COMESA Competition Commission
Kang'ombe House, 5th Floor
P.O. Box 30742
Lilongwe 3, Malawi
Tel: +265 1 772 466
Email- compcom@comesacompetition.org

Common Market for Eastern and Southern Africa

Case File No. CCC/MER/4/27/2022

Decision[1] of the 103rd Meeting of the Committee Responsible for Initial Determinations Regarding the Divestiture of Heineken's Strongbow business as ordered in the CID Decision in the Merger involving Heineken International B.V., Namibia Breweries Limited and Distell Group Holdings Limited

ECONOMIC SECTOR: Alcoholic and Non-Alcoholic Beverages

13 December 2023

[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 Where possible, the information omitted has been replaced by ranges of figures or a general description.

The Committee Responsible for Initial Determinations,

Cognisant of Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the "**COMESA Treaty**");

Having regard to the COMESA Competition Regulations of 2004 (the "**Regulations**"), and in particular Part 4 thereof;

Mindful of the COMESA Competition Rules of 2004, as amended by the COMESA Competition [Amendment] Rules, 2014 (the "**Rules**");

Conscious of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation of 2015;

Recalling the overriding need to establish a Common Market;

Recognising that anti-competitive mergers may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA Member States;

Considering that the continued growth in regionalization of business activities correspondingly increases the likelihood that anti-competitive mergers in one Member State may adversely affect competition in another Member State,

Desirability of the overriding COMESA Treaty objective of strengthening and achieving convergence of COMESA Member States' economies through the attainment of full market integration,

Having regard to the COMESA Merger Assessment Guidelines of 2014,

Determines as follows:

Introduction and Relevant Background

1. On 10 February 2023, the Committee Responsible for Initial Determinations (the "**CID**") approved the acquisition by Heineken International B.V. ("**Heineken**") of a further interest in Namibia Breweries Limited and the flavoured alcoholic beverages, wine and spirits businesses of Distell Group Holdings Limited (the "**Initial Merger**")[2]. The merger was approved on condition that, *inter alia*:

   a. The merging parties shall divest of the Strongbow brand within 6 months from the date of the merger approval to a buyer who must be capable of ensuring

[2] Decision of the Ninety-First (91st) Meeting of the Committee Responsible for Initial Determinations Regarding the Proposed Merger involving Heineken International B.V., Namibia Breweries Limited and Distell Group Holdings Limited, available at: https://comesacompetition.org/wp-content/uploads/2023/05/Decision-Case-No-CCC-MER-4-27-2022-compressed.pdf

continued sales of the brand in Eswatini, Zambia and Zimbabwe for the foreseeable future;

b. The buyer of the divested brand must not have any structural relationship with the merging parties;

c. The divestiture package shall include all required licenses to enable the buyer to produce, distribute, and market the Strongbow brand as well as list of customers in the Common Market and any operating plan specific to the divested asset; and

d. The parties shall notify the Commission of the potential buyer for the Commission's review and approval before the implementation of the divestiture.

2. In furtherance of the above, on 27 July 2023, the merging parties notified the COMESA Competition Commission (the "**Commission**") of their preferred buyer and the proposed divestiture structure.

The Preferred Buyer

Cider House Investments Proprietary Limited ("CHI")

3. Heineken[3] selected CHI as the preferred bidder for Strongbow. CHI is a partnership between Signal Hill Products Holdings Proprietary Limited ("**SHPH**") and Livor Investments Proprietary Limited ("**Livor**"). It is a newly created joint venture between SHPH (49%) and Livor (51%) for the purposes of acquiring the Strongbow License and accordingly it does not have any current activities.

4. It is intended that CHI, as the holder of the License, will in turn outsource the production and sale of Strongbow to Signal Hill Products (Pty) Ltd ("**SHP**"), the primary operating subsidiary of SHPH, in return for a royalty payable by SHP to CHI based on the gross value of all Strongbow sales.

Livor

5. Livor, the majority shareholder in CHI, is a newly incorporated 100% HDP[4]-owned entity for the purposes of the proposed transaction and accordingly it does not

[3] It is recalled that Heineken does not have manufacturing facilities in Eswatini, Zambia, and Zimbabwe. In respect of these Member States, Strongbow is currently only produced by Heineken at its Sedibeng brewery (near Johannesburg) and then exported from South Africa to these other countries. South Africa is the largest market for Strongbow and constitutes approximately 98% of the total volumes of Strongbow supplied in the relevant territories. The divestiture of the Strongbow business in South Africa was ordered by the Competition Commission of South Africa in its review of the merger. The same buyer has been put forward as the preferred buyer by the parties to the CCSA.

[4] Historically Disadvantaged Person (HDP).

have any current activities in South Africa nor in the Common Market. However, Livor's representatives have extensive experience in the development and marketing of brands of various products (particularly alcoholic beverages) in South Africa and it is anticipated that Livor will provide crucial input into CHI, particularly around the marketing of Strongbow, which will be an essential component in realising CHI's vision of expanding Strongbow's sales volumes, as well as play a key role in growing SHPH's broader business.

SHPH

6. SHPH is a holding company with the following current subsidiaries, of which it possesses 100% shareholding and sole control:

   a. SHP, the primary operating subsidiary.

   b. Signal Hill Products Africa (Pty) Ltd, which has a partial shareholding in Sierra Premium Breweries Kenya ([redacted]

   c. Signal Hill Products Headquarters (Pty) Ltd ("**SHPHQ**"), which owns the trademark for the beer brand Striped Horse and employs several executive staff in South Africa. SHPHQ outsources the commercial execution of this brand to SHP for a royalty and it has no further activities.

   d. Stoked (Pty) Ltd ("**Stoked**"), which owns the St Francis Brewing Co. trademark in South Africa. Stoked also outsources the commercial execution of this brand to SHP for a royalty and it has no further activities.

7. SHP is active in the production, packaging, distribution and marketing of beer and FABs beverages in South Africa. SHP entered the South African beer industry in 2012 with its Devil's Peak brand[6]. SHP is currently the third largest brewer in South Africa, after AB InBev and Heineken Beverages South Africa.[7]

8. SHP's current beer and craft beer brands include Devil's Peak, Striped Horse, St. Francis, and Fokof. SHP also acts as a contract producer for several smaller brands of alcoholic beverages including Miller Genuine Draft, Hooch, Bavaria 0.0% and Buffelsfontein lager. SHP currently supplies two FABs brands, namely KIX and Alpha. KIX is a grain-based, fruit -flavoured spritzer (akin to AB InBev's Brutal Fruit). Alpha is a craft-based apple cider supplied in keg packaging format (not

[5] Sierra Premium Breweries Kenya owns and operates the largest independent brewery in Nairobi, Kenya with a [redacted].

[6] SHP was initially incorporated as Devil's Peak Brewery CC before transitioning to Devil's Peak Brewery (Pty) Ltd and subsequently to SHP.

[7] Based on SHP's internal data, sales volumes of its beer brand Devils Peak grew by more than 35% on average per year between 2018 and 2022.

available in single-serve cans or bottles) and it is available for consumption only at a limited number of on-premises outlets in Cape Town, South Africa.

9. SHP has operated a brewing production facility in Cape Town, South Africa since 2017 with a current capacity of 250 000 HL (expandable to 450 000 HL). This facility also packages SHP's brands in bottles, cans and kegs and it is currently SHP's only distribution depot in South Africa. SHP has commenced with upgrades to its Cape Town brewery, with a view to ensuring that the facility is ultimately equipped to reach its full productive capacity of 450 000 HL.

10. SHP's brands are distributed nationally by about 20 distributors and redistributors to 8 000 on- and off-consumption outlets, as well as more than 200 distribution partners, and syndicated sales and merchandising resources via third parties. SHP also distributes directly to independent off- and on-consumption outlets, but this typically accounts for less than [redacted]% of SHP's sales volumes in any given year.

11. SHP's board has approved an investment to construct an additional beer and FABs production facility in Johannesburg, South Africa with a proposed capacity of [redacted] within [redacted] months of acquisition of the License. This facility will also include a returnable bottle line and perform as a further distribution depot.[8] SHP anticipates that civil construction works will commence at the designated premises by the end of this year. SHP will start moving plant and equipment into the newly commissioned facility by the [redacted]. Based on these forecasts, it is SHP's intention to commence with its brewing operations at the Johannesburg facility by the [redacted]. Funding for the new production facility has been approved by local financiers and is the in the final stages of being secured.

12. SHP also intends to increase its number of already high qualified employees (with many existing employees having previously worked in strategic positions at AB InBev's local subsidiary, South African Breweries (Pty) Ltd by more than [redacted] new employees (to their existing [redacted] employees) across production, distribution, marketing, sales and support services, in particular, to support the Strongbow business in future.

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[8] SPH has undertaken to invest an aggregate amount of [redacted] to acquire the License, upgrade and expand its existing Cape Town brewery, invest in returnable packing facilities and equipment for Strongbow, as well as construct an additional beer and FABs production facility in Johannesburg.

The Divestiture Package

13. The parties submitted that the divestiture of the Strongbow business will take the form of a perpetual, royalty-free licence for CHI to supply Strongbow in Eswatini, Zambia and Zimbabwe. The parties submitted that in terms of the rationale for the perpetual, royalty-free license, Strongbow is a cider brand that is owned by Heineken and supplied in more than 40 countries around the world. It was originally launched in the United Kingdom in 1960 and is considered by Heineken at least to be the '*world's no.1 cider brand*'. Due to the fact that Strongbow has a global presence, and is supplied in many markets, it is not possible or appropriate for Heineken to simply sell the brand and related trademarks in the relevant territories to a third party.

14. According to the parties, the most effective manner to implement a divestiture of the Strongbow business in the relevant territories, while maintaining its intellectual property rights for other jurisdictions where Strongbow is sold, is for Heineken to grant a third-party acquirer a perpetual, royalty-free license for the Strongbow brand. The parties further submit that such licensing arrangements are common in respect of alcoholic beverages globally[9].

15. The licensee will acquire the rights in perpetuity and on a royalty-free basis to manufacture, distribute, and sell Strongbow for its own benefit in the relevant territories. Heineken will further provide the licensee with the specifications and recipes for the Strongbow products which are manufactured in other markets.

16. A summary of the key provisions in the Trademark Licence Agreement dated 2 December 2022 (signed on 8 December 2022, with an amendment letter dated 23 March 2023 extending the territories of the Licence to Zambia and Zimbabwe following the CID decision) (the "**Trademark Licence Agreement**") is provided below:

[9] The parties submitted that SAB recently concluded a licensing agreement in terms of which it acquired the rights to manufacture, distribute, market, and sell certain Smirnoff RTD products and certain Guinness branded products in South Africa. The global brand owners of the licensed brands are Diageo North America Inc (which owns the Smirnoff brand) and Diageo Ireland (which owns the Guinness Brand), which are subsidiaries of Diageo plc ("**Diageo**"). Diageo is a global player in the alcoholic beverages with a portfolio comprising spirits, beer and RTD brands in more than 180 countries. Significantly, Diageo continues to supply many other brands (including Smirnoff branded spirits) even though it has now licenced the Smirnoff and Guinness brands to SAB in South Africa. Up until a few days ago, a (former) Distell subsidiary held the license for the sale and distribution of two alcoholic beverage brands owned by Diageo, namely Gordon's London Dry Gin and Pimm's No. 1 Cup, in South Africa, Namibia, Lesotho, Botswana, and Eswatini. Pursuant to the Heineken/Distell merger and change of control of Distell, Diageo has terminated the license for those two products and will thus re-acquire the rights for the sale and distribution of Gordon's Gin and Pimm's No. 1 Cup in these countries.

Clause 2: Commencement and duration

2.1 [redacted]

Clause 3: Licence

3.1 [redacted]

3.3 [redacted]

3.5 [redacted]

Clause 5: Licensee Obligations and Prohibited Acts

5.1 [redacted]

i. [redacted]

ii. [redacted]

[10] Territory defined as South Africa, Namibia, Eswatini, Lesotho and Botswana. On 22 March 2023, the parties entered into an Amendment Agreement whereby the definition of 'Territory' was extended to include the countries of Zambia and Zimbabwe.

iii.

Clause 7: Supply of Strongbow Yeast

7.1

Clause 8: Restrictions on Sales

8.1

i.

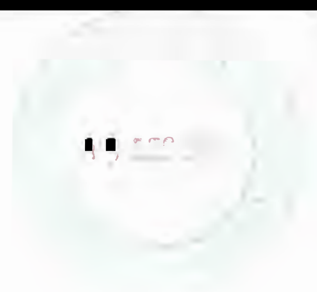
ii.

8.2

Clause 10: Breach and Termination

10.2

10.3



10.5

Grounds Relied Upon by The Parties for The Commission to Approve the Preferred Buyer and Divestiture Agreement

17. In selecting the preferred bidder, CHI, Heineken had regard to broad range of factors, including:

    a. the financial resources of bidders to invest in the brand and capital expenditure requirements for the business (including any need for financial assistance);

    b. the need for any transitional services and the duration of such services;

    c. the ability of the bidder to secure regulatory approvals for the proposed acquisition of the Strongbow license in a smooth and timeous manner;

    d. whether the Strongbow license is complementary to the bidder's product portfolio, enabling it to further leverage the growth of Strongbow;

    e. strong industry knowledge and route-to-market capabilities to deliver credible competition in the marketplace for the benefit of consumers;

    f. commercial and operational experience to run a requiring significant production footprint (in due course, following transitional production by Heineken for a period of time);

    g. the extent to which a bid was conditional (the more conditionality and complexity of a bid the less attractive it would be for Heineken International); and

    h. the extent of historically disadvantaged person (HDP) ownership of the prospective licensee (a particular concern for the South African competition authorities).

CID'S ASSESSMENT OF THE PREFERRED BUYER

18. The CID decision in the Initial Merger stated that the buyer must be capable of ensuring continued sales of the brand in Eswatini, Zambia and Zimbabwe for the foreseeable future; and must not have any structural relationship with the merging

parties. The CID assessed whether CHI would constitute a suitable purchaser in whose hands Strongbow will remain an active competitive brand in the affected markets within the Common Market.

19. Having regard to the information at hand, the CID was satisfied that the proposed buyer, including its parent companies, is independent of and unconnected to the parties; and absent any ancillary restrictions set out in the License Agreement (assessed further below), Heineken will not be in a position to exercise influence over the divestment business' competitive strategy post-divestment.

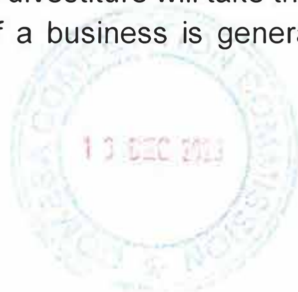
20. Further, having regard to the activities of SHP, the CID considered that SPH possesses the financial resources, relevant expertise, and has the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors. The CID observed that within South Africa, where its manufacturing facilities are located, SPH is already an established player in the production of alcoholic beverages and has a strong distribution network. SPH's investment plans also point towards their intent to grow the Strongbow brand within the licensed territories.

21. The SHP group have operations in the Common Market, in Kenya, where they have interests in the largest independent brewery in Nairobi, Sierra Premium Breweries Kenya. In addition, SHP also has a distributor in Zambia which distributes their beer but they are considering other distributors for the Strongbow sales. SHP submitted that the Zambian market is a market they wish to grow in the future, and it has been earmarked for the setting up of a brewery. SHP further submitted that that in relation to Botswana, Lesotho, and Eswatini, they intend to utilise Heineken's existing service providers for its warehousing and logistical service needs in respect of the distribution of Strongbow, at least in the short term. In respect of Zimbabwe, SHP submitted that they would use a different distributor than the current Heineken distributor.

22. In view of SHP's plans for growing its production facilities and in relation to the exports of the products to Eswatini, Zambia, and Zimbabwe, the CID was satisfied that CHI constitutes a suitable buyer for Heineken's Strongbow business in the Common Market and ensure its continued growth in the territories which apply to the License.

CID'S ASSESSMENT OF THE DIVESTITURE LICENCE

23. The CID observed that the divestiture will take the form of a perpetual, royalty-free licence. The divestiture of a business is generally preferable to the granting of



licenses to IP rights, as the granting of a license involve more uncertainties, and requires an on-going relationship with the parties which may allow the licensor to influence the licensee in its competitive behaviour. However, the CID may accept licensing arrangements as an alternative to divestiture where, for instance, a divestiture would not be efficient or proportionate. In the current case, the CID observed that concerns were raised in relation to three Member States which account for a relatively small share of Strongbow's global presence. The Strongbow brand is further not present in any other African country outside of the affected territories. The CID therefore considered that there are sufficient grounds to accept the licensing arrangement in this matter.

24. However, it is important that the provisions of the Trademark Licence Agreement enable the licensee to compete effectively with the parties in a similar way as if a divestiture had taken place.

Assessment of Breaches/Termination Clauses

25. The CID noted the parties' submissions that "█████".

26. The CID considered that the above restrictions, as set out under Clause 5 at paragraph 16(d) above, amount to justifiable considerations having regard to the Licensor's legitimate rights to protect the value and reputation of the Strongbow brand globally. Whilst there is a maximum limit imposed in relation to the alcoholic level, the CID observed that the Licensee will have the freedom to produce the Products with any ABV below this maximum limit. The CID further observed that the requirement for the Products to contain █% fruit juice is linked to the Strongbow image and would therefore not be contrary nor disproportionate to the objectives of the License Agreement and divestiture package. The other restrictions pertain to general compliance with the applicable laws in the affected territories and use of the trademarks.

27. The CID observed that Clause 10.2 states that the parties will not be entitled to cancel the Trademark Licence Agreement after the Effective Date other than as provided for in Clause 10.3. which are related to the above breaches.

28. However, Clause 2 states that "[redacted]" (emphasis added). The CID considered that a provision allowing the parties to terminate the licence by simple written agreement could result in a situation whereby following the approval of the preferred buyer by the CID, the parties agree to terminate the Licence and the Strongbow brand is transferred back to Heineken.

Assessment of Sub-Licencing Rights

29. In relation to Clause 3 pertaining to the rights granted under the Licence, the CID observed that the [redacted], except to the main competitors of Heineken. The CID considered this restriction to be appropriate given that Heineken and the identified competitors compete across a number of markets across the Common Market and would therefore limit the risks of incentives to collude or soften competitive pressures on each other. However, the CID considered that there is a risk that the Licensee could sub-license to an entity within the Heineken Group, which would reinstate the competition concerns identified during the Initial Merger assessment.

Assessment of Supplies of Yeast

30. Clause 7 provides that [redacted]".

31. In order to maintain the full economic viability and competitiveness of the divested business, certain on-going relationships between Heineken and the Licensee business may be necessary on a transitional basis.

32. SHP submitted that there is no particular type or strain of yeast or other raw materials which is required to manufacture the Strongbow brand, and that yeast can be easily sourced from other suppliers. SHP submitted that the yeast supplied by their current suppliers, namely [redacted], can be used for the manufacture of Strongbow. SHP submitted that if Heineken were to try to charge higher prices for yeast, SHP would have other options to turn to.

33. The CID observed that there is a legitimate interest from SHP's perspective to have a wide option for suppliers. Further, the CID observed that the supply of yeast is not limited and there would not be any contractual obligations for SHP to only source from Heineken. Therefore, Heineken would be constrained by their competitors if they attempted to charge higher prices or other unfair conditions compared to the competitors.

Assessment of Territorial Restrictions

34. The parties submitted that "[redacted]".

35. The CID, however, observed that under Clause 8, the Licensee is prohibited from engaging in active sales outside the Territory, as well as engaging in passive sales to customers seeking the export or sale of the Product outside the Territory.

36. Certain types of territorial restrictions have been found to be anti-competitive under competition laws. In particular, absolute territorial protection has been considered as a restriction by object, where they prevent all parallel trade of the respective products in that territory. Case precedence in the EU has found that an agreement designed to create absolute territorial protection in favour of one operator (generally a distributor) has as its object the restriction of competition as the situation results in the isolation of the particular market and tends to diminish the effectiveness of competition between producers.

37. The CID was mindful that certain territorial restrictions in licence and distribution agreements can serve to protect and balance the interests of consumers and the intellectual property rights of brand owners. This acts as an incentive for investment and helps avoid distribution inefficiencies and free riding. However, it is the CID's settled position that absolute territorial protection is an affront to the single market imperative of the COMESA Treaty and agreements that seek to reinforce borders cannot be found to be compatible with the Regulations. Whilst restrictions on active sales can be justified on efficiency grounds, restrictions on passive sales have as their effect the partitioning of the Common Market, which runs contrary to the objective of regional market integration.

38. It is recalled that the review of the Initial merger identified concerns in only three Member States, specifically Eswatini, Zambia, and Zimbabwe. The CID observed that there was a necessity for the restriction under 8.1(i) where the Licensee is not

allowed to sell, market or distribute the products outside the Territory, to respect the intellectual property rights of Heineken in respect of the rest of the Common Market, and to avoid imposing remedies which go beyond what is necessary to address concerns which were previously identified.

39. Heineken submitted that as the owner of the Strongbow brand throughout the world, it has the ability and incentive to supply Strongbow in all countries and COMESA Member States (other than covered by the Trademark License Agreement) where this would be commercially feasible and profitable. Heineken can do so either itself, or via third party licensees or distributors. While Heineken does not currently supply Strongbow in other COMESA countries, it is always looking for opportunities to supply or introduce its brands in all countries and markets where it operates (or can enter).

40. [redacted]

41. Accordingly, the CID considered that the counterfactual where this restriction is not imposed, thus requiring Heineken to extend the Licence to the Common Market, may have negative consequences on the effective distribution of the products in the Common Market.

42. However, it is important that the territorial restriction is limited to active sales. It is noted that the parties have acknowledged that there may be instances where passive sales by CHI would be in the interests of consumers. The requirement to allow passive sales is a long-established principle and there is a wealth of jurisprudence on the matter and the parties confirmed that Heineken would be willing to change the Trademark License Agreement to clarify that passive sales by CHI to customers in other COMESA Member States which currently fall outside of the License Territory are permitted.

43. As regards the restraint on the Licensee from "[redacted]", the CID

observed that such restriction only relates to the Strongbow brand and is necessary to ensure compliance with the restriction on active sales outside the assigned territories. Further, it is noted that the clause provides that Heineken shall not "unreasonably withhold" its consent for CHI to establish new facilities, such that this is not an outright restriction.

Determination

44. In view of the foregoing assessment, the CID hereby a**pproves the selection of CHI as the buyer for Heineken's Strongbow business in Eswatini, Zambia, and Zimbabwe.**

45. However, the CID has determined that certain provisions are incompatible with the Regulations in that they impose absolute territorial restrictions on the licensee, thereby frustrating its ability of establishment and effective competition in the Common Market. The CID, therefore, **approves the Trademark Licence Agreement on condition of the following amendments:**

    i. Clause 2 is amended to read as follows:
    *This Agreement (other than the Surviving Provisions) and the Licence (…) shall continue in perpetuity, **unless terminated in terms of Clause 10**.*

    ii. Clause 10 is amended to incorporate the following:
    In the event of a termination in terms of Clause 10, Heineken shall inform the Commission within 30 days of the termination of the agreement for the Commission's determination of whether in view of prevailing market conditions, Heineken can maintain the Strongbow brand or shall be required to identify another buyer for the Licence in the affected Member States.

    iii. Clause 3.5 is amended to read as follows:
    *Subject to any applicable laws (including without limitation any applicable competition or anti-trust laws), Licensee shall not be entitled, without the prior written consent of Licensor, to, within a period of 5 years after the Effective Date appoint any of **Heineken**,*

to manufacture and/or package Products; or assign or sub-license the License.

iv. Clause 8 is amended to read as follows:

8.1(ii) ***The restrictions on passive sales referred to in this clause shall not be applicable in any part of the Common Market for Eastern and Southern Africa.***

46. This decision is adopted in accordance with Article 26 of the Regulations.

Dated this 13th day of December 2023

Commissioner Dr Mahmoud Momtaz (Chairperson)

Commissioner Lloyds Vincent Nkhoma **Commissioner Islam Tagelsir Ahmed Alhasan**