



COMPETITION ALERT

IN THIS ISSUE

MEGABREW MERGER APPROVED BY TRIBUNAL SUBJECT TO CONDITIONS

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

SECOND THROUGH THE DOOR WINS IMMUNITY

In June 2016, the Competition Tribunal (Tribunal) dismissed an application by Blinkwater Mills Proprietary Limited (Blinkwater) to set aside the conditional immunity granted by the Competition Commission (Commission) to Tiger Consumer Brands Limited (Tiger) along with the subsequent referral. The Tribunal held that the Commission's objective is to prosecute as many hardcore cartels as possible and if it requires further evidence that the first applicant through the door cannot supply, it can grant leniency to a second applicant.

MEGABREW MERGER APPROVED BY TRIBUNAL SUBJECT TO CONDITIONS

The conditions imposed by the Tribunal 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.

The Tribunal's conditional approval of the merger means that the transaction has now been approved by competition authorities in 17 jurisdictions.



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.

.....
George Miller

SECOND THROUGH THE DOOR WINS IMMUNITY

In November 2007, the Commission also granted immunity to Tiger, as the second applicant through the door.

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.



In June 2016, the Competition Tribunal (Tribunal) dismissed an application by Blinkwater Mills Proprietary Limited (Blinkwater) to set aside the conditional immunity granted by the Competition Commission (Commission) to Tiger Consumer Brands Limited (Tiger) along with the subsequent referral. The Tribunal held that the Commission's objective is to prosecute as many hardcore cartels as possible and if it requires further evidence that the first applicant through the door cannot supply, it can grant leniency to a second applicant.

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

CONTINUED

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.

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



TOP RANKED
GLOBAL CHAMBERS AND PARTNERS
2016

Cliffe Dekker Hofmeyr

BAND 2
Competition/Antitrust

The LEGAL 500

2014-2016

Ranked Cliffe Dekker Hofmeyr

TIER 2 FOR COMPETITION

2015 RANKED #1 BY DEALMAKERS FOR M&A DEAL FLOW 7 YEARS IN A ROW
1st by General Corporate Finance Deal Flow

2014 1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance Deal Flow

2013 1st by M&A Deal Flow
1st by M&A Deal Value
1st by Unlisted Deals - Deal Flow

2012 1st by M&A Deal Flow
1st by General Corporate Finance Deal Flow
1st by General Corporate Finance Deal Value
1st by Unlisted Deals - Deal Flow

DealMakers

2015

1ST
South African law firm and 12th internationally for Africa & Middle East by deal value

2ND
South African law firm and 2nd internationally for Africa & Middle East by deal count

1ST
South African law firm and 15th internationally for Europe buyouts by deal value

NO.1

6

YEARS IN A ROW
for client service excellence

#6YearsInARow

OUR TEAM

For more information about our Competition practice and services, please contact:



Chris Charter
National Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com



Albert Aukema
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com



Nazeera Mia
Senior Associate
T +27 (0)21 481 6337
E nazeera.mia@cdhlegal.com



Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com



Naasha Loopoo
Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com



Susan Meyer
Director
T +27(0)21 481 6469
E susan.meyer@cdhlegal.com



George Miller
Associate
T +27 (0)21 481 6356
E george.miller@cdhlegal.com



Natalie von Ey
Director
T +27 (0)11 562 1333
E natalie.von_ey@cdhlegal.com



Kitso Tlhabanelo
Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 1188/JULY



LinkedIn

