



# COMPETITION ALERT

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### SECOND THROUGH THE DOOR WINS IMMUNITY

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# MEGABREW MERGER APPROVED BY TRIBUNAL SUBJECT TO CONDITIONS

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**On 30 June 2016, the Competition Tribunal (Tribunal) approved the large merger between Anheuser-Busch Inbev (AB Inbev) and SABMiller, subject to conditions.**

The conditions imposed by the Tribunal, which are designed to remedy competition and public interest concerns arising from the merger between the world's largest brewers, are largely similar to those that were proposed by the Competition Commission, and are the result of extensive consultation with the Minister of Economic Development.

One of the most notable differences between the conditions imposed by the Tribunal and those proposed by the Commission relates to employment. Whereas the Commission sought an evergreen ban on merger-related retrenchments, the Tribunal relaxed this condition somewhat by replacing the outright ban with a five year ban on merger-related retrenchments, after which the onus will be on a retrenched employee to show that their retrenchment was merger-related, rather than operational.

The condition relating to the provision of fridge space was also tweaked so that tavern owners and retailers who are supplied with fridges by the merged entity will be free to allocate 10% of the fridge space to cider products of South African rivals for a period of five years. This is over and above the perpetual obligation on the merged entity to allow the allocation of 10% of the space in fridges and coolers supplied by it for the products of smaller rivals with sales of less than 200,000 hectolitres per year.

The merger conditions also detail how the R1 billion AB Inbev investment fund will be allocated, with amounts of R610 million, R200 million and R190 million being earmarked for agricultural development, enterprise development and social development (including clean energy initiatives), respectively. The fund will be managed by an implementation board consisting of an equal number of AB Inbev and government appointees.

The Tribunal's conditional approval of the merger means that the transaction has now been approved by competition authorities in 17 jurisdictions, including the European Commission, Australia, India, Botswana, Kenya and Namibia. Approval by the United States and Chinese competition authorities remains outstanding.

The vast swathe of conditions imposed will provide ongoing compliance headaches for the merged entity. It remains to be seen to what extent some of the conditions (especially those dealing with local procurement and maintenance of headcount) will become standard policy, or if they will be largely reserved for "megamergers" involving foreign takeovers of large South African assets.

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*George Miller*

# SECOND THROUGH THE DOOR WINS IMMUNITY

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In February 2007, the Commission granted immunity to Premier Foods Proprietary Limited (Premier) for its collusive involvement in the maize milling market, as the first applicant through the door. In November 2007, the Commission also granted immunity to Tiger, as the second applicant through the door. In October 2009, the Commission explained that its investigation had revealed that other firms were also involved in colluding in the maize milling market, and a complaint was subsequently initiated against Blinkwater and others. In March 2010, the Commission referred the complaint against Blinkwater and others to the Tribunal.

Among other things, Blinkwater argued that since Premier had already been granted immunity, it was *ultra vires* the Commission's own policy to grant immunity to Tiger. Blinkwater contended that the Commission's case against it was exclusively based on information submitted by Tiger under the corporate leniency policy (CLP); and the referral against it to the Tribunal would not have materialised had the Commission not granted immunity to Tiger.

On the question as to whether the Commission acted *ultra vires*, the Tribunal noted that Premier was not able to provide the Commission with complete information to allow it to proceed against the respondent firms, and Tiger's evidence was not secondary to that of Premier's – it was the primary evidence in respect of some arrangements without which, prosecution would have not been possible. The Tribunal held that the Commission acted rationally and most importantly, the Commission had an important objective: to prosecute as many cartels as possible in the matter - and for that matter it needed to have further evidence that Premier could not supply, justifying leniency to Tiger. The Tribunal concluded that a rational connection was established between the "means" and the "end".

In coming to its decision, the Tribunal also considered an OECD document from October 2012 which noted that there is a general consensus on the benefits of a mechanism for granting subsequent applicants immunity both in terms of obtaining additional evidence and relieving the investigative burden of pursuing a case; a subsequent applicant can support an investigation by corroborating and completing the information on the cartel provided by the immunity applicant.

# SECOND THROUGH THE DOOR WINS IMMUNITY

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By way of comment, it should be noted that the Commission retains a discretion to award leniency and with "first to the door" being a key part of the policy, there is no guarantee that leniency will be granted to subsequent applicants. In any event, information submitted to the Commission by cartel members, whether leniency is granted or not, is admissible and it is difficult to see how Blinkwater could have expected to escape prosecution on such a technical basis.

In the 2014/2015 financial year, the Commission carried over 18 CLP applications from the previous year and received 121 new CLP applications, thereby managing a total of 139 CLP applications. On the one hand, it stands to reason that many more CLP applications may follow suit in light of the Tribunal's decision; on the other hand, it remains to be seen the extent to which the introduction of criminal liability on cartel conduct will impact the application of the CLP and its effectiveness in detecting and prosecuting hardcore cartels in South Africa.

*Naasha Loopoo*



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