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Common Market for Eastern
and Southern Africa

Staff Paper No. 2017/04/11/01/RR

Decision[1] of the Thirty First Meeting of the Committee Responsible for Initial Determination Regarding the Proposed Merger between B.I.H. Brasseries Internationales Holdings Limited and Carlsberg Malawi Limited

ECONOMIC SECTOR: Alcoholic and Non-Alcoholic Beverages

11th April 2017

[1] In the published version of this decision, some information has been omitted pursuant to Rule 73 of the COMESA Competition Rules concerning non-disclosure of business secrets and other confidential information. Where possible the information omitted has been replaced by ranges of figures or a general description.

Information and Relevant Background

1. On 14th December 2016, the COMESA Competition Commission (hereinafter referred to as "the Commission") received a notification for approval of a merger from B.I.H. Brasseries Internationales Holdings Limited (hereinafter referred to as "BIH") and Carlsberg Malawi Limited (hereinafter referred to as "Carlsberg").

2. The transaction was notified with the Commission under Article 24(1) of the COMESA Competition Regulations (hereinafter referred to as "the Regulations"). Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the proposed transaction between the parties would, or is likely to have the effect of substantially preventing or lessening competition; or would be contrary to public interest in the Common Market.

3. The Committee of Initial Determination (hereinafter referred to as "the CID") noted that the parties operate in two or more COMESA Member States. This, therefore, means that the regional dimension requirements under Articles 23(3) and 23(5) of the Regulations are satisfied and asserts jurisdiction of the Commission to assess the transaction. The parties to the transaction are currently operational in the following COMESA Member States:

    - Ethiopia
    - Malawi
    - Madagascar
    - Democratic Republic of Congo

The Parties

BIH

4. The acquiring undertaking, BIH, is a holding company of the Castel Group ("Castel") and is registered in Gibraltar. Castel is a French beverages group active in the production and distribution of wine, beer, soft drinks and bottled water.

Carlsberg

5. Carlsberg is a holding company registered under the laws of Malawi which has 100% shareholding in three (3) subsidiary companies registered in Malawi namely: Carlsberg Malawi Brewery Limited (CMBL), Malawi Distilleries Limited (MDL) and Southern Bottlers Limited (SOBO). The Parties have also submitted that Carlsberg, through its subsidiary companies, is active in the manufacturing, marketing and sale of alcoholic and non-alcoholic drinks such as brewery goods, carbonated soft drinks, still soft drinks, cordial, syrup, water and liquors for the Malawian market. The parties have submitted that Carlsberg's operations in the Common Market are only in Malawi.

Nature of the Transaction

6. BIH is acquiring from Carlsberg Breweries A/S 59.48% of the total share capital in Carlsberg. At the completion of the transaction, Press Corporation Limited will remain a minority shareholder with 39.65% of the total share capital. The parties submitted that BIH will hold sole control of Carlsberg at the completion of the transaction.

Competition Analysis

7. The CID defined the relevant markets as:

   a) The market for the production and distribution of clear beer;

   b) The market for the production and distribution of opaque beer;

   c) The market for the production and distribution of spirits;

   d) The market for the production and distribution of bottled water;

   e) The market for the production and distribution of cordial; and

   f) The market for the production and distribution of carbonated soft drinks.

8. The CID observed that the transaction raises some competition concerns in the relevant markets. Specifically, the CID noted that the transaction may result in coordinated effects between merged entity and SABMiller Africa Investments Limited (SABMiller). This is because there is an affiliation between the acquiring undertaking, B.I.H and SABMiller in that SABMiller holds 20% shareholding interest in BIH and Castel owns 38% of SABMiller African business. SABMiller produces opaque beer in Malawi.

9. The other concern raised by the CID is a public interest concern over the job losses and the termination of input supply contracts between Carlsberg and existing suppliers that may occur as a result of the transaction.

10. Further, at its 29th Meeting held on 15 March 2017, the CID observed that the beer market appeared to be partitioned in the Common Market. The CID noted that in most cases, it was rare to find competing firms producing beer products in one Member State or a firm operating in one country exporting its beer products to other Member States. The CID observed that Carlsberg beer produced in Malawi was not exported to neighbouring Member States and similarly, SABMiller products are not exported from neighbouring Member States into Malawi. The CID raised concern that beer products were not subject to free movement across borders in the Common Market despite the Free Trade Area being in effect.

11. In view of the above, the CID instructed the Secretariat to seek further information from the parties on the following:-

    a) the distribution agreements that exist between the parties and various distributors in the Common Market;

    b) any agreements between Castel and Carlsberg Malawi Limited (hereinafter referred to as "Carlsberg").

12. The CID contended that the transaction could be authorised only if the parties undertook to allow the free movement of their products across borders in the Common Market whether by themselves, their subsidiaries, distributors and independent traders who may wish to import and export the products.

13. Based on the above, the CID postponed the determination of the transaction until such a time that the raised concerns are addressed.

14. The Commission considered the CID's concerns and recommended that such concerns could best be addressed under Part III of the Regulations. In particular, the Commission observed that the parties would be requested to notify any such agreements under Article 20 of the Regulations in order for the Commission to determine whether or not they are compatible with the Regulations. The Commission therefore recommended to the 31st CID meeting that the transaction be approved.

Determination

15. The CID determined that the merger is likely to raise competition concerns in the relevant markets through coordinated effects and that public interest concerns are likely to arise from the transaction. This notwithstanding, the CID determined that the concerns could be addressed through the undertakings made by the parties that:

    a) The merged entity will ensure that, post-merger, there is continued independent operation of the merged entity (Carlsberg) and SABMiller subsidiary (Chibuku) in Malawi. Particularly, BIH/Castel shall not share sensitive or confidential business information with SABMiller concerning its operations in Malawi which would lead to coordination of their behaviour in the Malawian market;

b) The merged entity will not engage in conduct that will or is likely to undermine the entry or sustenance of competition imported clear beer into Malawi including but not limited to SABMiller clear beer;

c) For a period of 24 months, the merged entity will not terminate any employment contract as result of the merger. Termination of contract does not include:

   i) voluntary retrenchment and/or voluntary separation arrangements;
   ii) separation from employment relating to disciplinary measures;
   iii) separation upon the agreement with employees; and
   iv) voluntary early retirement offers.

d) The merged entity will continue to build capacity of the current employees in key operations of the company; and

e) For a period of 12 months, no contracts with local input suppliers will be terminated as a result of the merger except in cases where there is a legitimate cause for termination such as failure to satisfy the agreed terms and conditions of the contract.

16. In view of the above undertakings from the parties, the CID determined to approve the merger.

17. This decision is made in accordance with Article 26 of the Regulations.

Dated this 11th day of April, 2017.

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Commissioner Matthews Chikankheni (Chairman)
(Signed)

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Commissioner Thabisile Langa (Member)
(Member)
(Signed)

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Commissioner Chilufya Sampa

(Signed)