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COMPETITION LAW ALERT

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A pint of trouble: COMESA'S beer manufacturer investigation commences

On 24 June 2021, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) announced the commencement of an investigation into potential restrictive and prohibited practices, under Articles 16 and 19 of the COMESA Competition Regulations (Regulations), undertaken or engaged in by several beer manufacturing companies operating in the Common Market.



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Evolution of the merger filing requirements: What you need to know about the proposed changes

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On 25 March 2021 the Minister of Trade, Industry and Competition published an invitation for commentary on, among other things, the Competition Commission merger filing forms. The proposed changes to the merger forms require detailed submissions by merger parties on substantive market-related aspects where a merger gives rise to horizontal overlaps and a significant combined market share, and on public interest considerations which address the recent amendments made to the Competition Act 89 of 1998 (Act).

It is evident from the proposed changes to the merger forms, and a recent decision emanating from the competition authorities, that greater focus will fall on section 12A(1A) of the Act, which provides that competition authorities "must also determine whether the merger can or cannot be justified on substantial public interest grounds."

The change to the CC4(1) form, which was previously used to give employees and trade unions sufficient information in order to help them decide whether or not to participate in the merger proceedings, now encompasses a whole new section dealing with the effect of a proposed merger on all of the public interest concerns outlined in section 12A(3) of the Act.

This proposed section encompasses questions requiring the merging parties to deal with, for example, the proposed merger's "impact on significant social projects and upliftment programs that contribute to upliftment of the region or sector" as well as its "impact on local resources or inputs, for example, whether the merger results in the movement or diversion of local resources to international markets or the creation of opportunities to benefit local resources".

These types of questions will require the merging parties to provide extensive detail in their merger filings. This will involve an analysis of the various public interest factors in order not to jeopardise the merger approval.

The proposed amendments include a section dealing with the effects of a merger on the "ability of small and medium businesses (SMEs), or firms controlled or owned by historically disadvantaged persons (HDP), to effectively enter into, participate in or expand within the market" and a section dealing with the effect of a proposed merger on "the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market".

Under the proposed amendments, merging parties are required to provide detailed submissions on how the proposed merger will raise or lower the barriers to entry for SMEs or firms owned or controlled HDPs and restrict or promote dynamic competition with respect to SMEs and firms owned or controlled by HDPs that exert a competitive constraint in relevant markets.

Under the proposed amendments dealing with the promotion of a greater spread of ownership, merging parties are required to make submissions on whether the proposed merger increases or decreases the levels of ownership by HDPs and workers in firms in the market. These should take into account, among other things, factors such as the broad-based black economic empowerment (B-BBEE) status of the seller, how the B-BBEE status of the purchaser will be affected by the proposed transaction, employee share schemes, board representation, etc.

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An important consequence of the proposed amendments is that the merger filing process in South Africa will become more rigorous.

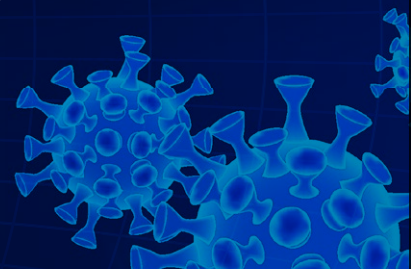
An important consequence of the proposed amendments is that the merger filing process in South Africa will become more rigorous and the merging parties will be required to apply their minds to complex public interest considerations before submitting a complete merger filing.

Although an exact date on which the new forms will be published and implemented has not yet been announced by the minister, merging parties would be well advised to pre-emptively consider the types of issues that have been identified in the draft forms in order to avoid unnecessary delays in obtaining merger approval.

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A pint of trouble: COMESA'S beer manufacturer investigation commences

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On 24 June 2021, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) announced the commencement of an investigation into potential restrictive and prohibited practices, under Articles 16 and 19 of the COMESA Competition Regulations (Regulations), undertaken or engaged in by several beer manufacturing companies operating in the Common Market.

Article 16 of the Regulations prohibits all agreements which have the object or effect of preventing, restricting or distorting competition in the Common Market, and which may affect trade between member states. Article 19 prohibits agreements or arrangements between competitors which, among others, allocate customers and markets within the Common Market.

The investigation, a first for the CCC in the beer market, will scrutinise practices that allegedly impede cross-border trade by implementing marketing structures that may serve to deny consumers benefits of competition in the alcoholic beverages industry across the region. The CCC noted that the manufacturers may have market allocation arrangements among themselves or territorial restrictions in their distribution agreements with third-party independent distributors. The CCC's concern is that such market allocation or territorial restrictions reinforce national borders and, in turn, hinder trade between member states, thereby restricting competition in the Common Market.

Drawing on the South African experience, in 2014 a similar investigation into market division and price discrimination in the beer production market was conducted by the Competition Commission (Commission), as outlined in *Competition Commission v South African Breweries Limited and Others* [2014] 2 CPLR 339 (CAC). Herein, it was alleged that South African Breweries

Limited (SAB) and its appointed distributors entered into agreements which prevented the distributors from distributing products other than SAB products, at prices and with distribution discounts different from those offered to independent distributors, thereby lessening competition in contravention of the Competition Act 89 of 1998, as amended (Competition Act). The Competition Appeal Court (CAC) found that the arguments raised by the Commission were insufficient in proving a substantial prevention or lessening of competition (to the detriment of consumers of other distributors or consumers in general). The CAC also noted, among other things, that one of the Commission's submissions was incorrectly rooted in the assertion that any restraint imposed by a firm goes on to restrain competition. The matter was ultimately dismissed by the CAC.

More recently, *albeit* in the cement market, the CAC dismissed an appeal by the Commission against an order by the Competition Tribunal finding the first respondent, NPC Cimphor (Pty) Ltd, had not contravened the Competition Act in *Competition Commission of South Africa v NPC-Cimpor (Pty) Limited and Others* [2020] 2 CPLR 524 (CAC). The CAC found, among other things, that a sufficient case had not been proven linking the first respondent to the alleged market allocation conduct. This emphasises that any finding of prohibited market allocation requires a thorough and well-evidenced investigation.

The CCC specified that the commencement of its investigation in no way presupposes a contravention of the Regulations. We await the findings of the CCC and its approach (more specifically whether or not same will be aligned to that adopted in South Africa) should formal allegation(s) of contravention be supported by the outcome of the investigation.

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