supply of electrical power is highly concentrated. It is, currently served by four companies with HHI fiugures of 2,946 in pre-merger scenario and HHI figure of 2,946 in post-merger scenario. Delta which is difference between HHI Post Merger and HHI pre-merger is 0 suggesting that, the concentration in the market segment for production and supply of raw gas remained unchanged. Therefore, the transaction in question did not strengthen the dominance position of the target firm in Mainland Tanzania.

6.5 Effects of the Acquisition

6.5.1 The Prohibition Test

Pursuant to Section 11(1) of the FCA, a merger is prohibited if it creates or strengthens a position of dominance in a market. Therefore, the test is whether the post-merger firm will result into either creation of a dominant position or strengthening the existing dominant position. To understand what a dominant position is, section 5 (6) of the FCA, provides that a firm will be considered to have a dominant position if both (a) and (b) apply:

(a) *Acting alone the post-merger firm can profitably and materially restrain or reduce competition in the market for a significant period of time; and*

(b) *The post-merger firm's share of the relevant market exceeds 35 per cent.*

The prohibition test is employed in the two segments of the relevant market so as to shape the verdict of the merger application. The analysis is as provided hereunder.

6.5.2 Unilateral Effects

Generally, the issue to be established in this part of analysis is whether the resulting firm will be able to unilaterally exercise market power through raising prices, reducing output, quality or variety in a bid to gain unjustifiable profits. This is particularly provided for in Section 5 (6) (a), but is read together with Section 5 (6) (b), for this case both (a) and (b) must apply.

Based on the analysis under paragraphs 7.4.1, 7.4.2 and 7.4.3 hereinabove, it is clear that said merger transaction did not strengthen the position of dominance of the 56th Respondent in the relevant markets.

FCC concludes that, since pre and post-merger scenarios remained the same for both perspectives, therefore, the merger did not strengthen the 5th Respondent's position of dominance in the relevant market.

6.6 Conclusion on the Ex-Post Merger Assessment of the Alleged Un-Notified Merger Occasioned by the 1st, 2nd, 3rd, 4th And 5th Respondents

(i) The 1st, 2nd, 3rd, 4th and 5th Respondents did not execute a prohibited merger contrary to section 11 (1) of the FCA. However, this fact does not exonerate the 1st, 2nd, 3rd, 4th and 5th Respondents from their obligation under Section 11 (2) and (5) of the FCA to have the merger notified to the Commission[18].

[18] The requirement to notify the transaction which meets the threshold was emphasized in the decision of the Fair Competition Tribunal (FCT), in *Tanga Fresh v Fair Competition Commission, FCT Appeal No. 5 of 2014, on page 49 (Unreported)*), where the Hon. Tribunal held:

(ii) The relevant market is defined as the production and distribution of industrial gas, electrical power and power generation.

(iii) The pre- and post-merger market concentration (HHI) figures are above 2500 in the relevant market. However, the delta is 0 and therefore there is no likelihood for the post-merger scenario to have adverse effects to competition in the relevant market.

(iv) Pre- and post-merger scenarios will remain the same for both perspectives of Section 5 (6) (a) and (b) and thus having no possibility of creating or strengthening a position of dominance in the relevant market.

7.0 PROPOSED PENALTIES AND REMEDIAL ACTIONS

7.1 Imposition of a Penalty

Rule 28 of the Competition Rules, 2018 provides that:

"The Commission in imposing fines stipulated under section 60 or any provision of the act shall have regard to: -

(a) the nature and extent of non-compliance or violation;

(b) the wrongful gain or unfair advantage derived as result of the non-compliance or violations;

(c) the degree of harassment caused to any person(s) as a result of the non-compliance or violation; or

(d) *the repetitive nature or continuance of the non-compliance or violation."*

Consequently, the Complainant intends to impose an administrative penalty/fine upon the 1st, 2nd, 3rd, 4th and 5th Respondents as stipulated under section 60 (1) of the FCA. In imposing such an administrative fine, the Complainant has considered the following factors as stipulated under Rule 28 of the Competition Rules.

"[W]e would like to emphasize that irrespective of the outcome of the assessment of the implemented merger, that violation of the standstill obligation of non-notification of a merger constitutes a serious breach of the FCA....."

7.1.1 Nature and Extent of the non-compliance or violation

The nature of the infringements committed in this case is failure to comply with section 11 (2) on the part of the 1st, 2nd, 3rd, 4th and 5th Respondents. The 1st, 2nd, 3rd, 4th and 5th Respondents proceeded to put the merger into effect without respecting the provisions of section 11 (2) of the FCA (read together with Rule 33 (1) and (2) of the FCC Procedure Rules and the Threshold Order).

The Commission considers that the underlying principles in these provisions are in themselves very important and that their violation undermines the effectiveness of the merger control in Tanzania. Indeed, the obligation of prior notification of a merger which falls within the scope of the FCA and its rules allows the Commission to prevent companies from carrying out a merger before it takes a final decision, thereby, avoiding irreparable and permanent harms to competition in the given relevant market.

7.1.2 Gravity of the infringements

The requirement to notify a merger is a *"standstill obligation"* under the FCA. In the decision of the Fair Competition Tribunal (FCT), in *Tanga Fresh v Fair Competition Commission, FCT Appeal No. 5 of 2014, on page 49 (Unreported)*), the FCT was clear on this point that breach of a standstill obligation is a serious issue which may attract a fine of up to 10% of the aggregate turnover of the undertakings concerned in the violation.

7.1.3 Duration of the infringement

The case at hand involves non-compliance with the notification obligation on the part of the Respondent as stipulated under section 11 (2) of the FCA. This infringement of the FCA took place in 2017 and was a one-time-off incident. Thus, it is clear that this is not a continuing infringement.

7.1.4 The Degree of Harassment

There have been no reported incidents of harassment to FCC staff in the course of investigating this complaint.

7.2 Calculation of the Administration Fines

Section 60 (1) of the FCA requires where the Commission is to impose a fine, the fine to be imposed should not be less than 5% and not exceeding 10% of Respondent's annual turnover.

Furthermore, according to Rule 32 (1) of the Competition Rules, the annual turnover referred to under section 60 (1) of the FCA shall be the total sales of goods or services made by the firm in-:

(a) the last full business year of its participation in the infringement; or
(b) The year reflected in the last audited accounts of the firm.

In the ordinary happening of events, where there is a continuing infringement, the Commission will use the year reflected in the last audited accounts of the firm as its benchmark. On the other hand, where it is a one-time-off incident as the case at hand, then it is wise to use the last full business year of a firm's participation in the infringement as the benchmark for calculating the annual turnover. The Complainant has noted however, that, any of the factors listed under Rule 28 and/ or Rule 30 of the Competition Rules can be used to determine whether there has been severe harm to competition as a result of the infringement. In that instance, severe punishment will be meted out for the purpose of deterring any other potential infringement of the law in the future.

We have considered that the infringement which the 1st, 2nd, 3rd, 4th and 5th Respondents have committed is about "non-notification" of a notifiable merger, which occurred on 29th December, 2017 and the same is not a continuing offence. This implies that, the parties to the merger enjoyed the benefit of the merger in 2018 as the transaction was effected at the end of the year 2017. Thus, in determining the appropriate proposed remedial action and taking into account Rules 28 and 32 (1) of the Competition Rules, the Complainant has resolved to calculate the proposed fines based on the last full business year of the Respondent's participation in the infringement, i.e. 2018.

7.3 Proposed Remedial Actions

Non-notification of a merger or acquisition is the violation of the FCA. The importance of notification was emphasised by the Fair Competition Tribunal in **Tanga Fresh v FCC, Tribunal Appeal No.5 of 2014**, that notification is 'a standstill obligation' to be complied by the merging parties. The Tribunal had the following to say (at page 51 of the Judgment)

> *"[W]e would like to emphasize that irrespective of the outcome of the assessment of the implemented merger, that violation of the standstill obligation (non-notification of a merger) constitutes a serious breach of the FCA which attracts imposition of fines. ..... if they fail to notify a merger prior to its implementation or if they otherwise breach the standstill obligation by implementing the merger prior to it having been cleared by the FCC."*

The Complainant is of the position that, if merger transactions are not controlled, there is a high possibility of the market to suffer from mergers that create or strengthen position of dominance, which its effect or likely effect is to appreciably distort, prevent or restrict competition in the relevant market. This position can be drawn from the takeover of the business of Kibo Breweries Limited (KBL) by East African Breweries Limited (EABL) in 2003 whereby assets including machines of the former were bought by the later and the former exited the market. Also, the same scenario happened when assets including brands of Iringa Tobacco Company (ITC) were acquired by Tanzania Cigarette Company (TCC) and Japanese Tobacco International (JTI) in 2005 whereby the ICT was shut down and its operations forever ceased as a result of the non-notification. In both cases consumer choices, loss of revenue to the Government and loss of jobs were massively occasioned.

Based on the above analysis, and having established that the Respondents contravened the provisions under FCA; the Commission intends, subject to the Respondents' written or oral representation in response to this 'Provisional Findings', to

issue a Compliance Order that requires the Respondent to execute the following remedial actions:

(i) Pursuant to section 60 (1) read together with section 58 (9) of the FCA and Rules 28 and 32 of the Competition Rules, the Commission intends to require the following:

a. The 1st Respondent to pay a monetary administrative fine amounting to **USD 177,712.20** which is equal to **5 percent** of annual turnover **(USD 2,954,244)** of the 1st Respondent as per its audited accounts for the year ended 31st December, 2018 (**FCC-7**).

b. The 2nd Respondent to pay a monetary administrative fine amounting to **USD 2,888,300** which is equal to **5 percent** of annual turnover (**USD 57,766,000**) of the 2nd Respondent as per its audited accounts for the year ended 31st December, 2018 (**FCC-6**).

c. The 3rd Respondent to pay a monetary administrative fine amounting to **USD 2,888,300** which is equal to **5 percent** of annual turnover (**USD 57,766,000**) of the 2nd Respondent's audited accounts for the year ended 31st December, 2018.

d. The 4th Respondent to pay a monetary administrative fine amounting to **USD 137,716.00** which is equal to **5 percent** of annual turnover (**USD 2,754,320**) of the 4th Respondent as per its audited accounts for the year ended 31st December, 2018 (**FCC-8**).

e. The 5th Respondent to pay a monetary administrative fine amounting to **USD 2,888,300** which is equal to **5 percent** of annual turnover (**USD 57,766,000)** of the 2nd Respondent as per its audited accounts for the year ended 31st December, 2018.

(ii) Pursuant to section 58 (1) and (3) of the FCA, the 1st, 2nd, 3rd, 4th and 5th Respondents be issued with a Compliance Order requiring them to refrain from any future conduct which is against the FCA.

(iii) Pursuant to section 58 (1) and (6) of the FCA, the 1st, 2nd, 3rd, 4th and 5th Respondents be issued with a Compliance Order requiring them to publish in 2 widely circulating Newspapers (1 Swahili and 1 English) a ¼ page Public Notice bearing the contents of paragraph 7.3. (ii) hereinabove.

(iv) The contents of the said Public Notice in paragraph 8.3.1 (iii) hereinabove shall be agreed upon by the Complainant and the 1st, 2nd, 3rd, 4th and 5th Respondents and published by the Complainant at the expense of the said Respondents.

(v) Pursuant to section 58 (1) and (6) of the FCA read together with section 76 (2) and Rules 20 (7) and 53 of the Competition Rules, 2018; the 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally, shall within seven (7) days from the date of issuance of these Provisional Findings; produce and submit to the Complainant, a Non-confidential version of these Provisional Findings intended for use by the interested Third Parties to the instant matter. Upon expiry of the said seven days without response from the 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally; the Complainant shall proceed to issue the Provisional Findings as they are, without the annexed documents.

(vi) Pursuant to 58 (1) and (2) of the FCA, read together with Rule 68 (2) of the Competition Rules, the 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally shall be liable to pay a sum of TZS 100,000,000 equal to the amount that would have been paid by the 1st, 2nd, 3rd, 4th and 5th Respondents if the merger was notified to the Commission.[19]

[19] According to the 3rd Respondent's 2018 Annual Report, the 3rd Respondent alone had a turnover equals to USD 60,832,00 equivalent to TZS 136,339,111,680 (1USD = TZS 2241.24 as per BoT exchange rate as at 31st December 2017).

(vii) Pursuant to 58 (1) and (2) of the FCA, read together with Rule 24 (2) (d) and 42(14) (a)(i) of the Competition Rules, the 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally be issued with Merger Clearance Certificate (Form FCC. 18) subject to compliance with the orders in paragraphs 7.3 (i), (ii), (iii), (iv), (v) and (vi) hereinabove.

(viii) Any other orders which the Commission may deem fit and proper to impose.

8.0 THE RESPONDENTS' RIGHT TO ORAL HEARING, SETTLEMENT AND RESPONSE

8.1 The Respondents' Right to Oral Hearing

The 1st, 2nd, 3rd, 4th and 5th Respondents MAY exercise their right to be orally heard by **MAKING AN APPLICATION** to that effect pursuant to **Rule 22** of the Competition Rules, 2018. The said application may be made in the course of **responding to these Provisional Findings as contemplated under paragraph 8.3 hereinbelow.**

8.2 The Respondents' Right to Settlement

The 1st, 2nd, 3rd, 4th and 5th Respondents have the right to utilise the avenue before a final decision is arrived. If the 1st, 2nd, 3rd, 4th and 5th Respondents so elect, an application in that regard ought to be filed to the Commission pursuant to **19 (5)** and **21** of the Competition Rules, 2018.

8.3 The Respondents' Right to Response

In the event the 1st, 2nd, 3rd, 4th and 5th Respondents opt to respond to these Provisional Findings in terms of Rules 19 (3), 20 (1) and 67(2) of the Competition Rules, 2018; the said Respondents are hereby ORDERED to file, their written submission in reply to these Provisional Findings within **28 days** from the date the 1st, 2nd, 3rd, 4th and 5th Respondents produce and submit to the Complainant a Non-confidential version of these Provisional Findings as per Rule 20(7) of the Competition Rules, 2018.

The Commission hereby issues this PFs to the 1st, 2nd 3rd, 4th and 5th Respondents.

Signed, dated, sealed and issued on this 05 day of AUGUST 2022.

We, the undersigned Members of the Commission have so DECIDED and ORDERED.

S/N	NAME	DESIGNATION	SIGNATURE
1.	Dr. Aggrey K. Mlimuka	Chairman	
2.	Mr. Fadhili J. Manongi	Commissioner	
3.	Dr. Godwin O. Osoro	Commissioner	
4.	Mr. Jenard L. Bahati	Commissioner	
5.	Mr. William E. Erio	Commissioner	

Dated and delivered at Dodoma under my hand and Seal of the Commission on this 05 day of AUGUST 2022.

Laiton S. Mhesa

Secretary of the Commission

To be served upon the Respondents by Order of the Commission

TO BE SERVED UPON:

1. Swala (PAEM) Limited,
   C/o Swala Oil and Gas (Tanzania) Plc,
   2nd Floor, Oyster Plaza,
   Plot No. 1196, Osterbay, Haile Selassie Road,
   P.O. Box 105266,
   DAR ES SALAAM.

2. Orca Exploration Group Inc.,
   C/o PanAfrican Energy Tanzania Limited
   Oyster Plaza Building, 5th Floor,
   Haile Selassie Road,
   P.O. Box 80139,
   DAR ES SALAAM.

3. PAE PanAfrican Energy Corporation
   C/o PanAfrican Energy Tanzania Limited
   Oyster Plaza Building, 5th Floor,
   Haile Selassie Road,
   P.O. Box 80139,
   DAR ES SALAAM

4. Swala Oil and Gas (Tanzania) Plc,
   2nd Floor, Oyster Plaza,
   Plot No. 1196, Oyster Bay, Haile Selassie Road,
   P.O. Box 105266,
   DAR ES SALAAM.

5. PanAfrican Energy Tanzania Limited
Oyster Plaza Building, 5th Floor,
Haile Selassie Road,
P.O. Box 80139,
DAR ES SALAAM.