Non-confidential

COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: LM187Oct18

In the matter between

The South African Breweries Pty Ltd — Primary Acquiring Firm

And

Diageo South Africa Pty Ltd — Primary Target Firm

In respect of the license and rights for the manufacture, distribution, marketing and sale of specified brands and rights related to the brands

Panel	: Yasmin Carrim
	: Imraan Valodia
	: Thando Vilakazi
Heard on	: 23 August 2019
Order Issued on	: 5 September 2019
Reasons Issued on	: 7 October 2019

REASONS FOR DECISION

Introduction

[1] On 5 September 2019, the Tribunal conditionally approved the large merger between South African Breweries Pty Ltd ("SAB") and Diageo South Africa Pty Ltd ("Diageo SA") in respect of the licensing and rights relating to specified brands. The conditions are attached marked Annexure [A]. These are the reasons for our approval.

Background

[2] The transaction involved a licensing agreement concluded between SAB and Diageo in terms of which SAB would (i) acquire the rights to manufacture, distribute, market and sell

the Smirnoff and Guinness brands ("Licensed Brands") and (ii) acquire 11 000 Diageo SA coolers ("Licensing Agreement"). Following the Commission's investigation and engagements with the merging parties, the Commission recommended that the transaction be approved subject to conditions.

[3] During the Commission's investigation various third-party customers and competitors of the merging parties had raised concerns. The Minister of Economic Development ("EDD") and the National Union of Food Beverage Wine Spirits and Allied Workers ("NUFBSAW") also filed notices of intention to participate in the proceedings.[1] In light of these concerns, the Tribunal convened a pre-hearing on 2 August 2019 and invited all interested stakeholders to attend if they still had concerns regarding the Commission's recommendations. The only attendee was Distell Limited ("Distell"), a competitor of the merging parties, who indicated its intention to make submissions to the Tribunal regarding the transaction and the conditions imposed. It was agreed that Distell would provide written submissions to the Tribunal and that the merging parties and the Commission would have an opportunity to respond thereto prior to the main hearing.

[4] Distell's submissions received on 15 August 2019 included an economic note prepared by FTI Consulting. Distell accepted the Commission's findings but disagreed with the conditions imposed. To this end, Distell provided the Tribunal with a set of revised conditions as part of its submissions. The merging parties' and the Commission's responses to Distell's submissions were received on 20 August 2019 and 22 August 2019 respectively in which they accepted some of the Distell suggestions but opposed others.

[5] The matter was heard by the Tribunal on 23 August 2019. At the request of the Tribunal the merging parties led two witnesses who could speak to the transaction and address concerns raised by third parties. These witnesses were Kameshan Moodley ("Moodley"), SAB's director of planning and performance management and revenue management, and Craig Price ("Price"), Distell's head of the sales centre of excellence and revenue management.

[1]Although both NUFBSAW and the EDD appear to have initially raised concerns and filed notices of intention to participate with the Commission, they did not respond to the Tribunal's invitation to attend the pre-hearing and did not make any submissions to the Tribunal regarding the transaction and/or the conditions imposed.

Parties to the Licensing Agreement and Activities

Primary Acquiring Firm / Licensee

[6] The primary acquiring firm (or licensee) is SAB, a company incorporated in accordance with the laws of the Republic of South Africa. SAB is controlled by Anheuser-Busch InBev SA/NV ("ABinBev"), a company incorporated in accordance with the laws of Belgium. AB InBev is a public company listed on the Euronext Stock Exchange, with secondary listings on the Johannesburg and Mexico Stock Exchanges. It is not controlled by any firm or shareholder. ABinBev is organised into six geographic areas[2] and controls various firms throughout the world. In South Africa, ABinBev only controls SAB.

[7] Globally, ABinBev has a portfolio of over 500 beer and other beverage brands which comprise global brands, multi-country brands and various local brands. In South Africa, ABinBev, through SAB, brews and distributes a number of well-known beers, flavoured beer and ready to drink ("RTD") products from its own breweries and depots. Relevant to this transaction is SAB's wide portfolio of beer and flavoured alcoholic beverage ("FAB") brands.

[8] In relation to beer, SAB supplies the following beer brands in South Africa: Budweiser, Beck's Blue (alcohol free), Carling Black Label, Castle Lager, Castle Lite, Castle Milk Stout, Castle Milk Stout Chocolate, Corona, Flying Fish (in pressed lemon) and chilled green apple flavours, Flying Fish Chill, Hansa Pilsner, Stella Artois and Newlands Spring. Its flavoured beers include Flying Fish, Flying Fish Chill. Its other RTDs include Brutal Fruit (in various flavours) and Redd's (Redd's original, Redd's Dry, Redd's Carnival Rose and Redd's Bold Crisp variations).

[9] In addition to its beverage operations, SAB also owns the following entities in South Africa: The South African Breweries Hop Farms Pty Ltd, a barley farming company, the South African Breweries Barley Farms Pty Ltd, a barley malting company, the South African Breweries Maltings Pty Ltd as well as a 60% share in Coleus Packaging Pty Ltd, the metal crown (bottle top) manufacturer.

[2] These geographic areas include North America, Middle America, South America, Africa, Europe and Asia-Pacific.

Primary Target Firm / Licensor

[10] The rights in the Licensed Brands are currently held by Diageo SA. The global brand owners of the Licensed Brands are Diageo North America Inc. ("Diageo NA") which owns the Smirnoff Brands and Diageo Ireland which owns the Guinness Brands. Diageo NA and Diageo Ireland license the Licensed Brands exclusively for use in Southern Africa. Diageo NA, Diageo Ireland and Diageo SA (the brand owners of the current licensee) are all wholly owned subsidiaries of plc ("Diageo").

[11] Diageo SA is controlled by Diageo, a British multinational alcoholic beverages company with a primary listing on the London stock Exchange and a secondary listing on the New York Stock Exchange. Diageo is not controlled by any single shareholder. Diageo is a global player in alcoholic beverages with a portfolio comprising spirits, beer and RTD brands in more than 280 countries. Significantly, in South Africa, Diageo offers the RTD Smirnoff brands Smirnoff Storm, Guarana, Spin, Pine Twist and Berry Twist as well as Guinness.

Proposed transaction

[12] The license and rights being acquired from Diageo SA (the target firm / licensor) are the rights to manufacture, distribute, market and sell the following brands in South Africa: i) Smirnoff RTD products including all RTDs related to the Smirnoff brands. In particular, the following: Smirnoff Storm, Guarana, Spin, Pine Twist and Berry Twist ("Smirnoff Brands"); and ii) All Guinness products excluding Guinness Foreign Extra Stout and Guinness Malta ("Guinness Brands") (the Smirnoff and Guinness Brands are collectively referred to as the "Licensed Brands"). In addition to the Licensed Brands, 11 000 Diageo SA branded coolers will also be acquired in the present transaction.

[13] In accordance with a term sheet signed by the parties, SAB in exchange for royalties, would have obligations to market the Licensed Brands in accordance with agreed targets. The arrangement is to endure for a [redacted]

[14] In relation to the Smirnoff Brands, SAB will be required to meet specified growth targets for Smirnoff Brands that are [redacted] SAB will also dedicate a [redacted]

and spend at least [redacted] of net sales value ("NSV") of the products on advertising and promotion for the [redacted] that the spend on the Smirnoff Brand is [redacted] Diageo is to retain creative oversight and ensure consistency in respect of Smirnoff brand innovations with its global and South African spirit brands.

[15] Similarly, in relation to Guinness brands, SAB will begin local production of Guinness draught and will continue to import 440 ml cans until local sales volumes reach a level at which local production is viable. [redacted] to Guinness Brands and to reach minimum volume targets with reference to the performance of comparable beer brands. SAB will be required to maintain spending on advertising and promotion of [redacted] and thereafter a [redacted] of Guinness Brands.

Rationale

[16] The merging parties submit that the Licensing Agreement provides SAB with the opportunity to leverage its existing capabilities in order to produce and distribute the Licensed Brands more efficiently to the local market than if Diageo were to continue to control the supply of such products in South Africa. From Diageo's perspective, [redacted] Thus, Diageo submits that the Licensed Brands will be better managed by a focused beer/ RTD producer such as SAB.

[17] From the Commission's perspective, the overarching rationale is to expand the reach of the Licensed Brands in South Africa through leveraging SAB's distribution network. In relation to Guinness, the Commission notes that the rationale is to reduce importation and facilitate the local production of Guinness brands which are currently being imported.

Relevant markets

[18] In determining the relevant markets, the Commission found that the merging parties are active in the manufacture and sale of alcoholic beverages. SAB has a large beer portfolio and also produces and supplies FABs (Brutal fruit, Redds, Flying Fish) whilst Diageo's

Licensed Brands include Smirnoff RTDs (FABs) and the Guinness brand (beer). Since both parties supply FABs and beer, the Commission debated whether to analyse the transaction on the basis of the broad market for alcoholic beverages or the narrow markets for FABs and beer respectively. In so doing, it considered international[3] and domestic[4] cases involving alcoholic beverages and found that the general approach is to delineate the market according to the relevant alcoholic products' segment, such as beer, and not alcoholic products generally.

[19] A further consideration was whether to segment the FABs market into sub-segments to account for different types of FABs such as ciders. According to the Commission, in the recently decided ABinBev/SABMiller transaction,[5] the Tribunal accepted the Commission's decision not to further segment the FABs market thus indicating that the same approach should be applied to this case. This position was supported by Distell's submission that there is no distinction between different types of RTD / FAB products from a demand side. In any event, the Commission found that since there is no supply-side substitution between Smirnoff RTDs and SAB's FABs due to the fact that the former is spirit based whilst the latter is fermented grain based, a narrower market definition would result in there being no horizontal overlap between the merging parties and no competition concerns.[6]

[20] Considering the above, the Commission defined the relevant product markets as follows:

- The market for the production and supply of clear beer products; and
- The market for the production and supply of FABs (including ciders and flavoured beers).

[21] In relation to the geographic market, the Commission concluded that the relevant market is national since both the merging parties supply and distribute their products throughout South Africa.[7]

[3] According to the Commission, in the international merger involving beer manufacturers, Heineken and Bayerische Brau Holdings / JV (Case No. COMP/M.2387), the European Commission found the market to be the "market for the production and distribution of beer, distinct from other beverages". The same approach was applied in the merger between Scottish Newcastle and HP Bulmer (Case No. COMP/M.3182).
[4] In Diageo South Africa Pty Ltd and Brandhouse Beverages (Case No. LM90Aug15), the Tribunal accepted the Commission's decision to assess the impact of the transaction on the following relevant markets: i) the market for the supply of clear beer; ii) the market for the supply of spirits in South Africa; and iii) the market for the supply of RTD products / flavoured alcoholic beverages in South Africa.
[5] ABinBev and SABMiller plc (Case no: LM211Jan16).
[6] This was based on the Commission's finding that there is no supply-side substitution between Smirnoff RTDs and SABs FABs since the former are spirit based whilst the latter are fermented grain based.
[7] As noted by the Commission, this approach was consistent with the geographic market defined in ABinBev/SABMiller.

Impact on Competition

[22] The Commission found that the transaction would result in horizontal overlaps in the FABs and beer markets. It would also result in vertical relationships in (i) the upstream market for the supply of tin plate metal crowns (bottle closures) since SAB's subsidiary (Coleus) is the sole supplier; and (ii) the downstream market for packaging materials associated with beer and FAB products. In light of these factors and SAB's undisputed dominance in the beer market, the Commission considered whether the transaction would result in unilateral effects, vertical effects and/or portfolio effects. Ultimately, the Commission found that the transaction did give rise to various concerns and recommended certain conditions to address these concerns. We address these below.

Co-ordinated effects / information exchange concerns

[23] In relation to co-ordinated effects, the Commission was concerned that the Licensing Agreement may facilitate the exchange of competitively sensitive information relating to beer and FABS and have a chilling effect on competition between SAB and Diageo SA post-merger. Although the merging parties contended that the transaction would not be used as a conduit for coordination outside of the Licensed Brands [redacted] the merging parties submitted a Clean Team Agreement to the Commission to address this concern.

[24] The Commission reviewed the Clean Team Agreement and found that it sufficiently addressed its concerns relating to the exchange of confidential information between the merging parties' post-merger. In addition, the Licensing Agreement contains information barrier provisions which regulates how information will be exchanged between the parties. As a safeguard the Commission has recommended a condition (Condition 2 Information Exchange) to entrench the merging parties' obligations in this regard which we found acceptable.

[25] We are satisfied that the information exchange concerns are adequately addressed by the Clean Team Agreement, the information barrier provisions of the Licensing Agreement and the conditions imposed on this transaction.

Unilateral effects in the FABs and beer markets

[26] The Commission found that the transaction would not result in any unilateral effects in the beer market due to the minimal market share accretion [redacted] that ensues from SAB acquiring the license and rights in respect of the Guinness Brand. Conversely, the Commission found that the licensing and rights relating to the Smirnoff Brands would confer SAB with a degree of market power thus indicating that unilateral effects in the FABs segment may be more likely. This was because of SAB's relatively high market shares (more than [redacted] accretion), the highly concentrated nature of the market and the fact that the transaction combines the second and third largest FAB manufacturers which would alter the structure even though Distell would remain the market leader with 50% market share. In light of this, the Commission found that the transaction would give SAB the ability to control prices for a significant portfolio of FABs in its post-merger stable.

[27] The Commission found that that based on the 2018 sales volume and sales value figures, SAB would have a post-merger market share of approximately [redacted] accretion) and [redacted] accretion) respectively. Distell however contended that the Commission took a static view of the post-merger competitive landscape which resulted in incorrect market share estimates. On Distell's version, had the Commission taken into account the growth targets associated with the Licensed Brands as well as SAB's ability to utilise its extensive distribution network, the post-merger market shares would more likely amount to 44% of the FABs market.[8] Although the Tribunal had regard to Distell's submission, it is not necessary for us to decide this issue conclusively since, even on Distell's higher market share estimates, the Commission found that there would be no post-merger incentive for SAB to unilaterally increase the price of Smirnoff branded products.

[28] We note that the Commission's finding of an unlikely price increase was based on several reasons. Firstly, the Smirnoff RTDs are already priced significantly higher than other FABs in the market. Secondly, the Commission found that, based on the evidence before it, the transaction is likely to result in an immediate increase as opposed to decrease in volumes of Smirnoff RTDs once they have been integrated into the SAB network and SAB is able to [redacted] Thirdly, the KPI targets and capital investments to which SAB will be bound in the post-transaction scenario demonstrate that

[8] "Economic note on key aspects of the proposed SAB and Diageo Transaction", prepared by FTI Consulting on behalf of Distell, 15 August 2019, pages 2-5.

a key driver of this transaction is SAB's intention to grow the Smirnoff RTD brands, [redacted] and ensure that SAB is able to earn sufficient return on its investment. In these circumstances, it is unlikely that the transaction would have a chilling effect on competition between the Diageo and SAB FAB brands post-merger.

[29] Accordingly, no conditions were imposed regarding unilateral effects nor was this issue addressed in any detail in the Tribunal proceedings.

Vertical effects

[30] As noted above, the Commission's vertical effects' assessment considered two issues: i) input foreclosure concerns in relation to bottle closures; and ii) customer foreclosure in relation to packaging materials (bottles, cans, decorations, labels etc.)

[31] In the former case, the Commission found that SAB (through Coleus) would have both the ability and incentive to engage in an input foreclosure strategy post-merger. This was because SAB would have 85% market share in the downstream market and the ability to absorb the bottle closures in its manufacturing process since it is equally dominant in the downstream market. The Commission further found that SAB would have the incentive to engage in an input foreclosure strategy since SAB's total bottle closure requirements would increase by virtue of it assuming the Diageo volumes. This would effectively incentivize SAB to prioritise Diageo over other downstream rivals as a direct result of the merger.

[32] In the latter case, the Commission found it unlikely that SAB would engage in a customer foreclosure strategy in respect of various third parties who supply Diageo with packaging materials. This was based largely on the following facts: Diageo's overall business to input suppliers accounts for only [redacted] of the market, third party suppliers would have alternative customers such as Distell, Heineken, Halewood and Douglas Green Bellingham should SAB discontinue any of the relevant third- party contracts and the fact that the Smirnoff volumes are not substantial relative to the requirements of these other customers.

[33] We note that even though the Commission found the transaction to raise significant input foreclosure concerns no condition was imposed. This was because SAB is still bound by condition 6 (Supply of Tin Metal Crowns) of the ABinBev/SABMiller conditions[9] which

[9] Condition 6 of the ABinBev / SABMiller conditions is as follows:

specifically requires ABinBev / SAB – for as long as it controls Coleus - to ensure that third parties have access to bottle closures. Likewise, as the Tribunal, we are satisfied that the condition imposed on the acquiring firm in that transaction will apply to the licensee in this transaction and that any concern regarding input foreclosure is ameliorated by this ongoing obligation.

Portfolio effects

[34] In relation to portfolio effects, the Commission was concerned that the transaction would enable SAB to leverage its dominant position (80% market share) in the beer market into the FABs market and ultimately foreclose other FABs suppliers from the market. In the Commission's view, this could be done in two ways: i) SAB could induce retailers to allocate a greater proportion of their cooler / refrigerator space to SAB's own products; and ii) SAB could engage in exclusionary tying and/or bundling strategies since the transaction enables SAB to provide a more appealing offering of beer and FABs to retailers.

[35] The Commission also raised the concern that the inclusion of the Licensed Brands into SAB's portfolio would enhance SAB's ability to conclude exclusive contracts with stadium owners / managers that prevent competitors from supplying their products at key events. This concern was also advanced by Distell and relates directly to a dispute between Distell and SAB regarding the interpretation of condition 7.3 of the ABinBev/ SABMiller conditions. This dispute has culminated in a complaint that Distell filed with the Commission which was pending before the Tribunal at the time that we heard this merger.[10] In this regard, the merging parties contended that Distell's submissions regarding the exclusivity agreements with stadia effectively required the Tribunal to pre-empt a decision in a separate matter that was not yet before it. The Commission agreed with the position of the merging parties that the stadia issue relates to a separate complaint which should be resolved in the appropriate complaint proceedings pending before the Tribunal. We have considered the position of Distell, the merging parties and the Commission and agree that

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"6.1 For as long as the Merged Entity controls Coleus, and subject to the Coleus Conditions, the Merged Entity, shall ensure that Coleus will continue to supply third parties with tin metal crows on reasonable, non-discriminator and market-related terms.

6.2The merged entity shall not enter into any exclusive agreements with Coleus for the supply of tin metal crowns.

6.3 The Merged Entity shall not in any way induce Coleus not to deal with or supply third parties with tin metal crowns."

[10] The complaint filed by Distell regarding the ABinBev/SABMiller conditions was set down for adjudication before the Tribunal on 12 September 2019 (Case No. LM211Jan16/OTH172) whilst this matter was heard on 23 August 2019.

it would be premature for the Tribunal to decide this until the matter is properly before it. Thus, no findings have been made or conditions imposed in relation to the stadia issue in this case.

[36] We now turn to address the remaining two issues relating to the Commission's portfolio effects theory of harm and the reasons why we believe the conditions adequately address these concerns.

i) Access to refrigerator / cooler space

[37] In relation to fridge space, the Commission found that the transaction, which involves SAB's acquisition of 11 000 Diageo coolers, would increase SAB's market share in fridges from [redacted] to almost [redacted] post-merger. In the Commission's view, this fact along with SAB's high market share in clear beer would enable SAB to leverage its dominance and exclude rivals from accessing the cold space necessary to store and sell their products in various outlets. Moreover, SAB would have the incentive to absorb the increased cold space since a key feature of the Licensing Agreement is the commitment to grow the Licensed Brands.

[38] In addressing this concern, the Commission initially recommended that condition 7.3 (Access to Cold Storage and Refrigerator Space)[11] from the ABinBev/ SABMiller transaction be applied to the present transaction and the newly acquired 11 000 Diageo coolers. We note that condition 7.3 effectively requires SAB to ensure that outlets, which are solely supplied by SAB with beverage coolers / refrigerators, keep at least 10% of the cold space available for competitors' products for a period of five years following the implementation date of that merger. It is also worth noting that another condition – condition 10 (Small Beer Producers)- from the ABinBev / SABMiller conditions relating to cold space for small beer producers applies to SAB in perpetuity.[12] The latter condition

[11] Condition 7 of the ABinBev / SABMiller conditions is as follows:

"7.1 It is hereby recorded that the allocation of space within outlets is the sole discretion of the outlet owner or operator.

7.2 The merged entity will not preclude or induce any outlet from offering no-merged entity owned refrigerator space to competing 3rd parties (ambient space to include shelving, floor space and storage). This restriction shall not apply to an event sponsored by the merged entity.

7.3 The merged entity shall ensure that Outlets which are solely supplied by it with beverage coolers or refrigerators are free for a period of 5 years to provide at least 10% capacity of one such beverage cooler or refrigerator in such outlets to South African owned and produced cider brands of competing third parties."

[12] Condition 10 of the ABinBev/ SABMiller conditions is as follows:

requires SAB to provide an additional 10% of the cooler space in outlets where SAB is the sole supplier of fridges / coolers for independent beer producers. This effectively means that SAB is required to make 10% available for competitors' products for five years and 10% available for independent beer producers indefinitely. However, as noted by the Tribunal in the course of the hearing, the indefinite condition that requires 10% to be available for small players applies to small beer and not FAB producers.

[39] Although the merging parties did not concede to the Commission's theory of harm, they nevertheless indicated that they had no objections to extending condition 7.3 of the ABinBev/ SABMiller conditions to the 11 000 Diageo coolers. Distell's position was that the verbatim incorporation of the ABinBev / SABMiller conditions to the present transaction will have the effect of importing the same dispute regarding the interpretation of condition 7.3 to the present transaction. Distell accordingly provided a revised set of conditions as part of its submissions to the Tribunal which included a number of changes to the initial condition. For instance, Distell proposed that the 10% figure relating to the amount of cold space that ought to be made available for third parties' products be replaced with provisions that determined a "fair share" of space allocation in accordance with market share data.[13] Distell also submitted that the five-year duration period which is due to expire on 10 October 2021 should be extended until the termination date of the Licensing Agreement or at least for a further two years.

[40] At the hearing, the merging parties strongly opposed Distell's suggestions pointing to the fact that Distell is the market leader in the FABs industry and that its revised conditions were an attempt to obtain two strategic objectives: firstly, to obtain a standstill on Distell's own market share and secondly, to regulate competition against the Licensed Brands.[14] In this regard, we note that the Commission also disagreed with Distell's reformulation of the condition relating to cold space allocation on the basis that it may have the unintended consequence of entrenching Distell's dominance in the FABs market.[15] In addition, the merging parties reiterated their position that they had no objection to extending the

"10.1 The merged entity shall ensure that Outlets which are solely supplied by it with beverage coolers or refrigerators are free to provide at least 10% (ten percent) capacity of 1 (one) such beverage cooler or refrigerator in Outlets, to the beer products of Small Beer Producers. For the avoidance of doubt, such 10% (ten percent) capacity shall be additional to the 10% (ten percent) capacity referred in clause 7.3 above, for the 5 (five) year period referred to in such clause."

[13] Annexure A to Distell's submissions.

[14] Transcript, page 51.

[15] Annexure C to the Commission's Submissions, page 5.

ABinBev/SABMiller conditions to the present transaction but that Distell failed to provide any substantive reasons as to why the further two-year period was warranted.

[41] The panel had regard to the submissions made by Distell, the merging parties and the Commission in the course of the proceedings and decided to impose two conditions to address the issue of third-party access to cold storage and refrigerator space. The first condition (Condition 3)[16] reserves 10% of space in fridges and coolers in outlets solely supplied with SAB fridges / coolers for competing cider brands and effectively extends the existing 7.3 ABinBev/SABMiller condition to the Diageo coolers until 10 October 2021. The second condition (Condition 4)[17] resembles condition 10.1 from ABinBev/SABMiller but applies specifically to independent FAB producers which are defined as "*local producers with sales of 35 000 hectolitres or less annually aggregated across all such brands.*"

[42] We highlight several important points that informed our decision regarding the final conditions. Firstly, we are mindful of the fact that cold space is essential for all market participants to store, sell and market their products. Although we make no findings in this regard, we note that SAB's overwhelming dominance in the beer market and the inclusion of the Licensed Brands in its portfolio *may* enhance its ability to leverage cooler / refrigerator space to the detriment of rival products. However, we believe the 10% space allocation in respect of competitors' cider products and an additional 10% in respect of small FAB producers to be enough to address the concern.

[43] Secondly, we are aware that at the time of hearing this matter, there is a complaint pending before the Tribunal regarding the ABinBev/SABMiller conditions (including condition 7.3) which the Commission has recommended be extended to this transaction. Although the facts of this matter and the manner in which it has been presented before us make it difficult to separate the two sets of conditions from each other, we have tried as far as possible to reformulate the conditions in such a way that does not pre-empt a decision

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[16] Condition 3 (Access to Cold Storage and Refrigerator Space by Cider Brands)
"SAB shall ensure that Outlets which are solely supplied by it with beverage coolers or refrigerators are free until 10 October 2021 to provide at least 10% (ten percent) of the capacity of one such beverage cooler or refrigerator in such Outlets to South African owned and produced Cider brands of competing third parties."

[17] Condition 4 (Access to Cold Storage and Refrigerator Space by Independent FAB Producers)
"SAB shall ensure that Outlets which are solely supplied by it with beverage coolers or refrigerators (including the Diageo Coolers) are free for the Duration of the Licensing Agreements to provide at least 10% (ten percent) capacity of each such beverage cooler or refrigerator in such Outlets to Independent FAB Producers. The reservation of space in terms of this obligation is at the sole discretion of the Outlet owner or operator."

pending before the Tribunal and at the same time addresses the concerns associated with this merger.

[44] Thirdly, we note that although condition 10.1 from ABinBev / SABMiller applies indefinitely, it only applies to small beer producers and not FAB producers which is the relevant market in this case. As the Tribunal, we are particularly concerned with the challenges faced by small businesses in a highly concentrated economy and therefore believe that the condition which we have imposed adequately considers small FAB producers in the industry.

ii) Tying and/or Bundling

[45] The Commission found that the transaction provides SAB with the ability and incentive to engage in exclusionary bundling and/or tying of beer and FAB products to the detriment of competition. This was based on the Commission's finding that SAB has more than 80% market share in the beer market in circumstances where the inclusion of the Licensed Brands (Smirnoff in particular) into the SAB portfolio means that SAB is able to provide a more appealing offering that may have an exclusionary effect on existing market participants including potential entrants. Mr Price on behalf of Distell also expressed a concern that no other competitor would be able to produce a bundle comparable to SAB's post-merger, especially with SAB's vast distribution network.

[46] To address this concern, the Commission recommended that the Tribunal impose a condition preventing the merging parties from employing tying and/or bundling strategies which combine SAB's beer branded products with the Licensed Brands. Significantly, the condition initially suggested by the Commission included a carve out which permitted SAB to sell the Licensed Products with other SAB products as a combined offering in the case of "specific promotions" which was defined as "*promotional offers available for a limited duration not exceeding 3 months.*" It appears that the reason for this carve out was to recognize the legal and economic position that tying and bundling strategies are not necessarily anti-competitive and may prove to be pro-competitive when they lead to discounts and enhance customer choices.

[47] In its submissions and in the course of the Tribunal hearing, Distell's representatives contended that the bundling / tying condition proposed by the merging parties and the Commission was vague and did not adequately address the potential harm. For instance, Distell argued that the meaning of specific promotions was unclear and did not cover a

range of marketing and incentive practices that SAB may employ to the detriment of competition. Further, the duration of the carve-out being three months could result in SAB engaging in promotions over the peak period (October-December) in which the majority of volumes are sold which could foreclose competitors from accessing outlets in prime periods.[18] Distell accordingly proposed a revised set of conditions that was more specific and also contained an itemised set of prohibited exclusionary practices.

[48] In response, the merging parties contended that the Commission's proposed condition was sufficient to address the tying and bundling concerns associated with this merger. Moreover, in opposing Distell's suggestions, the merging parties disputed the enumerated list of prohibited exclusionary practices for a number of reasons. In their view, imposing certain of the prohibited practices identified by Distell would again result in pre-empting the Tribunal's decision in separate proceedings. They also argued that certain of these practices did not relate to merger specific concerns, some of them may entrench market share positions whilst others may prove impractical from a monitoring perspective.[19] The Commission agreed with the position advanced by the merging parties but indicated that it was sympathetic to Distell's concern relating to the issue of "specific promotions" and the three month period to the extent that such a concern could be substantiated by evidence.[20] On this aspect, the Commission urged the Tribunal to consider the respective arguments made by Distell and SAB at the hearing and revise the condition appropriately.

[49] During the hearing, the panel believed it was necessary to obtain the necessary evidence to inform its decision on the tying and bundling condition and the various marketing and incentive strategies such as rebates with which Distell raised concerns.

[50] Mr Moodley, a representative from SAB, provided evidence on rebate schemes as well as its approach to marketing and promotions. In relation to rebates, he indicated that currently SAB's offers two main rebate schemes (i) bulk pack schemes aimed at wholesalers and (ii) convenience pack schemes aimed at consumers. Bulk packs comprise all brands which are supplied to wholesalers who receives a rand-value rebate per case when certain targets are reached. In this regard, SAB only requires volume targets to be met in order for the wholesaler to receive its rebate but does not prescribe the products to be included in the bulk pack. In the case of convenience packs, Moodley indicated that these include bottles and cans around 500 millilitres or lower sold at liquor stores and are largely

[18] Distell's submissions, page 15.
[19] Annexure C to Merging Parties submissions (responding to Distell's submissions to the Tribunal.
[20] Commission's submissions (responding to Distell and the merging parties' submissions to the Tribunal), paras 9 -11.

consumer driven promotions. The point of convenience pack schemes is to incentivize consumers to buy more of a certain alcoholic beverage at a cheaper overall price.[21] Moodley indicated that these rebate schemes are based on [redacted] per scheme and that the corresponding rebates / payments are paid to the customer on a [redacted] basis.[22]

[51] The panel requested that Moodley clarify whether the schemes have ever been structured differently so as to condition the discount or rebate on the volume targets of both clear beer and FAB products together. Moodley confirmed that for so long as he has been involved in the business (approximately twenty years), no scheme has been structured in this way.[23] In addition, Mr Moodley indicated that his convenience pack rebates schemes have previously been associated with one type of product since consumers are generally inclined to buy more of their preferred alcoholic beverage such as Castle Lite. Moodley did however indicate that nothing prevents him from structuring convenience packs across different brands [redacted].[24]

[52] He also indicated that even though the Smirnoff Brand may enhance the SAB portfolio, it was not significant enough to result in SAB changing its commercial or marketing strategy and cited an example when SAB launched new brands such as Flying Fish and Brutal Fruit. In those circumstances SAB utilised the same marketing approach which made use of the two rebate schemes discussed above.[25] He anticipated that they would [redacted] post-merger.

[53] Mr Moodley also provided evidence on combo promotions that SAB offers. These types of promotions are different from single brand promotions in the sense that the customer is still incentivized to buy more volumes at a better price, but they apply across brands. In effect, the customer would still be able to buy the various products individually but would get better value if they were bought together. Put differently, the customer would never be forced into buying the combined offering without the option to buy the products separately regardless of whether they are single brand or combination brand promotions.

[54] A further issue which the panel required clarity on was the duration period associated with the specific promotions. In this regard, Moodley indicated that these promotions last more than a month but not exceeding three. This is because SAB only trades with its customers

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[21] Transcript, page 77 – 78.
[22] Transcript, page 85.
[23] Transcript, page 80.
[24] Transcript, page 93.
[25] Transcript, page 86-87.

on a weekly basis but requires transaction data over a period of [redacted] to calculate the amount of the rebate. This means that the customer could game the system by buying more stock than s/he needs in order to get the maximum discount but run the campaign for a lesser period.[26] In addition, in-store promotions, like other types of advertising, are costly and therefore informed by an investment decision that makes commercial sense in light of the anticipated returns.[27] We note that, in response to the chairperson's question regarding the likelihood of whether SAB would make a commercial decision to run extended promotions over consecutive periods, Moodley indicated that he is unlikely to do so because it would be more efficient [redacted] than run promotions continuously.[28]

[55] After considering the submissions made by all parties and specifically the evidence provided by Moodley, the Tribunal decided to impose a condition similar to the initial one proposed by the Commission subject to two amendments. The condition preventing the merging parties from engaging in tying and/or bundling strategies except in the case of specific promotions should apply specifically to the combination of ABI Branded products with the Licensed Brands since this is the specific portfolio effects concern associated with this transaction. In addition, the duration period associated with the carve-out for specific promotions is now two-months as opposed to the three-month period initially proposed by the Commission with the clarification that the promotions cannot take place in consecutive periods. In our view, this is sufficient when considering Moodley's evidence on the nature of the promotions and rebate schemes that SAB currently employs and the fact that SAB is likely to persist with the same marketing strategies discussed above in the post-merger scenario.

Efficiencies

[56] Although we make no findings on the issue of efficiencies and do not believe it is material to the outcome of this decision, we note that the merging parties submitted certain pro-competitive outcomes of this transaction. Firstly, the merging parties submitted that the Proposed Transaction will enable Smirnoff RTDS to form part of SABs distribution network which will ultimately result in increased volumes of Smirnoff RTDs from the current reach of [redacted] outlets to over 35 000 outlets. Thus, the increased output (volumes) will address [redacted] and will impose a better constraint on the Distell FAB brands, thereby

[26] Transcript, page 98.
[27] Transcript page 97-98.
[28] Transcript, page 99.

enhancing competition in industry. The second efficiency relates to the fact that SAB has committed to undertake a feasibility study to assess the merits of implementing a returnable bottle policy in relation to Smirnoff RTDs which may reduce the cost of manufacturing.

[57] The Commission found both these efficiencies to be plausible and capable of offsetting the potential anti-competitive effect associated with this merger.

Public interest

[58] In terms of direct employment effects, the Commission was concerned that the transaction would result in retrenchments of Diageo SA employees that currently manufacture the Smirnoff RTD products in its Isipingo plant. In this regard, the merging parties provided a firm commitment to the Commission that all Diageo SA employees currently employed at Isipingo will be re-deployed within the broader Diageo Group.

[59] The Commission was further concerned with the indirect negative employment associated with two entities involved with Diageo namely and . currently has a labelling agreement with Diageo and indicated that it will have to resort to retrenchments should SAB (which has its own bottle labelling services in-house) terminate its Labelling Agreement post-merger. Following its investigation, the Commission found that business is not dependent on Diageo as a customer because it does not constitute a substantial portion of its total revenue and that its customers (apart from Diageo) amounted to over of its revenue in 2018. It follows that the Commission did not believe any conditions were warranted in this case.

[60] Ultimately, the Commission found that the Proposed Transaction would have a substantial public interest impact on since the Diageo business accounts for more than of its business and would accordingly result in significant retrenchments. Despite this adverse effect, the Commission was unable to obtain further information from and therefore did not impose any employment related conditions on the transaction.

[61] From the Tribunal's perspective, all third parties including were invited to attend the pre-hearing in order to make submissions. Although did provide the Tribunal with written concerns over email, we were unable to verify or interrogate these concerns in any detail since no representative was willing or able to attend the pre-hearing or the main hearing. In these circumstances, it would be

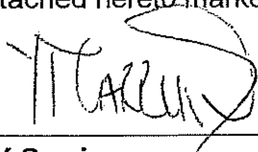
inappropriate to impose conditions without evidence or submissions to substantiate the concerns.

[62] Significantly, the merging parties submitted that the Proposed Transaction will have a positive impact on public interest grounds 12A(3) (a) and (d).[29] In relation to a particular industrial sector or region, they submitted that the transaction will have a positive impact on local FAB and beer production due to the growth targets associated with the Licensed Brands. Further, SAB will commence local production of the currently imported Guinness draught and may produce 330 ml cans if the requisite sales volumes can be achieved during the term of the Licensing Agreement. In relation to the ability of national industries to compete in international markets, the transaction will give SAB the ability to sell locally produced Licensed Brands in neighbouring territories. In addition, the Licensing Agreements are anticipated to increase the volumes of the Licensed Brands [redacted]

[63] The Commission found the manufacturing of Guinness Brand beer locally instead of importing it from Ireland will likely give rise to a positive public interest factor that may result in job creation in the future. However, to the extent that the parties did not provide sufficient detail on this issue, the Tribunal has imposed a condition obliging the merging parties to follow through with their commitment to commence local draught production of the Guinness Brands in line with the feasibility [redacted] being reached within the first [redacted] of the implementation date of the transaction.

Conclusion

[64] For these reasons, the Tribunal approved the transaction subject to the conditions attached hereto marked Annexure A.



Ms Y Carrim

7 October 2019
Date

Prof. I Valodia and Dr. T Vilakazi concurring.

Tribunal Case Manager : Ammara Cachalia & Lumkis Jordaan

[29] Section 12A(3)(a) and (d) refer to the public interest effect on "a particular industrial sector or region" and "the ability of national industries to compete in international markets" respectively.

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For the Commission	: Amanda Mfuphi & Grashum Mutizwa
For Distell	: Advocate Engelbrecht instructed by Werksmans Attorneys