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COMPETITION ALERT

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COMMISSION RAISES A (CONDITIONAL) GLASS TO AB INBEV/SABMILLER MERGER

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THE LAST DAYS OF THE CD AND DVD MARKET AND THE FAILING FIRM DEFENCE

History teaches us that all good things come to an end. The CD and DVD manufacturing and replication market appears to be in its last days. Of course there is always a positive side of things, with the demise of this industry allowing the Competition Tribunal to expand our jurisprudence on the failing firm defence.

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AB Inbev agreed to establish a fund, to which it will contribute R1 billion over a five year period for investments in South Africa.

The conditions are aimed at addressing alleged competition and public interest concerns raised by various stakeholders, including suppliers, competitors and labour unions during the Commission's lengthy investigation. Among others, the Commission's shopping list of conditions include:

The parties have agreed that the merged entity will sell its 27% interest in JSE-listed Distell within three years of the merger's closing date. Distell enjoys first place in the South African cider market, with SABMiller in second spot. This condition is intended to limit the risk of the exchange of commercially sensitive information between AB Inbev and Distell, who will share common directors post-merger. The Commission also hopes that the removal of AB Inbev's partial ownership of its direct competitor will enhance competition between the two rivals.

Following in the footsteps of the *Walmart/Massmart* precedent, AB Inbev agreed to establish a fund, to which it will contribute R1 billion over a five year period for investments in South Africa, including the development of agricultural outputs (barley, hops and maize); the growth of emerging and black farmers; and other suppliers. AB Inbev also agreed to maintain SABMiller's current ratio of local production of beer and cider, and promises not to depart from the latter's popular policy of maximising local production.

To allay fears of job losses, AB Inbev agreed that there will be no merger-related job losses. This undertaking extends in perpetuity. In addition, the parties agreed to offer employment to employees of DGB (Pty) Ltd - the local distributor of AB Inbev's foreign beers - who may be retrenched if AB Inbev terminates existing distribution arrangements. The merged entity will be given a two-year grace period within which to submit its new BEE plans to maintain black equity participation, with the current scheme being said to mature in 2020.

Craft beer connoisseurs will be pleased that the Commission recommended that AB Inbev be required to continue supplying raw materials such as hops and malt, of which SABMiller is a dominant producer in South Africa, to small brewers. The parties also agreed not to induce or prevent their suppliers from dealing with small brewers. In retail outlets or taverns where the merged entity is the sole supplier of the fridge (a common SABMiller business practice), it will ensure that the retailers or tavern owners are free to allocate at least 10% of the fridge capacity to competitors' products.

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CONTINUED

The merged entity will be the world's largest beer brewer and will brew one in every three beers consumed globally.

It remains to be seen whether the Tribunal hearing will rubber stamp pre-agreed conditions or whether certain issues will become contested. Certain stakeholders have already indicated their intention to intervene in the Tribunal hearing.

Merger approval is still outstanding, but understood to be imminent, in two of the key jurisdictions where the parties operate, namely China and the United States of America.

Upon implementation, the merged entity will be the world's largest beer brewer and will brew one in every three beers consumed globally.

Susan Meyer and George Miller

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History teaches us that all good things come to an end. The CD and DVD manufacturing and replication market appears to be in its last days. Of course there is always a positive side of things, with the demise of this industry allowing the Competition Tribunal to expand our jurisprudence on the failing firm defence.

The facts also showed that if CDT had exited the market, its market share would have been acquired by CTP in any case.

On 16 March 2016, the Competition Tribunal approved, with conditions, a merger between CTP Limited (CTP) and Compact Disc Technologies, a division of Times Media Proprietary Limited (CDT). The transaction involved an acquisition of CDT's digital disc manufacturing and replication business by CTP.

Both CDT and CTP operate in the market for the manufacture and replication of CDs and DVDs and were, at the time of the transaction, the only operators in the market capable of servicing large recording companies. The Commission opposed the merger on the grounds that the merger would substantially lessen competition as the merged entity would become a near monopoly resulting in supra-competitive price increases and adverse terms of trade for customers. It prohibited the merger after the merging parties could not agree with an inflation linked price cap condition proposed by the Commission.

The merging parties argued that CDT was a 'failing firm' in a dying market. The reality for the merging parties was that they operated in a market that was in steep decline and CTP had already lost significant customers. As such, the merger was the only way to save the CDT's business as its current owners had already decided to exit the business. However, the Commission did not accept that the failing firm test had been met because in its view the merging parties did not show that there was no other buyer of the business or that attempts at rationalisation had been made.

On the contrary, the Tribunal identified that CDT had met the requirements of the EU test for failing firms based on, among other things, its recent performance in the market and the steady loss of its customers to CTP over the years. The facts also showed that if CDT had exited the market, its market share would have been acquired by CTP in any case. The Tribunal also stated that the merger would produce certain efficiencies as it would increase the merged entity's capacity to meet demand quickly at times when demand is high in the market such as Christmas time.

The Tribunal approved the merger on, among others, the following conditions: CTP will not make the use of its services to customers as a CD and DVD replicator conditional on the customer using its distribution services; customers are permitted to place minimum orders of between 100 and 300 CDs; CTP may not compel customers to commit to exclusivities in respect of its replication services; and no more than 23 employees of either firm may be retrenched as a result of the merger.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

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