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**Common Market for Eastern  
and Southern Africa**

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

**Decision<sup>1</sup> of the Ninety-First (91<sup>st</sup>) 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**

**ECONOMIC SECTOR: Alcoholic and Non-Alcoholic Beverages**



**10 February 2023**

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<sup>1</sup> 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 Where possible, the information omitted has been replaced by ranges of figures or a general description.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 8 July 2022, the COMESA Competition Commission (the "**Commission**") received a notification of a merger involving Heineken International B.V. ("**Heineken**") as the acquirer, and Namibia Breweries Limited ("**NBL**") and Distell Group Holdings Limited ("**Distell**") as the target businesses, pursuant to Article 24(1) of the Regulations.
2. Pursuant to Article 26 of the Regulations, the Commission is required to assess whether the 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. Pursuant to Article 13(4) of the Regulations, there is established a Committee Responsible for Initial Determinations, referred to as the CID. The decision of the CID is set out below.



4. Article 25(1) of the Regulations provides that the Commission shall examine a merger within 120 days after receiving the notification. Article 25(2) of the Regulations provides that if prior to the expiry of the 120-days period, the Commission has decided that a longer time period is necessary, it shall so inform the parties and seek an extension from the Board. In the instant case, the 120-day period expired on 6 November 2022. The Commission's preliminary assessment identified potential concerns likely to arise from the transaction in a number of Member States, which necessitated additional time for the conclusion of discussions with the merging parties and affected Member States. On 18 October 2022, approval was granted for an extension of 30 days starting from 6 November 2022.
5. On 15 November 2022, the Commission informed the parties of its proposed recommendations. As there remained significant areas of divergence between the parties and the Commission, and to ensure that the parties were provided sufficient and reasonable time to respond to the Commission's proposed recommendations, which would entail significant adjustments to the parties' operations in the Common Market, the Commission noted that it would require a longer period of time to conclude the review of this transaction. At its 89<sup>th</sup> meeting held on 27-28 November 2022, approval was granted for the extension of the statutory period for assessment of this transaction by sixty (60) days starting from 6 December 2022.

#### **The Parties**

##### ***Heineken (the acquiring firm)***

6. Heineken is a private company incorporated under the laws of Netherlands, and is a wholly owned subsidiary of Heineken N.V., a Dutch multinational brewing company headquartered in Amsterdam, Netherlands. Heineken is active in the production, marketing and distribution of beer and other beverage products through its subsidiaries and associated companies. Heineken has a range of 170 beer brands and more than 300 products including both global and regional brands.
7. Heineken has local manufacturing operations in COMESA Member States including Burundi, the Democratic Republic of Congo (the "DRC"), Egypt, Ethiopia, Rwanda and Tunisia. In the Members States where Heineken does not have local manufacturing operations, it supplies local customers via an export model partnering with local distributors.
8. In addition to its local manufacturing and distribution activities, Heineken also supplies customers in certain Member States through Heineken N.V.'s subsidiaries, namely:



- (i) Heineken South Africa Export Company ("HSAEC"), which procures Heineken's products from Heineken's subsidiary in South Africa, Heineken South Africa, and supplies to customers in the Member States including Eswatini, Malawi, Zambia and Zimbabwe (as of 2021). HSAEC is incorporated in South Africa and operates solely in South Africa; and
- (ii) Heineken Brouwerijen B.V ("HBBV"), which procures Heineken's products from Heineken's subsidiaries around the world and supplies to customers located in COMESA Member States including Burundi, Comoros, Djibouti, Kenya, Libya, Madagascar, Seychelles, Somalia, and Uganda (as of 2021). HBBV is incorporated in the Netherlands.

9. Heineken currently supplies a range of beers and other beverages in the Common Market, with the main brands listed in Table 1 below:

**Table 1 – Products supplied by Heineken in the Common Market**

Member State	Category	Brand
Burundi	Beers	Amstel, Nyongera and Primus
	Carbonated soft drinks (CSDs)	Coca Cola, Fanta Citron, Fanta Orange, Schweppes Tonic and Sprite
	Malts	Maltina and Viva
Comoros	Beers	
Djibouti	Beers	
DRC	Beers	Heineken, Legend, Mutzig Class, Mutzig Super Bock, Priums, N'Tay, Turbo King and Victoire.
	Malts	Energy Malt, Maltina
	CSDs	Coca Cola
Egypt	Beers	Desperados, Heineken, Meister Mix, Sakara, and Stella
	Wines	Abarka, Auld Stag, Ayam, Butler's, Cape Bay, Caspar, CGV, Cubana Rum, Devlin, Grand Marquis, Malvado, Miraki, Nermine, Obelisque, Omar Khayam, Leila, RTDS
	Spirits	Blue40, Black50, and Valmont
	Non-Alcoholic Beers	Amstel Zero, Birell, and Fayrouz
Eswatini	Ciders	Strongbow
	Beers	
	NCSDs	
Ethiopia	Beers	Bedele Regular, Bedele Special, Buckler, Harar, Heineken, Sergegna, Walia
	Malts	Sofi
Kenya	Beers	
Madagascar	Beers	
Malawi	Beers	
Mauritius	Beers	
	Ciders	Strongbow
Rwanda	Beers	Amstel, Heineken, Legend, Mutzig, Primus, and Turbo King



	CSDs and NCSDs	Coca Cola, Fanta Citron, Fanta Orange, Krest Tonic, and Sprite, Vital'O
Seychelles	Beers	
	CSDs	
Tunisia	Beers	Amstel, Golden Brau, and Heineken
Zambia	Beers	
	Ciders	Strongbow
Zimbabwe	Beers	
	Ciders	Strongbow

***NBL (the target business)***

10. NBL owns and operates a brewery in Windhoek, Namibia. NBL produces a range of beers as well as other limited non-alcoholic beverages (**NABs**) such as mineral water and CSDs mixers. NBL does not have any manufacturing facilities outside of Namibia and it supplies its customers in the Member States via an export model. Since 2019, NBL's products have been imported from Namibia into Eswatini and Malawi through a pre-existing arrangement with Heineken N.V.'s subsidiary HSAEC and distributed through appointed local distributors. In all other COMESA Member States, NBL's products are imported via an export model and distributed through local distributors. In the Common Market, NBL is active in Burundi, DRC, Kenya, Malawi, Mauritius, Rwanda, Uganda, Zambia and Zimbabwe.

***Distell (the target business)***

11. Distell is a public company listed on the Johannesburg Stock Exchange, incorporated under the laws of South Africa. Distell manufactures, markets and distributes wines, spirits, flavoured alcoholic beverages (**FABs**) and NABs. Distell's major brands include:
- Hunter's, Savanna, Bernini, Esprit and Klipdrift and Cola in the FABs segment;
  - 4th Street Wine, Paarl Perle, Autumn Harvest, Drostdy-Hof in the wine segment and Sedgwicks Old Brown as a fortified wine;
  - Old Buck Gin, Klipdrift Brandy, Viceroy Brandy, Richelieu Brandy and Amarula Cream Liqueur in the spirits segment; and
  - A sparkling flavoured fruit juice, Chamdor, in the NABs segment.
12. Distell operates a range of business models across the COMESA Member States. Distell has a local manufacturing presence in Kenya, Zimbabwe and Mauritius through equity shareholdings in local manufacturers. In all other COMESA member states, Distell's products are imported from South Africa via an export model and distributed through local distributors. Amongst the Member States, Distell considers Kenya and Zambia as strategic markets based on



anticipated future growth opportunities and accordingly it has focussed its resources and efforts in these countries.

13. In the Common Market, Distell is active in Burundi, DRC, Ethiopia, Eswatini, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.

### **Jurisdiction of the Commission**

14. Article 24(1) of the Regulations requires 'notifiable mergers' to be notified to the Commission. Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation (the "**Merger Notification Thresholds Rules**") provides that:

*Any merger, where both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, shall be notifiable if:*

- a) the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM\$ 50 million; and*
  - b) the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM\$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State.*
15. The undertakings concerned together have operations in two or more Member States. The undertakings concerned have a combined annual asset value in excess of the threshold of USD 50 million in the Common Market. In addition, the Parties each held asset value of more than USD 10 million in the Common Market and they did not hold more than two-thirds of their respective COMESA-wide asset value within one and the same Member State. The notified transaction is therefore notifiable to the Commission within the meaning of Article 23(5)(a) of the Regulations.

### **Details of the Merger**

16. The proposed transaction is a single, inter-conditional and multi-step transaction, involving the acquisition by Heineken of a further interest in NBL and the combination (within a newly created entity, Newco) of Heineken's current South African business (along with its increased interest in NBL) and Distell's FABs, spirits and wine businesses (excluding certain of Distell's Scotch whiskey and local spirits businesses).



17. The parties submitted that the Proposed Transaction forms part of a larger global transaction driven by Heineken's acquisition of Distell in South Africa. The primary rationale for the acquisition of Distell's FABs, wine and (select) spirits businesses is to enhance the competitiveness of Heineken against the far larger and better resourced global beer and FABs suppliers, namely Anheuser Busch InBev ("AB InBev") (which dominates the supply of alcoholic beverages throughout Southern Africa), Diageo and Castel. Heineken is currently focused on the distribution of beer, whereas Distell is currently focused on smaller volume but higher value FABs, wine and spirits products.
18. The parties submitted that the Proposed Transaction will allow the merged entity to unlock substantial economies of scale and scope in the distribution and marketing of their largely complementary product ranges. By combining NBL's existing product portfolio and distribution network with Distell's presence in the mainstream alcohol market in Namibia with its FAB, wine and spirit brands, the Proposed Transaction will provide the merged entity with enhanced economies of scope and scale. This will allow the merging parties to distribute their products to customers more efficiently and more frequently. As a result, the Proposed Transaction will likely result in the merged entity becoming more cost competitive, especially in relation to AB InBev.

## Competition Assessment

### *Relevant Product Market*

19. The parties to the merger are all active in the alcoholic and non-alcoholic beverages sector. More specifically, in the Common Market:
- i. Heineken is active in the production, marketing and distribution of beer, malts, wines, spirits, CSDs, bottled water, ciders, and non-alcoholic beers;
  - ii. NBL is involved in the distribution of beer and CSDs; and
  - iii. Distell is involved in the manufacture and distribution of ciders, wines, spirits, CSDs, and sparkling fruit juice.

### Alcoholic Beverages

20. There is substantial case precedence from the CID<sup>2</sup> and other competition authorities<sup>3</sup> confirming the existence of distinct product markets for alcoholic

<sup>2</sup> See for instance, CID decision dated 2 August 2022 in the merger involving B.G.I Ethiopia Private Limited and Meta Abo Brewery Share Company; CID decision dated 9 July 2022 in the merger involving Coca-Cola Sabco (East Africa) Limited and Castel Malawi Limited.

<sup>3</sup> See for instance, European Commission Case M.10061 (2021) - COCA-COLA HELLENIC BOTTLING COMPANY / HEINEKEN / STOCKDAY, para 10; United States v. Anheuser-Busch InBev SA/NV, et al. (2020). The Competition Commission of South Africa in *Diageo/Brandhouse Beverages* identified clear beer as a separate relevant market to the market for the supply of FABs/ready-to-drink products, alongside a third relevant market for the supply of spirits (Case No. LM090Aug15 Diageo/Brandhouse Beverages).



beverages and non-alcoholic beverages ("NABs") on the basis of taste, alcohol content, manufacturing processes, and price. Within the alcoholic segment, the CID identified distinct narrower markets for beer, wines, and spirits. Beer's taste, lower alcohol content, image (e.g., marketing and consumer perception), and price make it substantially different from other alcoholic beverages (such as wine and distilled spirits); such that it is highly unlikely that a significant number of consumers would substantially reduce their beer purchases or turn to wines for example in response to a SSNIP. A distinction amongst alcoholic beverages can also be drawn from a supply-side perspective on account of the different raw materials and production processes that each entail. For instance, beer is brewed whereas rum and whisky are distilled. Beer is made from barley malt, water, hops, and yeast, whereas whisky is made from water, yeast and grain, while rum is made from distilled alcohol obtain from molasses.

21. Within the beer market, the CID previously identified distinct markets for clear beer and opaque beer<sup>4</sup>. Clear beer is an alcoholic beverage produced from malted cereal grains (such as barley, wheat, rye, corn or rice), hops, and water that is fermented by adding yeast. Fermentation is when the yeast breaks down the sugar in the malt and produces carbon dioxide and alcohol. This process can take up to 7 to 10 days. At the end of the fermentation, the yeast is separated from the clear beer. The beer is then stored in a cold place for a period of one to three weeks after which it is filtered once or twice before it is ready for bottling. The alcohol content in clear beer can range from 2% alcohol by volume to as high as 15% alcohol by volume as is the case in beer made from barley.
22. Traditional beer (or opaque beer), the other type of beer, is mainly made from sorghum malt and tends to have a biting taste due to continuous fermentation even after it is packaged. The brewing process uses a process called "yeast top fermentation" and the fermentation continues after the opaque beer is packaged due to the presence of yeast in the beer. In terms of physical characteristics, opaque beer has a reddish-brown colour. As for the alcohol content by volume for opaque beer, this would range from 0.5% alcohol by volume when it leaves the brewery to up to 5% within 5 days while the beer is packaged.
23. It is noted that neither the acquirer nor the target is involved in the manufacture or supply of opaque beer. The CID has thus focussed its assessment on the clear beer segment. The CID has also considered whether to treat premium brands and mainstream brands as separate markets. Locally produced beer is often referred to as mainstream beer whereas craft beer and imported beer are often regarded as premium. In *Meta Abo/BGI*, the CID held that notwithstanding the varied products within the clear beer market, these products compete against

<sup>4</sup> CID decision dated 2 August 2022 in the merger involving B.G.I Ethiopia Private Limited and Meta Abo Brewery Share Company





each other as consumers choose from a wide variety of clear beers in different segments when making their purchasing decisions. The CID held that there is a high level of porosity among the different segmentations of clear beer, which forms the basis for broadening the clear beer market.

24. Further, the CID considered whether the relevant market should be narrowed down to the particular segments of the market, having regard to the significant price difference between the different categories of clear beer, which is more than 50% in some cases, and the potential 'image' associated with some premium brands could point towards limited demand substitution and thus separate markets. There is, however, no common or industry standard or criteria for grouping the different brands. Given the varying price charged at different retail stores, the CID noted the risk of overlooking the competitive threat imposed by certain brands if narrow price points are considered.
25. In view of the potential effects of the transaction on the beer markets in Zimbabwe, the CID considered both the broad market for the production and distribution of clear beer, and the markets for production and distribution of mainstream, premium and ultra-premium clear beer in its competitive assessment.

#### *Distinct Market for Ciders*

26. Beers can be further differentiated from ciders. Cider is a beverage obtained after alcoholic fermentation of apples, water and glucose. As a result of the different ingredients used in the manufacturing process, beers and ciders further differ in terms of flavour. Because cider is made from fermented apple juice, it can be very high in sugar content and is naturally gluten-free. On the other hand, beer only has sugar added to it in small quantities to balance the sourness. Additionally, beer can range from ales to lagers and bitters which makes it more varied than cider<sup>5</sup>.
27. The CID also noted that from a supply perspective, the difference in production process is unlikely to make substitution between the different beverages (such as beer, ciders, and wines) occur swiftly and without incurring significant costs in a manner contemplated under the SSNIP test.
28. As noted above, beer is made with different ingredients and through different processes than cider and wine. The ingredients of beer include barley, hops, water and yeast. The brewing process begins with malting, or heating up grains and isolating the enzymes, followed by mashing or steeping the grains in hot water. The result of this is called the wort. The wort is added to a fermenting

<sup>5</sup> <https://www.comish-bottled-beer.co.uk/blog/beer/the-tough-choice-beer-vs-cider/>



- vessel along with yeast. The length of time and temperature this is stored at depends on the type of beer being brewed<sup>6</sup>.
29. The production of wine starts with picking or harvesting the grapes. After harvesting, wineries will crush the grapes, followed by fermentation and once the wine is bottled, it's aged unlike most beers and ciders. Red wine is made from the pulp of red or black grapes and the skin is left on during fermentation. White wine is made from the extracted juice from the grapes and the skins aren't involved in the rest of the wine making process<sup>7</sup>.
30. Cider is naturally made from pressing apples into juice. Hard (alcoholic) cider is the result of the fermentation of that juice. While the fermentation process of cider is very similar to what is used in winemaking, the process does not take as long, and the lower sugar content of the apples generally results in a lower alcohol content. A cider typically contains a lot more natural sugars than wine, which ultimately makes a substantial difference. Sugar content in cider is around 6% to 15%, while a wine's sugar content rarely exceeds 2%. When wine exceeds 2% sugar, it is typically a dessert wine, or port explicitly made for its sweetness<sup>8</sup>. Ciders typically have an alcohol content around the 5% mark, while the alcohol content for wines ranges between 13% to 15%.
31. The above differences in production processes would make changing between beer, cider and wine production costly. These include production tanks that cannot be easily switched, or at a minimum, require additional cleaning procedures to switch, and access to different raw materials which would require further investments in fruit farms or contractual arrangements with such suppliers. Further, the manufacturer would also incur significant sunk investment in marketing in order to establish a profitable cider brand.
32. The parties submitted that the identification of ciders, which are a type of flavoured alcoholic beverage ("FAB"), as a distinct market is inconsistent with case precedent in Africa and Europe. The parties submitted that *"in Tanzania, the FCC previously found that ciders are constrained by other alcoholic beverages including beer, wine and locally produced spirits and thus these products jointly comprise a distinct product market. In South Africa and Europe, competition authorities have extensively considered the competitive constraints in alcohol beverage markets and found that beer, FABs, wine and spirits are in distinct markets. However, and more importantly, these authorities define a single market including all types of FABs. This means that ciders compete with other types of FABs such as ready-to-drink ("RTD") products and spirit coolers"*.

<sup>6</sup> <https://www.wildstatecider.com/post/cider-beer-wine-whats-the-difference>

<sup>7</sup> *ibid*

<sup>8</sup> <https://drinkbev.com/blogs/news/cider-vs-wine-breaking-down-the-differences>



33. The CID noted that the identification of narrower markets within a particular product category is not peculiar, as consumption patterns for specific drinks differ according to taste, price and occasion. In **COCA-COLA HELLENIC BOTTLING COMPANY / HEINEKEN / STOCKDAY**<sup>9</sup>, the market investigation conducted confirmed that the production of cider can be distinguished from other beverages since they '[address] different customer needs'<sup>10</sup>.
34. Whilst the CID is not constrained by precedents established in other jurisdictions, it is also worth noting that, contrary to the parties' arguments, the identification of a distinct market for ciders is not contrary to case precedent in Europe nor Africa. In **SCOTTISH & NEWCASTLE / HP BULMER**<sup>11</sup>, both the merging parties and the market investigation by the European Commission (EC) confirmed that cider constitutes a separate relevant product market<sup>12</sup>. More importantly, in its assessment of the current Heineken/Distell merger, the Competition Commission of South Africa (CCSA) found that the merger results in "a horizontal overlap in the broad market for FABs and in the narrow market for ciders. The evidence collected by the [CCSA] shows that there is stronger competition between cider brands than between ciders and other FABs"<sup>13</sup>.
35. The parties did not agree that the above sources are authority for a distinct cider market. The parties contended that properly interpreted, the outcome of the competition assessments undertaken in relation to the above matters did not turn on product market definitions and they accordingly do not serve as case precedent that can be reasonably relied upon to support defining cider as a market in its own right. To the extent that a cider market was referenced, this was attributable to the specific circumstances relevant to those matters and not the product of the application of competition law principles. It must therefore follow that the conclusions reached cannot reasonably be applied to the Proposed Transaction. The view of the merging parties, therefore, remained that the correct market to be adopted is that of separate markets for the supply of flavoured alcoholic beverages. The CID disagreed with the parties' interpretation of the quoted sources. It is worth considering the arguments raised in the **SCOTTISH & NEWCASTLE / HP BULMER** decision:

- *The parties submit that cider constitutes a separate product market. Although cider has not been considered directly in previous decisions of the [EC], there have been indications that cider does not form part*

<sup>9</sup> Case M.10061 - COCA-COLA HELLENIC BOTTLING COMPANY / HEINEKEN / STOCKDAY

<sup>10</sup> *Ibid*, paragraph 12.

<sup>11</sup> EC Case No COMP/M.3182 - SCOTTISH & NEWCASTLE / HP BULMER, decision date 30/06/2003.

<sup>12</sup> *Ibid*, para 11 – 14.

<sup>13</sup> Media Statement issued by CCSA on 09 September 2022: 'Commission Recommends Conditional Approval of Heineken's Proposed Takeover of Namibian Breweries And Certain Distell Operations'. Accessed at <https://www.compcom.co.za/wp-content/uploads/2022/09/Commission-Recommends-Conditional-Approval-of-Heineken-acquisition-of-Namibian-Breweries.pdf> on 27 September 2022.



*of the beer product market. In this respect the parties cite the case Interbrew/Bass (2000), in which the UK Competition Commission concluded that cider does not form part of the same product market as beer. The parties also stress that this conclusion is consistent with a long line of UK Competition Commission decisions, going back to the Supply of Beer report (1989).*

- The parties have considered, for the purposes of the notification, that cider constitutes a separate relevant product market. Furthermore, although (as previously mentioned) cider has not been investigated in previous [EC] decisions, it appears reasonable to argue that the same further delineation as for beer (into production, wholesaling and retailing on the hand and into on-trade and off-trade on the other) is also applicable to cider.*
- The market investigation conducted by the [EC] has largely confirmed the parties' submission. Cider and beer (brewing and wholesaling) thus constitute the relevant product markets for the purposes of the present decision.*

36. It is clear from the above that cider is considered as a distinct market of its own, separate from a broader market which would include ready to drinks beverages. The decision notes that there is no horizontal overlap between the parties, as S&N is not active in cider manufacture in the UK. In the absence of any overlap in an improperly defined narrow market, it would be of utmost importance for an authority to give consideration to any potential overlaps in a potentially broader market. The fact that despite the absence of overlap, the competitive assessment carried out by the European Commission ("EC") focussed on cider production and supply confirms that the ciders were not considered to compete with other types of beverages within a broader segment.
37. The investigation of the Competition Commission of South Africa makes the distinction between ciders and other FABs even more apparent. The parties have themselves acknowledged that Distell's major FABs brands are ciders, while Heineken's major FABs brands are RTDs, which would point towards a clear distinction between ciders and RTDs, and that competition mainly occurs between cider brands.
38. In accordance with its decisional practice, the CID identified distinct markets for (i) clear beers (and the narrower market for premium and ultra-premium clear beers); (ii) ciders; (iii) wines; and (iv) spirits.



### Non-Alcoholic Beverages

39. Consistent with its prior merger decisions, the CID also delineated relevant product markets in the NABs segment, including separate markets for CSDs and non-CSDs, noting that patterns of consumption of various types of drinks seem to reflect the different reasons for which consumers might choose a specific drink.
40. CSDs are typically manufactured from a carbonated water base and sweeteners and natural and/or artificial flavouring is added to the carbonated based at the end of the production process. CSDs may also contain additional ingredient such as caffeine, colourants and other additives<sup>14</sup>. To a certain extent, CSDs have an image of being artificial and do not seem to have any association with a positive effect on health compared to mineral waters for example.
41. NCDs are non-fizzy or still beverages which comprise of a wide range of products, namely fruit juice, non-carbonated energy drinks, water, dairy products, iced tea, iced coffee and hot beverages such as tea and coffee. A consumer who has a specific taste and preference for CSDs is unlikely to substitute NCDs given a SSNIP. Further, consumers who prefer NCDs for various reasons, among them health lifestyles, are unlikely to substitute CSDs in reacting to a SSNIP. The CID therefore concluded that CSDs and NCDs are in distinct markets with any overlaps in consumer demand being lacking in critical mass to support the existence of a broader market.
42. Each of the drinks within the non-carbonated ready to drink product has its own characteristics, price and intended use. Within each category, there can be several sub-categorisations. For instance, in *PepsiCo/Pioneer*, the CID identified a distinct market for long life fruit juices separate from other NCDs<sup>15</sup>.
43. Having regard to the overlapping products distributed by the parties in the Common Market, for the purpose of this assessment, the CID considered that the relevant product markets comprise the supply of the following:
  - (a) clear beer (including the narrower premium and ultra-premium clear beer markets);
  - (b) ciders;
  - (c) wines;
  - (d) spirits; and
  - (e) CSDs.

<sup>14</sup> Paragraph 67, Project Nile RBB Report.

<sup>15</sup> CID decision dated 10 March 2020 in the merger involving PepsiCo, Inc. and Pioneer Food Group Limited.



### ***Relevant Geographic Market***

44. The relevant geographic market consists of all areas where the conditions of competition are significantly similar for all traders.
45. The CID has previously identified national markets for the distribution of the various alcoholic and non-alcoholic beverages<sup>16</sup>. While the retail markets are characterised by the presence of international brands, these are usually sourced from wholesalers/distributors operating at national level, indicating the preference for national marketing strategies by the global manufacturers. The need for local distribution networks is supported by the model operated by the merging parties who are principally active in the Common Market through exports to local distributors.
46. Further, it is noted that the imported products tend to be more expensive than the products bottled nationally. It is typically cheaper for the products to be shipped in their concentrated forms, then bottled at local facilities for onward distribution as there will be a relatively shorter journey to the customer to save on logistics costs.
47. Given the overlaps in the product and geographic dimensions, and without prejudice to the CID's approach in similar future cases, the relevant markets for purposes of this competition assessment comprise the national supply of the following:
  - (a) **Clear beer (including the narrower premium and ultra-premium clear beer markets) in Burundi, DRC, Eswatini, Kenya, Malawi, Mauritius, Zambia, and Zimbabwe;**
  - (b) **CSDs in DRC; and**
  - (c) **Ciders in Eswatini, Mauritius, Zambia, and Zimbabwe.**

### ***Market shares and Concentration***

#### ***Assessment of the Beer Markets***

48. In the majority of the broader beer markets (Eswatini, Kenya, Malawi, Mauritius, Zambia, and Zimbabwe), the merging parties' combined market shares are insignificant. The transaction will not result in any incentive for the merging parties to engage in unilateral conduct as consumers will still have sufficient external options to switch to in such a situation. In Eswatini, Zambia, and

<sup>16</sup> Decision of the 85<sup>th</sup> CID in B.G.I Ethiopia Private Limited/ Meta Abo Brewery Share Company (2 August 2022). These findings are consistent with the approach by other competition authorities. For instance, in *Coca-Cola Hellenic Bottling Company/Heineken/Stockday* (2021), the EC held that the markets for the production as well as the wholesale distribution of various alcoholic beverages, which includes spirits, beer and ciders, were national in scope.



- Zimbabwe, the beer market is dominated by AB InBev, whilst in the other Member States, there are other strong competitors including Diageo and Castel.
49. It is recalled that the CID identified separate submarkets for premium clear beer and ultra-premium clear beer. With respect to the Zimbabwean market, it is more likely than not that Heineken faces effective competition in the premium clear beer market from Delta/Ab InBev's Castle Lite brand, and as such it appears unlikely that the merging parties would be able to successfully engage in price increases post-merger without risking losing market share to Delta/Ab InBev's brands. Even if one were to adopt the view that Heineken and NBL belong to the ultra-premium category, consumers would still have the option of shifting to Delta's ultra-premium brands should the merging parties try to engage in unilateral conduct. This notwithstanding, the available information, and market dynamics suggest that concerns of unilateral conduct may not arise in the clear beer markets, irrespective of the submarkets identified.
50. The national beer markets in the Common Market are highly concentrated, and the products are mostly homogeneous. Beer markets have been the subject of investigation by competition authorities for market allocation. In 2014, the Competition Commission of Mauritius fined Stag Beverages Ltd, a subsidiary of Castel, and Phoenix Beverages, for colluding to share the Mauritian and Malagasy beer markets. Under the agreement, Stag was to exit the Mauritian beer market, and dismantle their operations in Mauritius while continuing its operation in Madagascar, with the reciprocal exit of Phoenix from Madagascar<sup>17</sup>. In 2021, the Competition Commission of India fined Heineken-controlled United Breweries Limited (UBL) and Carlsberg India Private Limited (CIPL) for collusive practices between UBL, CIPL and Anheuser Busch InBev SA/NV (who was granted leniency for reporting the cartel) to align prices of beer and implement price adjustments across various states in the country<sup>18</sup>.
51. The CID observed that the transaction would result in the combination of two entities (Heineken and NBL) who were not strong competitors to each other pre-merger. In particular, NBL's market position was insignificant within the national territories in the Common Market. It is therefore extremely unlikely that this transaction would strengthen or create incentives of the remaining players on the market to coordinate.

<sup>17</sup> See Competition Commission of Mauritius, 'Commissioners Endorse the Recommendations of the Executive Director and Direct Phoenix Beverages Ltd and Stag Beverages Ltd to Pay Financial Penalties of MUR27 Million for Collusive Behaviour' (22 August 2014). <https://competitioncommission.mu/wp-content/uploads/2020/01/220814.pdf>

<sup>18</sup> CCI Imposes Record Penalties On Beer Cartel Leniency Applicants: <https://www.mondaq.com/india/cartels-monopolies/1119352/a-new-high-cci-imposes-record-penalties-on-beer-cartel-leniency-applicants>; <https://www.reuters.com/world/india/india-antitrust-body-fines-united-breweries-carlsberg-price-fixing-case-2021-09-24/>



52. However, the CID also observed a high asymmetry of market shares between Heineken, AB InBev, Castel, and Diageo across the Member States over the period 2018 to 2021 – the national territories are either dominated by AB InBev, Heineken, Castel or Diageo. The stable asymmetry of market shares could point towards potential sharing of national markets among the beer producers in the Common Market. This notwithstanding, the perceived collusive action would not be a merger specific concern (as the transaction itself would not lead to any material change in the market structure to further facilitate collusive practices) and the Commission is currently investigating potential market allocation in the beer sector under Part 3 of the Regulations.
53. It is noted that Distell has non-controlling shareholdings in African Distillers Ltd (“Afdis”) (of 30.04%), while 50.44% is held by Delta Corporation Limited (“Delta”), an entity in which AB InBev has a 40% shareholding. The core business of Afdis is the manufacture, distribution and marketing of branded wines, ciders and spirits for the Zimbabwean market and for export<sup>19</sup>. Delta is a Zimbabwean beverages company with a diverse portfolio of local and international brands in lager beer (clear beer), traditional beer (sorghum beer), Coca-Cola franchised sparkling and alternative non-alcoholic beverages<sup>20</sup>.
54. As a result of the transaction, Heineken will have common shareholding in a distributor with its competitor in the broad beer market, and specifically in the narrower market for clear beer. The CID considered whether the participation of Heineken at Afdis’s shareholder meetings may provide incentives and facilitate the exchange of business secrets between Delta and Heineken and could incentivise the parties to compete less aggressively in the beer market in Zimbabwe. Given that Afdis is not active in the distribution of beers, it appears unlikely that the participation of Heineken on the Board of Afdis could provide Delta with access to competitively sensitive information on the beer market as the Heineken board representative is likely be an individual with knowledge of the relevant product categories supplied by Afdis and may not have deeper insights into Heineken’s competitive strategy in the beer markets.
55. The CID also noted that there is also no symmetry in Heineken’s and Delta’s cost structures, which is likely to increase the possibility for deviation. Low-cost parties have more to gain from deviating than high-cost parties due to the higher margins that they can earn on additional volumes gained from a reduction in price i.e. deviating. At the same time, it may be difficult for a high-cost party to deter lost-firms parties for if effective punishment would require them to price below

<sup>19</sup> Afdis Annual Report 2021, page 2 – ‘Company Profile’. Accessed at: <https://www.africandistillers.co.zw/downloads/ir/AnnualReports/2021%20Annual%20Report.pdf>

<sup>20</sup> Delta Annual Report 2022, page 4 – ‘Company Profile’. Accessed at: [https://indi.adobe.com/view/publication/2e6495fa-e8bb-4374-b581-9bc3bad5e247/gr8f/publication-web-resources/pdf/Delta Annual Report 2022 19 July B.pdf](https://indi.adobe.com/view/publication/2e6495fa-e8bb-4374-b581-9bc3bad5e247/gr8f/publication-web-resources/pdf/Delta%20Annual%20Report%2019%20July%20B.pdf)





cost. Delta is expected to have a significant cost advantage over Heineken because Delta has significant local production facilities while Heineken exports its products to Zimbabwe from South Africa.

56. The CID also took note that the parties confirmed that the only agreement between Distell and Delta in regards to Afdis is only the Shareholders' Agreement and that the latter does not confer any material influence or veto rights upon Distell in relation to the operations of Afdis, neither does the Shareholders' Agreement confer upon Distell the ability to employ any staff in Afdis.
57. Having duly considered submissions made by the merging parties and various affected third parties, and noting the significant investments made by Distell in Afdis, and thus the significant impact of a divestiture remedy on the parties' operations in Zimbabwe, the CID resolved that a behavioural remedy regulating the participation of the Heineken director on the board of Afdis would proportionately address the potential risk of collusion.

#### Assessment of CSD market

58. Heineken and NBL both supply CSDs in the DRC. Heineken supplies a wide variety of CSDs brands including popular brands such as Coca-Cola, Fanta and Sprite under a licensing agreement with The Coca-Cola Company, as well as malt based CSDs brands such as Maltina, Energy Malt and Fayrouz. NBL supplies only one CSDs brand, McKane, which is a flavoured CSDs typically consumed together with alcoholic spirits in mixed drinks and cocktails. The CID noted that NBL's market share is estimated at [0-1]% for the year 2021, and the transaction was not likely to lead to unilateral effects in the market for CSDs in the DRC.

#### Assessment of Ciders market

59. The CID noted that in Eswatini, Zambia, and Zimbabwe, the transaction will result in complete elimination of competition, as the merging parties (Heineken and Distell) were the only two suppliers of ciders. The CID noted that whilst in Zambia and Zimbabwe, Heineken's brand accounted for a relatively small share of the market, its presence on the market did offer some alternative choice to consumers to the Distell brands. The CID noted the need to prevent any further concentration or complete elimination of competition in markets which are heavily concentrated. In Eswatini, the merging parties are both effective rivals in the ciders markets and the transaction would thus eliminate all effective competition.
60. The transaction would therefore remove all competitive constraints on the merged entity in the ciders markets in Eswatini, Zambia and Zimbabwe to the detriment of consumers. The CID noted that a divestiture of the Strongbow brand



would return competition in the market to the level prevailing pre-merger in the ciders market.

61. The CID considered that the divestiture of the Strongbow brand would return competition in the market to the level prevailing pre-merger in the ciders market. For the divestiture to be effective, 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. Until such time the divestiture is finalised, the parties should not engage in any action that could reduce the value of divested business or hinder the sales or competitiveness of the Strongbow brand. The divestiture should include the licenses to produce, distribute and market, as well as the list of customers in the Common Market and any operating plan specific to the divested asset.
62. The parties submitted that they have already committed to divesting Strongbow in Eswatini as part of the South African remedy package and accordingly a further commitment was unnecessary (since all Strongbow volumes sold in Eswatini are imported from South Africa). It was submitted that the acquirer of the Strongbow business will acquire a license to manufacture and distribute in those markets. Given that Eswatini is located inside South Africa's borders, by reason of its geographic proximity, the acquirer is likely to have a strong incentive to continue to supply into the Eswatini market and to continue to compete for sales into that market. The CID considered that for purposes of monitoring and enforcement action in case of non-compliance, it would be important for the divestiture commitment with respect to Eswatini to be equally reproduced under a COMESA order, to which the parties agreed. The merging parties further provided undertakings to extend the Strongbow divestiture to include both Zimbabwe and Zambia.
63. Having regard to the high market strength of the Distell brands, the CID was also concerned that the merged entity could have the incentive and would have the ability to condition the purchase of Distell's best-selling cider brands upon the purchase of Heineken's less popular brands in the beer market in Eswatini, Zambia and Zimbabwe through their distributors. The CID noted that the Distell brands are particularly strong in Africa, as evidenced by the citations by the parties below:

- ***"Stand-out brands for the [African] region include Savanna, Hunter's, 4<sup>th</sup> Street and Amarula across all markets, Chamdor in Nigeria and Hunter's Choice in Kenya... Hunter's and Savanna are now the leading cider brands in all of [Distell] key markets."***<sup>21</sup>

<sup>21</sup> Distell 2021 Integrated Annual Report, page 73 – 'EXPAND IN AFRICA', Accessed at <https://www.distell.co.za/investor-centre/annual-report/>



- *"The opportunity outside of accessible beer on the [African] continent remains attractive. This is evidenced by ciders and RTDs continuing to grow revenue by 33,2% (including Botswana, Lesotho, Namibia and Eswatini) this year alone – and some 50% above pre-COVID-19 levels. This growth was despite supply chain and on-consumption channel disruptions. We are proud that both Hunter's and Savanna are the leading RTDs in the key markets we operate in."*<sup>22</sup>
- **"Ciders continue to dominate this category driven by the Hunters range."**<sup>23</sup>

64. In view of the strong popularity of Distell's ciders, it would be critical to prevent any strategy that would allow the parties to leverage their market share in the cider markets to grow the sale of less popular brands in other product markets, whether through tying strategies or restriction of cooler usage. In this regard, the CID noted the undertaking provided by the merging parties that for a period of five years from the approval of the transaction, there would be no requirement on distributors seeking to purchase Distell's cider brands to also purchase Heineken's beers in Eswatini, Zambia and Zimbabwe. The CID considered that a time period of 5 years would allow the competitors on the market sufficient time to adjust to the new competitive conditions post-merger.

#### ***Maintenance of Distribution Agreements***

65. In relation to concerns raised by CTC regarding the impact on local distribution post-merger, the CID noted from the parties' business model across the Member States, that they do conduct their activities through local distributors. Further, there are no indications that the parties intend to reduce supply of products sold to the Zimbabwean market; in fact, the transaction is expected to increase volumes sold, and thus distribution services, in Zimbabwe.
66. The CID noted that there could be potential unintended consequences of an obligation to retain all existing distribution, namely potentially inefficient distribution service; excessive costs; and reduced ability for other potential distributors in Zimbabwe to compete for the market.
67. There is, therefore, need to balance the public interest considerations against the competition effects. It is worth recalling the provisions of Article 26(4) which state that in order for the Commission to determine whether a merger is or will be contrary to the public interest, the Commission shall take into account all

<sup>22</sup> Distell 2022 Integrated Annual Report, page 5 – 'A MESSAGE FROM OUR GROUP CEO'. Accessed at <https://www.distell.co.za/investor-centre/annual-report/>

<sup>23</sup> Afdis 2021 Annual Report, page 8 – 'Review of Operations'. Accessed at <https://www.africandistillers.co.zw/downloads/ir/AnnualReports/2021%20Annual%20Report.pdf>



matters that it considers relevant in the circumstances and shall have regard to the desirability of:

- i) **maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;**
- ii) **promoting the interests of consumers, purchasers, and other users in the region, in regard to the prices, quality and variety of such commodities and services;**
- iii) **promoting through competition, the reduction of costs and the development of new commodities and facilitating the entry of new competitors into existing markets (emphasis added).**

68. It is noted that an obligation on the parties to retain existing distributors, without any further criteria, could result in ineffective competition between distributors, inefficient distribution services which may impact consumers and may impede entry by new local competitors into the existing distribution markets.

69. Having regard to the above, the CID was satisfied that the following undertakings negotiated between the Commission and the parties would address the concerns of loss of employment whilst ensuring the distribution market in Zimbabwe remains effective and competitive:

- i) **The merging parties shall be required to comply with their obligations under the existing distribution agreements and they shall not be permitted to terminate nor amend the terms and conditions of the agreements in a manner which is unfavourable to the distributor, by reason of the merger. Where a distributor fails to perform under the existing terms of the distribution agreement and in circumstances of a material breach of the agreement by either party, the parties can terminate the agreement as provided by the terms of the agreement; and**
- ii) **The merging parties shall be required to submit a list of objective criteria pursuant to which they shall renew contracts with existing local distributors and/or appoint new local distributors, within 3 months from the approval date.**
- iii) **The merging parties shall commit to continue using in-country distributors in Zimbabwe, for a minimum period of 5 years from the date of the merger approval. At the expiration of the 5-year period, the Commission shall review the relevance of the continuation of the undertaking in light of the prevailing market conditions and determine accordingly.**



### **Consideration of Effect on Trade between Member States**

70. In the transaction under review, no material change in the relevant markets structure for CSDs is expected in the foreseeable future. However, the transaction will result in a monopolisation of the ciders markets in Eswatini, Zambia and Zimbabwe, and may create incentives for collusive conduct in the beer market in Zimbabwe, which will have the effect of hindering the ability of other undertakings to enter and establish themselves in the Common Market. The transaction is therefore capable of having an appreciable effect on trade between Member States.

### **Consideration of Third-Party Views**

71. Submissions were received from the national competition authorities of Egypt, Eswatini, Kenya, Malawi, Mauritius, Seychelles, Zambia, and Zimbabwe, as well as from two competitors in the beer market. These submissions were duly considered and factored into the analysis of appropriate remedies.

### **Determination**

89. Given the foregoing reasons, the CID determined that the merger is likely to substantially prevent or lessen competition in the Common Market.
90. The CID, therefore, approved the merger subject to the merging parties' compliance with the following undertakings:
- (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 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.**
  - (e) **For a period of 5 years from the date of the merger approval, the merging parties shall not condition the purchase by distributors of Distell's best-selling ciders upon the purchase of Heineken's beers in Eswatini, Zambia and Zimbabwe.**



- (f) The merging parties commit that the Heineken director who serves on the board of Afdis shall have no involvement whatsoever in the beer business affairs of Heineken and that he or she shall be required to confirm as much on affidavit. In addition, *ad hoc* audits may be undertaken to ensure on-going compliance. The merged entity should establish, post-closing, information barriers designed to prevent the disclosure of any competitively sensitive non-public information in relation to the beer market which may be obtained by the Heineken director as a result of his or her participation on the Afdis Board, to Heineken.
- (g) The merging parties commit that Heineken's and NBL's beer brands shall not be supplied through Afdis for as long as Heineken shall hold minority shares in Afdis. Should Heineken's control in Afdis change, the parties shall be required to notify the Commission.
- (h) The merging parties commit to comply with their obligations under the existing distribution agreements in Zimbabwe and they shall not be permitted to terminate nor amend the terms and conditions of the agreements in a manner which is not objective, by reason of the merger. Where a distributor fails to perform under the existing terms of the distribution agreement and in circumstances of a material breach of the agreement by either party, the parties can terminate the agreement as provided by the terms of the agreement.
- (i) The merging parties commit to submit a list of objective criteria pursuant to which they shall renew contracts with existing local distributors and/or appoint new local distributors in Zimbabwe, within 3 months from the date of the merger approval.
- (j) The merging parties commit to continue using in-country distributors in Zimbabwe, for a minimum period of 5 years from the date of the merger approval.
- (k) The merging parties shall produce an annual report which details their compliance with the undertakings as set out above. Such report will be submitted to the Commission within one month of each anniversary of the Approval Date, for the period of the undertakings and will be accompanied by affidavits or declarations attesting to the accuracy thereof by directors of Heineken and Distell, respectively.
- (l) At the expiration of the period of the undertakings, the Commission shall review the relevance of the undertakings and determine whether the undertakings shall continue and any monitoring and reporting thereof or be terminated based on the prevailing market conditions.



- (m) The merging parties may, at any time, on good cause shown and on notice to the Commission, apply for any of the undertakings to be waived, relaxed, modified or substituted. The Commission shall consider the application and determine whether or not the undertakings should be waived, modified or substituted based on the prevailing market circumstances.
72. The Commission reserves the right to independently monitor the market, either by itself or through the national competition authorities, at any reasonable time to assess the merging parties' compliance with the above conditions.
73. This decision is adopted in accordance with Article 26 of the Regulations.

Dated this 10<sup>th</sup> day of February 2023

**Commissioner Dr Mahmoud Momtaz (Chairperson)**

**Commissioner Lloyds Vincent Nkhoma**

**Commissioner Islam Tagelsir Ahmed Alhasan**

